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Washington Court of Appeals, Division Three

No.

SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III
NO. 22931-9-III

MYRTLE E. WOLDSON,
Petitioner/Appellant,

vs.

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

PETITION FOR REVIEW

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ORIGINAL

TABLE OF CONTENTS

I.	IDENTITY OF PETITIONER	1
II.	COURT OF APPEALS' DECISION	1
III.	INTRODUCTION	1
IV.	ISSUE PRESENTED FOR REVIEW	3
V.	STATEMENT OF THE CASE	3
	A. Procedural History	3
	B. Statement Of Facts Relevant To The Issue For Review.	5
VI.	ARGUMENT IN SUPPORT OF ACCEPTANCE OF REVIEW	10
	A. This Petition Involves An Issue That Is Either One of First Impression In This State Or Is In Conflict With Petition Of The Supreme Court Or Of The Court Of Appeals	10
VIII.	CONCLUSION	18

TABLE OF AUTHORITIES

Cases

Bradley v. American Smelting, 104 Wn.2d 667, 709 P.2d 782 (1985)..... 11

Doran v. City of Seattle, 24 Wash. 182, 64 P. 230 (1901)..... 11, 12

Fradkin v. North Shore Util. Dist., 96 Wn.App. 118, 124,
977 P.2d 1265 (1999)..... 11

Uline v. New York Central and Hudson River Railroad Company,
101 N.Y. 98, 4 N.E. 536 (1886)..... 14

Well v. Frontier Contractors, Inc., 121 Wn.App. 119, 124,
89 P.3d 242 (2004), *rev. denied*, 153 Wn.2d 1008 (2005) 11

Statutes and Court Rules

RAP 13.4(b)(1) 10

RAP 13.4(b)(2) 10

RCW 4.16.080 10

Other Authorities

Restatement (Second) of Torts Section 158, Comment *m* 15

I. IDENTITY OF PETITIONER

This Petition presents a very important issue which has a practical input on the presentation of cases at the trial court and on the already heavily taxed court system.

Myrtle E. Woldson (hereinafter "Miss Woldson" or "Woldson"), an unmarried woman, petitions this court to accept review of the Court of Appeals' decision designated herein.

II. COURT OF APPEALS' DECISION

Miss Woldson seeks review of the Court of Appeals' decision in the matter of Case No. 22931-9-III, Division III, Panel 7, filed on August 23, 2005, attached hereto as Appendix A.

III. INTRODUCTION

Miss Woldson and John and Jane Doe Woodhead (hereinafter "Woodheads") live in adjacent houses in a pleasant South Hill neighborhood in Spokane, Washington. The houses were built around the same time approximately ninety years ago. Between the houses is a "basalt wall" located on Miss Woldson's property and constructed about the same time as the two houses. Sometime in the mid-1960s previous owners of the Woodheads' home artificially raised the level of their property by placing a

substantial amount of fill soil on their side of the wall. To preserve the integrity of the Woodheads' property, the basalt wall was utilized to retain the fill dirt and the wall's function changed from a boundary/border fence to a full scale retaining wall. The wall was not constructed to be a retaining structure, the wall was supporting a loading condition much different from that for which it was designed. The lateral soil pressure caused an overall weakening to the full length of the wall. Miss Woldson presented substantial evidence, including expert testimony, to prove the damages caused by the trespass to Miss Woldson's wall as a consequence of the Woodheads' placement and retention of the fill dirt by using it as a retaining wall. The Honorable James M. Murphy entered a Summary Judgment Order in favor of Miss Woldson which found actions of the Woodheads to be a trespass continuing in nature. Following the trial of this matter, the Honorable Maryann C. Moreno entered Findings of Fact, Conclusions of Law and Judgment in favor of Miss Woldson predicated upon substantial evidence supporting continuing trespass to Miss Woldson's basalt wall. The Woodheads appealed the decision.

The Court of Appeals affirmed the decision of the Trial Court with one exception taken to a conclusion of law related to the period within which

Miss Woldson was able to claim damage in a case based upon continuing trespass. The Court of Appeals held that the damages awarded should have been limited to the period dating from the filing of the Complaint back three years.

Miss Woldson respectfully asserts that this is not an inaccurate characterization or conclusion as to the current law in the State of Washington or, if it is the current status of the law in the State of Washington, it should be modified to allow damages to be proven to the date of trial not limited to the period as determined by the Court of Appeals.

IV. ISSUE PRESENTED FOR REVIEW

Does or should the law in the State of Washington allow an owner whose property is damaged by the continuing trespass of another to recover damages, properly proven at a single trial, which include damages sustained to their property from the date of the filing of the Complaint to the date of trial?

V. STATEMENT OF THE CASE

A. Procedural History.

On July 7, 1997, Myrtle E. Woldson filed a lawsuit against John and Jane Doe Woodhead seeking damages to her property under theories of

nuisance, continuing trespass and violation of constitutional rights guaranteed by Article I, § 16 of the Washington State Constitution. On January 10, 2003, the Summary Judgment Order was entered by Honorable James M. Murphy in favor of Miss Woldson, which dismissed the claims of nuisance and constitutional violation and found the act of placement of the fill dirt against the wall of Miss Woldson was an act of continuing trespass for which she is entitled to prove damages.

