

69428-6

**ORIGINAL**

69428-6

NO. 69428-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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ZOYA SPENCER,  
a single woman,

Appellant,

v.

ROBERT LUTON AND KARIN LUTON,  
as individuals and as the marital community comprised thereof,

Respondents.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 APR 1 PM 4:45

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY,

The Honorable Patrick Oishi

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OPENING BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

A. SUMMARY OF ARGUMENT ..... 1

B. ASSIGNMENTS OF ERROR ..... 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 5

D. STATEMENT OF THE CASE..... 8

    1. Procedural History ..... 8

    2. Relevant Facts ..... 8

E. ARGUMENT ..... 14

    1. THE TRIAL COURT'S FINDING THAT THE ROCKERY IS SITUATED UPON LUTONS' PROPERTY WAS ENTERED IN THE ABSENCE OF SUBSTANTIAL EVIDENCE ..... 14

        a. The parties stipulated on the first day of trial that 220 feet of Spencer's property had been taken by Luton's rockery ..... 15

        b. The uncontroverted 1998 survey showed a trespass ..... 15

        c. Multiple photographs document that currently a significant portion of the center and south rockery are on the Spencer property ..... 16

        d. Three witnesses testified from personal observation that the rockery has moved significantly toward the Spencer residence over the years ..... 16

    2. THE TRIAL COURT'S FINDING THAT THE ROCKERY IS STABLE AND HAS NOT MOVED WAS ENTERED IN THE ABSENCE OF SUBSTANTIAL EVIDENCE ..... 17

a.	The trial court's finding ignores the parties' stipulation that the rockery has taken over 220 feet of Spencer's property .....	17
b.	Comparing the 1998 survey with the 2012 photographs, it is immediately apparent that major portions of the rockery have slid onto Spencer's property .....	17
c.	It is undisputed that the bulkhead underneath the south portion of the rockery was on Lutons' property in 1998 and 2009 .....	18
d.	It is undisputed that the bulkhead had by the time of trial slid several inches over the line onto the Spencer property .....	18
e.	The trial court's reliance on Batterman's testimony that the rockery was stable and had moved was without substantial support in the record .....	19
f.	The trial court's finding that Mr. Costello had kicked at the rockery during trial and this could have caused the problems with the rockery is unsupported in the record.....	25
g.	The trial court's finding that Spencer's motivation for bringing suit may be based on Luton's complaint about the height of her new house is unsupported in the record and should be reversed.....	25
3.	THE TRIAL COURT'S FINDING THAT SPENCER'S 2007 EXCAVATION OF THE WALKWAY AND PLANTER BOX NEAR THE ROCKERY WEAKENED SUPPORT FOR THE ROCKERY AND CAUSED ROCKS TO FALL OUT WAS ENTERED IN THE ABSENCE OF SUBSTANTIAL EVIDENCE.....	26
a.	It is undisputed that Spencer did not remove or touch the portion of her walkway under the center and south portion of the rockery .....	26

b.	The rockery collapse began as a result of the 1998 amateur installation of dirt and a retaining railroad tie wall on top of the rockery several years before Spencer's excavation; therefore her excavation did not cause the collapse .....	27
4.	THE TRIAL COURT'S FINDING THAT THE CITY INSPECTOR INSPECTED AND "PASSED" THE ROCKERY WAS ENTERED IN THE ABSENCE OF SUBSTANTIAL EVIDENCE .....	28
a.	The rockery as a whole has never been inspected, permitted, or "passed by the City of Seattle" .....	28
b.	Only the very limited repair to the rockery was inspected and "passed" .....	28
c.	The inspector "passing" the repair does not provide support for the court's finding that the rockery as a whole is stable and sound .....	29
5.	THE TRIAL COURT ERRED IN DISMISSING SPENCER'S CLAIM FOR INTENTIONAL TRESPASS AT THE CLOSE OF SPENCER'S CASE.....	30
a.	Standard of review is <i>de novo</i> .....	30
b.	The trial court erroneously dismissed the intentional trespass case because it believed that the prior owners' intentional act is not attributable to the Lutons and that an omission cannot satisfy the intent element.....	30
i.	The court interpreted the intentional act element too narrowly; an omission can satisfy it.....	30
ii.	The prior owner's intentional act -- placement of the amateur retaining wall and fill dirt -- is attributable to Luton ....	34

