

FILED
OCT 28 2005
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON

NO. 77707-1

SUPREME COURT
OF THE STATE OF WASHINGTON

MYRTLE E. WOLDSON,
Petitioner,

v.

JOHN G. WOODHEAD, SR., and
JANE DOE WOODHEAD, husband and wife,
Respondents

**ANSWER TO
PETITION FOR REVIEW**

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A. IDENTITY OF RESPONDENT

John G. Woodhead, the appellant before the Court of Appeals, asks this court to deny review of the unpublished decision of the Court of Appeals terminating review. Mr. Woodhead further asks the court to accept review on the two issues he raises below.

B. ISSUES PRESENTED ON CROSS-REVIEW

1. Whether an award of damages is barred under Washington law where the wall was damaged to the point it had to be replaced prior to the three-year limitation period applicable to trespass cases.

2. Whether the Court of Appeals correctly reviewed the findings of fact of the trial court; that is, whether there was sufficient evidence to persuade a fair-minded person that the premise upon which those findings are based was true.

C. STATEMENT OF THE CASE

1. Procedural History

Mr. Woodhead agrees for the most part with the procedural history contained in Ms. Woldson's Petition for Review ("Petition") with the following observations:

1) The date given for filing the complaint of July 7, 1997 is in error as the complaint was filed on July 7, 2000. CP 1-7.

2) Judge James Murphy ruled in the Order Granting in Part and Denying in Part Defendant's Motion for Joint Summary Judgment, an order prepared by counsel for Ms. Woldson, that:

The statute of limitations for a cause of action sounding in trespass is three years and the Plaintiff will be limited to damages proven which occurred during the three-year period prior to the date upon which the Complaint in this matter was filed.

CP 68.

2. Statement of Facts Relevant to the Petition for Review and Cross-Review

There is no dispute that the wall which divides Ms. Woldson's and Mr. Woodhead's properties was built in the 1915-1917 time frame. Petition, p. 5. The useful life of the wall is 75 to 100 years. RP 75-6, 110.

The wall is approximately 170 feet long. RP 117. It runs in a north/south direction, mostly on Ms. Woldson's side of the property line, but with a number of places where the wall lies on Mr. Woodhead's property. RP 113-15, 268, 276. The wall exceeds 3½ feet in height and is 15 inches across. RP 114-15, 118, 341, Exh. P 6C, 6D. The soil on Mr. Woodhead's side of the wall is approximately six inches below the top of the wall and the wall is

mortared along its entire 170-foot length. RP 195-97, Exh. D 11.21, 11.35-6, 11.39-41.

No one can say when the wall failed. Mr. Woodhead testified that in 1986 or 1987 Ms. Woldson told him that a portion of this wall had fallen over. RP 290. When he built a backyard fence in 1994 it jogged around the place where the wall had collapsed. RP 219, 298, Exh. D 15. Ms. Woldson testified she discovered that part of the wall had fallen over shortly after Spokane's Ice Storm in 1996. RP 32. She had the wall investigated by the City of Spokane, which sent her a letter regarding the wall failure dated June 18, 1997. This was more than three years before the complaint was filed on July 7, 2000. RP 43. Exh. D 12, CP 1-7.

Ms. Woldson's expert, engineer Allen Gifford, testified that he visually observed the wall several times, but based his damages testimony on an assessment of the wall he made in 2001. RP 111. Mr. Gifford did not testify that the wall changed at all between June, 1997 and 2001. Yet as a result of this 2001 examination, Mr. Gifford opined that 80 feet of the wall, which included the section that had fallen over and approximately 25 feet on either side, was damaged to the point that it needed to be replaced. RP 120. Ms. Woldson's other expert, Don Skillingsstad, who first "viewed" the wall in

1998, also testified that 80 feet of the wall needed to be replaced. RP 67-9; 96-7. The remaining 90 feet of the 170 foot wall was in good shape and could be left alone. RP 120.

