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Washington Court of Appeals, Division I re:

No.

SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III
NO. 22931-9-III

MYRTLE E. WOLDSON,
Petitioner/Appellant,

vs.

JOHN G. WOODHEAD, SR., and
JANE DOE WOODHEAD, husband and wife,
Respondents.

PETITION FOR REVIEW

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ORIGINAL

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I. IDENTITY OF PETITIONER

This Petition presents a very important issue which has a practical input on the presentation of cases at the trial court and on the already heavily taxed court system.

Myrtle E. Woldson (hereinafter "Miss Woldson" or "Woldson"), an unmarried woman, petitions this court to accept review of the Court of Appeals' decision designated herein.

II. COURT OF APPEALS' DECISION

Miss Woldson seeks review of the Court of Appeals' decision in the matter of Case No. 22931-9-III, Division III, Panel 7, filed on August 23, 2005, attached hereto as Appendix A.

III. INTRODUCTION

Miss Woldson and John and Jane Doe Woodhead (hereinafter "Woodheads") live in adjacent houses in a pleasant South Hill neighborhood in Spokane, Washington. The houses were built around the same time approximately ninety years ago. Between the houses is a "basalt wall" located on Miss Woldson's property and constructed about the same time as the two houses. Sometime in the mid-1960s previous owners of the Woodheads' home artificially raised the level of their property by placing a

Miss Woldson was able to claim damage in a case based upon continuing trespass. The Court of Appeals held that the damages awarded should have been limited to the period dating from the filing of the Complaint back three years.

Miss Woldson respectfully asserts that this is not an inaccurate characterization or conclusion as to the current law in the State of Washington or, if it is the current status of the law in the State of Washington, it should be modified to allow damages to be proven to the date of trial not limited to the period as determined by the Court of Appeals.

IV. ISSUE PRESENTED FOR REVIEW

Does or should the law in the State of Washington allow an owner whose property is damaged by the continuing trespass of another to recover damages, properly proven at a single trial, which include damages sustained to their property from the date of the filing of the Complaint to the date of trial?

V. STATEMENT OF THE CASE

A. Procedural History.

On July 7, 1997, Myrtle E. Woldson filed a lawsuit against John and Jane Doe Woodhead seeking damages to her property under theories of

Finally, subsequent to trial and continuing eight years after filing the Complaint, the defendants continued the trespass until finally removing the fill dirt from Miss Woldson's wall by establishing their own retaining wall adjacent to the wall of Miss Woldson.

B. Statement Of Facts Relevant To The Issue For Review.

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 built, 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)

Early photographs of the wall show that it was freestanding, unimpeded by dirt or other matter. (RP 25-27; Ex. 6F and Ex. 6G)

It is the dirt placed against the wall on the Woodheads' side, coupled with the moisture retained by that soil, which was causing the lateral pressure on the wall and was the source of the failure of its structural integrity. (RP 117-118)

The presence of the fill dirt against the wall creates a significant lateral earth pressure load. (RP 118-119) The lack of a proper drainage element in the design of the wall creates a further problem in that the soil absorbs and retains the water thereby actually increasing pounds per linear foot of pressure against the wall creating increased stress and failure in the collapsed area and elsewhere. (RP 118-119) The presence of the moisture also contributed to the deterioration of the mortar and the structural integrity of the wall. (RP 64-65)

The basalt wall is approximately 170 feet long. (RP 96-97, 117) The visible failure zone, where the wall actually disintegrated and toppled over is approximately 30 to 32 feet long. (RP 120-121) Outside of this failure area is another zone of approximately 25 feet in total on either side of the failure zone which is in a deteriorated condition. (RP 119-120) The mortar is badly cracked and has been significantly weakened by the lateral pressure existing behind it. (RP 119-120, 128) This area also shows evidence of major tilting

year limitation period. (RP 125-126) This equates to 45% of the failure accruing during the limitation period. (RP 127)

