

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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## BRIEF OF APPELLANT



STEVEN L. JONES  
EYMANN ALLISON FENNESSY  
HUNTER JONES, P.S.  
2208 W. SECOND AVE.  
SPOKANE, WA 99204

- ATTORNEYS FOR APPELLANT -

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## **I. ASSIGNMENT OF ERROR**

The trial court erred in denying Mr. Woodhead's Motion for Reconsideration, Motion to Amend Findings and Motion to Alter or Amend Judgment.

### **1. Issues Relating To Assignments of Error**

A. Whether the trial court erred as a matter of law in ruling that a claim for damages under a continuing trespass theory was not limited to the three-year period prior to the date the complaint was filed as required by Washington law. Finding of Fact Nos. 13 and 14, Conclusions of Law Nos. 5 and 6, CP 144-47.

B. Whether the trial court erred as a matter of law in awarding damages where those damages were not "real and substantial" as required by Washington continuing trespass law because they were based on a formula rather than actual measurement. Finding of Fact Nos. 13 and 14, CP 144-46.

C. Whether the trial court erred in awarding damages for a portion of the collapsed wall that was not measured in the three year period before the Complaint was filed and for 90 feet of the wall that was in good shape and didn't need replacement. Finding of Fact Nos. 11, 12, 13, and 14, Conclusions of Law Nos. 5 and 6, CP 143-47.

was no testimony of any injury to the wall during the three year period before the Complaint was filed.

- This Court is being asked to decide whether the trial court erred in awarding damages based upon a formula rather than actual measurement of any injury to the wall.
- This Court is being asked to decide whether the damages testimony of Mr. Woldson's expert, Allen Gifford, amounted to "real and substantial" damages as required by Washington law on continuing trespass claims, including an award of \$8,960.00 in damages for 90 feet of the wall that this expert testified was in good shape and would not have to be replaced.
- The Court is being asked to decide whether the entire damages award should be set aside because both of Ms. Woldson's experts testified and the trial court found that 80 feet of the wall would have to be replaced, testimony based on their original observations of the wall and thus unavailable under the theory of continuing trespass because this injury to the wall occurred more than three years prior to the complaint being filed.
- This Court is being asked to decide whether the damages formula testified to by Ms. Woldson's expert, Allen Gifford, and adopted by

The issues presented in this case concern the responsibility for failure of this wall and if any damages may be awarded due to the application of the law of continuing trespass. It comes to this court after the trial court denied Mr. Woodhead's Motion for Reconsideration, Motion to Amend Findings and Motion to Alter or Amend Judgment.

## **2. Statement of Facts**

Although somewhat dimmed by the mists of time, it is undisputed that the houses on the properties owned by Ms. Woldson and Mr. Woodhead were built at roughly the same time and by the same builder, with building permits issued in 1915 and 1917, respectively. Report of Proceedings ("RP") 304-06, Exhibits ("Exh.") D14, D17. And although no evidence was found dealing with the date the wall was built, it seems reasonable to assume that it would have been built at the same time these homes were constructed. The useful life of the wall, according to Ms. Woldson's experts, was 75 to 100 years. RP 75-6, 110.

The wall is approximately 170 feet long. RP117. It runs in a north/south direction, with most of it on Ms. Woldson's side of the property line, although there are number of places where the edge of the wall lies on Mr. Woodhead's property. RP 113-15, 268, 276. The wall is approximately 3½ feet high and 15 inches across. RP 114-15, Exh. P6C, 6D. The soil on

in the old photograph. RP 54-55, 134, and 208. Mortar is seen in the wall which exists today. RP 135, 195-97, Exh. P 6H, D.

The original garage in Mr. Woodhead's home is on the west side in the basement of that structure. RP 45, Exh. D 11.5. Ms. Woldson's expert, Allen Gifford, agreed that the grade where the external carport now sits was the same level of his basement garage which would have been established when the home was built. RP 157, 339-41. Mr. Gifford testified that truckloads of fill were brought in to support the carport and placed along the entire left of the wall in the 1960's. RP 344. 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 agreed that the distance between the edge of that driveway and the current wall is a matter of two to three feet. RP 340, Exh. D 11.11, 11.12, 11.15. This would have left a three-foot slope in the two to three foot gap between the edge of that driveway and the wall, which, according to Mr. Gifford, meant that drivers would have had to take particular care when driving down that driveway, in the winter. RP 342. Ms. Woldson's acknowledged the cars using this basement garage would have backed out of the garage to the north in order to drive forward up the hill. RP 46. This backing area is at the same level as the basement garage and the external carport. RP 339-40, Exh. D11.5, 11.6. Ms. Woldson testified that

Mr. Woodhead's yard, as recognized by Allen Gifford, is generally above the elevation of Ms. Woldson's yard. RP 198-99, 338. Ms. Woldson's yard is flat. Exh. P 6A. Ms. Woodhead's expert 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.