Mr. Gifford remeasured the portion of the wall that had fallen down shortly before trial in 2003. RP 125. He stated that the zone where the wall had fallen over increased from 26 to 32 feet. *Id.* He did not remeasure or reassess any other portion of the wall in 2003 to compare it to his findings in 2001. RP 117, 144, 146. He also testified that his measurements of the portion of the wall that had fallen down were "imprecise" and "difficult." RP 146, 158-59, 173-74.

Ms. Woldson and Mr. Gifford believe and the trial court found that the wall at issue was initially freestanding and used as a fence between these premises. CP 141-43. They rely on an old photograph for proof of their contention that the wall was constructed as a freestanding fence-like structure. RP 28, 117, P Exh. 6 F and 6 G. Ms. Woldson and Mr. Gifford believe that in the late 1960's fill was brought in and placed along the entire 170-foot length of the wall to a depth of three and one-half feet in order to support the construction of a detached 24 by 26-foot carport next to the wall and on the same level as the original basement garage in Mr. Woodhead's

house. RP 28, 118, 152, 343-44, Exh. D 14. Ms. Woldson testified that she remembered that a small amount of fill was brought in at the far end of the carport area, but did not observe the numerous truckloads of fill required for just the carport area alone or the equipment needed to compact that fill. RP 52-53, 152.

Mr. Woodhead presented evidence that the wall depicted in the old photograph relied upon by Ms. Woldson and Mr. Gifford is not the wall which is the subject of this case, but instead was a second, intermediate wall. This evidence includes a photograph taken at the same time as the photo relied upon by Ms. Woldson showing a second wall nearer to where Mr. Woodhead's house is now located. Exh. D 19. Mr. Gifford agreed that this second wall closer to the home of Mr. Woodhead could be seen. RP 351-52.

The record also shows that Ms. Woldson, Mr. Gifford and Mr. Woodhead's engineer expert, Steve Burchett, all testified that no mortar was visible on the wall in the old photograph. RP 54-55, 134, and 208. Mortar is clearly evident in the wall which exists today. RP 135, 195-97, Exh. P 6H, D.

The record also shows that the original garage in Mr. Woodhead's home is in the basement of that structure. RP 45, Exh. D 11.5. Mr. Gifford

agreed that the grade where the external carport now sits is at the same level as this basement garage, and extending that grade only two or three feet to the wall would meet the wall six to eight inches below its cap. This is the same level where Mr. Woodhead's yard meets the wall along its entire 170-foot length. RP 118, 157, 339-41, Exh. D 11.

To access the original basement garage, cars drove down a rather steep driveway from Sumner Street. RP 45, Exh. D 11.5, 11.6, 11.8, 11.9. Mr. Gifford also agreed that the distance between the edge of that driveway and the wall is two to three feet. RP 340, Exh. D 11.11, 11.12, 11.15. Before the truckloads of fill that Mr. Gifford testified were brought in the late 1960's to support the carport and placed to a depth of three and one-half feet along the entire length of the wall, a three-foot slope in the two-to-three-foot gap between the edge of that driveway to the base of the wall would have existed. According to Mr. Gifford, drivers would have had to take particular care when driving down that driveway in the winter. RP 118, 342, 344. Ms. Woldson acknowledged that the cars using this basement garage would have backed out of the garage area where the carport was built in order to drive forward up the hill. RP 46. This backing area is at the same level as the basement garage. RP 339-40, Exh. D11.5, 11.6. She also testified that cars

would have backed out from her original basement garage in a way that would have allowed them to face up the hill because the slope was difficult in winter. RP 46-48.

The wall in the old photograph also shows an expanse of lawn extending from that wall towards Mr. Woodhead's property. Exh. P9, D19. The test pits dug by Mr. Woodhead along the existing wall should have revealed remnants of that lawn; instead consistent, uniform brown soil down to basalt was found. RP 192-94, 196-98, 284-86. Mr. Gifford testified he didn't know why fill would have been brought in and placed against the entire 170-foot wall to just below its top, in order to build a 24 by 26-foot carport. RP 343-44, Exh. D 14. Nor would Mr. Gifford expect to see the two different soil types he observed in the test holes dug by Mr. Woodhead in the fill that was brought in. RP 346.