Multiply the 45% figure times the cost of repair per lineal foot (\$885.00) times the number of lineal feet in the total failure zone (30 feet rounded) and the result is a compensable damage figure of \$11,948.00. (RP 127-128) In addition, multiply the approximate 25 feet measured on either side of the failure zone by the cost per lineal foot (\$885.00) times the percentage occurring during the limitation period (45%) times the figure of .75 (which reflects the measured reduction in the amount of deterioration in that section relative to the deterioration in the failure zone) and this results in a compensable damage figure of \$7,467.00. (RP 127-130) These amounts are added to the amount which reflects the damage of the next 25-foot zone measured on either side of the failure zone. The damage to this section is the 25-foot length times the lineal foot cost to repair (\$885.00) times the percentage of the damage occurring within the period of limitation (45%), times the figure of .50 (which reflects the measured reduction in the amount of deterioration in that section relative to the deterioration in the failure zone) which equates to a damage figure of \$4,978.00. (RP 127-130) Finally, the 90 feet of wall which has experienced stress but does not appear as easily

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 language is beyond the statute is to prove the damage occurred more than three years prior to the filing of the Complaint. The Court of Appeals in this case reached the same conclusion, citing *Fradkin v. North Shore Util. Dist.*, 96 Wn.App. 118, 124, 977 P.2d 1265 (1999), that Miss Woldson is entitled to recover damages until “wrong or nuisance shall be terminated or abated.” 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.

The Woodheads rely on the cases of *Bradley v. American Smelting*, 104 Wn.2d 667, 709 P.2d 782 (1985) and *Fradkin v. North Shore Util. Dist.*, 96 Wn.App. 118, 124, 977 P.2d 1265 (1999). The Appellant also cited to *Bradley, supra*, and *Fradkin, supra*, and also cited to *Doran v. City of Seattle*, 24 Wash. 182, 64 P. 230 (1901). The Court of Appeals, in its opinion, also cited to the case of *Will v. Frontier Contractors, Inc.*, 121 Wn.App. 119, 124, 89 P.3d 242 (2004), *rev. denied*, 153 Wn.2d 1008 (2005), but this case does not appear to add anything of substance to the issue before this court.

There is no evidence to suggest that the claim for damages, or the proof offered occurred after the filing of the complaint.

These cases simply do not answer the question of whether damages occurring after the date of filing are compensable in one lawsuit.

The Respondent, and perhaps even the Court of Appeals, misunderstand or misinterpret certain reference in these cases to statements such as “limiting the period of limitations to three years” or referencing the potential for “successive lawsuits” to mean that the law does not allow recovery of damages in any one lawsuit beyond the three year period ending with the filing of the complaint. The explanation for these references is found in the watershed case of *Doran v. City of Seattle, supra*. In this case, the Washington State Supreme Court made two significant proclamations regarding the law of trespass and the period of limitations. The first is that contrary to assertion by the City of Seattle that the statute of limitations begins to run from the inception of the injury, the court held that the nature of continuing trespass was such that the injury to the plaintiff was continuing and that it would not measure the statute of limitations from the date of the original injury but apply the statute successively as the injury continued.

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:

. . . The action of the defendant amounts to a continuing trespass which is defined by the Restatement (Second) of Torts Section 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.

To allow the plaintiff in a continuing trespass case to submit evidence of damage which accrues during the period which elapses from the date of filing to the date of trial allows for consistency in the application of the

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.

VII. CONCLUSION

Miss Woldson respectfully requests that this court grant this Petition as this issue is an important aspect of the law of continuing trespass and has yet to be addressed by the courts of this state. If the Court finds that the law is consistent with the decision of the Court of Appeals, this court should overrule the Court of Appeals and allow continuing trespass cases to allege

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APPENDIX A

No. 22931-9-III
Woldson v. Woodhead

The entire length of the wall is mortared. But the wall has a very loose core and interstitial spaces are not filled with mortar.

Early photographs of the wall show it was freestanding and unimpeded by dirt. Sometime in the 1960s, the level of the Woodhead property was raised by a substantial amount of fill soil.

At some point, the wall failed. Mr. Woodhead first became aware of a problem in 1986-87. In 1994, he also noticed an area where the wall had collapsed. Ms. Woldson discovered the wall had failed in 1996.

Ms. Woldson sued Mr. Woodhead for damages to the wall dividing their properties. She alleged 80 feet of the wall had to be replaced.

An expert for Ms. Woldson testified the wall was constructed as a freestanding fence. He believed that in the 1960s, fill was brought in and placed along the entire length of the wall to support the construction of a carport. The fill would have had to have been compacted, thus damaging the wall. In 1983, the then owners of the Woodhead property built a garage using the carport as a base.