No one can say when the wall failed. Mr. Woodhead testified that he was first made aware of it in 1986-1987. 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 the wall failure shortly after icestorm in 1996. RP 32. She did have the failed wall investigated by the City of Spokane, which sent a letter regarding that fact dated June 18, 1997, which was more than three years before the complaint was filed. RP 43. Exh. D 12, CP 1-7.

This appeal centers around the damages testimony of Ms. Woldson's expert, Allen Gifford. Mr. Gifford testified that the wall could be divided into roughly four zones. RP 121. The first zone is where the wall has completely failed. It consisted of approximately 32 feet in 2003, according to Mr. Gifford's trial testimony. RP 125. Mr. Gifford also testified that he measured the failed area of the wall in 2001 at 26 feet. *Id.* He also measured the "tilt" of the wall on both sides of the failed zone in 2001 but not in 2003.

the two 12 ½- foot sections on either side of the failure zone which were quite damaged. RP 86, 120. Mr. Skillingstad, who first saw the wall in 1998, and Mr. Gifford both believed that this 80 feet of the wall was stressed to the point where it needed to be replaced. RP 67-8. 96-7, 120. As noted earlier, Mr. Gifford testified that the remaining 90 feet of the 170-foot wall was in good shape and would not have to be replaced. RP 120.

### **III. ARGUMENT**

#### **1. Standard of Review.**

The standard of review applicable to this case has been summarized by the Washington Supreme Court in Sunnyside Valley Irrigation District v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003) as follows:

Findings of fact are renewed 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. Questions of law and conclusions of law are reviewed de novo. (Internal citations omitted)

#### **2. Washington Law Restricts Damages In Continuing Trespass Cases To The Three-Year Period Which Precedes The Filing Of The Complaint**

The first sentence of Finding of Fact No. 13 entered by the Court, reads as follows:

We now hold that when the actions of a defendant have (1) invaded the plaintiff's interest in the exclusive possession of his property, (2) been committed intentionally, (3) been done with the knowledge and reasonable foreseeability that the act would disturb the plaintiff's possession, and (4) caused actual and substantial damages, the 3-year statute of limitations applies.

\* \* \*

The action of the defendant amounts to a continuing trespass which is defined by the Restatement (2d) 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.** (Emphasis added.)

Bradley, 104 Wn.2d at 692-694.

At the end of this opinion, our Supreme Court summarized its view with respect to the damages limitation period, 104 Wn.2d at 695:

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**

entry or by causing a chattel or structure to be on another's property, the continuation of the invasion is regarded as a new and separate wrong for every unit of time that it continues, unless the trespass is what the law regards as a permanent one.

The legal consequences of this notion of continuing trespass are these: (1) **the plaintiff may bring successive actions, and a judgment in one action does not bar further actions for the continuation of the trespass after the date when the first action was begun.** (2) **As a corollary of this, damages in each action are limited to "the actual physical injury suffered before the commencement of the action."** (Emphasis added.)

The writers of this treatise cite Bradley, supra, and cases from other jurisdictions as support for these rules.

Ms. Woldson's complaint was filed on July 7, 2000. As such, the damage period for her claim of continuing trespass under Washington law and the prior order of this Court ran from July 7, 1997 through July 6, 2000. Ms. Woldson knew that the wall failed prior to July 7, 1997. RP 43, Exh. D 12. Accordingly, the first measurement of damage to the wall would constitute the starting point for the assessment of continuing trespass damages, that is, discrete injury that demonstrably occurred within three years of filing suit. Injury that occurred prior to that three-year period is not compensable. Bradley, supra, 104 Wn.2d at 693.

There was no testimony by any witness on behalf of Ms. Woldson of

this testimony in its Findings of Fact No. 13. CP 144-45. Mr. Gifford's trial testimony further demonstrates the uncertainty of these measurements.

(By Mr. Jones) Q. Okay. Now, when you made those, those measurements, and then again in 2003 you made similar measurements?

A. In 2003 I primarily looked at how long the (failed) section was and how much it had expanded.

Q. Okay.

A. I did not resound the rock, I did not re-measure all the tilt.

Q. All right. So as far as you know, back to the tilt, it, you can't say whether it's increased or not?

A. No, not really.

Q. Okay. Now, in, in respect to the failed portion of the wall that you said you measured, you said in 2001 it was 20 feet?

A. No. I said it was about 26 feet, I think.

Q. In 2001?

A. Yes.

Q. And how did you determine the margins?

A. That's difficult to do. That's why I said "about."

Q. Okay. And then if, in 2003 you measured again?

A. Yes.

Q. And you determined the margins to be something different?

A. Slightly more, yes.

Q. Okay. And what was that measurement again?

A. About 32 feet.

Q. 32 feet. So that's, you are saying a 6 foot further section of the wall has crumbled, is that what you are saying?

A. Yes.

Q. Okay. So we are clear here, are you talking about where the wall has fallen down?

A. Yes.

Q. Okay. And was 26 feet, you say, in the year 2001, and 32 feet in 2003?

RP 159.

