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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

BRIEF OF APPELLANT



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EYMANN ALLISON FENNESSY
HUNTER JONES, P.S.
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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.

D. Whether the trial court erred as a matter of law in awarding damages where plaintiff's experts testified that 80 feet of the wall was stressed to the point that it had to be replaced where that testimony was based on their initial inspections of the wall and thus are barred by the statute of limitations. Finding of Fact Nos. 11, 12, 13 and 14, Conclusions of Law Nos. 5 and 6, CP 143-47.

E. Whether the trial court erred in finding that the wall in question was originally constructed as a freestanding rock wall Findings of Fact Nos. 3 and 8, CP 141-43.

F. Whether the trial court erred in finding that in the 1960s Mr. Woodhead's predecessors raised a portion of the backyard and placed fill against the entire length of the wall, changing the nature of the wall from a border fence to a retaining wall and supporting an increased load, generally weakening the wall. Findings of Fact Nos. 5 and 7, CP 141-42.

2. **Decision Points Raised by the Assignment of Error and Issues Relating Thereto**

- This Court is being asked to decide whether Ms. Woldson, the plaintiff below and appellee here, is entitled to any damages to this wall under the continuing trespass law of Washington because there

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 trial court which predicated its conclusions on admittedly imprecise measurements made between 2001 and 2003 of an increase in the failure zone of the wall from 26 to 32 feet should be set aside as unreliable.

- Finally, this Court is being asked if the findings of fact that the current wall was originally built as a freestanding fence with fill subsequently placed against the wall should be set aside.

II. STATEMENT OF THE CASE

1. Introduction

The Complaint in this case was filed on July 7, 2000. Clerk's Papers ("CP") 1-7. The complaint sought compensation for damage to a 170-foot wall that has divided the properties owned by the plaintiff/appellee, Myrtle Woldson, and the defendant/appellant, John Woodhead. This wall, which has most likely been in existence since the time these homes were built in the second decade of the last century, failed over one 30-foot section and was tilting and cracking over two additional 25 foot sections on each side of the failure zone. According to Ms. Woldson's experts, this entire 80 foot section was stressed to the point where it had to be replaced, but the remaining 90-foot section could be left alone.

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

Mr. Woodhead's side of the wall is approximately six inches below the top of the wall and the wall is mortared along its entire 170-foot length. RP195-97 .

Ms. Woldson and her experts relied on an old photograph for proof of the contention that the wall was constructed as a freestanding fence-like structure. RP 28, 117, P Exh. 6F and 6G. Ms. Woldson and her expert believe that in the 1960's fill was brought in and placed along the entire 170-foot length of the wall in order to support the construction of a detached carport next to the wall. RP 28, 152, 343-44. The permit for the carport showed it to be only 26 feet long. Exh. D14. None of the numerous truckloads of fill required for just the garage area or the equipment needed to compact that fill was observed by Ms. Woldson. RP 52-53, 152.

Mr. Woodhead presented evidence that the wall depicted in this old photograph is not the wall at issue in this case, but instead was a second, intermediate wall. This evidence includes a photograph taken at the same time as the photo relied upon by Ms. Woldson. It shows a second wall nearer to Mr. Woodhead's house which is east of the wall in the photograph relied upon by Ms. Woldson and her expert. Exh. D 19. Ms. Woldson's expert engineer, Allen Gifford, agreed that this second wall closer to the home of Mr. Woodhead could be seen. RP 351-52. Ms. Woldson, Mr. Gifford and Mr. Woodhead's expert also all agreed that no mortar was visible on the wall

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

cars could have backed straight out from this garage RP 47. She also testified that cars would have backed out from her original basement garage in a way that would have allowed them to face up the hill because the slope was difficult in the winter. RP 46-48.

