

69428-6

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NO. 69428-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ZOYA SPENCER,
a single woman,

Appellant,

v.

ROBERT LUTON AND KARIN LUTON,
as individuals and as the marital community comprised thereof,

Respondents.

2013 JUL 12 AM 11:00
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Patrick Oishi

REPLY BRIEF OF APPELLANT

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In addition to the issues and arguments presented on behalf of Ms. Spencer in Appellant's Opening Brief, Ms. Spencer respectfully offers the following for the consideration of this Court.

A. ARGUMENT

1. MS. SPENCER PRESERVED THE ISSUE OF CONTINUING INTENTIONAL TRESPASS FOR REVIEW BY THIS COURT

The second page of Ms. Spencer's Motion For Reconsideration requests Judge Oishi to reconsider "all of the issues presented at trial." CP 131, line 5. Judge Oishi denied Ms. Spencer's motion in a summary ruling. CP 143. Ms. Spencer's Notice of Appeal included appeal of the Motion To Reconsider, thus incorporating review of the dismissal of the continuing intentional trespass claim. CP 145. The issue was therefore preserved for review.

2. THE RECORD SHOWS THAT FIVE ROCKS FELL OUT OF THE ROCKERY WITHIN FIVE MONTHS OF CREATIVE BROTHERS' REPAIR OF THE ROCKERY IN JULY 2010 AND MORE ROCKS HAVE FALLEN OUT SINCE THEN; THUS THE TRIAL COURT'S FINDING THAT THE ROCKERY HAS BEEN SOUND SINCE IT WAS REPAIRED BY CREATIVE BROTHERS IN JULY 2010 IS UNSUPPORTED IN THE RECORD

While Creative Brothers' initial repair of the rockery took place in July 2010, the record shows that there were problems with that repair. The rockery partially collapsed again after that repair and Creative Brothers had to return and again restack rocks into

the rockery. 8/23/2012 RP 33-4, 56. Exhibit 15-E, taken on December 18, 2010 (five months after the repair that the trial court found had solved the rockery's problems) shows five rocks subsequently collapsed from the rockery onto Spencer's property. A few days after this photo, Ms. Spencer told the court, in December 2010, Luton had the rockery re-repaired. 8/28/2012 RP at 77. Exhibit 15-J shows the post-December 2010 repair. Creative Brothers' Enzo Morella testified that while he could not remember whether he had returned to repair his repair, he could not rule it out. 8/28/2012 RP 117.

Since that repair, more rocks have fallen out of the rockery. Bradley Paul Biggerstaff, the geotechnical engineer Ms. Spencer hired to evaluate the rockery, also observed two rocks out of the rockery in 2011. 8/27/2012 RP 104. In March 2012, another rock fell out. 8/28/2012 RP 44. In total, since the July 2010 Creative Brothers repair, eight more rocks have fallen out of the rockery.

It is also undisputed that Creative Brothers found it necessary to drive three iron stakes into the front of the rockery in an attempt to prevent further collapsing. 8/28/2012 RP 46.

The trial court's finding that the rockery has been structurally sound since Creative Brothers' July 2010 repair is unsupported by substantial evidence. No matter how often the defendant or his experts conclude that the rockery is sound, the

evidence itself tells a different story. If the rockery were sound, rocks would not continue to fall out of it.

3. SPENCER CONTACTED LUTONS ABOUT THE ROCKERY IN AN EFFORT TO RESOLVE THE PROBLEM, BUT SHE WAS IGNORED; LUTONS DID NOTHING UNTIL SHE FILED SUIT, THUS THE TRIAL COURT'S FINDING 14 THAT THE LUTONS ADDRESSED THE PROBLEM AS SOON AS THEY WERE AWARE OF IT IS UNSUPPORTED BY THE RECORD

When Spencer began planning her construction project, she wrote to the owners of the adjoining property well in advance, in 2005, regarding the rockery and enclosing a copy of her 1998 letter 8/29/2012 RP 12, 66, 73. She did not know the Robinson/Neilson home was for sale at that point; the houses face onto different streets. 8/29/12 RP 12. She began her demolition work in 2007. 8/28/2012 RP 55. Luton did not respond about the rockery.

In September 2009, James Costello, Spencer's tenant/builder/certified expert sent Luton a letter and discussed Spencer's concerns about the rockery with Luton on behalf of Spencer. 8/29/2012 RP 106, 108. Still, nothing was done.

After a geotechnical engineer told her that the rockery was a safety hazard, Spencer engaged in unsuccessful negotiations with Lutons regarding the rockery and she was ultimately forced to file suit in January 2010. CP 1-4. Finally, six months after Spencer filed suit, the Lutons addressed the rockery by commissioning a partial repair. Accordingly, the trial court's finding that the Lutons

addressed the problem as soon as they were made aware of it is unsupported by the evidence.