6.	THE TRIAL COURT ERRED IN CONCLUDING THAT LUTON DID NOT BREACH ANY DUTY TO MAINTAIN THE ROCKERY .....	37
	a. Standard of review is mixed <i>de novo</i> and substantial evidence standard.....	37
	b. Luton had a duty to remove the encroaching portions of the rockery from Spencer's property, and take steps to ensure that rocks would no longer fall on her property .....	37
7.	THE TRIAL COURT ERRED IN CONCLUDING THAT WHEN SPENCER RENTED OUT HER HOME, SHE DEPRIVED HERSELF OF THE ABILITY TO RECOVER FOR NUISANCE.....	39
	a. Standard of review is <i>de novo</i> .....	39
	b. There is no authority for the court's theory of nuisance recovery .....	39
8.	THE TRIAL COURT ERRED IN CONCLUDING THE ROCKERY DID NOT CONSTITUTE A NUISANCE AND THAT THERE HAD BEEN NO TRESPASS, NEGLIGENT OR INTENTIONAL, BY LUTON .....	41
	a. The rockery is a nuisance.....	41
	b. Luton committed intentional trespass .....	42
	c. Luton committed negligent trespass .....	43
9.	SPENCER IS ENTITLED TO FEES AND COSTS AT TRIAL AND ON APPEAL IF SHE PREVAILS....	44
F.	CONCLUSION .....	44

**TABLE OF AUTHORITIES**

**DECISIONS OF THE WASHINGTON SUPREME COURT**

**Bradley v. Am. Smelting & Ref. Co., 104 Wn.2d 677,  
709 P.2d 782 (1985) ..... 30, 32-4, 37-8, 41-2**

**Cass v. Dicks, 14 Wash. 75, 44 P.113 (1896) ..... 31**

**Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567,  
964 P.2d 1173 (1998) ..... 41**

**Pardee v. Jolly, 163 Wn.2d 558, 182 P.3d 967 (2008)..... 37**

**Sunnyside Valley Irrigation Dist. v. Dickie,149 Wn.2d 873,  
73 P.3d 639 (2003) ..... 30, 37**

**Woldson v. Woodhead, 159 Wn.2d 215, 149 P.3d 361 (2006) ... 35-6, 39**

**State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994)..... 8**

**DECISIONS OF THE WASHINGTON COURT OF APPEALS**

**Freeburg v. City of Seattle, 71 Wn. App. 356, 859 P.2d 610 (1993) .. 14**

**Gaines v. Pierce County, 66 Wn. App. 715, 834 P.2d 631 (1992).....43**

**Grundy v. Brack Fmaily Trust, 151 Wn. App. 557,  
213 P.3d 619 (2009) ..... 30-3**

**Wallace v. Lewis County, 134 Wn. App. 1, 137 P.3d 101 (2006) ..... 36**

**OTHER AUTHORITIES**

**Washington Practice: Real Estate: Transactions §13.2  
(2d ed. 2004)..... 15**

**WASHINGTON STATUTES**

**RCW 4.24.630..... 44**

**RCW 7.48.010..... 41**

**WASHINGTON COURT RULES**

**RAP 14.2 ..... 44**

**RAP 18.1 ..... 44**

**A. SUMMARY OF ARGUMENT**

Lutons live behind Spencer on a hill in West Seattle. Their house is at a higher elevation than Spencer's house and the cut slope between the two is fronted by a rockery. Fifteen years ago, the previous owner of the higher elevated lot added fill dirt to the top of the slope and a railroad tie retaining wall. Since then, the rockery, which had been located on Lutons lot, has partially collapsed and is slowly sliding over Spencer's property.

In Spencer's action for trespass and nuisance, the trial court incorrectly ruled that a current owner is automatically relieved of liability for the intentional acts of a prior owner, thus barring recovery in trespass for those acts. Further, the trial court decided that a landowner could not recover in nuisance if that landowner rents the property to another instead of personally occupying it. These erroneous legal conclusions should be reversed.

The majority of the trial court's factual findings are not supported by substantial evidence; and the court's findings cannot be reconciled with the undisputed survey of the property, exhibits clearly showing the rockery has slid past the property line, and the defendant's stipulation that 220 feet of Spencer's property was taken by the rockery. The court's conclusions are therefore erroneous. Spencer requests reversal or, in the alternative, a new trial.