Subsequently, the matter went to trial on August 20, 2003, and on February 13, 2004, the Honorable Maryann C. Moreno entered Findings of Fact, Conclusions of Law and Judgment, attached as Appendix B in favor of Miss Woldson.

The Woodheads timely appealed the decision of the Trial Court to the Division III Court of Appeals which rendered its decision on August 23, 2005, largely confirming the Trial Court's decision with the exception of a conclusion that the law only allows Miss Woldson to submit and prove evidence of damages which occurred during the three year period prior to the filing of the lawsuit and not for any damages continuing to occur after the filing of the Complaint.

Finally, subsequent to trial and continuing eight years after filing the Complaint, the defendants continued the trespass until finally removing the fill dirt from Miss Woldson's wall by establishing their own retaining wall adjacent to the wall of Miss Woldson.

B. Statement Of Facts Relevant To The Issue For Review.

The house located at 526 West Sumner Avenue in Spokane, Washington, was constructed in 1915 by William L. Mathews. (Ex. D-17) This house was purchased by Miss Woldson's family in 1943 and she has lived in this house since that time. (RP 17)

The house immediately to the east of Miss Woldson's home is 516 West Sumner Avenue, which was constructed in 1917 and purchased by the Woodheads in 1986. (RP 288, 290) The Woodheads have resided there since that date. (RP 290) The two homes were constructed by the same builder. (Ex. D-14 and Ex. D-17)

At or about the time that Miss Woldson's house was built, a boundary/border fence was also constructed between the two properties which is a rubble masonry construction. (RP 25-27; Ex. 6F and Ex. 6G)

Early photographs of the wall show that it was freestanding, unimpeded by dirt or other matter. (RP 25-27; Ex. 6F and Ex. 6G)

Sometime in the mid 1960's, previous owners of the Woodhead home artificially raised the level of a portion of the home's rear yard by placing a substantial amount of fill soil on the east side of the wall. (RP 27-30, RP 53, RP 137-138)

To preserve the integrity of the Woodhead property, the basalt wall was utilized to retain the fill dirt placed on the Woodhead property and its function changed from a boundary/border fence to a full scale retaining wall. (RP 116-117) Because the wall was not constructed to be a retaining structure, the wall was supporting a loading condition much different from that for which it was designed. (RP 118-119) The basalt wall was continuing to act as a retaining wall by holding back the fill soil which is supporting the garage. This lateral soil pressure is caused an overall weakening to the full length of the wall which was exposed to the fill soil. (RP 118-119) Some of the effects of the deterioration are readily observable, others are not. (RP 123-124)

Miss Woldson presented visual evidence of a wall which was free standing between the two properties and it was not encumbered by soil on the east side of the wall. (Ex. 6F and Ex. 6G) Miss Woldson represented this to be the same wall which exists today. (RP 25-27)

It is the dirt placed against the wall on the Woodheads' side, coupled with the moisture retained by that soil, which was causing the lateral pressure on the wall and was the source of the failure of its structural integrity. (RP 117-118)

The presence of the fill dirt against the wall creates a significant lateral earth pressure load. (RP 118-119) The lack of a proper drainage element in the design of the wall creates a further problem in that the soil absorbs and retains the water thereby actually increasing pounds per linear foot of pressure against the wall creating increased stress and failure in the collapsed area and elsewhere. (RP 118-119) The presence of the moisture also contributed to the deterioration of the mortar and the structural integrity of the wall. (RP 64-65)

The basalt wall is approximately 170 feet long. (RP 96-97, 117) The visible failure zone, where the wall actually disintegrated and toppled over is approximately 30 to 32 feet long. (RP 120-121) Outside of this failure area is another zone of approximately 25 feet in total on either side of the failure zone which is in a deteriorated condition. (RP 119-120) The mortar is badly cracked and has been significantly weakened by the lateral pressure existing behind it. (RP 119-120, 128) This area also shows evidence of major tilting

towards the west side. (RP 119) Outside this area is another zone which is a total of approximately 25 feet. (RP 121) This area shows some mortar cracking and evidence of tilt towards the west side. (RP 119-121) The balance of the 90 feet of the wall appears to be in fairly good condition, but is still under stress from the back fill on the east side of the wall. (RP 121)

The measure of damage caused by the Woodheads' trespass is the total of the cost to repair each of the respective damaged sections of the basalt wall. (RP 128) Because of the extent of the damage the interior 80 linear feet of the wall should be replaced. (RP 120) The cost to remove and replace that portion of the wall, including sales tax, is \$70,762.00, or \$885.00 per lineal foot. (RP 126-127)

The Court previously ruled that the period for which damages are compensable, applying the applicable period of limitations, is the three years prior to the date the Complaint was filed. (CP 66-69) The deterioration of the wall was measured over a period beginning in 2001, and ending in 2003. (RP 125) During that period the failure zone extended from approximately 26 feet to approximately 32 feet. (RP 125) From this figure you extrapolate to determine that 14 of the total 32 feet failure zone occurred during that six

year limitation period. (RP 125-126) This equates to 45% of the failure accruing during the limitation period. (RP 127)

