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NO. 229319

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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MYRTLE E. WOLDSON,  
Plaintiff/Respondent,

v.

JOHN G. WOODHEAD, SR., and  
JANE DOE WOODHEAD, husband and wife,  
Defendants/Appellants.

Appeal from the Superior Court of Washington  
For Spokane County  
Honorable MaryAnn Moreno

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## REPLY BRIEF OF APPELLANT



STEVEN L. JONES  
EYMANN ALLISON FENNESSY  
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SPOKANE, WA 99204

- ATTORNEYS FOR APPELLANT -

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## I. SUMMARY OF THE REPLY

### 1. Statement of Facts

Ms. Woldson contends that the Statement of Facts contained in Mr. Woodhead's Brief of Appellants is argumentative. In order to eliminate this as an issue in this appeal, Mr. Woodhead has submitted a revised Brief of Appellant which removes the language that could be deemed to be argumentative. No other changes were made to the Brief of Appellant.

### 2. Argument

Ms. Woldson cites no authority that challenges the ruling of Judge Murphy on summary judgment in this case, and the unanimous decision of the Supreme Court in Bradley v. American Smelting, 104 Wn.2d 677, 709 P.2d 782 (1985) and the decision in Fradkin v. North Shore Utility District, 96 Wn.App. 118, 977 P.2d 1265 (1999), all of which hold that the damage period for claims based on continuing trespass are limited to the three-year period which immediately precedes the filing of the complaint. The case law cited by Ms. Woldson, Doran v City of Seattle, 24 Wash. 182, 64 P.230 (1901), does not, as she argues, undercut this rule of law, Doran actually agrees with Bradley, *supra*. Ms. Woldson does not and cannot cite any

authority for her proposition that damages for continuing trespass which accrue after the complaint is filed are recoverable in that action.

The balance of the Brief of Respondent does not raise legal issues except to the extent that the damages testimony rises to the level of being “actual and substantial” as required by Bradley, supra.

Mr. Woodhead will respond to the arguments and points made by Ms. Woldson in her Brief of Respondent in sequential order.

## **II. REPLY TO MS. WOLDSON’S ARGUMENTS**

### **1. Reply to Section “B” of Brief of Respondent Regarding the Damages Limitation Period in Continuing Trespass Cases.**

In her response, Ms. Woldson does not cite to any authority which contradicts the holdings in Bradley v. American Smelting, 104 Wn.2d 677, 709 P.2d 782 (1985) and Fradkin v. North Shore Utility District, 96 Wn.App. 118, 977 P.2d 1265 (1999). In these cases, the Supreme Court and Division I of the Court of Appeals held that damages in continuing trespass cases are limited to those damages that can be proved for the three year period prior to the date that the complaint was filed. Bradley, supra, 104 Wn.2d at 692-695. Fradkin, supra, 96 Wn. App. at 124. Judge James Murphy, as Ms. Woldson concedes, followed this plain meaning authority when he ruled on Mr.

Woodhead's summary judgment motion. Brief of Respondent, pp. 6, 14, CP 68.

Ms. Woldson cites Doran v. City of Seattle, 24 Wash. 182, 64 P. 230 (1901), as the "watershed" case in this area. Brief of Respondent, p. 15. She goes on to state that Bradley, supra, reinforces the rules set forth in Doran. This is an interesting comment since Doran is not even cited in the Supreme Court's unanimous decision in Bradley. Be that as it may, Doran does not somehow alter the three-year damage limitation rule set forth in Bradley. Doran primarily 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, supra, 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 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.

Doran, supra, 24 Wash. at 184. (emphasis added). This instruction was upheld in Doran.

As Ms. Woldson points out, the Doran court did cite and rely on the case of Uline v. New York Cent. & E.H.R.R.Co., 101 N.Y. 98, 4 N.E. 536 (1886). Brief of Respondent, pp. 15-16. But that case 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. Brief of Respondent, p. 16. In fact the Doran court noted with approval that in Uline where:

An 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.