The wall in the old photograph also shows an expanse of lawn extending from that wall towards Mr. Woodhead's property. Exh. P9, D19. The test pits dug by Mr. Woodhead along the existing wall should have revealed remnants of that lawn; instead consistent, uniform soil down to basalt was found. RP 193-94, 196-98, 284-86. Mr. Gifford testified he didn't know why fill would have been brought in and placed against the entire 170-foot wall to just below its top, in order to build a carport. RP 343-44. The carport, which was later converted to a garage, was 26 feet long. Exh. D14, CP 142-43. Mr. Gifford testified that several truckloads of fill would have been needed for the carport area alone and that that fill would have to have been compacted (which would have damaged the wall), RP 152-54, 344. There is no testimony from Ms. Woldson that she observed this quantity of fill being brought in. RP 52. Nor would Mr. Gifford expect to see the two different soil types he observed in the test holes dug by Mr. Woodhead in the fill that was brought in. RP 346.

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.

RP 117, 144, 146. In earlier court proceedings, Mr. Gifford submitted an affidavit dated July 16, 2001 where he stated under oath that he measured the failure zone of the wall in 1998 at 30 feet. RP 143, CP 38, 40. He also admitted that his measurements of the failure zone were “imprecise,” “difficult” and although he made diagrams of the 2001 and 2003 measurements, they were not presented to the court. RP 146, 158-59, 173-74.

Using a graph rather than actual measurements, Mr. Gifford determined that 14 feet of the wall failed between 1997 and 2003, based on the six-foot increase in the failed portion of the wall he measured between 2001 and 2003. RP 125-27, Exh. P5. He concluded that this 14 foot wall failure equated to 45% of the total wall failure¹. He then applied this percentage to assess damages to the rest of the wall. RP 126-27. To ascertain damages for each of the four zones of the wall, Mr. Gifford applied a percentage reduction based on his “personal estimate of what I thought would be reasonable.” RP 130. He applied this formula to the 90-foot section of the wall he said “was still really in good shape” and would not have to be replaced. RP 117,121.

Mr. Gifford and plaintiff’s other expert, Donald Skillingstad, a mason, testified that 80 feet of the wall consisted of the failure zone of 30 feet, and

¹ The simple math equates to 43.75%. (14 divided by 32=43.75%.)

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:

The Court previously ruled that the period for which damages are compensable, applying the applicable period of limitations, is July 7, 1997, to the date of Judgment. CP 144-145.

In Conclusion of Law No. 8, the court ruled:

This (statute of limitations) period is limited to damages caused for three years prior to the filing of the claim through the date of judgment. CP 148.

This finding and conclusion are plainly wrong. Indeed, in entering this finding and conclusion, the trial court ignored Judge James Murphy's earlier Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment, entered January 10, 2003. In that Order, Judge Murphy ruled that:

The statute of limitations for a 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 in 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. **There is an issue of fact as to the extent and amount of the Plaintiff's damages that occurred during the three-year limitation period.** (Emphasis added.) CP 68.

This Order, which was drafted by Ms. Woldson's attorney, follows Washington law which is unequivocal on this point. In Bradley v. American Smelting, 104 Wn.2d 677, 709 P.2d 782 (1985), the Washington Supreme Court discussed the requisites of a cause of action for continuing trespass.

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**

previously and occurring within the three-year period preceding suit. (Emphasis added.)

This same damage limitation period was upheld in Fradkin v. North Shore Util. Dist., 96 Wash.App. 118, 977 P.2d 1265 (1999). In Fradkin, a landowner sought damages for trespass arising from a sewer running across his property. While the plaintiff in Fradkin had granted an easement for this sewer, the area around the sewer became wet and increasingly bog-like. Plaintiff brought suit after an investigation revealed that the sewer project had permanently damaged the ground around the sewer pipe, creating several wet areas on his property. The court in Fradkin noted:

A claim for trespass must be brought within three years of the injury. Because Fradkin sued more than six years after the initial injury, his trespass claim is barred by the statute of limitations unless it may properly be characterized as a continuing trespass. **In a case of continuing trespass, “suit for damages may be brought for any damages not recovered previously and occurring within the three-year period preceding suit.”** (Citing Bradley, supra, emphasis added.)

Fradkin, 96 Wash.App. at 124.