Multiply the 45% figure times the cost of repair per lineal foot (\$885.00) times the number of lineal feet in the total failure zone (30 feet rounded) and the result is a compensable damage figure of \$11,948.00. (RP 127-128) In addition, multiply the approximate 25 feet measured on either side of the failure zone by the cost per lineal foot (\$885.00) times the percentage occurring during the limitation period (45%) times the figure of .75 (which reflects the measured reduction in the amount of deterioration in that section relative to the deterioration in the failure zone) and this results in a compensable damage figure of \$7,467.00. (RP 127-130) These amounts are added to the amount which reflects the damage of the next 25-foot zone measured on either side of the failure zone. The damage to this section is the 25-foot length times the lineal foot cost to repair (\$885.00) times the percentage of the damage occurring within the period of limitation (45%), times the figure of .50 (which reflects the measured reduction in the amount of deterioration in that section relative to the deterioration in the failure zone) which equates to a damage figure of \$4,978.00. (RP 127-130) Finally, the 90 feet of wall which has experienced stress but does not appear as easily

observable and obvious deterioration caused by the placement of the fill dirt, results in yet another damage figure. (RP 121, 128-129) This figure is determined by multiplying the 90-foot length by the cost per lineal foot (\$885.00) times the percentage occurring during the limitation period (45%) times .25 (reduction factor which reflects the deterioration of this 90-foot section relative to the deterioration in the failure zone), resulting in a damage figure of \$8,960.00. (RP 128) The total damage is \$33,353.00.

VI. ARGUMENT IN SUPPORT OF ACCEPTANCE OF REVIEW

This Petition Involves An Issue That Is Either One of First Impression In This State Or Is In Conflict With A Decision Of The Supreme Court Or Of The Court Of Appeals.

The extent to which damages can be proven in a continuing trespass case is either one of first impression in this state or the decision by the Division III Court of Appeals is in conflict with either or both Supreme Court and Appellate Court cases. RAP 13.4(b)(1) and RAP 13.4(b)(2).

The limitation period for claims arising out of trespass to property is three years. RCW 4.16.080. The Woodheads concede that Miss Woldson's Complaint contemplates damages occurred after the date of filing and interpret the three year limitation period to exclude damages which occurred after the filing of the Complaint. The Woodheads do not claim that the

damages arising since the case filing date are illegal or beyond the limitation period. In fact, the only way the Woodheads could assert that this additional language is beyond the statute is to prove the damage occurred more than three years prior to the filing of the Complaint. The Court of Appeals in this case reached the same conclusion, citing *Fradkin v. North Shore Util. Dist.*, 96 Wn.App. 118, 124, 977 P.2d 1265 (1999), that Miss Woldson is entitled to recover damages until “wrong or nuisance shall be terminated or abated.” The issue is not whether it is compensable but whether you can recover damages in one lawsuit that accrue after the filing of the complaint and up to the time of trial.

The Woodheads rely on the cases of *Bradley v. American Smelting*, 104 Wn.2d 667, 709 P.2d 782 (1985) and *Fradkin v. North Shore Util. Dist.*, 96 Wn.App. 118, 124, 977 P.2d 1265 (1999). The Appellant also cited to *Bradley, supra*, and *Fradkin, supra*, and also cited to *Doran v. City of Seattle*, 24 Wash. 182, 64 P. 230 (1901). The Court of Appeals, in its opinion, also cited to the case of *Will v. Frontier Contractors, Inc.*, 121 Wn.App. 119, 124, 89 P.3d 242 (2004), *rev. denied*, 153 Wn.2d 1008 (2005), but this case does not appear to add anything of substance to the issue before this court.

It is Miss Woldson's position that these cases do not address the issue of whether damages which occur after the date of filing and to the date of trial and recoverable and thus this is a case of first impression. Alternatively, if these cases do make such a pronouncement of the law, that the law and these decisions are erroneous as inconsistent with the practice in trespass cases and contravenes the practical application of the rule of judicial economy.

In *Doran, supra*, a private landowner sought damages from the City of Seattle after it negligently constructed a bulkhead that pressed up against the Plaintiff's house. The court rejected the defendant's argument that the trespass limitation period should begin after the date of first damage stating:

The rule [proposed by defendant] is inequitable and that the damages in the first instance and before the statute of limitations expires may be so trifling that it would not justify litigation. It would be inequitable and not in accordance with good laws to estopp a person from obtaining his rights for damages or injuries which might eventually become burdensome, because he was not litigious enough to plunge into a suit over a trifling matter.

Id. at 188-189. In *Dorian*, the act ensued more than six years after the initial injury but there was no evidence that he was trying to recover for damages which occurred after the complaint was filed.

Bradley, supra, was an environmental trespass case in which the clear focus was restricting damages beyond the three year period of limitations.

There is no evidence to suggest that the claim for damages, or the proof offered occurred after the filing of the complaint.

These cases simply do not answer the question of whether damages occurring after the date of filing are compensable in one lawsuit.