Doran, supra, 24 Wash. at 187 (emphasis added). 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 if the continuing trespass was not abated. Doran, supra, 24 Wn. at 182, Uline, supra, 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, supra, 104 Wn.2d at 693, Fradkin, supra, 96 Wn.App. at 124-25.

Ms. Woldson could have brought successive actions here. She did not, but 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. Of course, it would be difficult to defend such a moving target. Nor is it true as Ms. Woldson argues that allowing damages to accrue through the time of trial is the norm in tort cases. Brief of Respondent, p. 17. In tort cases damages typically flow from a discrete event such as a car accident. To the contrary, 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, supra, 104 Wn.2d at 695.

Finally, Ms. Woldson argues in this section of her brief that Mr. Woodhead could have remediated the continuing trespass by removing the dirt from against the wall, thus promoting judicial economy. Brief of Respondent, pp. 17-18. Ms. Woldson does not really say why this is so, but relies instead on a comment made by Mr. Woodhead’s expert regarding the placement of fill dirt against the wall. Ms. Woldson knows well from the testimony at trial that this expert, Steve Burchette, does not believe fill dirt

was placed against the wall by Mr. Woodhead's predecessor in interest. RP 222. Ms. Woldson also knows that Mr. Woodhead was prepared to remove the dirt placed against the wall, but did not do so because Ms. Woldson did not respond to his offer, but rather brought suit against him. RP 292-93.

**2. Reply to Section C of the Brief of the Respondents Regarding the Damage Testimony.**

Ms. Woldson concedes that both of her experts were of the opinion that 80 feet of the wall was damaged to the point where it had to be replaced. Brief of Respondent, pp. 19-20. There is no testimony in the record that this 80-foot section of the wall that needed replacing had changed at all during the three-year period which preceded the filing of the complaint, or that it increased through the time of trial. Mr. Skillingstad, when he viewed the wall in 1998, couldn't tell how long the failed portion had been down. RP 64, 83-4. There is no testimony in the record from Mr. Skillingstad that this eighty-foot section of the wall which needed replacement increased at all from the first time he saw it in 1998. Mr. Gifford also testified that he first looked at the wall in 1998 but didn't measure it until 2001. RP 110-11. Accordingly, there are no measurements of the wall during the three years before the complaint was filed, except for a July, 1998 measurement sworn to by Mr. Gifford which he apparently forgot at trial, which put the failure zone

at 30 feet. CP 38. The testimony of the measurements made by Mr. Gifford in 2001 and 2003 only relate to an increase in the failure zone of the wall. RP 125, 144-45. There is no testimony from Mr. Gifford or anyone else on Ms. Woldson's behalf that the 80-foot section of the wall that needed to be replaced changed at all in that time frame.

Ms. Woldson also contends that Mr. Gifford's measurement of an increase in the failure zone of the wall between 2001 and 2003 was not inadequate because a row of arborvitae and the "variegated edge" of the failure zone made precise measurements impossible. Brief of Respondent, p. 22. Ms. Woldson concedes that this measurement was subjective. *Id.* Mr. Woodhead also suggests that as the photos admitted as exhibits P6B-E demonstrate, this was not a difficult area to access or measure.

Ms. Woldson further contends that the award of damages awarded by the trial court should be upheld on appeal because Mr. Gifford's testimony regarding the use of a graph was "good science" and had no expert testimony to refute it. There was no expert testimony from Mr. Woodhead because Ms. Woldson's counsel assured Mr. Woodhead's counsel that they would not be able to show movement in the wall. CP101-106. It is also noteworthy that Mr. Gifford did not offer his expert opinion testimony on a more probable than not basis. Moreover, his testimony of an increase of six feet in the

failure zone does not impact on Mr. Gifford's and Mr. Skillingstad's overall testimony that 80 feet of the wall was damaged to the point that it needed replacing. Accordingly, any testimony of an increase in the failure zone does not provide a foundation for Mr. Gifford's or Mr. Skillingstad's damage testimony.

