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No. 77707-1

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.

PETITIONER'S REPLY TO
 ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Petitioner, Myrtle E. Woldson (hereinafter "Miss Woldson" or "Woldson"), submits this Reply pursuant to RAP 13.4(b) as the Respondents', John G. Woodhead, Sr., et ux (hereinafter "Woodheads"), Answer raises two new substantive issues. These two issues are exclusively factual and relate to whether the subject wall was fully destroyed prior to the three year limitation period and whether there is sufficient evidence to support the Trial Court's Finding of Fact regarding the issue of the subject wall as a free standing fence.

Miss Woldson respectfully submits that these issues submitted for cross review do not satisfy the criteria set forth in RAP 13.4(b) and are essentially asking this Court to revisit Findings of Fact well considered by the Trial Court and accepted by the Division III Court of Appeals as appropriate.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the Woodheads have satisfied the threshold criteria for review as set forth in RAP 13.4(b).
2. Whether the Supreme Court should review the factual findings of this case in such a way as to reconstitute these findings in contravention of the determinations made by the Spokane Superior Court and accepted by the Division III Court of Appeals.

B. The Trier Of Fact Is In The Best Position To Decide Factual Issues.

In the frequently cited case of *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959), this Supreme Court stated: . . . “the constitution does not authorize this court to substitute its findings for that of the trial court. . . .” (Citations omitted). The Woodheads recognize this fact in their Answer and cite the case of *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 73 P.3d 369 (2003) where the Supreme Court held at pages 879-880:

Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational 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. . . .

(Citations omitted).

As set forth in the two sections following, the Woodheads argue that the Trial Court’s weighing of disputed evidence and undisputed evidence was inadequate to satisfy the burden of proof with regard to Miss Woldson’s damages and specifically dispute the factual finding of the existence of a free standing structure between the two properties involved in this case. This is obviously an attempt by the Woodheads to retry their case in the level of this

170-foot length of wall. The facts reflect that both the opinions of Don Skillingstad and Allen Gifford (the geotechnical expert) were that eighty feet of the wall should be replaced and that the remaining ninety feet, although experiencing stress and deterioration as a function of the pressure placed upon it by the fill dirt and the effects of moisture, was stable enough that it did not need to be replaced. Mr. Skillingstad opined that the cost per linear foot to replace the eighty foot segment of the wall was \$885.

The Woodheads suggest that by June of 1997 the eighty foot segment of the wall was fully deteriorated, and thus no damage occurred during the period in which Miss Woldson is allowed to recover. This was not the evidence presented at trial. The evidence presented through the testimony of Miss Woldson and the two experts showed that there was continuous deterioration and damage to the wall which transcended the period from before the outside point of the limitation period through trial. There was also expert testimony based upon scientific evidence of the deterioration of the wall that occurred during the limitation period through trial. This was the basis for Miss Woldson's damage claim. There was evidence of damage which occurred prior to the limitation period but that damage was not included in Miss Woldson's claim.

that two-year period, Mr. Gifford was able to opine as to how much of the damage that had occurred to the wall since the placement of the fill dirt on or about 1965, occurred during the limitation period. This percentage (calculated to be 45%) was then used as a limiting factor in determining the total compensable damage;

4. Mr. Gifford then assigned a further limiting percentage of deterioration factor to each of the segments. The interior segment was 100% destroyed, the first 25-foot segment was assigned a 75% deterioration factor, the second 25-foot segment a 50% factor and the outside 90-foot segment a 25% deterioration factor. The total damage was the sum of the damage calculations assigned to each of the segments, equal to \$33,353.

The method utilized by Miss Woldson to calculate damage was more than fair and reasonable. Because Allen Gifford opined that the interior eighty feet of the wall should be replaced, Miss Woldson could have credibly taken the position that she was entitled to the full cost of replacement of that wall. Instead, she only asked the court to award her the damages to the wall in proportion to the percentage of deterioration assigned to each segment by her expert. Mr. Gifford testified that he believed that the assignment of these percentages and their amounts is reasonable and based upon a fair assessment

D. The Finding By The Court That The Wall In Question Was Built As A Free-Standing Structure And Was Later Impeded By The Woodheads' Predecessors In Interest Placement Of Fill Dirt On The East Side Of The Basalt Wall Is Supported By Substantial Evidence.

This is a pure question of fact. Miss Woldson at trial presented evidence, through her testimony and the testimony of Allen Gifford, of the existence of a free-standing basalt wall between her property and the property directly to the east, now owned by the Woodheads. She presented photographs showing this wall unimpeded by dirt on either side of the wall. She also presented evidence that her neighbor, predecessor in interest to the Woodheads, brought fill dirt onto the property, graded it and constructed a carport on the property adjacent to the wall. (RP 53) She also presented evidence that later, in approximately 1983, the carport was converted into a garage. She further presented evidence that there is fill dirt against the wall along its entire length of 170 feet, and the presence of this dirt 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

1. Photograph shows a second wall.

Response: This photograph is the only evidence of the existence of a second wall. There is no direct evidence that a second wall ever existed and the photograph is taken at such a distance that no one could testify with any credibility that what was depicted was a different wall. Further, in order to believe this theory, you would have to assume that Miss Woldson had two 170-foot walls traversing the whole length of her property within several feet of each other. This lacks credibility.

2. There is no mortar shown in the photograph relied upon by Miss Woldson.

Response: To the contrary, Don Skillingstad, the expert mason, identified mortar in the wall is depicted in the photograph (Ex. P6-F and Ex. P6-G) (RP 78-79).

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.

...

A: It's very difficult in my opinion and my experience to define undisturbed material in fill unless you find in the fill things that are man-made, like water lines, or old bottles, or pieces of human use.

(RP 322-323)

(By Mr. Hession) Q: So you are saying that there is no transition really there, that there wasn't a bunch of gravel material and then this sort of --

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.

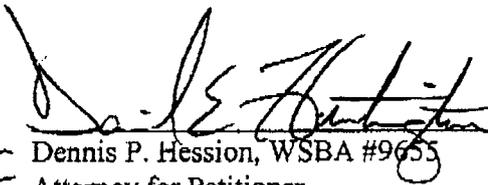
Response: Here, the Woodheads suggest that "common sense" would say that the wall was built into the side of the Woodhead property.

IV. CONCLUSION

Miss Woldson respectfully requests this Court to find her Petition for Review to be sufficient and to accept it for review and to deny the Woodheads' request to consider its issues on cross-review.

Respectfully Submitted this 2 day of December 2005.

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