The Respondent, and perhaps even the Court of Appeals, misunderstand or misinterpret certain reference in these cases to statements such as “limiting the period of limitations to three years” or referencing the potential for “successive lawsuits” to mean that the law does not allow recovery of damages in any one lawsuit beyond the three year period ending with the filing of the complaint. The explanation for these references is found in the watershed case of *Doran v. City of Seattle, supra*. In this case, the Washington State Supreme Court made two significant proclamations regarding the law of trespass and the period of limitations. The first is that contrary to assertion by the City of Seattle that the statute of limitations begins to run from the inception of the injury, the court held that the nature of continuing trespass was such that the injury to the plaintiff was continuing and that it would not measure the statute of limitations from the date of the original injury but apply the statute successively as the injury continued.

The other issue addressed by the court in *Doran* was whether, in a case involving continuing trespass, the plaintiff would be required to assert and prove not only current damages, but also to allege and prove prospective damages such that all claims against the defendant would be incorporated into one lawsuit. Citing the scholarly opinion by Judge Earl of the New York Court of Appeals in the case of *Uline v. New York Central and Hudson River Railroad Company*, 101 N.Y. 98, 4 N.E. 536 (1886), held and quoted the rule as outlined in *Uline* at p. 125:

But if it be carelessly and unskillfully done, it can be made liable. It may cease to be careless, or remedy the effects of its carelessness, and it may apply the requisite skill to the embankment, this it may do after its carelessness and unskillfulness and the consequent damages have been established by a recovery in an action. The moment an action has been commenced, shall the defendant in such a case be precluded from remedying its wrong? Shall it be so precluded after a recovery against it? Does it establish the right to continue to be a wrong-doer forever by the payment of the recovery against it? Shall it have no benefit by discontinuing the wrong, and shall it not be left the option to discontinue it? And shall the plaintiff be obliged to anticipate his damages with a prophetic ken and foresee them long before, it may be many years before they actually occur, and recover them all in his first action; I think it is quite absurd and illogical to assume that a wrong of any kind will forever be continued and that the wrongdoer will discontinue or remedy it, and that the convenient and just rule, sanctioned by all the authorities in this state, and by the great weight of authority elsewhere, is to permit recoveries in such cases by successive actions until the wrong or nuisance shall be terminated or abated. . .

It is obvious that these cases were discussing successive actions, not purporting to establish an artificial barrier for the presentation of damage evidence which may have occurred from the date of filing to the date of trial. The decision provides the plaintiff with the flexibility to bring successive lawsuits and not to be hobbled by the obligation to ascertain and incorporate all of its future damages in one lawsuit.

The references cited by the Woodheads from the *Bradley* case are there to reinforce the two rules set forth by the Supreme Court in *Doran* and not to artificially inhibit a plaintiff from incorporating damage proof for injuries occurring between the filing of the lawsuit and the presentation of evidence at trial. The Supreme Court in *Bradley* makes its intent clear when it states at p. 693:

. . . The action of the defendant amounts to a continuing trespass which is defined by the Restatement (Second) of Torts Section 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.

To allow the plaintiff in a continuing trespass case to submit evidence of damage which accrues during the period which elapses from the date of filing to the date of trial allows for consistency in the application of the

limitation period and the presentation of damage evidence consistent with other civil cases. Commonly, the limitation period in a civil case begins to run on a cause of action when the conduct which gives rise to the claim for damage occurs. Then, so long as you file within the limitation period, you can recover all damages which accrue up to the date of judgment. If you file your lawsuit late in the limitation period and/or it takes some time to get to trial and judgment, you are entitled to all damages which you can prove at trial, including any which may have accrued from the date of filing of the lawsuit to the date of judgment.

Finally, interpreting the rule in this manner, is good practice. It promotes judicial economy by avoiding potential successive lawsuits by giving the defendant up until the time of trial to remediate the trespass. In this case, although the Woodheads were warned in March of 2000 by their own expert, the geotechnical engineer who testified on their behalf at trial that the placement of fill dirt on their side of the Woldson wall was causing damage to the wall, they chose not to remediate the problem until six months after the entry of Judgment. The point is that the Woodheads had it within their power to remediate the trespass and the damage well before the filing of

the lawsuit which could have fixed the amount of damage as of that date and avoided the issue raised by the Woodheads.

If the Woodheads are correct, every case of this type would demand and require successive lawsuits, taxing the judicial system, the parties and witnesses and not promoting closure of the parties' disputes. We must also ask why would the courts create such an inefficient and cumbersome system which contradicts well-established tenets of civil litigation and would cause one to ask what interest is furthered by such a strained interpretation of the three-year rule.

VII. CONCLUSION

Miss Woldson respectfully requests that this court grant this Petition as this issue is an important aspect of the law of continuing trespass and has yet to be addressed by the courts of this state. If the Court finds that the law is consistent with the decision of the Court of Appeals, this court should overrule the Court of Appeals and allow continuing trespass cases to allege

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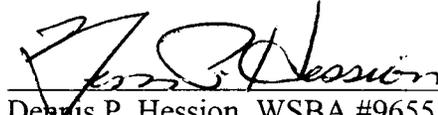
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and prove damages extending to the date of trial. To do so promotes judicial economy and the practical and predictable administration of justice.

Respectfully Submitted this 29 day of Septab, 2005.

RICHTER-WIMBERLEY, P.S.