**3. Reply to Section D Regarding Damage to the 90-foot Section of the Wall That Does Not Need to be Replaced.**

The damage award for the 90-foot section of the wall that doesn't need replacing does not measure up to the "actual and substantial" damages requirement of Bradley, supra, 104 Wn.2d at 693. Further, as noted above, the reference to a letter written by Mr. Woodhead's expert, Steve Burchette, in March, 2000, referring to the pressure of fill placed against the wall, is disingenuous. Ms. Woldson well knows that Mr. Burchette's trial testimony based on further investigation was that 170 feet of fill was not placed against this wall in the 1960s to support a detached carport as she believes. Brief of Respondent, p. 24, RP 222.

It simply strains credulity and common sense to argue that significant damages of \$8,960.00 are proper for a section of the wall that, according to Ms. Woldson's own experts, doesn't need to be replaced and may well last

another 50 years or more, which is well beyond the wall's estimated, useful life. RP 75-76,110, 117, 121.

**4. Reply to Section E Regarding the Wall at Issue.**

Ms. Woldson's testimony regarding her position that the wall at issue was originally a freestanding wall is predicated entirely on the photographs admitted as Exhibits P6F and 6G. And while her expert Allen Gifford testified that many truckloads of fill dirt must have been brought in and placed against the entire length of the 170 foot wall in the 1960s, RP 152-54, 344, Ms. Woldson's testimony is starkly different. Ms. Woldson's only testimony in this regard, cited by her in her Brief of Respondent at page 25, is as follows:

Q. (By Mr. Hession). Did you see any equipment brought in that would have smoothed the dirt out to make it level for the carport?

A. It seems to me I do – I do remember seeing the dirt being leveled. The carport was small, and where it started it was on the level, and I do have a faint recollection of the carport maybe 'cause you, you know, it doesn't – you don't build a carport and put your car on it and have it running down.

Q. So is your –

A. And the carport was started on a level piece – on a flat piece of ground. And then if the ground tapers down, you naturally would have to fill a little bit at the far end of the carport to have your car on a level platform.

RP 53. Ms. Woldson's recollection strongly suggests that if she observed this minimal fill activity, she would have been aware of and would have testified to the many truckloads of fill brought in and placed along the entire 170-foot wall. RP 152-54, 344. It simply strains common sense to believe that fill dirt would have been brought in in the 1960's and placed along the entire 170-foot length of this wall to support a carport which was 26 feet long and which, according to Ms. Woldson's recollection, only needed just a bit of fill to make it level. RP 53.

In response to a second photograph showing another wall closer to Mr. Woodhead's rear drive, Ms. Woldson contends that this photograph taken at the same time as the photograph she relies on is so far away that "no one could testify with any credibility that what was depicted was another wall." Brief of Respondent, p. 27. The problem with this statement is that the engineer expert, Mr. Gifford, agreed that this second wall could be seen. RP 351-352, Exh. D19.

Ms. Woldson responds to the question as to whether the photograph she relies on to support her position that the wall at issue was originally freestanding does not show mortar was not accurate as one of her experts, Don Skillingstad, testified that he could see mortar in the wall. His testimony was that the mortar was shown in shadows, though neither Ms. Woldson nor

her engineer expert, Allen Gifford, nor Mr. Woodhead's expert, Steve Burchette, saw any mortar in this photograph. RP 54-55, 134-35, 208. In addition, Mr. Skillingstad thinks that the mortar he saw in the wall as shown in Exhibit P6G was the same mortar he saw in the other photos in Exhibit P6. The contrast between these photos underscores the credibility of the testimony of everyone else who looked at the wall, including Ms. Woldson and Mr. Gifford, who agreed that no mortar could be seen.