Mr. Woodhead's yard, as recognized by Mr. Gifford, is generally above the elevation of Ms. Woldson's yard. RP 198-99, 338. Ms. Woldson's yard is flat. Exh. P 6A. Mr. Woodhead's expert, Steve Burchett, testified that the wall was built into the hillside of Mr. Woodhead's property in order to create Ms. Woldson's flat backyard. RP 222, Exh. D 18.

D. ARGUMENT

1. The Court of Appeals Decision Is Not One of First Impression and Does Not Conflict with Supreme Court or Court of Appeals Precedent

Ms. Woldson contends the Court of Appeals decision conflicts with decisions of this Court or of the Court of Appeals warranting review under RAP 13.4(b)(1) and (2). To the contrary, the Court of Appeals decision recognizes and applies the clear and unequivocal holding of this Court in *Bradley v. American Smelting*, 104 Wn.2d 667, 709 P.2d 782 (1985) and is consistent with the decision of Division I of the Court of Appeals in *Fradkin v. North Shore Util. Dist.*, 96 Wn. App 118, 998 P.2d 1265 (1999) and Division II of the Court of Appeals in *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 89 P.3d 242 (2004), *review denied*, 153 Wn.2d 1008 (2005). In each of these cases, as recognized by the Court of Appeals here, damages in continuing trespass cases were limited to those damages which can be proved in the three-year period which immediately precedes the filing of the complaint. This is the same ruling reached by Judge James Murphy below. CP 38-40.

In *Bradley*, this Court discussed the requisites of a cause of action for continuing trespass in response to certified questions from the United States

District Court in the Western District of Washington. Towards the end of that opinion, this Court considered statute of limitations issues in continuing trespass cases and unanimously ruled as follows:

The action of the defendant amounts to a continuing trespass which is defined by the Restatement (Second) of Torts §158, comment m as “[a]n unprivileged remaining on land in another’s possession”. Assuming that a defendant has caused actual and substantial damage to a plaintiff’s property, the trespass continues until the intruding substance is removed. If such is the case, and damages can be proved, as required, actions may be brought for uncompensated injury. In view of our holding that the tort falls within the theory of continuing trespass, we further find that the 3-year period of limitations must run from the date that the cause of action accrues.

* * *

Further, in ruling that actual and substantial damages are required, we find it proper to also require that damages claimed not extend past the 3-year period of limitations.

Bradley, 104 Wn.2d at 693-94.

In its conclusion, this Court summarized its holding limiting the damages period:

The appropriate limitations period for such a trespass is 3 years, but if the trespass continues, suit for damages may be brought for any damages not recovered previously and occurring within the 3-year period preceding suit.

Bradley, 104 Wn.2d at 695.

This same damage limitation period was applied in *Fradkin v. North*

Shore Util. Dist., 96 Wn. App. 118, 977 P.2d 1265 (1999). In *Fradkin*, a landowner sought damages for trespass arising from a sewer running across his property. While the plaintiff in *Fradkin* had granted an easement for this sewer, the area around the sewer became wet and increasingly bog-like. Plaintiff brought suit after an investigation revealed that the sewer project had permanently damaged the ground around the sewer pipe, creating several wet areas on his property. The court in *Fradkin* noted:

A claim for trespass must be brought within three years of the injury. Because *Fradkin* sued more than six years after the initial injury, his trespass claim is barred by the statute of limitations unless it may properly be characterized as a continuing trespass. **In a case of continuing trespass, "suit for damages may be brought for any damages not recovered previously and occurring within the three-year period preceding suit."** (Citing *Bradley*, emphasis added.)

Fradkin, 96 Wn. App. at 124. See also *Harper, James, Gray, The Law of Torts*, Vol. 1, pages 1:30 and 1:31.

