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No. 229319

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MYRTLE E. WOLDSON,
Plaintiff/Respondent,

vs.

JOHN G. WOODHEAD, SR., and
JANE DOE WOODHEAD, husband and wife,
Defendants/Appellants,

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

The Woodheads do not specifically describe the error they believe occurred at the trial court level but rely on the section “Issues” relating to “Assignments of Error” to describe what they consider to be errors of the trial court. Miss Woldson accepts the decision of the trial court and its Findings, Conclusions and Judgment as reflective of the law and evidence submitted by the parties. She does not accept the assertions by the Woodheads that there is any substantive error by the trial court in rendering its decision in this case and does not accept the issues described by the Woodheads as reflective of any alleged error. However, Miss Woldson will accept the issues of law set forth in Issues A and B. Irrespective of how they are denominated, Issues C, D, E and F are merely questions of fact supporting the Woodheads’ theories, some of which were argued at the trial court. Miss Woldson does not accept the “decision points” argued by the Woodheads as the road map for this Court to resolve this case on appeal. In contrast, the proper approach on appeal is set forth hereafter in the Argument section on Standard of Review.

II. STATEMENT OF FACTS

The Woodheads' Statement of Facts is repeatedly argumentative, in opposition to the mandate of RAP 10.3(a)(4) and should be rejected.

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 constructed, 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)

The wall has a very loose core with the interstitial spaces not filled with mortar. (RP 324-325) Drainage or weep holes designed to channel moisture away from the wall are absent. (RP 117, 170)

Early photographs of the wall show that it was freestanding, unimpeded by dirt or other matter. (RP 25-27; Ex. 6F and Ex. 6G) Sometime in the mid 1960's, previous owners of the Woodhead home artificially raised the level of a portion of the home's rear yard by placing a substantial amount of fill soil on the east side of the wall. (RP 27-30, RP 53, RP 137-138)

After the soil was added to the Woodhead property, the then owners constructed a freestanding carport at the north end of the driveway on the west side of the property. (RP 27-30; Ex. D-14) Later, in approximately 1983, other owners of the same property constructed a garage utilizing the structure of the carport as a base. (Ex. D-14)

To preserve the integrity of the Woodhead property, the basalt wall was utilized to retain the fill dirt placed on the Woodhead property and its function changed from a boundary/border fence to a full scale retaining wall. (RP 116-117) 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. (RP 118-119) 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. (RP 118-119) Some of the effects of the deterioration are readily observable, others are not. (RP 123-124)

Miss Woldson 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. (Ex. 6F and Ex. 6G) Miss Woldson represents this to be the same wall which exists today. (RP 25-27)

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

The most observable deterioration of the wall is close to the northwest corner of the Woodheads' garage, a location where a downspout from the garage roof discharged on the ground surface to the top of the wall in this area. (RP 117-118, 120-121) The deterioration of the wall was exacerbated by the placement of the downspout directing moisture from the roof onto the soil adjacent to and on top of the basalt wall. (RP 141-143) Periodic saturation of the adjacent soil from general moisture as well as the discharges

from the downspout have added to the overall failure of the wall. (RP 141-143, RP 162, RP 168-169, RP 174-175)

The presence of the fill dirt against the wall creates a lateral earth pressure load of 300 to 400 pounds per lineal foot. (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 contribute 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 towards the west side. (RP 119) Outside this area is another zone which is a total of approximately 25 feet. (RP 121) This area shows

some mortar cracking and evidence of tilt towards the west side. (RP 119-121) The balance of the 90 feet of the wall appears to be in fairly good condition, but is still under stress from the back fill on the east side of the wall. (RP 121)

The measure of damage caused by the Woodheads' trespass is the total of the cost to repair each of the respective damaged sections of the basalt wall. (RP 128) Because of the extent of the damage the interior 80 linear feet of the wall should be replaced. (RP 120) The cost to remove and replace that portion of the wall, including sales tax, is \$70,762.00, or \$885.00 per lineal foot. (RP 126-127)

The Court previously ruled that the period for which damages are compensable, applying the applicable period of limitations, is the three years prior to the date the Complaint was filed. (CP 66-69) The deterioration of the wall was measured over a period beginning in 2001, and ending in 2003. (RP 125) During that period the failure zone extended from approximately 26 feet to approximately 32 feet. (RP 125) From this figure you extrapolate to determine that 14 of the total 32 feet failure zone occurred during that six 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 observable and obvious deterioration caused by the placement of the fill dirt, results in yet another damage figure. (RP 121, 128-129) This figure is

determined by multiplying the 90-foot length by the cost per lineal foot (\$885.00) times the percentage occurring during the limitation period (45%) times .25 (reduction factor which reflects the deterioration of this 90-foot section relative to the deterioration in the failure zone), resulting in a damage figure of \$8,960.00. (RP 128)