A handwritten signature in black ink, appearing to read "Dennis P. Hession", is written over a horizontal line.

Dennis P. Hession, WSBA #9655
Attorney for Respondent

APPENDIX A

FILED

AUG 23 2005

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MYRTLE E. WOLDSON,)	No. 22931-9-III
)	
Respondent,)	
)	
v.)	Division Three
)	Panel Seven
JOHN G. WOODHEAD, SR. and)	
JANE DOE WOODHEAD, husband)	
and wife,)	
)	
Appellants.)	UNPUBLISHED OPINION

KATO, C.J.—Myrtle Woldson sued John Woodhead, Sr. for damages to a wall that separated their property. The court found for Ms. Woldson and awarded her damages. We reverse.

Ms. Woldson and Mr. Woodhead are neighbors whose houses were built, respectively, in 1915 and 1917. A rubble masonry wall was built dividing the properties at the time the homes were constructed. Ms. Woldson's family purchased their home in 1943 and she has lived there since that time. Mr. Woodhead purchased his home in 1986.

The wall is approximately 170 feet long, 3-1/2 feet high, and 15 inches deep. It runs north to south and most of it is located on Ms. Woldson's property.

No. 22931-9-III
Woldson v. Woodhead

The entire length of the wall is mortared. But the wall has a very loose core and interstitial spaces are not filled with mortar.

Early photographs of the wall show it was freestanding and unimpeded by dirt. Sometime in the 1960s, the level of the Woodhead property was raised by a substantial amount of fill soil.

At some point, the wall failed. Mr. Woodhead first became aware of a problem in 1986-87. In 1994, he also noticed an area where the wall had collapsed. Ms. Woldson discovered the wall had failed in 1996.

Ms. Woldson sued Mr. Woodhead for damages to the wall dividing their properties. She alleged 80 feet of the wall had to be replaced.

An expert for Ms. Woldson testified the wall was constructed as a freestanding fence. He believed that in the 1960s, fill was brought in and placed along the entire length of the wall to support the construction of a carport. The fill would have had to have been compacted, thus damaging the wall. In 1983, the then owners of the Woodhead property built a garage using the carport as a base.

Mr. Woodhead's yard has a higher elevation than Ms. Woldson's yard, which is flat. Mr. Woodhead's expert asserted the wall was built into the hillside of Mr. Woodhead's yard in order to make Ms. Woldson's yard flat.

Ms. Woldson's expert responded the wall was utilized to retain the fill on the Woodhead property, whereupon the wall's function changed from a boundary fence to a retaining wall. Consequently, there was lateral soil pressure that caused the entire wall to weaken and damaged the wall's structural integrity. The deterioration of the wall has been exacerbated by Mr. Woodhead's garage roof downspout, which pours water from the garage onto the wall.

Ms. Woldson's expert testified the wall could be divided into four zones. The wall had completely failed in the first zone, which was approximately 32 feet long in 2003. This measurement was up from 26 feet in 2001. The expert also testified he believed 14 feet of the wall failed between 1997 and 2003. The wall had a failure zone of 30 feet and two 12-1/2 foot sections on either side of the zone were badly damaged. An additional 25-foot zone had some mortar cracking and evidence of tilting. A total of 80 feet of the wall needed to be repaired.

The measure of damage to the wall caused by the trespass from the Woodhead property was the cost to repair 80 feet of the damaged wall. The cost was \$885 per linear foot, for a total of \$70,762.

The court allowed Ms. Woldson to recover damages for the three years prior to the filing of the complaint, that is, from 1997 to the present. Given the measurements of the experts, 45 percent of the wall failed during this time. The

No. 22931-9-III
Woldson v. Woodhead

court determined Ms. Woldson was entitled to \$33,353 in damages. This appeal follows.

Mr. Woodhead contends the court erred when it determined the length of time during which Ms. Woldson was entitled to damages for her continuing trespass claim. In a continuing trespass case, the plaintiff may seek damages that occurred during the three years prior to the lawsuit. *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 124, 89 P.3d 242 (2004), *review denied*, 153 Wn.2d 1008 (2005). Damages claimed may not extend past the three-year limitation period. *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 693-94, 709 P.2d 782 (1985).

Ms. Woldson filed her complaint on July 7, 2000. She is thus entitled to damages from July 7, 1997 to July 7, 2000. *See Bradley*, 104 Wn.2d at 693-94.

Ms. Woldson argues that in civil cases, the plaintiff can establish damages up to the date of judgment. That is indeed the general rule. In *Fradkin v. Northshore Util. Dist.*, 96 Wn. App. 118, 124, 977 P.2d 1265 (1999), the court discussed what damages could be recovered in a continuing trespass case:

The defendant argued that the statute of limitations began to run from the inception of the injury, and that all damages both past and future must be included in the same suit. Rejecting this approach, the court instead approved a rule permitting recoveries in such cases "by successive actions until the wrong or nuisance shall be terminated or abated."

No. 22931-9-III
Woldson v. Woodhead

Id. at 124 (quoting *Doran v. City of Seattle*, 24 Wash. 182, 188, 64 P. 230 (1901)).

