

No. 229319

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MYRTLE E. WOLDSON,
Plaintiff/Respondent,

vs.

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

BRIEF OF RESPONDENT

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II. STATEMENT OF FACTS

The Woodheads' Statement of Facts is repeatedly argumentative, in opposition to the mandate of RAP 10.3(a)(4) and should be rejected.

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 constructed, 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)

The wall has a very loose core with the interstitial spaces not filled with mortar. (RP 324-325) Drainage or weep holes designed to channel moisture away from the wall are absent. (RP 117, 170)

length of the wall which is 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 represents 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 is causing the lateral pressure on the wall and is the source of the failure of its structural integrity. (RP 117-118)

The most observable deterioration of the wall is close to the northwest corner of the Woodheads' garage, a location where a downspout from the garage roof discharged on the ground surface to the top of the wall in this area. (RP 117-118, 120-121) The deterioration of the wall was exacerbated by the placement of the downspout directing moisture from the roof onto the soil adjacent to and on top of the basalt wall. (RP 141-143) Periodic saturation of the adjacent soil from general moisture as well as the discharges

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)

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 as reflected in this recapitulation as follows:

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

(RP 125-128)

III. SUMMARY OF ARGUMENT

Miss Myrtle Woldson, the Plaintiff in the trial court and the Respondent herein (hereinafter referred to as “Miss Woldson” or “Woldson”), presents to this Court a proper decision by the Honorable James M. Murphy who entered a Summary Judgment Order in favor of Woldson which found actions of the Woodheads in continuing the placement of fill dirt against the Woldson wall to be a trespass continuing in nature. Miss Woldson also offers a well-reasoned decision by the Honorable Maryann C.

the proof presented at trial. Miss Woldson offered damage evidence through the testimony of an expert mason and a geotechnical engineer. The experts definitively demonstrated damage to the Woldson basalt wall caused by the placement of fill dirt on its opposite side, on the basis of the cost to replace the existing wall, identified the portion of the damage which occurred during the limitation period, and segmented the damage by attributing deterioration of the wall in varying degrees based upon their proximity to the central area of the wall exhibiting the most obvious deterioration. The sum of the respective segment damages is Miss Woldson's total recoverable damage. The Woodheads did not offer a damage witness and only the most limited rebuttal testimony.

Finally, the Woodheads devised a theory about the construction of the wall, in an attempt to refute certain physical evidence proffered by Woldson which proved that the wall was originally freestanding and later encumbered by fill dirt impressed against Woodheads' side of the wall. The theory included the hypothesis that there were actually two walls, one built unencumbered and the other built by Woldson's predecessor in interest. Ostensibly, the second wall was built against an already existing edge of the adjacent lot which was later purchased by the Woodheads. Judge Moreno

whose decision is being reviewed. *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001).

B. The Woodheads' View Of The Law On The Limitation Period For Continuing Trespass Is Contrary To Established Law And Is Neither Practical Nor Logical.

The law reflecting the limitation period for causes of actions in the State of Washington is generally set forth in Chapter 4.16 of the Revised Code of Washington. Included in the actions, which are limited to three years, RCW 4.16.080, are actions based upon trespass to property. RCW 4.16.080 provides in part:

Actions Limited to Three Years

Within three years: (1) an action for waste or trespass upon real property.

The statute, as interpreted by the courts, establishes a three-year period of limitations. 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 damage is beyond the statute is to prove the damage occurred more than three years prior to the filing of the Complaint. 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.

In his Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment (CP 66-69) at p. 3, states:

As to the issue of continuing trespass, the Court finds that the action of placing fill dirt on the east side of the plaintiff's basalt wall is a trespass. The statute of limitations for its cause of action sounding in trespass is three years and the plaintiff will be limited to damage proven which occurred during the three-year period prior to the date upon which the complaint this matter was filed. The conduct of placing the dirt against the Plaintiff's wall is a continuing trespass for which the Plaintiff is entitled to recover, subject to the period of limitations, for damages, until the Defendants' trespassing conduct is abated. . . .

The Woodheads concede that the Woldson Complaint contemplates damages incurred after the date of filing, but interpret the three-year limitation period to exclude damages which accrue after the filing of the complaint. In other words, you can look back three years but you cannot look beyond the date of filing. For their conclusions, the Woodheads rely exclusively on the cases of *Bradley v. American Smelting*, 104 Wn.2d 677, 709 P.2d 782 (1985) and *Fradkin v. Northshore Utility District*, 96 Wn. App. 118, 977 P.2d 1265 (1999). The Woodheads misunderstand the import of these cases.

The watershed case in the area of the statute of limitations and the theory of continuing trespass is *Doran v. City of Seattle*, *supra*. In this case,

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:

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 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.