This clear law of the State of Washington is recognized in treatises as well. For example, in Harper, James, Gray, The Law of Torts, Vol. 1, pages 1:30 and 1:31, the law of continuing trespass is described as follows:

When a trespass is committed either by a personal

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

any “actual and substantial damages” as required by our Supreme Court in Bradley, supra, which occurred between July 7, 1997 and July 6, 2000. As set forth in Finding of Fact 13, the testimony purporting to support the deterioration of the wall was measured over a period beginning in 2001 and ending in 2003. CP 144-45, RP 110, 123, 125. As such, this measurement occurred outside of the applicable period of limitations and thus has no relevance to this lawsuit. Absent such proof, the Court’s Findings of Fact Nos.13 and 14, which are based on testimony outside of the relevant period, is clear error, and should be reversed. CP 144-45.

3. The Evidence Supporting The Damages Award Is Based On Speculation And Does Not Comply With The Standards Required By Washington Law.

Ms. Woldson had the burden of proof to establish damages in this case. As noted above, in a continuing trespass case those damages must be “actual and substantial,” and the injury must occur within the 3-year limitation period. Bradley, supra, 104 Wn.2d at 693. Although Ms. Woldson knew the wall was damaged at least by June, 1997, no assessment of damages was made until 1998, when Ms. Woldson’s expert Allen Gifford measured the failed portion of the wall at “a length of approximately 30 feet ...” CP 38. As noted earlier, Mr. Gifford testified during trial that he measured the failure zone at 26 feet in 2001 and 32 feet in 2003. RP 125. The trial court adopted

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?

A. That's the way I measured it, yes.

Q. Did you leave any marks in 2001 to show where those measurements were made?

A. I don't know if those marks would still be there, but there were some marks made when we marked the stations, yes.

Q. Did you mark those, find those again in 2003?

A. No.

Q. Did you take any pictures of the measurements, either in 2001 or 2003?

A. I took the photographs you have included in here in 2003. I did not take any in 2001.

RP 144-46

Q. Okay. Is it your testimony that that failure section has fallen down another 3 feet on each end?

A. Well, I don't know that it has fallen down 3 feet on each end, but I am just saying the total width that has fallen down is now 3 feet – is now 6 feet wider than it was the time before.

Q. Even though you are not, you would agree with me that that measurement was not a precise –

A. That is right. It was not precise.

Q. There could be some variations.

A. Sure there could be.

Q. And you have no photos or other evidence showing the first one and then the second one?

A. No, I do not...

RP 146.

Q. Are these photos in an area of the wall that you have testified should be replaced?

A. 6H is an area where the, where the mortar has cracked and there is, there is some tilting towards the Woldson property line.

Q. But you don't know when that tilting took place?

A. I don't know when that tilting took place, no.

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.

Q. And did you make a chart where you prepared cracking or rocks off, either time?

A. Yes.

Q. You did? And that's not presented here?

RP 173-74

As demonstrated from the testimony of Mr. Gifford, there is no proof or evidence of "actual or substantial damages" which occurred in the three-year period between July 7, 1997 and July 6, 2000. In addition, there is no testimony of any "actual or substantial damages" to any section of the wall, other than the rather uncertain and imprecise 6 foot portion that he testified failed in the two-year period between 2001 and 2003.

Mr. Gifford could have taken other measurements to establish actual damage to Plaintiff's wall. In 2003 he could have, for example, re-measured the tilt of the wall as he did in 2001. This would have demonstrated if any further damage occurred to the wall outside of the failure area. This he didn't do. In fact, he admitted that he couldn't testify that the "tilt" of the wall had increased at all. RP 144, 159. In addition, he could have "re-sounded" the rock. He didn't do that, either. RP 144.

Mr. Gifford testified that because he believed that 6 feet of the wall failed between 2001 and 2003, he could somehow use that measurement to compute how much of the wall had failed since July, 1997 by use of a graph

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

his failure zone rather than the 32 feet he purportedly measured in calculating damages. RP 126-27. Had he used 30 feet instead of 32 feet as the measurement of the failure zone in 2003, the “increase” he testified to and his damages calculation would have been reduced substantially. Exh. P 5. Mr. Gifford’s conclusions for other segments of the wall are predicated on speculation and conjecture, not actual measurements.