**B. ASSIGNMENTS OF ERROR**

The trial court entered the following Findings of Fact in the absence of substantial evidence:

1. Finding of Fact No. 1, specifically that "[c]ompetent evidence established that the rockery is situated upon the Luton property[]."

2. Finding of Fact No. 2, specifically that "[t]he rockery is in reasonably good condition and shows no evidence of past lateral or rotational movement."

3. Finding of Fact No. 3 in its entirety.

4. Finding of Fact No. 5, specifically that the "planter container ... abutted the rockery" and that "[p]art of the toe of the rockery in the northeast corner of the Spencer property was removed during the excavation of the backyard of the new Spencer house[]."

5. Finding of Fact No. 6 in its entirety.

6. Finding of Fact No. 8, specifically that "due to a complaint the Lutons filed with City of Seattle during the construction of the new residence at 7130 [Costello] would make sure the Lutons replaced the rockery."

7. Finding of Fact No. 9 in its entirety.

8. Finding of Fact No. 11, specifically that "the rockery was

inspected by City of Seattle Department of Planning and Development inspector Dan Richardson. The rockery passed the inspection of Mr. Richardson on February 17, 2011."

9. Finding of Fact No. 12, specifically that "Dan Richardson inspected and passed the rockery."

10. Finding of Fact No. 14 in its entirety. To the extent that the last two sentences of No. 14 are a conclusion of law, they are erroneous.

11. Finding of Fact No. 15, specifically that "once the repair of the rockery was completed by Creative Bros. Landscaping the rockery was in reasonably good condition, structurally sound, and the rockery should continue to function as an erosion control rockery into the foreseeable future."

12. Finding of Fact No. 16, specifically that "an occasional rock has fallen from the rockery but that these events have been rare. The court finds that at the time of trial there was one rock from the rockery that was out of place."

The trial court erred in entering the following Conclusions of Law:

13. Conclusion of Law 2, that "the rockery in question is in generally good condition and is structurally sound and therefore concludes as a matter of law it does not constitute a nuisance as defined by RCW 7.48.010 and RCW 7.48.120."

14. Conclusion of Law 3, that "as a matter of law the defendants did not breach their duty to the plaintiff to maintain the rockery."

15. Conclusion of Law 4, that "as a matter of law the plaintiff failed to prove by a preponderance of the evidence (i) negligent trespass on the part of the defendants, or that (ii) the Luton rockery constitutes a nuisance. Therefore the Court finds in favor of the defendants and dismisses this matter against the defendants with prejudice."

16. Finding of Fact 13 (to the extent that it is a mislabeled Conclusion of Law), specifically that "since Ms. Spencer has not lived at the residence since 1996 any issues associated with either rocks falling onto the property located at 7130 Woodside Place S.W. or any alleged silting that may have occurred has not interfered with Ms. Spencer's enjoyment or use of the property, or caused her to be insecure in the use of her property."

The trial court erred in entering the following rulings:

17. Dismissing Spencer's claim for intentional trespass at the close of her case in chief. Specifically, the trial court erred in concluding that the intentional acts of prior owners of defendants' property were not attributable to defendants as a matter of law, and therefore Spencer had failed to prove the intentional act element of intentional trespass.

18. Denying Spencer's motion to reconsider.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Should the court's half-time dismissal of Spencer's intentional trespass claim be reversed? Prior owners of defendant Luton's property placed additional dirt and railroad ties on the rockery in 1998. In 2005, Spencer wrote to Luton complaining about the rockery collapsing over her property, trespassing and creating a nuisance. In 2010, Lutons undertook a repair which was strictly limited to replacing fallen rocks and adding a few rocks. Our Supreme Court has stated that the intent element of intentional trespass is satisfied when one intentionally fails to remove from the land a thing which he is under a duty to remove. The trial court dismissed Spencer's claim for intentional trespass at half time, reasoning that (a) the prior owner's act was not attributable to Lutons, so Lutons themselves committed no "volitional" act and (b) an omission or failure to act by Luton does not satisfy the intent element of intentional trespass. (Assignments of Error 1-3, 5-13, 18.)