C. **The Damage Evidence By Woldson Was Based Upon Good Science And Supported By Expert Testimony.**

Miss Woldson presented evidence at trial through the testimony of the expert mason, Donald D. Skillingstad, Jr., and of the expert geotechnical engineer, Allen Gifford. The Woodheads did not present damage testimony,

Allen Gifford's testimony could be summarized to include the following:

1. The interior eighty feet of the wall was damaged as a consequence of the placement of the fill dirt and moisture against the east side of the wall in such a way as to require replacements;

2. The 170-foot wall could be segmented into four sections, with the interior section having the most extensive damage and the sections as you move away from the center of the length of the wall experiencing less and less damage. Although not the center point of the wall, the segment experiencing the greatest damage which was approximately 30-32 feet (RP 121) was completely destroyed. The next two segments were each twenty-five feet in length, with approximately 12½ feet on each side of the interior section followed by another segment of approximately 12½ feet on each side of the previously-noted 25-foot section. The outside section of ninety feet is the portion which received the least damage and was not recommended for replacement;

3. The calculation of the damage which occurred beginning in July of 1997 was based upon measurements of the deterioration and destruction of the wall which occurred during the period of 2001-2003.

percentages and their amounts is reasonable and based upon a fair assessment of the actual deterioration and destruction of each of the segments relative to the central section, which was completely destroyed. (RP 130)

The Woodheads complained that the damage testimony is inadequate because the measurement of the failed segment of approximately 32 feet was inexact. The fact that these measurements were referred to as approximate does not make them insufficient. Allen Gifford testified that the measurement of the damaged areas of the wall was difficult due to access to the wall. (RP 158) The wall was described and shown underneath a very thick row of pyramid arborvitae and the wall was described as having variegated edge where the rock wall fell down making the determination as to where the destruction ends somewhat subjective.

The Woodheads also question the method used to extrapolate from the deterioration during the two-year period to ascertain the amount of deterioration during the approximate six-year period beginning in July of 1997, but produced no expert testimony to refute the efficacy of Mr. Gifford's methods. The method was based upon good science and reflected by the graph prepared by Mr. Gifford and submitted as Exhibit P5. Mr. Gifford measured the deterioration during that two-year period as the change from 26

Skillingstad and Allen Gifford who provided calculations based upon accepted science and years of experience, which were essentially unrefuted.

D. The Testimony Regarding The Damage To The 90-Foot Section Of The Wall Is Reasonable And Supported By Unrefuted Expert Testimony.

The Woodheads object to the Defendants' claim for damage to the 90-foot section of the wall because the wall was still in good shape and would not have to be replaced. What the Woodheads fail to accept is the premise that just because the wall has held up to the pressures of the fill dirt and moisture quite well, does not mean that there is not deterioration and damage to the wall as a consequence of these influences. To the contrary, that there was probable damage to the interior of the wall in spite of the fact that it might not be visible from the outside (RP 121). This was corroborated by the Woodheads' own expert witness who, in a letter to them of March 22, 2000, stated: "We conclude that the tilting and failure of the wall is the result of a lateral pressure imposed by the fill on the eastern side of the wall" (RP 277); "Infiltrating surface water increases the load imposed by the fill" (RP 278); and "We do not believe this is a stable long-term condition, however, as soil pressure and frost action are likely to continue to tilt the wall and may eventually cause it to fail." (RP 279)

there is fill dirt against the wall along its entire length of 170 feet and that it is the presence of this wall and the moisture that it retains is the cause of the wall's destruction and deterioration. (RP 152, 154)

The Woodheads spent much of their defense attempting to prove that soil on the east side of the basalt wall was significantly "native soil," which was defined by their expert as soil which had been undisturbed in that location for 8,000-10,000 years. (RP 238) They did so in an effort to try to suggest that the free-standing wall depicted in the photographs submitted by Miss Woldson (Ex. 6F and Ex. 6G) is not the same wall that exists today. Without any direct evidence to support this assertion, ostensibly the original wall in the photograph was placed on the property, later torn down and replaced by a wall closer to the Woodhead property. Both Woldson experts opined that this wall was not constructed as a retaining wall. (RP 65-67, 115-116) Mr. Burchette, the Woodheads' expert witness, did assert that based upon his analysis of the photograph (Ex. 6F and Ex. 6G) the wall in the photographs was actually closer to the Woldson home than it currently exists. He did so without measuring the distance of the existing wall from the Woldson home. This evidence was disputed by Allen Gifford, the Woldson expert, who indicated that due to optical compression, without some

3. The original garage of the Woodhead house would have had a steep slope adjacent to the driveway and "common sense" tells us they would not have allowed this.

Response: Although the trier of fact is to use common sense in making determinations, there is no direct evidence to support this position and the court, using its common sense, found to the contrary.

4. The basement garage would have required a backing area.

Response: This is pure hypothesis that is not supported by any direct evidence submitted at trial.

5. There is no need for fill dirt for the full length of the wall.

Response: This is just argumentative and is not supported by any direct evidence.

6. Uniformity of material and test pits.

Response: The varying layers, depths and consistencies of the material in the test pits was of considerable dispute in the trial. Allen Gifford testified as follows:

(By Mr. Hession) Q: So would you question Mr. Burchette's conclusions that this was some kind of compacted material and not placed there later after the wall built?

A: No. I am saying that there was about 8 to 12 inches of gravelly material near the surface and the material below that occasionally had some darker bands in it, but it wasn't significantly different than the material at depth in the test beds, and I did not notice any specific fill material above the elevation of that irrigation pipe.

Q: You didn't notice any fill material above it?

A: It wasn't, it wasn't obviously different. The material wasn't obviously different than the material below it.

(RP 345-346)

7. Miss Woldson's property is flat and the Woodheads' property is higher.

Response: Here, the Woodheads suggest that "common sense" would say that the wall was built into the side of the Woodhead property. Once again, the common sense used by the court in the matter rejected the Woodheads' two wall theory which resulted in the second wall being built into the existing glade of the Woodhead property. This apparently