Mr. Woodhead's yard has a higher elevation than Ms. Woldson's yard, which is flat. Mr. Woodhead's expert asserted the wall was built into the hillside of Mr. Woodhead's yard in order to make Ms. Woldson's yard flat.

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Woldson v. Woodhead

court determined Ms. Woldson was entitled to \$33,353 in damages. This appeal follows.

Mr. Woodhead contends the court erred when it determined the length of time during which Ms. Woldson was entitled to damages for her continuing trespass claim. In a continuing trespass case, the plaintiff may seek damages that occurred during the three years prior to the lawsuit. *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 124, 89 P.3d 242 (2004), *review denied*, 153 Wn.2d 1008 (2005). Damages claimed may not extend past the three-year limitation period. *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 693-94, 709 P.2d 782 (1985).

Ms. Woldson filed her complaint on July 7, 2000. She is thus entitled to damages from July 7, 1997 to July 7, 2000. *See Bradley*, 104 Wn.2d at 693-94.

Ms. Woldson argues that in civil cases, the plaintiff can establish damages up to the date of judgment. That is indeed the general rule. In *Fradkin v. Northshore Util. Dist.*, 96 Wn. App. 118, 124, 977 P.2d 1265 (1999), the court discussed what damages could be recovered in a continuing trespass case:

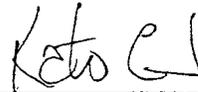
The defendant argued that the statute of limitations began to run from the inception of the injury, and that all damages both past and future must be included in the same suit. Rejecting this approach, the court instead approved a rule permitting recoveries in such cases "by successive actions until the wrong or nuisance shall be terminated or abated."

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Woldson v. Woodhead

But the court's findings do not support the damage award that Ms. Woldson is afforded under the law. The court erred by awarding damages from July 7, 1997 to the date of judgment. Rather, the damages should have been limited to the period from July 7, 1997 to July 7, 2000.

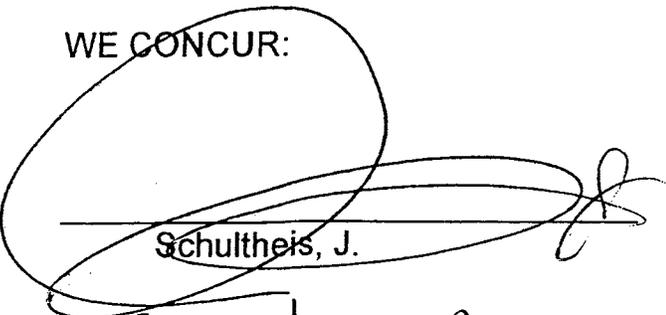
We reverse as to the amount of damages and remand to the trial court for further proceedings to determine the amount of damages from July 7, 1997 to July 7, 2000.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

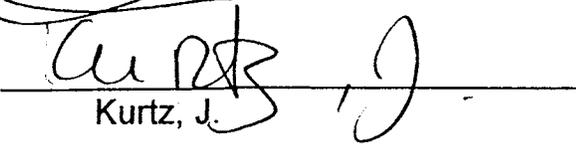


Kato, C.J.

WE CONCUR:



Schultheis, J.



Kurtz, J.

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7. To preserve the integrity of the Defendants' property, the basalt wall was utilized to retain the fill dirt placed on the Defendants' property and its function changed from a boundary/border fence to a full scale retaining wall. Because the wall was not constructed to be a retaining structure, the wall is now supporting a loading condition much different from that for which it was designed. The basalt wall is continuing to act as a retaining wall by holding back the fill soil, which is supporting the garage. This lateral soil pressure is causing an overall weakening to the full length of the wall which is exposed to the fill soil. Some of the effects of the deterioration are readily observable, others are not.

8. The Plaintiff 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. The Plaintiff represents this to be the same wall which exists today. The Defendants presented evidence which was intended to prove that the free standing wall is a different wall than the subject wall and that the subject wall was actually built into the Defendants property. Ostensibly, this was to show that the problem of the dirt against the east side wall was somehow caused by the Plaintiff's predecessor in interest building the wall against the Defendants' dirt foundation. The Defendants have failed to carry the burden of persuasion that the wall pictured in the evidence admitted is a different wall than the subject wall. Further, it is not reasonable that the Plaintiff's predecessor would have

1 actually disintegrated and toppled over is approximately 30 to 32 feet long. Outside of
2 this failure area is another zone of approximately 24 feet in total on either side of the
3 failure zone which is in a deteriorated condition. The mortar is badly cracked and has
4 been significantly weakened by the lateral pressure existing behind it. This area also
5 shows evidence of major tilting towards the west side. Outside this area is another
6 zone which is a total of 25 feet. This area shows some mortar cracking and evidence of
7 tilt towards the west side. The balance of the 90 feet of the wall appears to be in fairly
8 good condition, but is still under stress from the back fill on the east side of the wall.