2. Should the trial court's erroneous conclusion that Spencer has no remedy because she is a landlord be reversed? It is undisputed that Ms. Spencer is the owner of the property at 7130 Woodside Place S.W., Seattle. Ms. Spencer moved out of the property in 1996 and has rented it out since that time. The trial court concluded (in Finding of Fact 13) that

renting out her home deprived her of the right to a remedy for trespass because she has not personally attempted to enjoy or personally use the area near the rockery. (Assignments of Error 15, 16.)

3. Did the trial court err in concluding the rockery does not trespass onto the Spencer property? An uncontroverted survey offered by defendant Luton showed that in 1998, before it shifted toward plaintiff Spencer's house, a small part of the rockery crossed over onto Spencer's property. Additionally, several photos showed the more recent collapse of the center of the rockery across the property line toward the Spencer house. At trial, Luton stipulated that 220 feet of Spencer's property had been taken by the rockery. (Assignments of Error 1 - 3, 5, 6, 7, 10-15.)

4. Was the trial court's conclusion that plaintiff Lutons did not breach their duty to maintain the rockery erroneous? In 1998, prior owners of the Luton property loaded fill dirt and railroad ties on top of the cut slope, at which time the center portion of the rockery began to move toward the Spencer house and rocks began to fall out. Spencer wrote to the owner in 1998 regarding this problem, and presented evidence at trial that the existing rockery is unable to handle the increased load. Spencer complained again in 2005 and 2008. The only repair by Luton has been to replace rocks that have fallen out, and add a few supporting rocks at the

north end where there has been no problem. (Assignments of Error 3, 5, 7, 13-15.)

5. Was the trial court's finding that Spencer's 2007 excavation and removal of her walkway weakened support for the rockery and caused rocks to fall out entered in the absence of substantial evidence? When prior owners of Lutons' property placed dirt and railroad ties on top of the rockery in 1998, Spencer complained that the rockery was collapsing under the increased load. Since that time, the rockery has never been strengthened or put back in its original position. At trial, uncontroverted photographs showed that when Spencer removed the concrete planter near the rockery and the walkway adjacent to the rockery in 2007, she left untouched the portion of her walkway over which the center and south portions of the rockery had collapsed onto her property. (Assignments of Error 1, 2, 4, 5, 13-15.)

6. Was the trial court's finding that Inspector Richardson inspected and passed the entire rockery entered in the absence of substantial evidence? Uncontroverted evidence showed that City of Seattle Inspector Richardson did not inspect the rockery as a whole, he merely inspected whether the limited 2010 repair (replacing rocks that had fallen out of the rockery) had been carried out per the scope of the permitted repair request. (Assignments of Error 8, 9.)

7. Was the trial court's finding that the 2010 repair placed the rockery in good condition and left it structurally sound entered in the absence of substantial evidence? Uncontroverted evidence showed that the 2010 rockery repair by Luton was strictly limited to replacing rocks that had fallen out and adding a few new rocks in the north end of the rockery. It was undisputed that the north end had not collapsed or moved toward the Spencer property. (Assignments of Error 11, 12 - 15.)

**D. STATEMENT OF THE CASE**

1. **Procedural History.** Spencer filed suit for trespass and nuisance in January 2010, and the case went to arbitration. CP 13. She prevailed on nuisance in arbitration and was awarded \$1,200 damages. CP 155. She took the case to a bench trial before Judge Patrick Oishi and lost on all grounds. CP 120. She unsuccessfully moved to reconsider, and now timely appeals. CP 130, 145.

2. **Relevant Facts.** A rockery runs the length of the boundary between two lots of unequal elevation. CP 120-21. In 1998, the prior owners of the higher-elevated home loaded fill dirt fronted by a railroad tie retaining wall on top of the rockery in 1998 to level the property. 8/29/12 RP 53-54. The railroad tie retaining wall is about 4 feet high and when originally built, was approximately 12 inches back from the top of

the rockery. 8/28/2012 RP 56.<sup>1</sup> It was not installed by a professional, but by the homeowner, Eric Robinson, on the advice of a landscape designer. 8/29/2012 RP 53-56. Robinson ripped out the existing vegetation and planted the rockery with ivy. Id. at 63. Shortly after, the rockery began slowly collapsing onto the lower-elevated property of the neighbor on the other side of the rockery, Spencer. 8/28/12 RP 12-13; 8/23/2012 RP 46, 48, 50. Spencer wrote a letter informing the owners of this situation and asking that it be addressed. 8/28/2012 RP 46-7; 8/29/2012 RP 62. Nothing was done about the rockery. 8/29/2012 RP 63.