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

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

(RP 125-128)

III. SUMMARY OF ARGUMENT

Miss Myrtle Woldson, the Plaintiff in the trial court and the Respondent herein (hereinafter referred to as “Miss Woldson” or “Woldson”), presents to this Court a proper decision by the Honorable James M. Murphy who entered a Summary Judgment Order in favor of Woldson which found actions of the Woodheads in continuing the placement of fill dirt against the Woldson wall to be a trespass continuing in nature. Miss Woldson also offers a well-reasoned decision by the Honorable Maryann C.

Moreno supported by Findings of Fact, Conclusions of Law and Judgment. The Judgment is predicated upon substantial evidence supporting the continuing trespass and the measurement of damage to Miss Woldson's basalt wall.

The Woodheads, Appellants herein, appeal the Judgment on the basis of one substantive legal issue, the statute of limitations, and one evidentiary issue related to the burden of proof. They claim that the limitation period for a matter based upon the theory of continuing trespass is the three-year period which begins three years prior to the filing of a lawsuit and ends with the date of the filing of a lawsuit. They also claim the Respondent's damage testimony is inadequate. And, without specifically challenging the prior Summary Judgment Order finding a continuous trespass, they dispute the factual basis for the trespass that the wall was free standing and that the fill dirt on the Woodheads' side of the fence was added subsequent to the construction of the wall.

The Woodheads misinterpret the Washington law regarding the limitation period for continuing trespass. Washington law establishes the time when the limitation period begins (three years prior to the date of filing), but defines the endpoint for the limitation period only by the pleadings and

the proof presented at trial. Miss Woldson offered damage evidence through the testimony of an expert mason and a geotechnical engineer. The experts definitively demonstrated damage to the Woldson basalt wall caused by the placement of fill dirt on its opposite side, on the basis of the cost to replace the existing wall, identified the portion of the damage which occurred during the limitation period, and segmented the damage by attributing deterioration of the wall in varying degrees based upon their proximity to the central area of the wall exhibiting the most obvious deterioration. The sum of the respective segment damages is Miss Woldson's total recoverable damage. The Woodheads did not offer a damage witness and only the most limited rebuttal testimony.

Finally, the Woodheads devised a theory about the construction of the wall, in an attempt to refute certain physical evidence proffered by Woldson which proved that the wall was originally freestanding and later encumbered by fill dirt impressed against Woodheads' side of the wall. The theory included the hypothesis that there were actually two walls, one built unencumbered and the other built by Woldson's predecessor in interest. Ostensibly, the second wall was built against an already existing edge of the adjacent lot which was later purchased by the Woodheads. Judge Moreno

found this theory to be not supported by sufficient evidence and lacking in credibility.

IV. ARGUMENT

A. Standard Of Review.

Judge Moreno entered Findings of Fact and Conclusions of Law to support the Judgment in favor of Miss Woldson. Courts of Appeal apply a “substantial evidence” standard of review to findings of fact. A finding of fact will not be overturned if it is supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Substantial evidence exists “if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *King County v. Washington State Boundary Review Board*, 122 Wn.2d 648, 675, 860 P.2d 1024 (1923); *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050.

The Appellate Court will independently determine whether the findings of facts support the conclusions of law. *Am. Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 797 P.2d 477 (1990). Appellate courts review *de novo* rulings on pure legal questions. This standard permits the appellant court to substitute its judgment for that of the decision-maker

whose decision is being reviewed. *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001).

B. The Woodheads' View Of The Law On The Limitation Period For Continuing Trespass Is Contrary To Established Law And Is Neither Practical Nor Logical.

The law reflecting the limitation period for causes of actions in the State of Washington is generally set forth in Chapter 4.16 of the Revised Code of Washington. Included in the actions, which are limited to three years, RCW 4.16.080, are actions based upon trespass to property. RCW 4.16.080 provides in part:

Actions Limited to Three Years

Within three years: (1) an action for waste or trespass upon real property.

The statute, as interpreted by the courts, establishes a three-year period of limitations. The Woodheads do not claim that the 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 damage is beyond the statute is to prove the damage occurred more than three years prior to the filing of the Complaint. 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.