Typically, a plaintiff can establish her damages in one proceeding. But Washington courts have held otherwise when dealing with continuous trespass actions. These cases have restrictive limitation periods and only damages occurring within that period can be recovered. Ms. Woldson's damages are therefore limited to the period from July 7, 1997 to July 7, 2000. In order to obtain damages after July 7, 2000, she must file a successive action. The court erred by awarding her damages through the date of judgment.

Mr. Woodhead also challenges the court's factual findings. "We review findings of fact to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law." *Gormley v. Robertson*, 120 Wn. App. 31, 38, 83 P.3d 1042 (2004). "Substantial evidence is 'evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.'" *Id.* (quoting *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987)). Credibility determinations are made by the trier of fact. *Id.*

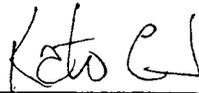
There is ample evidence by way of expert testimony to support the court's factual findings. Although some expert testimony was disputed, the credibility determination is left to the finder of fact and will not be disturbed.

No. 22931-9-III
Woldson v. Woodhead

But the court's findings do not support the damage award that Ms. Woldson is afforded under the law. The court erred by awarding damages from July 7, 1997 to the date of judgment. Rather, the damages should have been limited to the period from July 7, 1997 to July 7, 2000.

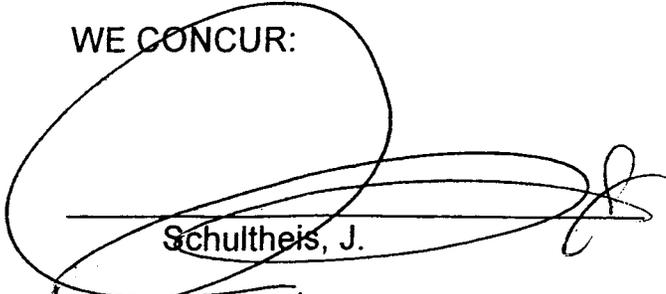
We reverse as to the amount of damages and remand to the trial court for further proceedings to determine the amount of damages from July 7, 1997 to July 7, 2000.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

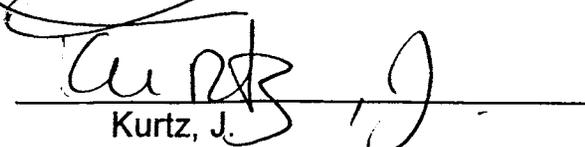


Kato, C.J.

WE CONCUR:



Schultheis, J.



Kurtz, J.

APPENDIX B

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FILED

FEB 13 2004

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, SPOKANE COUNTY, WASHINGTON

MYRTLE E. WOLDSON,)

Plaintiff,)

vs.)

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

Defendants.)

NO. 00-2-03948-9

PLAINTIFF'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The Court having heard all of the evidence from both parties in this case and having rendered its oral decision on December 18, 2003, does hereby make the following findings of fact:

FINDINGS OF FACT

1. The house located at 526 West Sumner Avenue in Spokane, Washington, was constructed in 1915 by William L. Mathews. This house was purchased by the Plaintiff's family in 1943 and the Plaintiff has lived in this house since that time.
2. The house immediately to the east of the Plaintiff's home is 516 West Sumner Avenue

PLAINTIFF'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW - 1

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1 which was constructed in 1917 and purchased by the Defendants in 1986. The
2 Defendants have resided in this location since that date. *The two houses*
3 *were constructed by the same builder*

4 3. At or about the time that the Plaintiff's house was constructed, a boundary/border fence
5 was also constructed between the two properties which is a rubble masonry
6 construction.

7 4. The wall is built out of rubble basalt. It has a very loose core with the interstitial spaces
8 not filled with mortar. Drainage or weep holes designed to channel moisture away from
9 the wall are absent. ~~The addition of heavier mortar on the exterior of the wall on the~~
10 ~~Plaintiff's side was apparently added to the wall in an effort to maintain its integrity~~
11 ~~sometime after the original construction.~~

12 5. Early photographs of the wall show that it was freestanding, unimpeded by dirt or other
13 matter. Sometime in the mid 1960's, predecessors in interest to the Defendants
14 artificially raised the level of a portion of the rear yard of the Defendants' property by
15 placing a substantial amount of fill soil on the east side of the wall.

16 6. After the soil was added to the Defendants' property, the then owners constructed a
17 freestanding carport at the north end of the west driveway. Later, in approximately
18 1983, other owners of the same property constructed a garage utilizing the structure of
19 the carport as a base. The wrought iron support structure above the carport is still
20 visible through the front door of the garage.

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26 PLAINTIFF'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW - 2

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7. To preserve the integrity of the Defendants' property, the basalt wall was utilized to retain the fill dirt placed on the Defendants' property and its function changed from a boundary/border fence to a full scale retaining wall. Because the wall was not constructed to be a retaining structure, the wall is now supporting a loading condition much different from that for which it was designed. The basalt wall is continuing to act as a retaining wall by holding back the fill soil, which is supporting the garage. This lateral soil pressure is causing an overall weakening to the full length of the wall which is exposed to the fill soil. Some of the effects of the deterioration are readily observable, others are not.