The prior owner commissioned a survey and the surveyor pounded survey markers into the corners of the property between Spencer and her neighbor. 8/29/2012 RP 59-60. This survey established that the rockery was on the neighbor's property, except for two very small portions that encroached onto Spencer's property. 8/29/2012 RP 100, 103. Spencer, her tenant James Costello, and their friend/frequent visitor Edward King all observed the rockery moving toward the Spencer residence over the years after the amateur retaining wall was installed. 8/23/2012 RP 50; Id. at 31, 38; 8/28/2012 RP 12, 32, 46-9.

In 2005, when she was contemplating replacing her house with a bigger one, Spencer again wrote to the owners of the rockery regarding

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<sup>1</sup> The record consists of 5 volumes, which shall be referred to by date, then "RP" followed by the page number.

her concerns, explaining that she was planning construction on her property, and enclosing a copy of her 1998 letter. 8/29/2012 RP 12, 66, 73. Nothing was done. CP 8/29/12 RP 69.

That year, the rockery owner sold his house to Luton. 8/29/2012 RP 67-9. In 2007 Spencer replaced her old house with a new taller one, incidentally blocking Lutons' view of Puget Sound and excavating some property near the rockery. 8/23/2012 RP 39; 8/29/2012 RP 133-4. As part of her excavation, Spencer removed an old, cracked walkway and planter box that were near the rockery. 8/28/2012 RP 57-8; 8/29/2012 RP 20-1, 35-6; Exhs. 14-D, 32-A. Near the center and south sections of the rockery, Spencer did not remove her entire walkway up to the property line as she had the right to do. 8/29/2012 RP 20-1. Instead, she left undisturbed the portion of her walkway (also referred to in the south end of the property as the "bulkhead") upon which Luton's rockery sat. Id.

Luton complained to the City about the height of Spencer's new home. 8/29/2012 RP 133-4. In 2008, Costello, Spencer's tenant, discussed his concerns about the rockery's stability with Luton. 8/29/2012 RP 108. Nothing was done.

In 2009, worried about the stability of the rockery, Spencer retained Brad Biggerstaff, a geotechnical engineer with a Masters of Science and 38 years' experience in the field, to evaluate the stability of

the rockery. 8/23/2012 RP 44-7. In December 2009 Biggerstaff reported that the rockery was in danger of collapse and presented a safety hazard. 8/27/2012 RP 68, 107.

As a result, Spencer filed suit against Luton in January 2010. CP 1-4. Negotiations between the parties ensued, and by spring 2010 the rockery had suffered a significant collapse and had moved further over Spencer's property line. Exh. 16-H. In May 2011, Luton installed a camera at the foot of the rockery with a motion sensor that would take a photograph of the rockery and Spencer's back yard whenever there was any motion in Spencer's back yard. 8/29/2012 RP 135. Costello strung physical lines at heights of four feet and six feet to show the height of the rockery, and strung a red string attached to each of the survey markers, to demarcate the boundary between the properties. Exh. 16-B (Attached as Appendix B); 8/28/2012 RP 44. The survey and the lines strung by Costello were not challenged at trial.

The rockery owner, Luton, hired Jamey Batterman, a geotechnical consultant with a B.S. to evaluate the rockery. 8/28/2012 RP 142. Luton did not provide Batterman with information about the rockery's movement over the property line. *Id.* at 168-70. Neither did Luton provide Batterman with information showing that the top of the rockery, which was now 3.5-4 feet away from the top of the railroad retaining wall, had

originally been only 12" away. 8/28/2012 RP 166. As a result, Batterman told Luton that he had no evidence that the rockery was moving. 8/28/2012 RP 165. Based on Batterman's report that the rockery was structurally sound and merely required a minor repair, Luton commissioned a repair by Creative Bros. which was limited to replacing rocks that had fallen out of the center portion of the rockery and replacing toe support on the north end. 8/28/2012 RP 96. Batterman told the court that Spencer's home excavation had undermined support for the northern part of the rockery, at the "toe ." Id. at 154-6.

