

NO. 229319

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

REPLY BRIEF OF APPELLANT



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- 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

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

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

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

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.

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.

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

III. CONCLUSION

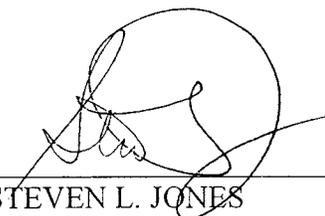
Mr. Woodhead respectfully submits that Ms. Woldson's claims fail both legally and factually. Under the clear rule of law set forth in Bradley, a unanimous decision of the Washington Supreme Court, damages in continuing trespass claims are limited to those which can be proved in the three year period 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.

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:

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