11 12. The measure of damage caused by the Defendants' trespass is the total of the cost to
12 repair each of the respective damaged sections of the basalt wall. The cost of repair
13 does not include the removal of fill dirt from behind the wall on the east side. Because
14 of the extent of the damage the interior 80 linear feet of the wall should be replaced.
15 The cost to remove and replace that portion of the wall, including sales tax, is
16 \$70,762.00, or \$885.00 per lineal foot.

19 13. The Court previously ruled that the period for which damages are compensable,
20 applying the applicable period of limitations, is July 7, 1997, to the date of judgment.
21 The deterioration of the wall was measured over a period beginning in 2001, and
22 ending in 2003. During that period the failure zone extended from approximately 26
23 feet to approximately 32 feet. From this figure you extrapolate to determine that 14 of
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26 PLAINTIFF'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW - 5

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1 The total damage is \$33,353.00 as reflected in this recapitulation is as follows:

2	Section A	30 LF @ 1.00 x \$885.00 x 0.45 = \$11,948.00
3	Section B	24 LF @ 0.75 x \$885.00 x 0.45 = \$ 7,467.00
4	Section C	25 LF @ 0.50 x \$885.00 x 0.45 = \$ 4,978.00
5	Section D	90 LF @ 0.25 x \$885.00 x 0.45 = <u>\$ 8,960.00</u>
6	Total	\$33,353.00

7 The Court having determined its Finding of Fact now enters its related Conclusions of Law:

8
9 CONCLUSIONS OF LAW

- 10
- 11 1. The placement of the fill dirt against the east side of the Plaintiff's basalt wall is a
12 nuisance.
 - 13 2. The cause of action for nuisance accrued at the time the fill was placed against the wall
14 and because the action was filed more than three years after the accrual of this cause of
15 action, the cause of action is barred by the statute of limitations.
 - 16 3. The placement of the fill dirt on the east side of the Plaintiff's basalt wall constitutes an
17 unlawful taking of the Plaintiff's property within, and in direct violation, of Article I,
18 Section 16 of the Washington State Constitution.
 - 19 4. The cause of action for eminent domain (unlawful taking of property) began to accrue
20 when the fill dirt was placed against the Plaintiff's wall. The best estimate is that the dirt
21 was placed against the wall in 1965, thus the applicable period of limitations, three
22 years, has run on this cause of action.
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26 PLAINTIFF'S FINDINGS OF FACT
27 AND CONCLUSIONS OF LAW - 7
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8. The case of Lee vs. Takao Building Development Company, Ltd., 200 Cal.Rptr 782 (Cal.App 2 dist, 1985) does not support the Defendants' theory that they cannot be held liable because the dirt was placed against the wall by their predecessors in interest and not them. This assertion is inconsistent with the accepted principle in this state to the effect that the statute of limitations on a continuing trespass is a rolling period. This period is limited to damages caused for three years prior to the filing of the claim to the date of judgment. Further, Lee, supra, is a lateral support case in which all of the damage claimed occurred prior to the transfer. It is not a continuing trespass case and does not address the issue of damage specifically caused by a subsequent property owner.

9. Defendants' claim of a prescriptive easement is an affirmative defense which was not timely pled by the Defendants' and, therefore, waived. Even if Defendants' had a viable claim for easement by prescription, they failed to present evidence to support the claim at trial before they rested their case. Further, the applicability of an easement by prescription to a continuing trespass case would render meaningless the body of law which supports this recognized theory of liability to owners and occupiers of land.

10. The period of limitations set forth in RCW 4.16.10 is specific to claims for construction and is not applicable to this case. RCW 4.16.310 is applicable to claims for damage which accrue as of a fixed period of time upon substantial completion of construction.

PLAINTIFF'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW - 9

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