The north section of the rockery, containing the toe support that Lutons had Creative Brothers replace in 2010, has never moved at all and has always been stable, remaining on the Luton side of the property line. 8/23/2012 RP 56. Enzo Morella of Creative Brothers told the court that the problem of rocks falling out of the rockery "clearly had nothing to do with that undermining of the toe." 8/28/2012 RP 95. Since the 2010 repair, a few rocks have again fallen out of the rockery, and the rockery continues to creep toward the Spencer residence. 8/28/2012 RP 32; Exh. 19, App. A.

After the repair, Luton had the City of Seattle inspect the repair so as to issue a permit. Exhibit 12. The scope of work Luton listed was "provide proper toe support to north end of rockery (per Geotech

recommendations)" and "repair two areas of rockery where rocks had become dislodged (approximately 2' X 3' per area)." Exhibit 12. David Cordaro, manager of building inspectors at Seattle Department of Planning and Development, testified that the inspection for the permit only related to the repair of the rockery and the City did not permit, inspect, evaluate, or "pass" the rockery *per se*. 8/27/2012 RP 118.

Biggerstaff explained to the court that he observed several serious problems with the rockery. Specifically, the rocks are in poor condition, i.e., breaking, fracturing, decomposing, and undersized for the task (8/27/2012 RP 57); the fill dirt and railroad tie retaining wall added above the rockery adds weight which then requires the rockery to serve as a retaining wall, which it is not able to do (*Id.*); many of the rocks lack 3 points of contact with another rock, making them prone to moving and falling out (*Id.* at 64); and the ivy planted in 1998 tends to work the rocks loose as the roots grow, separating the rocks and dislodging them (*Id.* at 63). As a result of these facts, Biggerstaff told the court that the rockery was unstable, in a partially failed state, and needed to be replaced. *Id.* at 68, 106-07.

The parties first took the case to arbitration, where arbitrator Theresa Dowell found for Spencer on nuisance and awarded \$1,200 damages. CP 155. Spencer requested a trial *de novo*. CP 15. At the

beginning of trial, the parties stipulated that approximately 220 feet total had been taken from the Spencer property by the rockery, to avoid the necessity of putting on testimony regarding value. 8/23/2012 RP 32.

At trial, Judge Oishi dismissed Spencer's claim for intentional trespass at the close of her case in chief, reasoning that (a) because prior owners had installed the fill dirt and retaining wall above the cut slope, their intentional act was not attributable to Lutons, and (b) Lutons at most may have failed to do an act and such failure cannot satisfy the "intentional act" element. CP 112. After trial, he entered Findings of Fact and Conclusions of Law that fail to acknowledge the 1998 construction in any way, concluding that Spencer had proved neither nuisance nor trespass, and awarding attorney's fees to Luton. CP 120.

#### **E. ARGUMENT**

##### **1. THE TRIAL COURT'S FINDING THAT THE ROCKERY IS SITUATED UPON LUTONS' PROPERTY WAS ENTERED IN THE ABSENCE OF SUBSTANTIAL EVIDENCE**

Substantial evidence is evidence that would persuade a reasonable person of the truth of the statement asserted. Freeburg v. City of Seattle, 71 Wn. App. 356, 371, 859 P.2d 610 (1993).

**a. The parties stipulated on the first day of trial that 220 feet of Spencer's property had been taken by Luton's rockery.**

Given this stipulation alone, the trial court's finding that the rockery sits on Luton's property is without substantial evidence. 8/23/2012 RP 32.

**b. The uncontroverted 1998 survey shows a trespass.**

The previous owner of the Luton property, Mr. Robinson, testified that in 1998 he commissioned a survey which delineated the boundary between his property and the Spencer property; markers were dug into the ground by the surveyor. 8/29/2012 RP 59-60. The accuracy of the survey and markers was not challenged. This survey showed that while in 1998 the rockery was mostly on Robinson/Luton's property, it crossed over slightly onto Spencer's property at the center and at the south end of the rockery. Exh. 12.

