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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John G. Woodhead, the appellant before the Court of Appeals, asks this court to deny review of the unpublished decision of the Court of Appeals terminating review.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:

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 Skillingstad, who first "viewed" the wall in

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

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.

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*

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

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

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

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

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.

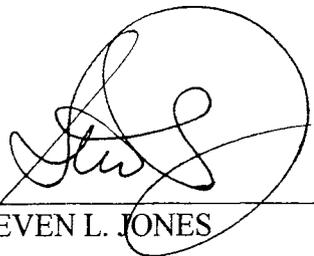
E. CONCLUSION

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

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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