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8. The Plaintiff presented visual evidence of a wall which was free standing between the two properties and it was not encumbered by soil on the east side of the wall. The Plaintiff represents this to be the same wall which exists today. The Defendants presented evidence which was intended to prove that the free standing wall is a different wall than the subject wall and that the subject wall was actually built into the Defendants property. Ostensibly, this was to show that the problem of the dirt against the east side wall was somehow caused by the Plaintiff's predecessor in interest building the wall against the Defendants' dirt foundation. The Defendants have failed to carry the burden of persuasion that the wall pictured in the evidence admitted is a different wall than the subject wall. Further, it is not reasonable that the Plaintiff's predecessor would have

1 constructed a wall to retain the dirt of the adjacent landowner.

2
3 9. Irrespective of whether the wall was originally freestanding, or built adjacent to the
4 Defendants' dirt foundation, it is the dirt placed against the wall on the Defendants'
5 side, coupled with the moisture retained by that soil, which is causing the lateral
6 pressure on the wall and is the source of the failure of its structural integrity.

7
8 10. The most observable deterioration of the wall is close to the northwest corner of the
9 Defendants' garage, a location where a downspout from the garage roof discharged on
10 the ground surface to the top of the wall in this area. The deterioration of the wall was
11 exacerbated by the placement of the downspout directing moisture from the roof onto
12 the soil adjacent to and on top of the basalt wall. Periodic saturation of the adjacent
13 soil from general moisture as well as the discharges from the downspout have added to
14 the overall failure of the wall. The presence of the fill dirt against the wall creates a
15 lateral earth pressure load of 300 to 400 pounSd per lineal foot. The lack of the
16 proper drainage element in the design of the wall creates a further problem in that the
17 soil absorbs and retains the water thereby actually increasing pounds per linear foot of
18 pressure against the wall creating increased stress and failure in the collapsed area and
19 elsewhere. The presence of the moisture also contribute to the deterioration of the
20 mortar and the structural integrity of the wall.
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24 11. The basalt wall is approximately 170 feet long. The visible failure zone, where the wall
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1 actually disintegrated and toppled over is approximately 30 to 32 feet long. Outside of
2 this failure area is another zone of approximately 24 feet in total on either side of the
3 failure zone which is in a deteriorated condition. The mortar is badly cracked and has
4 been significantly weakened by the lateral pressure existing behind it. This area also
5 shows evidence of major tilting towards the west side. Outside this area is another
6 zone which is a total of 25 feet. This area shows some mortar cracking and evidence of
7 tilt towards the west side. The balance of the 90 feet of the wall appears to be in fairly
8 good condition, but is still under stress from the back fill on the east side of the wall.
9

10
11 12. The measure of damage caused by the Defendants' trespass is the total of the cost to
12 repair each of the respective damaged sections of the basalt wall. The cost of repair
13 does not include the removal of fill dirt from behind the wall on the east side. Because
14 of the extent of the damage the interior 80 linear feet of the wall should be replaced.
15 The cost to remove and replace that portion of the wall, including sales tax, is
16 \$70,762.00, or \$885.00 per lineal foot.
17

18
19 13. The Court previously ruled that the period for which damages are compensable,
20 applying the applicable period of limitations, is July 7, 1997, to the date of judgment.
21 The deterioration of the wall was measured over a period beginning in 2001, and
22 ending in 2003. During that period the failure zone extended from approximately 26
23 feet to approximately 32 feet. From this figure you extrapolate to determine that 14 of
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26 PLAINTIFF'S FINDINGS OF FACT
27 AND CONCLUSIONS OF LAW - 5
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1 the total 32 feet failure zone occurred during that six year limitation period. This equates
2 to 45% of the failure accruing during the limitation period.

3
4 14. We multiply the 45% figure times the cost of repair per lineal foot (\$885.00) times the
5 number of lineal feet in the total failure zone (30 feet rounded) which generates a
6 damage figure of \$11,948.00. Additionally, in the approximate 24 feet measured on
7 either side of the failure zone multiplied by the cost per foot times the percentage
8 occurring during the limitation period times the figure of .75 (which reflects the
9 measured reduction in the amount of deterioration in that section relative to the
10 deterioration in the failure zone) generates a damage figure of \$7,467.00. These
11 amounts are added to the amount which reflects the damage of the next 25 foot zone
12 measured on either side of the failure zone, times the lineal foot cost to repair times the
13 percentage of the damage occurring within the six year period of limitation, times the
14 figure of .50 (which reflects the measured reduction in the amount of deterioration in
15 that section relative to the deterioration in the failure zone) generates a damage figure of
16 \$4,978.00. Finally, the 90 feet of wall which has experienced stress but does not
17 appear as obvious deterioration caused by the placement of the fill dirt times the cost
18 per lineal foot times the percentage occurring during the limitation period times .25
19 (reduction factor which reflects the deterioration of this 90 foot section relative to the
20 deterioration in the failure zone) generates a damage figure \$8,960.00.
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26 PLAINTIFF'S FINDINGS OF FACT
27 AND CONCLUSIONS OF LAW - 6
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1 The total damage is \$33,353.00 as reflected in this recapitulation is as follows:

