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No. 77707-1

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SUPREME COURT OF THE STATE OF WASHINGTON  
 COURT OF APPEALS, DIVISION III  
 NO. 22931-9-III

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MYRTLE E. WOLDSON,  
 Petitioner/Appellant,

vs.

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

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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.

### III. ARGUMENT

A. **Woodheads' Cross Petition Should Be Dismissed For Failure To Support The Basis For Acceptance Of Review By Argument As Provided By Rule.**

The Woodheads did not denominate their Answer to include a cross petition for review. Nevertheless, they do reference two issues in their Answer as "Issues Presented on Cross-Review", but do not support their Issues on Cross-Review with argument as required by RAP 13.4(c)(7). In addition to failing to comply with this rule, the Woodheads also fail to provide this Court with any insight as to how this "Cross Petition" satisfies the criteria of Acceptance of Review by the Supreme Court as set forth in RAP 13.4(b).

If the Woodheads had attempted to argue that their "Issues on Cross-Review" satisfy the criteria of the rule, their arguments would most certainly be inadequate. The two issues they have raised on cross appeal challenge the factual findings made by the Trial Court and accepted and affirmed by the Court of Appeals. There is nothing in the criteria of RAP 13.4(b) which contemplates such an appeal.

**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 existencce 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

Court just as they did at the Court of Appeals. Miss Woldson respectfully submits that this was not accepted by the Court of Appeals and should not be considered by this Court.

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 an expert mason, Donald D. Skillingstad, Jr., and an expert geotechnical engineer, Allen Gifford. The Woodheads did not present damage testimony, either expert or otherwise, and the rebuttal testimony was minimal. Miss Woldson concedes her burden was to show her damages were "actual and substantial" but disputes the assertion that she failed to meet that burden. The damage evidence presented by these experts was based upon undisputed scientific testimony and solid factual evidence of destruction and deterioration. Not only was the evidence "actual and substantial," it clearly related to the period which begins in July, 1997, and ends at the time of trial, roughly a six-year period.

The damage evidence presented by Miss Woldson started with the testimony of Don Skillingstad, a person with over forty years of masonry experience who gave testimony about the deterioration of the wall and provided information regarding the cost to replace roughly eighty feet of the

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.

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

1. 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 replacement;

2. The 170-foot wall can 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 segment was approximately 12½ feet on each side of the destroyed section followed by another segment of approximately 12½ feet on each side. 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. Based upon the increase in deterioration and destruction that occurred during

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

of the actual deterioration and destruction of each of the segments relative to the central section, which was completely destroyed. (RP 130)

Finally, the Woodheads criticize the overall methods used by Miss Woldson's expert. Apparently, the Woodheads decided in their own minds what is the appropriate evidence or basis for a proper foundation for damages in this case, but they failed to produce an expert witness on damages who could opine as to the methods used by Miss Woldson's expert. This failure to produce expert testimony on damages is curious. The Woodheads hired a geotechnical engineer to testify regarding the possibility that the wall in the photographs submitted by Miss Woldson was not the existing wall and to discuss his opinions about whether fill dirt had actually been placed on the property after the wall was built. Presumably, Mr. Burchette, as a geotechnical engineer, could give opinions as to the methods used by Miss Woldson's experts but was not requested to do so. As a consequence, what you have is the Woodheads claiming that the damage testimony is inexact and thus insufficient. Contrast that with the expert testimony of Don Skillingstad and Allen Gifford who provided calculations based upon accepted science and years of experience, which were essentially unrefuted.

**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

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. P6-F and Ex. P6-G) 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, and 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. P6-F and Ex. P6-G) 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 reference point in the foreground of the picture it was impossible to accurately determine the distances in the photographs. (RP 331-332)

The Woodheads summarize their evidence to support their claim that there was never a free-standing wall as follows (Miss Woldson's responses follow each statement):

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.

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: Well, it certainly could have been compacted material, could have been some compaction on the material they placed behind the wall but I don't believe it was native material. The wall couldn't have been built there if it was native material.

(RP 131-132)

(By Mr. Hession) Q: I guess what I am asking you to do is look at it and tell me how you would characterize the layering of the dirt in the various test pits that you observed.

...

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.

Once again, the common sense used by the court in the trial rejected the Woodheads' two wall theory which resulted in the second wall being built into the existing grade of the Woodhead property. This apparently did not make any more sense to the trial court than it did to Allen Gifford in his statement referenced above.

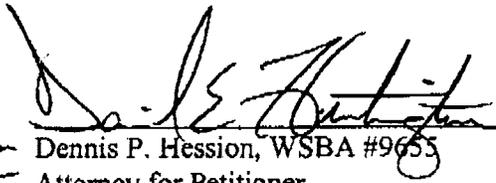
All of these comments are factual disputes and/or theories for which Miss Woldson provided expert testimony to refute. Obviously, the trial court was in the best position to have reviewed all of this evidence and testimony and found in favor of Miss Woldson and the Court of Appeals accepted those facts as "ample". The suggestion that the Court of Appeals "rubber stamped" the Trial Court's findings is both an affront to that Court and a failure to acknowledge the responsibility of the Court in its appellate review. This Court should not disturb those findings as there is substantial evidence to support them.

**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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