4. COSTELLO STRUNG SURVEYING TAPE BETWEEN THE PROPERTY MARKERS

Luton points out a typographical error in Spencer's opening brief; to clarify, Costello told the court he strung surveying tape between the property markers, and this testimony was unrebutted. 8/28/2012 RP 44. Exhibit 22 J shows the surveying tape Costello strung from the markers, in relation to the rockery. The tape is further discussed by Costello at 8/28/2012 RP 47.

5. LUTON MISCONSTRUES BIGGERSTAFF'S TESTIMONY; BIGGERSTAFF UNEQUIVOCALLY STATES THAT THE ROCKERY REMAINS IN DANGER OF FURTHER COLLAPSE

Luton's brief misleads the court about the testimony of Spencer's expert, Mr. Biggerstaff. Brief of Respondent at 43. Biggerstaff unequivocally testified that the rockery partially collapsed and is still in danger of collapse because rocks are too small, in poor condition, not able to take the load placed upon it, and are still falling out of it. 8/27/2012 RP 51-2, 63, 77, 107. While Luton claims that Biggerstaff affirmatively testified that the rockery has not moved laterally over the years, this is an inaccurate portrayal of what Biggerstaff told the court. What Biggerstaff actually said was that he cannot say for sure that the rockery

moved laterally from 2009 to 2011 because he did not survey it.
8/27/2012 RP 105.

This is the type of answer that Luton's expert, Batterman, should have given during his own testimony, since Batterman did not survey the rockery either. Biggerstaff was exercising sound professional caution and declining to reach beyond what he could justify based upon expert observation and measurement. His testimony fully supported Spencer's claims.

6. THE ROCKERY TRESPASSES ONTO
SPENCER'S PROPERTY AND MULTIPLE
TRESPASSES HAVE OCCURRED
DURING MULTIPLE REPAIR ATTEMPTS
BY LUTON OR HIS CONTRACTORS

The 1998 survey shows the rockery is over the property line in two places. Exhibit 12; 8/29/2012 RP 59-60. This survey is unrebutted and the trial court's finding that the rockery is on Luton's property and does not trespass flies in the face of this survey. At trial, Luton testified that the rockery crosses over onto Spencer's property. 8/29/2012 RP 100.

Beyond the survey, a continuing trespass has also occurred because many large rocks from the rockery have fallen into Spencer's yard many times over many years. 8/23/2012 RP 33-4, 56; Exhibit 15-E; Exhibit 16-H; 8/27/2012 RP 104; 8/28/2012 RP 44. It was never disputed at trial that the many rocks that have fallen from the rockery have landed, and often remained for

significant periods of time, well into Spencer's yard. Eight rocks have fallen since Lutons' July 2010 "repair." Based on these occurrences alone, the trial court erred in concluding that there was no trespass.

Additionally, while there have been several repair attempts which have involved entry onto the Spencer property, at no time did Lutons ever ask for or receive permission to be on Spencer's property or to have contractors work on her property. 8/28/2012 RP 81-2; 8/29/2012 RP 152.

7. THE NUISANCE CREATED BY THE ROCKERY IS SIGNIFICANT

The core of Lutons' argument against nuisance is that any nuisance is minimal. Brief of Respondent at 47-8. Yet the repeated tumbling of several large rocks onto one's property, over a period of years, is not a minor inconvenience. Spencer testified that she cannot landscape that portion of the yard because rocks continue to fall on it, and people cannot use that portion of the property because of the danger presented by the falling rocks. 8/23/2012 RP 58; 8/29/2012 RP 22. She does not feel safe making any permanent improvements to that portion of her property, since it is subject to falling rocks. 8/23/2012 RP 59. She is subject to strangers entering her property multiple times to attempt to deal with the rockery. The trial court's conclusion that these facts do not constitute nuisance is erroneous and should be reversed.

8. GRUNDY IS NOT ANALOGOUS TO THIS CASE AND THE TRIAL COURT ERRED IN RELYING UPON IT

The trial court held that Grundy v. Brack Family Trust, 151 Wn. App. 557, 213 P.3d 619 (2009) rev. denied 168 Wn.2d 1007 (2010) is directly analogous to this case and that it requires an intentional volitional act, not an omission, by the defendants presently in court before liability can be imposed. Brief of Respondents at 21.

This is simply not what Grundy says. The Lutons are not in the position of the defendant Bracks who erected the bulkhead. Defendant Brack's bulkhead did not itself trespass onto the plaintiff's property. Grundy differs from the typical trespass case in that it was claimed that the Bracks had control over an independently acting agent, the sea, which did not belong to the Bracks and was not on the Brack property. 151 Wn. App. at 560. Here, there is no third agent at work; the material which is trespassing onto Spencer's property is owned by the Lutons and is under the Lutons' control.