2

3 Section A	30 LF @ 1.00 x \$885.00 x 0.45 = \$11,948.00
4 Section B	24 LF @ 0.75 x \$885.00 x 0.45 = \$ 7,467.00
5 Section C	25 LF @ 0.50 x \$885.00 x 0.45 = \$ 4,978.00
6 Section D	90 LF @ 0.25 x \$885.00 x 0.45 = \$ <u>8,960.00</u>
7 Total	\$33,353.00

8 The Court having determined its Finding of Fact now enters its related Conclusions of Law:

9 CONCLUSIONS OF LAW

- 10
- 11 1. The placement of the fill dirt against the east side of the Plaintiff's basalt wall is a
- 12 nuisance.
- 13 2. The cause of action for nuisance accrued at the time the fill was placed against the wall
- 14 and because the action was filed more than three years after the accrual of this cause of
- 15 action, the cause of action is barred by the statute of limitations.
- 16
- 17 3. The placement of the fill dirt on the east side of the Plaintiff's basalt wall constitutes an
- 18 unlawful taking of the Plaintiff's property within, and in direct violation, of Article I,
- 19 Section 16 of the Washington State Constitution.
- 20
- 21 4. The cause of action for eminent domain (unlawful taking of property) began to accrue
- 22 when the fill dirt was placed against the Plaintiff's wall. The best estimate is that the dirt
- 23 was placed against the wall in 1965, thus the applicable period of limitations, three
- 24 years, has run on this cause of action.

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26 PLAINTIFF'S FINDINGS OF FACT
27 AND CONCLUSIONS OF LAW - 7

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1 5. The action of placing and retaining fill dirt on the east side of the Plaintiff's basalt wall is
2 a trespass. The trespass is continuing, giving rise to a claim by the Plaintiff for damages,
3 until the Defendants' trespassing conduct is abated. The period of limitations for
4 trespass is three years. The period of limitations for continuing trespass includes the
5 three year period which began three years prior to the filing of the complaint and
6 continuing to the time when the abatement of the trespass is complete.

7
8
9 6. This action was filed on July 7, 1997, and the Plaintiff is entitled to damage from July 7,
10 1997, to the period when the trespass is abated.

11 7. The Plaintiff has shown that she is entitled to injunctive relief pursuant to the criteria
12 under Washington State law. Under the case of Tyler v. Pipe Industrial v.s. Department
13 of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982), the Plaintiff has shown that she
14 has a clear and equitable right to free and unfettered enjoyment of her rock wall and
15 that she has established an invasion of that right by the placement of the fill dirt on the
16 east side of the Plaintiff's wall. The evidence at trial showed that the Defendants'
17 conduct resulted in substantial injury to the Plaintiff's wall and to her financial interest as
18 a consequence. Further, injunctive relief in the form of requiring the Defendants to
19 remove the dirt is a reasonable solution for both parties and will avoid future litigation
20 on this issue and is consistent with the goal of efficiency and the preservation of judicial
21 resources.

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26 PLAINTIFF'S FINDINGS OF FACT
27 AND CONCLUSIONS OF LAW - 8

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1 8. The case of Lee vs. Takao Building Development Company, Ltd., 200 Cal.Rptr 782
2
3 (Cal.App 2 dist, 1985) does not support the Defendants' theory that they cannot be
4 held liable because the dirt was placed against the wall by their predecessors in interest
5 and not them. This assertion is inconsistent with the accepted principle in this state to
6 the effect that the statute of limitations on a continuing trespass is a rolling period. This
7 period is limited to damages caused for three years prior to the filing of the claim to the
8 date of judgment. Further, Lee, supra, is a lateral support case in which all of the
9 damage claimed occurred prior to the transfer. It is not a continuing trespass case and
10 does not address the issue of damage specifically caused by a subsequent property
11 owner.

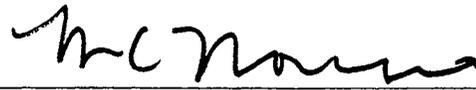
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14 9. Defendants' claim of a prescriptive easement is an affirmative defense which was not
15 timely pled by the Defendants' and, therefore, waived. Even if Defendants' had a
16 viable claim for easement by prescription, they failed to present evidence to support the
17 claim at trial before they rested their case. Further, the applicability of an easement by
18 prescription to a continuing trespass case would render meaningless the body of law
19 which supports this recognized theory of liability to owners and occupiers of land.

20
21 10. The period of limitations set forth in RCW 4.16.10 is specific to claims for construction
22 and is not applicable to this case. RCW 4.16.310 is applicable to claims for damage
23 which accrue as of a fixed period of time upon substantial completion of construction.
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26 PLAINTIFF'S FINDINGS OF FACT
27 AND CONCLUSIONS OF LAW - 9
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1 The most specific statute, RCW 4.16.310(1), which provides for a three year statute
2 for waste or trespass upon real property, applies to this case.
3

4 

5 The Honorable Maryann C. Moreno
6 Superior Court Judge

7 Presented By:

8 RICHTER-WIMBERLEY, P.S.
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11 Dennis P. Hession, WSBA # 9655
12 Attorney for Plaintiff
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26 PLAINTIFF'S FINDINGS OF FACT
27 AND CONCLUSIONS OF LAW - 10
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