Ms. Woldson also suggests that common sense does not support the fact that it was unlikely that the prior owners of Mr. Woodhead's house would have lived with a driveway with a sharp slope from its western edge down to the base of this freestanding wall. Brief of Respondent, p. 28. Ms. Woldson states that there is no direct evidence to support this position. However, if you accept Ms. Woldson's theory that fill dirt was brought in in the late 1960s and placed against the entire length of this 170-foot wall, there is no question that such a steep slope at the edge of the driveway would have been in existence. As noted earlier, Mr. Gifford recognized that driving down that driveway in the winter with such a slope would take particular care. RP 342. It simply belies common sense to believe that a driveway with such a significant slope that would have been slippery in the wintertime would have been built with what is essentially a 3-foot ditch on its west side.

In the same way, it strains common sense to suggest that the original owners of Mr. Woodhead's house would have not backed out of the basement garage and into the area where the carport was built, which is at the same level as the basement garage, in order to be able to drive forward up the driveway, particularly in the winter. Even Ms. Woldson testified that this was what was done at her house. RP 46-48.

Ms. Woldson also points out that her expert, Mr. Gifford, did not agree that the soil on Mr. Woodhead's side of the wall was native soil. Brief of Respondent, pp. 28-30. However, it is noted even in this testimony, Mr. Gifford stated that there was 8-12 inches of gravelly material near the surface. RP 346. On cross examination, Mr. Gifford testified that he would not expect to find two different types of fill material. RP 346.

The final point raised by Ms. Woldson in her response regards the fact that her backyard is flat and Mr. Woodhead's contention is that it makes more sense for a flat yard to be built into the side of his property, which even Mr. Gifford admitted was generally above the level of Ms. Woldson's yard. RP 338. Again, common sense plainly suggests that in order to create such a flat yard, with no visible change in level, when contrasted with Mr. Woodhead's property directly to the east which follows natural contours, that the flat yard would have been out to the hillside. RP 222. Again, this undercuts the trial

court's determination of the matter of fact that the wall at issue originally was freestanding.

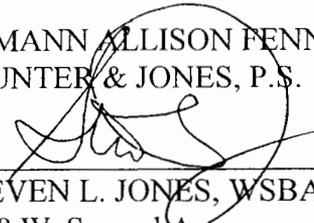
### III. CONCLUSION

Mr. Woodhead respectfully submits that Ms. Woldson's claims fail both legally and factually. Under the clear rule of law set forth in Bradley, a unanimous decision of the Washington Supreme Court, damages in continuing trespass claims are limited to those which can be proved in the three year period which precedes the filing of the complaint. Ms. Woldson did not bring forth any evidence of any damages which accrued in that time frame. And where Ms. Woldson was aware that this wall had failed more than three years before bringing suit, and where both of her experts testified that 80 feet of the wall had to be replaced but cannot show any increase in that 80-foot zone for the three-year period before the complaint was filed or for any period thereafter, Ms. Woldson cannot sustain her burden of proof.

Finally, with respect to the challenges made by Mr. Woodhead to the Findings of Fact of the trial court, Mr. Woodhead submits such findings should not be rubber stamped and they should be set aside here because a "fair-minded, rational person" would not be persuaded of their truth, the standard for such review by this Court.

Respectfully submitted this 11th day of April, 2005.

EYMANN ALLISON FENNESSY  
HUNTER & JONES, P.S.

BY 

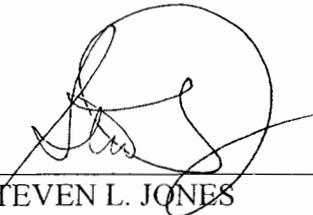
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**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury under the laws of the State of Washington and the United States of America that on April 11, 2005, I caused to be served, by mailing by first class United States mail, postage prepaid, a true and correct copy of the Reply Brief of Appellant to:

Dennis P. Hession  
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422 West Riverside Ave.  
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