Ms. Woldson's complaint was filed on July 7, 2000. As such, Ms. Woldson could seek recovery for "the actual and substantial damages" arising for trespasses which occurred in the period running from July 7, 1997 through July 6, 2000. *Bradley*, 104 Wn.2d at 692-94. There is no dispute that Ms. Woldson knew that a large section of the wall had fallen over prior to July 7, 1997. RP 43, Exh. D 12. Accordingly, since the first measurement of

damage to the wall was made by Mr. Gifford in 2001, there is no way for Ms. Woldson to prove that any injury to the wall occurred within three years of filing suit. Mr. Gifford did not and can not say the wall as he measured it in 2001 was any different than the wall as it existed before July 7, 1997. Injury that occurred prior to that three-year period is not compensable and injury that allegedly occurred after that period is premature. *Bradley*, 104 Wn.2d at 693.

Ms. Woldson cites *Doran v. City of Seattle*, 24 Wash. 182, 64 P. 230 (1901), as the “watershed” case in this area. Petition, p. 13. She goes on to state that *Bradley* reinforces “two rules” set forth in *Doran*. Petition, p. 15. *Doran*, however, does not somehow alter the three-year damage period limitation holding of *Bradley*. *Doran* stands for the proposition that a person does not have to sue when he or she first becomes aware of a continuing trespass if the damages are so “trifling” that suit is not warranted. *Doran*, 24 Wash. at 188-189.

Contrary to Ms. Woldson’s argument, *Doran* recognizes that continuing trespass claims are limited to damages which accrue prior to the date of filing the complaint. The appeal in *Doran* was from an instruction given by the trial court which provided that if the jury believed the City of

Seattle was negligent in constructing the bulkhead at issue and if the plaintiff was damaged:

... [Y]our verdict will be for plaintiff in one such gross sum as will, in your opinion, from the evidence, just compensate plaintiff for such injury **as so accrued within said six months immediately prior** to the filing of said plaintiffs' claim with defendant. (Emphasis added.)

Doran, 24 Wash. at 184. This instruction was upheld in *Doran*.

As Ms. Woldson points out, the *Doran* court did rely on the case of *Uline v. New York Cent. & E.H.R.R.Co.*, 101 N.Y. 98, 4 N.E. 536 (1886).
Petition, p. 14. *Uline* does not stand for the proposition that damages in continuing trespass cases may include those alleged to have occurred after the filing of the complaint as Ms. Woldson contends. Petition, p. 14. In fact the *Doran* court noted with approval that in *Uline* where:

... [A]n elaborate and painstaking investigation of this question was indulged in and the authorities collated, it was decided that where a railroad is unlawfully constructed in a street, in an action by an adjacent owner to recover damages, **he is entitled to recover simply the damages sustained up to the commencement of the action**, and that for any damages thereafter sustained, other actions might be brought successively until the nuisance should be abated. (Emphasis added.)

Doran, 24 Wash. at 187. Thus *Doran* and *Uline* are on all fours with *Bradley*. Both *Doran* and *Uline* speak specifically to bringing successive

actions to prove damages which may occur after filing of the complaint if the continuing trespass was not abated. *Doran*, 24 Wn. at 182, *Uline*, 101 N.Y. at 125. In the same way, *Bradley* and *Fradkin* recognize that successive actions may be brought to recover in continuing trespass claims. *Bradley*, 104 Wn.2d at 693, *Fradkin*, 96 Wn. App. at 124-25.

Ms. Woldson argues, without any citation to any authority and contrary to the rule of law crystallized in *Bradley*, that she should be able to prove damages through the date of trial. Petition, p. 15. Of course, it would be difficult to defend such a moving target or to comply with discovery cutoffs. Nor is it true as Ms. Woldson argues that allowing damages to accrue through the time of trial is the norm in trespass cases. Petition, p. 16. In continuing trespass cases a new tort cause of action arises if the trespass is not abated which runs from "the date the cause of action occurs;" that is, the date of "actual and substantial damage." *Bradley*, 104 Wn.2d at 695. A new tort action requires, under *Bradley*, a new complaint to address it.