The damages testimony of Mr. Gifford, incorporated into Finding of Fact No.14, is much more problematic with respect to the outside of the failure zone. CP 145-46. As noted above, Mr. Gifford could have re-measured the “tilt” but did not. RP 144. He could have re-sounded the wall, but did not. RP 144. He testified that he could not say whether the “tilt” in the wall had changed at all between 2001 and 2003. RP 144. Accordingly, there is no testimony whatsoever of any increased “tilt” or other damage to the wall outside the failure zone since July, 1997. RP 41, 59. Despite this fact, Mr. Gifford opined, and the trial court found, that the wall outside of the 30 foot failure zone had the same 45% “deterioration” rate as the failed portion of the wall with “damages” associated with those sections awarded in the total amount of \$21,405.00. CP 145-46, RP 126-27. \$8,960.00 of those damages were for the outermost portions of the wall, even though Mr. Gifford testified that this 90-foot section of the wall was in good shape and

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.

5. The Court's Finding That The Current Wall Was Originally Built As A Freestanding Wall Should Be Reversed

Mr. Woodhead is mindful that the burden to be met to overturn a finding of fact is significant. Sunnyside Valley Irrigation District v. Dickie, supra, 49 Wn. 2d 879-80. Here, however, the evidence supporting the trial court's finding that the wall was originally built as a freestanding wall is so sparse while the evidence to the contrary is so overwhelming that this is that rare case where the trial court's finding should be overturned.

The only evidence to support this finding is an old photograph which shows a freestanding rock wall between Ms. Woldson's and Mr. Woodhead's property with lawn and other plantings on Mr. Woodhead's side of that wall. Exh. P. 6F and H, D 19, RP 117.

To the contrary, the following evidence on the record shows that the existing wall was never a freestanding wall:

1) a second photograph taken at the same time as the photo relied on by Ms. Woldson shows another wall behind the wall in the first photograph closer to Mr. Woodhead's property line. RP 351-52, Exh. D 19.

2) There is no mortar shown in the photograph relied upon by Ms. Woldson, while the current wall is heavily mortared. RP 54-55, 134, 135, 195-97, 208, Exh. P 64, D, F, G, D19.

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

vegetable matter shown in Ms. Woldson's photograph, and they did not. RP 285-86.

7) Mr. Woodhead's yard is higher than Ms. Woldson's yard, while Ms. Woldson's yard is completely flat along the entire length of the wall. RP 338, Ex P 6A, 6B. Common sense overwhelmingly suggests that Ms. Woldson's yard was created to be level, and the wall was built into Mr. Woodhead's elevated property level to achieve that result. RP 222, Exh. D18.

For these reasons, this trial court's finding would be reversed. In addition, the record also reflects that at points along the wall, the property line is within the wall itself, meaning that any dirt up against that portion of the wall cannot constitute any sort of trespass. RP 268, 276. All this supports the only reasonable conclusion from all this; that the wall was built into the higher property of Mr. Woodhead so that Ms. Woldson's predecessors could have an entirely flat yard. In actuality, there was no trespass and this matter should have been dismissed by the trial court.

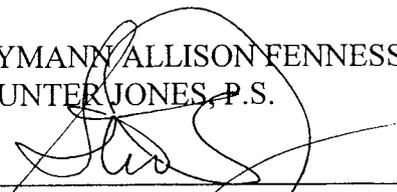
IV. CONCLUSION

This matter should be reversed and dismissed because Ms. Woldson cannot prove any damages occurred within the three-year period preceding the filing of this suit which is required by Washington law. In addition, Ms.

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 3rd day of January, 2005.

EYMANN ALLISON FENNESSY
HUNTER JONES, P.S.

By: 

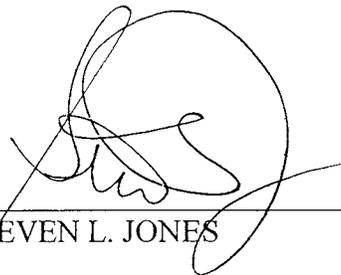
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CERTIFICATE OF SERVICE

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 said document first class United States mail, postage prepaid, a true and correct copy of the Brief of Appellant to:

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