Pursuant to the order entered by the Honorable James M. Murphy on the Defendants' Motion for Summary Judgment, the conduct by the Woodheads in this case gave rise to a cause of action for "continuing trespass."

The concept of continuing trespass is well established in Washington. In *Doran v. City of Seattle*, 24 Wash. 182, 64 P. 230 (1901), a private landowner sought damages from the City of Seattle after it negligently constructed a bulkhead that pressed up against plaintiff's house. The defendant argued that the City should have been instructed that the claim would be barred if they found that the plaintiff instituted suit two years (the applicable statute of limitations at that time) after the first damage, no matter how small. *Id.* at 183. The court rejected this argument and stated:

The rule [proposed by defendant] is inequitable and that the damages in the first instance and before the statute of limitations expires may be so trifling that it would not justify litigation. It would be inequitable and not in accordance with good morals to estop a person from obtaining his rights or damages for injuries which might eventually become burdensome, because he was not litigious enough to plunge into a suit over a trifling matter.

Id. at 188-189; see also *Fradkin v. Northshore Utility District*, 96 Wn. App. 118, 126, 977 P.2d 1265 (1999), citing with approval *Doran v. City of Seattle*, *supra*.

In his Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment (CP 66-69) at p. 3, states:

As to the issue of continuing trespass, the Court finds that the action of placing fill dirt on the east side of the plaintiff's basalt wall is a trespass. The statute of limitations for its 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 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. . . .

The Woodheads concede that the Woldson Complaint contemplates damages incurred after the date of filing, but interpret the three-year limitation period to exclude damages which accrue after the filing of the complaint. In other words, you can look back three years but you cannot look beyond the date of filing. For their conclusions, the Woodheads rely exclusively on the cases of *Bradley v. American Smelting*, 104 Wn.2d 677, 709 P.2d 782 (1985) and *Fradkin v. Northshore Utility District*, 96 Wn. App. 118, 977 P.2d 1265 (1999). The Woodheads misunderstand the import of these cases.

The watershed case in the area of the statute of limitations and the theory of continuing trespass is *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.

The other issue addressed by the court in *Doran* was whether, in a case involving continuing trespass, the plaintiff would be required to assert and prove not only current damages, but also to allege and prove prospective damages such that all claims against the defendant would be incorporated into one lawsuit. Citing the scholarly opinion by Judge Earl of the New York Court of Appeals in the case of *Uline v. New York Central and Hudson River Railroad Company*, 101 N.Y. 98, 4 N.E. 536 (1886), held and quoted the rule as outlined in *Uline* at p. 125:

But if it be carelessly and unskillfully done, it can be made liable. It may cease to be careless, or remedy the effects of its carelessness, and it may apply the requisite skill to the embankment, this it may do after its carelessness and unskillfulness and the consequent damages have been established by a recovery in an action. The moment an action has been commenced, shall the defendant in such a case be precluded from remedying its wrong? Shall it be so precluded

after a recovery against it? Does it establish the right to continue to be a wrong-doer forever by the payment of the recovery against it? Shall it have no benefit by discontinuing the wrong, and shall it not be left the option to discontinue it? And shall the plaintiff be obliged to anticipate his damages with a prophetic ken and foresee them long before, it may be many years before they actually occur, and recover them all in his first action; I think it is quite absurd and illogical to assume that a wrong of any kind will forever be continued and that the wrongdoer will discontinue or remedy it, and that the convenient and just rule, sanctioned by all the authorities in this state, and by the great weight of authority elsewhere, is to permit recoveries in such cases by successive actions until the wrong or nuisance shall be terminated or abated. . .

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 limitation period and the presentation of damage evidence consistent with other civil cases. Commonly, the limitation period in a civil case begins to run on a cause of action when the conduct which gives rise to the claim for damage occurs. Then, so long as you file within the limitation period, you can recover all damages which accrue up to the date of judgment. If you file your lawsuit late in the limitation period and/or it takes some time to get to trial and judgment, you are entitled to all damages which you can prove at trial, including any which may have accrued from the date of filing of the lawsuit to the date of judgment.

Finally, interpreting the rule in this manner, is good practice. It promotes judicial economy by avoiding potential successive lawsuits by giving the defendant up until the time of trial to remediate the trespass. In

this case, although the Woodheads were warned in March of 2000 by their own expert, the geotechnical engineer who testified on their behalf at trial that the placement of fill dirt on their side of the Woldson wall was causing damage to the wall, they chose not to remediate the problem until six months after the entry of Judgment. The point is is that the Woodheads had it within their power to remediate the trespass and the damage well before the filing of 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.