Finally, Ms. Woldson argues in her petition that the Court of Appeals decision does not promote judicial economy. Petition, p. 17. It is unlikely that judicial economy is affected by this case. Continuing trespass cases are

rare, with little or no impact on the number of cases handled by Washington courts.

2. Ms. Woldson Did Not Present Evidence of "Actual and Substantial" Damages

In a continuing trespass case damages must be "actual and substantial," and the injury must occur within the 3-year period preceding the filing of the complaint. *Bradley*, 104 Wn.2d at 693. Although Ms. Woldson knew the wall was damaged at least by June, 1997, the damages testimony of Mr. Gifford was based on an assessment of the full wall in 2001 and a second measurement of the failure zone in 2003. RP 125. The trial court adopted this testimony in its Findings of Fact. CP 143-47.

This damage testimony was fatally flawed and contrary to *Bradley*. There are no proveable damages here in the three-year period before the complaint was filed. As noted above, Mr. Gifford did not and can not testify to any difference in the wall from the time Ms. Woldson knew that it had fallen down, which was more than three years before the complaint was filed, and when he first assessed the wall for damage in 2001. RP 111, 144, 159. Mr. Skillingstad similarly did not testify to any additional damage to the wall after 1977. Yet both Mr. Gifford and Mr. Skillingstad testified that 80 feet of the wall would have to be replaced in order to repair the injury visited upon

the wall by Mr. Woodhead's alleged continuing trespass. RP 86, 120. The remaining 90 feet of wall was in good shape and didn't need replacing. RP 117, 121. Accordingly, the extent of these damages and the remedy for those damages – replacement of 80 feet of the wall – arose from Mr. Gifford's and Mr. Skillingstad's first assessments of the wall. It is impossible for Ms. Woldson to show that damage occurred after July 7, 1997 as the wall could suffer no more damage if it had reached the point, as Ms. Woldson's experts agreed, that it had to be replaced. As such, no damages were available to Ms. Woldson. *Bradley*, 104 Wn.2d at 692-93. Or, as stated in *Fradkin*, 96 Wn. App.124, this claim for injury sustained by Ms. Woldson was not brought within 3 years of the date that the extent of the damages were known. As a result, no damages within the three-year statute of limitations period were proved by Ms. Woldson.

The Court of Appeals in its decision entirely ignored this argument. It should have ruled, consistent with *Bradley*, that Ms. Woldson could not prove damages within the applicable three-year limitations prior to filing the complaint or thereafter, for that matter, because the wall was either already completely damaged to the point where it needed to be replaced (the 80-foot section), or was sufficiently sound and would not need replacing or any other

work to restore it (the 90-foot section).

3. The Court of Appeals Erred in Upholding the Trial Court's Finding That the Wall was Originally Built as a Freestanding Fence

Mr. Woodhead is mindful that issues relating to findings of fact are generally not subject to review at this level. Mr. Woodhead would not raise this issue in his cross-petition except for what appears to be a misperception on the part of the Court of Appeals and to suggest that this is that rare case where the actual findings do not stand up to appellate scrutiny.

In *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003), this Court held:

Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a fair-minded person the premise is true. If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. (Internal citations omitted)

Mr. Woodhead seeks review of whether the Court of Appeals correctly applied this standard.

The Court of Appeals ruled that there was "ample evidence" in the form of expert testimony to support the court's findings and credibility issues were left to the finder of fact. Opinion, p. 5. Mr. Woodhead respectfully

submits that the trial record does not support this ruling, and that under the standard of *Sunnyside Valley Irrigation District*, a fair minded person would not be persuaded that the premise upon which the findings were predicated was true.

The evidence supporting the trial court's finding that the wall was originally freestanding is limited to an old photograph which shows a rock wall between Ms. Woldson's and Mr. Woodhead's properties with lawn and other plantings on Mr. Woodhead's side of that wall. Exh. p. 6F and H, D19, RP 117. However, to accept this premise as true, this reasonable person would have to ignore the rest of the evidence in the record, evidence that clearly supports the proposition that Ms. Woldson's premise is not true and is not a matter of credibility. This evidence consists of the following:

- 1) A second photograph taken at the same time as the photo relied on by Ms. Woldson shows another wall behind the wall in the first photograph. Even Ms. Woldson's own expert, Mr. Gifford, acknowledged that this second wall, closer to where Mr. Woodhead's residence now sits, could be seen. RP 351-52, Exh. D19.