This key distinction flows through Grundy's reasoning and distinguishes it from the instant case. Because the state of evidence at the Grundy trial was that (1) the Bracks were merely defending themselves against this independently acting agent, (2)

they did not specifically act with any other intent than to defend themselves against the sea, and (3) they had no reason to know their bulkhead could direct seawater onto Grundy's property, the Grundy court found there was no intentional act vis-à-vis Grundy. The Bracks' only intentional act was vis-à-vis the sea.

Here, the situation is very different because (1) the Lutons were not defending themselves against anything and there was no independently acting third agent impacting them, (2) they ignored Spencer's requests to address the problem, thus specifically intending to let it continue to occur; and (3) they had reason to know their rockery was causing rocks to fall onto Spencer's property and was migrating onto her land because they were repeatedly informed this was occurring.

The Lutons' rockery is itself collapsing and trespassing onto Spencer's land. The rocks and dirt and fill behind the rockery are not, as Spencer's brief suggests, analogous to the independent and uncontrollable action of the sea. Instead, the Lutons personally own the trespassing rockery and have full control over its placement, movement, and condition.

The trial court found that Grundy stands for the proposition that trespass requires "a volitional act and a failure to act or an omission is not sufficient to prove intentional trespass." CP 112. It is important to note that in Grundy the court found no evidence

that the defendant Bracks should have known that their new bulkhead could cause seawater to wash onto Grundy's property. In contrast, both Lutons and their predecessor owners had reason to know their rockery was trespassing – Lutons were personally notified of the problem in 2009, several months before Spencer brought suit. 8/29/2012 RP 108.

By analogizing this case to Grundy, the trial court's finding indicates that Lutons must have been helpless regarding the condition of the rockery just as the Bracks were helpless before the action of the sea. Since this is obviously not the case, Grundy does not apply; the trial court's conclusion is erroneous and should be reversed.

9. SELLING A PROPERTY DOES NOT
BAR A THIRD PARTY FROM
RECOVERING DAMAGES BASED
ON THE ACTS OF THE PRIOR OWNER

Our Supreme Court has demonstrated a willingness to hold successor property owners liable for the acts of prior owners in trespass. Woldson v. Woodhead, 159 Wn.2d 215, 149 P.3d 361 (2006), while primarily a statute of limitations case, involved liability of a current property owner for the act of the previous owner. Id. at 17. The Supreme Court had no difficulty attributing the prior owner's acts to the current owner. Id.

Woldson's facts are strikingly similar to the facts of this case. As in Woldson, Spencer was damaged by the additional load

placed on an adjoining rockery by the prior owners of her neighbor's property. The only distinction between the cases is a fairly meaningless one; the rockery itself was owned by Woldson, but was also partly on Woodhead's property. Here, the rockery is mostly Lutons', but small parts are on Spencer's property.

For purposes of understanding the Supreme Court's position on successor liability in this type of situation, the cases present the same scenario. Accordingly, the result should be the same; Spencer should be able to recover based on the acts of the prior owner of the Luton property just as Woldson was able to recover based on the acts of the prior owner of the Woodhead property. The trial court's conclusion to the contrary should be reversed.

B. CONCLUSION

Ms. Spencer preserved the issue of intentional trespass for review by this court; the rockery has been subject to multiple repairs and still rocks fall out of it, therefore the trial court's finding that it is structurally sound is unsupported in the record. Lutons were informed of the rockery's problem in 2009 and declined to address it, waiting until six months after Spencer filed suit in 2010; thus the trial court's finding that Lutons addressed the problem as soon as they became aware of it is also unsupported in the record.

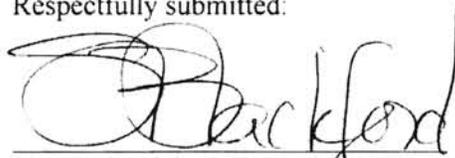
The prior owner's sale does not extinguish Ms. Spencer's right to a remedy. Ms. Spencer gave ample notice of the problem to both owners and any failure of notice claimed by Luton was caused by the prior owner, not by Ms. Spencer.

Mr. Biggerstaff's testimony unequivocally supports Spencer's position that the rockery is unstable and unsafe, and the rockery clearly trespasses onto Spencer's property; several rocks have fallen out and trespassed onto Spencer's property since the second 2010 repair. These rocks create a significant nuisance to Spencer. The trial court's findings and conclusions to the contrary are erroneous and unsupported in the record.

Grundy is inapposite and the trial court erred in concluding that it stands for the proposition that intentional trespass cannot be committed by omission. Finally, selling a property does not automatically cleanse the property of a neighbor's claims for damages based on trespass. For these reasons and for the reasons set forth in Ms. Spencer's Amended Opening Brief of Appellant, this Court should reverse.

DATED this 12th day of July, 2013.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "S. Blackford", written over a horizontal line.

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