Government surveys are considered conclusive evidence of boundaries. See 18 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Transactions § 13.2, at 74 (2d ed. 2004): (“Ultimately, the force of the system of government surveys rests upon a rule of evidence law, recognized in Washington and everywhere else: courts take judicial notice of the system. Moreover, a point that has been located on the ground on a government survey is conclusive; no surveyor, no court may go behind it or show that it is in error.”)

As a result, the admitted survey showing the rockery in relation to the property line and the survey markers pounded into the ground by the surveyor are conclusive as to the location of the property line.

**c. Multiple photographs document that currently a significant portion of the center and south rockery are on the Spencer property.** Mr. Costello strung a red line along the property line, from survey marker to survey marker, in March 2012. Exh. 14-L; 8/23/2012 RP 44-9. The accuracy of this line in marking the property boundary was never challenged at trial. Several of the admitted photographs in Exhibit 14 show the rockery photographed from above this red string looking downward, and these photos plainly show that the center and south portions of the rockery cross the red line and therefore sit on the Spencer property. Exh. 14-E, F, J, L, N, O, P, R. (Attached as Appendix A.)

**d. Three witnesses testified from personal observation that the rockery has moved significantly toward the Spencer residence over the years.** Zoya Spencer, her longtime tenant James Costello, and their friend and frequent visitor Edward King all testified that they have personally observed the rockery over a period of years, with reference to the survey markers. 8/23/2012 RP 50; Id. at 31, 38; 8/28/2012 RP 12, 32, 46-9. They all told the court that the rockery had moved significantly

toward the Spencer residence since the amateur retaining wall had been installed.

Given the parties' stipulation that the rockery has taken 220 feet of Spencer's property, as well as the progression of the rockery over the property line testified to by three witnesses and shown by comparing the 1998 survey with the more recent photographs of rocks over the property line, the trial court's finding that the rockery is situated upon Luton's property is unsupported by substantial evidence.

**2. THE TRIAL COURT'S FINDING THAT THE ROCKERY IS STABLE AND HAS NOT MOVED WAS ENTERED IN THE ABSENCE OF SUBSTANTIAL EVIDENCE**

**a. The trial court's finding ignores the parties' stipulation that the rockery has taken over 220 feet of Spencer's property.** This stipulation, combined with the 1998 survey showing only a slight intrusion of the rockery in two widely separated locations, leads inescapably to the conclusion that the rockery has moved a significant distance since 1998.

**b. Comparing the 1998 survey with the 2012 photographs, it is immediately apparent that major portions of the rockery have slid onto Spencer's property.** As explained above, admitted photographic exhibits show that parts of the rockery currently sit

on the Spencer property in the center and south sections. See App. A.

The portions now on Spencer's property are much larger than the portions that touched her property in the 1998 survey.

**c. It is undisputed that the bulkhead underneath the south portion of the rockery was on Lutons' property in 1998 and 2009.** The 1998 survey showed that the portion of the rockery that lies on the bulkhead, the south portion of the rockery, was on the Luton property. Exh. 12. Only a very small portion of the south rockery went over into Spencer's property, and this area was not on the bulkhead. At trial, no one disagreed that the bulkhead was on Luton's property in 1998. In 2009, Luton told the court, he specifically observed that with relation to the property line as referenced by the markers, the bulkhead was completely on his side of the line. 8/29/2012 RP 150.

**d. It is undisputed that the bulkhead had by the time of trial slid several inches over the line onto the Spencer property.** Photographic exhibits show that the bulkhead and the portion of rockery on top of it has now slid several inches into Spencer's property. Exhs. 22-L and P show that in March 2012, the bulkhead had crossed the property line by several inches. Neither the red property line string nor the accuracy of Costello's photographs were challenged at trial. No witness

testified that they had personal knowledge that the bulkhead or any other portion of the rockery had not slid over the property line.

**d. The trial court's reliance on Batterman's testimony that the rockery was stable and had not moved was without substantial support in the record.** Batterman presumed, based on the limited information he received from Luton, that the rockery had not moved. 8/28/2012 RP 165. However, Zoya Spencer, James Costello, and Edward King all testified based on repeated personal observation over a period of many years that the rockery has moved over the property line toward Spencer's residence since 1998. Their testimony, which is supported by the photographic exhibits described above, was never contradicted at trial by any testimony of personal observation of the rockery, or by any rebutting measurements.