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 the expert mason, Donald D. Skillingstad, Jr., and of the 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 to show her damages were “actual and substantial” as referenced in the *Bradley, supra* case 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 the roughly eighty feet of interior of the 170-foot length of wall. The facts reflect that both the opinion of Don Skillingstad and Allen Gifford (the geotechnical expert) were that the interior eighty feet of the wall should be replaced and that the outside 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 interior segment of the wall was \$885.

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

1. The interior 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 replacements;

2. The 170-foot wall could 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 two segments were each twenty-five feet in length, with approximately 12½ feet on each side of the interior section followed by another segment of approximately 12½ feet on each side of the previously-noted 25-foot section. 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 has 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 to 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)

The Woodheads complained that the damage testimony is inadequate because the measurement of the failed segment of approximately 32 feet was inexact. The fact that these measurements were referred to as approximate does not make them insufficient. Allen Gifford testified that the measurement of the damaged areas of the wall was difficult due to access to the wall. (RP 158) The wall was described and shown underneath a very thick row of pyramid arborvitae and the wall was described as having variegated edge where the rock wall fell down making the determination as to where the destruction ends somewhat subjective.

The Woodheads also question the method used to extrapolate from the deterioration during the two-year period to ascertain the amount of deterioration during the approximate six-year period beginning in July of 1997, but produced no expert testimony to refute the efficacy of Mr. Gifford's methods. The method was based upon good science and reflected by the graph prepared by Mr. Gifford and submitted as Exhibit P5. Mr. Gifford measured the deterioration during that two-year period as the change from 26

feet to 32 feet, an increase of six feet, and using the graph Exhibit P5 he extrapolated from that figure to conclude there was an approximate 14-foot expansion of the total failure zone during the six-year period from 1997 to the date of trial. (RP 125-126)

Finally, the Woodheads go on for numerous pages in their brief criticizing the overall methods used by the Defendants' 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. They must have done so because they have 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 the Plaintiff 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 Testimony Regarding The Damage To The 90-Foot Section Of The Wall Is Reasonable And Supported By Unrefuted Expert Testimony.

The Woodheads object to the Defendants' claim for damage to the 90-foot section of the wall because the wall was still in good shape and would not have to be replaced. What the Woodheads fail to accept is the premise that just because the wall has held up to the pressures of the fill dirt and moisture quite well, does not mean that there is not deterioration and damage to the wall as a consequence of these influences. To the contrary, that there was probable damage to the interior of the wall in spite of the fact that it might not be visible from the outside (RP 121). This was corroborated by the Woodheads' own expert witness who, in a letter to them of March 22, 2000, stated: "We conclude that the tilting and failure of the wall is the result of a lateral pressure imposed by the fill on the eastern side of the wall" (RP 277); "Infiltrating surface water increases the load imposed by the fill" (RP 278); and "We do not believe this is a stable long-term condition, however, as soil pressure and frost action are likely to continue to tilt the wall and may eventually cause it to fail." (RP 279)

The court also had before the testimony of the expert mason, Don Skillingstad, Jr., in response to cross-examination, opined that the area outside of the failed area was not “essentially straight” and that it was in “imminent danger” of failing. (RP 87-88)

In light of all of this testimony, it is not unreasonable for Miss Woldson to claim a 25% deterioration in the 90-foot section located at the ends of the basalt wall.

E. 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.

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 of her neighbor, predecessor in interest to the Woodheads, who 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 that it is the presence of this wall 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. 6F and Ex. 6G) 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, 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. 6F and Ex. 6G) 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:

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 this 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 another 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 by Miss Woldson.

Response: To the contrary, Don Skillingstad, the expert mason, identified mortar in the wall as depicted in the photograph (Ex. 6F and Ex. 6G) (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 matter rejected the Woodheads' two wall theory which resulted in the second wall being built into the existing glade 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. This Court should not disturb those findings as there is substantial evidence to support them.

V. CONCLUSION

The decision by Judge Moreno in this case is well-reasoned and clearly supported by substantial evidence. Miss Woldson respectfully requests this Court to affirm the Trial Court.

Respectfully Submitted this 9th day of March, 2005.

RICHTER-WIMBERLEY, P.S.

A handwritten signature in cursive script, appearing to read "Dennis P. Hession", written over a horizontal line.

Dennis P. Hession, WSBA #9655
Attorney for Respondent