- 2) There is no mortar in the wall depicted in the photograph relied upon by Ms. Woldson, while the current wall is heavily mortared. RP

54-55, 134, 135, 195-97, 208, Exh. P64, D, F, G, D19.

3) The original basement garage in Mr. Woodhead's house is accessed by a steep driveway which parallels the current wall with only a gap of three to four feet between the edge of the driveway and the wall. RP 340, Exh. D 11.11, 11.12, 11.15. If the wall were freestanding until three and one-half feet of fill was brought in in the late 1960s as Ms. Woldson and her expert believe, a steep three-foot slope would have existed in the very small area between the driveway and the wall; something Mr. Gifford recognized would be treacherous in Spokane winters. RP 342.

4) The basement garage of Mr. Woodhead's house had an area to back into at the same level as the floor of the carport which was constructed in the 1960's. RP 45, 339-40, Exh. D 11.5, 11.6, 11.8, 11.9. There would have been no need to bring in fill as theorized by Ms. Woldson and is consistent with her testimony that only a small amount of fill was needed to raise the rear area of the carport. RP 152-54, 342-45.

5) If fill were in fact brought in to support the construction of a 24 by 26-foot carport, there would have been no need to bring fill in for the entire 170-foot wall. RP 342-43, Exh. D14.

6) If fill had been brought in along the entire length of the wall,

there would have only been one type of fill, not the layers which were revealed in the test holes. RP 356.

7) If the fence were freestanding, then the five test holes dug along it would have shown residue of the lawn and other vegetable matter shown in Ms. Woldson's photograph, which they did not. RP 285-86.

8) Mr. Woodhead's yard is higher than Ms. Woldson's yard, which is completely flat along the entire length of the wall. RP 338, Exh. P 6A, 6B. Common sense overwhelmingly suggests that Ms. Woldson's yard was created to be level, and the wall was built into Mr. Woodhead's elevated property level to achieve that result. RP 222, Exh. D18.

Mr. Woodhead respectfully suggests that the Court of Appeals did not adequately examine the underpinnings of the trial court's findings of fact under the standard required by *Sunnyside Valley Irrigation District*. Credibility was not the issue. Rather, it was whether the trial court's findings were simply rubber stamped by the Court of Appeals rather than tested as required by the appropriate standard of whether a reasonable person would consider the premises to be true.

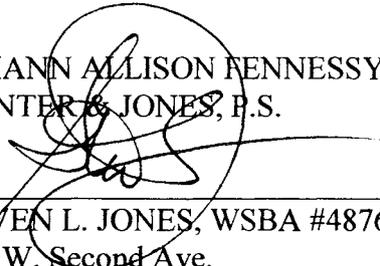
E. CONCLUSION

The Petition for Review filed by Ms. Woldson does not meet the

criteria of RAP 13.4(a) or (b) because the Court of Appeals decision is not in conflict with either a decision of this Court or the Court of Appeals. Mr. Woodhead's cross petition should be granted because the Court of Appeals decision conflicts with *Bradley v. American Smelting* as Ms. Woldson can not prove that damages occurred in the relevant statutory period. Further, this Court should review whether the Court of Appeals erred in upholding the trial court's findings of fact under the standard set forth in *Sunnyside Valley Irrigation District*.

Respectfully submitted this 24th day of October, 2005.

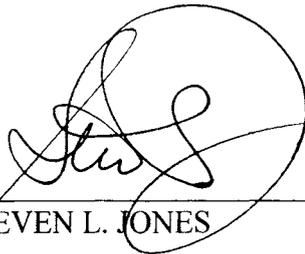
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington and the United States of America that on October 24, 2005, I caused to be served, by mailing by first class United States mail, postage prepaid, a true and correct copy of the Answer to Petition for Review to:

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