Q. I just want to clarify a couple things, Mr. Gifford, one is, I believe when we were, when I was questioning you earlier, we had talked about the failure zone and we talked about describing that as the complete failure of the wall, is that, am I remembering that correctly?

A. Yes.

Q. And now you were talking, and in response to questions from Mr. Hession, that when you did this re-measurement in 2003, the difference, maybe some rocks knocked off the top of the wall, could be by animals, it could be by humans, but you are not talking about complete portion failure of the wall, are you?

A. I think I am, yeah. I don't think that the wall was doing what it was intended to do ...

Q. - where you talk about maybe an animal dislodging a rock, you are saying now that section has failed because one rock is off the top?

A. No. I am saying that that wall has failed, but that indicates the end of the failure zone.

Q. But it's not -

A. There isn't a straight line where the wall has failed. It's a gradual thing. It happens over 4 or 5 feet, and you have to make a judgment as to where that, that, the edge of it is.

Q. Right. And that judgment is different now than it was in 2003, but not because more of the wall has fallen?

A. No. No. The judgment was the same in 2001 as it is in 2003. We had the same problems evaluating the edge of the failure zones both times.

Q. But when, the first time you were measuring in segments and second time directly?

A. Maybe didn't - measured it in segments both times.

to measure deterioration of the wall. P Exh. 5, Finding of Facts Nos. 13 and 14. CP 144-46. This graph, according to Mr. Gifford, showed 14 feet or 45% of the wall fell between 1997 and 2003. P. Exh. 5, Finding of Fact No. 13. Of course there was no actual measurement that showed that this 8 foot section of the wall collapsed between July, 1997 and 2001. The only "real" measurement of the wall by Mr. Gifford between 1997 and 2001 put the failure zone at 30 feet. CP 38. This means, of course, that 8 feet of the wall could not have failed between 1997 and 2001, despite whatever speculative graph Mr. Gifford may have prepared. That graph was based on surmise only, which does not rise to the level of "actual" damages as required by our Supreme Court in Bradley in continuing trespass cases.

Mr. Gifford then assumed that all portions of the wall would have deteriorated at the same 45% rate without any measurement whatsoever of those other sections. Again, the cause of action here is based on the theory of continuing trespass. The Plaintiff has to show "actual and substantial" damage. "Actual" is defined by Webster's II New College Dictionary (2001) as "Existing in fact and reality." Here, there was no testimony of any "actual" damages except for the uncertain and wavering testimony by Mr. Gifford that 6 feet of wall had failed. Mr. Gifford was apparently so uncertain of his measurement that in his damages calculations, he used 30 feet of the wall as

would not have to be replaced. RP 117, 121, CP 145-46. This is hardly testimony of “actual and substantial” damage and is not enough to sustain this judgment under Bradley, supra.

**4. Testimony That The Wall Needed Replacement Bars Any Award Of Damages**

Both plaintiff’s experts, 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. Mr. Gifford’s testimony is predicated on examinations of the wall made in 2001 with no remeasurement of any portion of the wall other than the failure zone after that point in time. RP 144, 159. Mr. Skillingstad did not testify to any additional damage to the wall between 1997 and trial. Accordingly, the extent of these damages and the remedy for those damages – replacement of 80 feet of the wall – was known more than three years before suit was brought. Bradley, supra, 104 Wn.2d at 692-93. Or, as stated in Fradkin, supra, 96 Wn.App.124, this claim for injury sustained by Ms. Woldson was not brought within 3 years of the date that the injury was known. As a result, no damages within the three-year statute of limitations period are available here.

3) The basement garage in Mr. Woodhead's garage 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 H.11, 11.12, 11.15. If the wall were freestanding until fill was brought in in the 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 RP 342; something that common sense tells us would not have been the case given Spokane winters.

4) The basement garage of Mr. Woodhead's house would have required a backing area which would have been 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. Hence, there would have been no need to bring in fill as theorized by Ms. Woldson and her experts. RP 152-54, 342-45.

5) If fill were in fact brought in to support the construction of a new carport, there would have been no need to bring fill in for the entire 170-foot wall. RP 342-43, Exh. D 14.

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 were in the test holes. RP 356. If the fence were freestanding, then the five test holes dug along it would have shown residue of the lawn and other

Woldson knew of the injury to her wall more than three years before failing her complaint, thus barring this cause of action under the statute of limitations. Finally, the factual findings of the trial court do not persuade a fair-minded person of their truth, and should be set aside.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of January, 2005.

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