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DIVISION II

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

LYNN S. VANCE,

Appellant,

v.

XXXL DEVELOPMENT, LLC,

Respondent.

APPELLANT'S REPLY BRIEF

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I. Introduction

In her opening brief, Ms. Vance provided this Court with ample authority suggesting that nuisance plaintiffs do not forfeit their standing to recover for past damages simply by selling the subject property before trial. In its response, XXXL makes two arguments. First, XXXL argues that because the definitions in Washington's nuisance statute use the present tense, a nuisance plaintiff must still own the property at the time of trial. But XXXL's argument ignores an important provision of the nuisance statute, under which the plaintiff need not be suffering from a nuisance at the time of trial to recover for past damages: "The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence."¹ Second, XXXL attempts to distinguish Ms. Vance's non-Washington authorities. But XXXL's attempt fails because each cited case illustrates that other courts have routinely allowed nuisance plaintiffs to recover damages even

¹ RCW 7.48.180.

when they sold their properties before trial. In sum, none of XXXL's arguments justifies depriving Ms. Vance of her right to recover her real and substantial damages caused by XXXL's nuisance.

II. Rebuttal of Respondent's Arguments

A. XXXL fails to acknowledge RCW 7.48.180.

In general, an individual who suffers harm at the hands of another has standing to seek recovery from the responsible party. XXXL's entire argument is based on a strained interpretation of the nuisance statute that looks myopically at only the verbal tense used in the definitions section. XXXL's statutory analysis, however, turns a blind eye to another provision of the same statute in an effort to reach an illogical and inequitable result.

XXXL's argument relies solely on the present tense language of RCW 7.48.010 and RCW 7.48.020—which define nuisance and identify who may sue for nuisance, respectively. Neither cited statute requires the plaintiff to own the property through pendency of the litigation. Neither cited statute addresses what happens if the property is sold or the nuisance subsides at some point during the litigation. Yet the cited statutes are XXXL's only support for their argument that Ms. Vance forfeited the right to nuisance damages by selling her home prior to trial.

It is indisputable that the nuisance statute does not address what happens if the plaintiff sells the nuisance-ridden property prior to trial. The statute does, however, address what happens in an analytically similar situation—when the nuisance is abated before trial. In both cases, the plaintiff is no longer actively suffering from the nuisance at the time of trial. In the case of abatement, the plaintiff's right to recover damages is explicitly preserved: "The abatement of a nuisance does not

prejudice the right of any person to recover damages for its past existence."²

Despite the strong similarities between abatement and selling of the property, XXXL's entire opposition brief fails to address—or even acknowledge—this other provision of the nuisance statute. Failure to do so is an implicit concession by XXXL that its statutory interpretation is flawed, and it should not be adopted by this Court.

B. XXXL cannot distinguish Ms. Vance's legal authority.

This case presents a question of first impression in Washington: whether a nuisance plaintiff forfeits the right to recover damages by selling the subject property prior to trial. Lacking Washington case law, Ms. Vance looked for and found other state courts that have allowed nuisance plaintiffs to recover damages even after they no longer owned the property.

² *Id.*

XXXL argues that the cases do not directly address the issue of standing. But if the courts thought that the plaintiffs did not have standing, they would have dismissed the cases *sua sponte*—and they did not.

While it cites no cases—Washington or otherwise—in support of its position, XXXL tries to factually distinguish the cases cited by Ms. Vance. In doing so, XXXL misses the point of the cases referenced—each case illustrates that courts across the nation have allowed nuisance actions regardless of whether the plaintiff still had possession of the subject property. By doing so, they have implicitly recognized, at least, that selling the property does not divest the plaintiff of standing to seek damages for past harm.

III. Conclusion

XXXL's brief does not raise any new support for its arguments. It focuses narrowly on the definitions section of

Washington's nuisance statute while completely ignoring the abatement provision, which is analytically closest to the issue here. Ms. Vance, on the other hand, has posited an interpretation of the nuisance statutes that looks at all its provisions and does not strain to reach an absurd and inequitable result. Ms. Vance has also cited case law illustrating that other states allow nuisance plaintiffs to proceed to trial even after selling the subject property. Because it is consistent with the law, and consistent with equity, Ms. Vance respectfully requests that this Court reverse the trial court's ruling dismissing Ms. Vance's nuisance claims.

Dated this 15th day of October, 2008.



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DATED this 5~~th~~ day of October, 2008.



Steven E. Turner