No witness, lay or professional, ever told the court either directly or indirectly that they had personal knowledge that the rockery had **not** moved across the property line over the years. Indeed, Luton specifically testified that he did not have any personal knowledge regarding whether the rockery had travelled across the line toward Spencer's property. CP Luton's witness Enzo Morella of Creative Brothers also testified that he did not know whether the rockery was on Luton's property. 8/28/2012 RP 118. The observations regarding change in the rockery's position over

time were provided by Spencer, Costello, King, the survey, the stipulation, and the photographic exhibits; and all this evidence is in accord that the rockery has moved across the line and is still moving.

Primarily, the court's finding that the rockery is stable and has shown no sign of movement is based upon the expert testimony of Jamey Batterman. Mr. Batterman, a geotechnical engineer retained by Luton, examined the rockery several times in 2009 and 2010 and told the court that he saw "no evidence" that the rockery was moving. 8/28/2012 RP 165. The probative value of Batterman's opinion, however, was severely limited by the lack of information with which he was provided. Put simply, he was not provided by Luton with any of the facts demonstrating that the rockery had moved.

Specifically, there is no evidence that Batterman was ever provided the 1998 survey, or had the opportunity to compare that with the current position of the rockery in relation to the surveyed, strung property line. And while Batterman freely told the court that there is now a distance of 3.5 or 4 feet between the rockery and the railroad ties on top of it, on the cut slope, he showed no awareness that the previous owner, Eric Robinson, had in 1998 built the railroad tie retaining wall on the slope approximately 12 inches back from the rockery. 8/28/2012 RP 166; 8/29/2012 RP 56. This is particularly significant because Batterman

testified that if he had reason to believe the gap between the wall on the cut slope and the rockery had widened, it would have changed his opinion regarding the stability and movement of the rockery:

- Q. Can you describe for us what you mean by lateral movement?
- A. That the rockery would be displaced in a horizontal direction.
- Q. And how are you able to make that determination if, for instance, you weren't there in 1998, and then, you know -- in other words, you don't have a time frame to make a comparison, how can you determine whether there is lateral or there isn't lateral movement?
- A. You can't 100 percent. But if it does move there's usually signs within the rockery itself. And you'll form some kind of crack and/or void at the top of the rockery between the rockery and whatever used to be behind it.
- Q. So if I understand, in this case, the cut slope that we have that's on the Luton property, you would expect to see some evidence of separation between that cut slope and the rockery itself?
- A. Correct.
- Q. Okay. Did you see any evidence of that in, again, the four visits that you had to the rockery?
- A. No.

8/28/2012 RP 169-70. Batterman apparently had not been informed that in 1998 the distance between the railroad tie retaining wall and the top of the rockery was only about 12 inches. Accordingly, he did not realize that the 3.5 to 4 feet separation he observed in 2009 between the railroad tie retaining wall and the rockery represented precisely the evidence of separation that he told the court characterizes lateral movement.

In contrast, Spencer's expert, Brad Biggerstaff, testified that the railroad tie retaining wall and fill dirt placed on the slope above the rockery puts an additional load (weight) onto the rockery and decreases the stability of the rockery. 8/27/2012 RP 48. He explained:

This [rockery] wall appears to have been constructed as a landscape wall initially, but, because of the height of the wall and the loads that were subsequently applied above the wall, should have been designed and constructed as an engineered rockery and should have had permits with it ... at the time of the modification.

8/27/2012 RP 52.

While the rockery began as erosion control, the increased load placed on it by the addition of an amateur-installed retaining wall now requires the rockery itself to perform as a retaining wall. Biggerstaff told the court that the condition of the rocks in the wall was "lacking," meaning that they are fracturing, breaking, and decomposing as well as being simply too small for the job. *Id.* at 57. He explained that while the 1998 ivy planting may provide good erosion control, ivy's roots can work the rocks loose as the roots grow bigger, separating the rocks and possibly dislodging them. *Id.* at 63.

Further, Biggerstaff noted that the rockery was not stable because many of the rocks do not have three points of contact with another rock in the rockery, which would provide necessary friction and resistance to

movement. Id. at 64. At trial, Biggerstaff pointed out many specific rocks in photographic exhibits that did not have three points of contact.

8/27/2012 RP 64-6; Exh. 3-F.

Batterman, on the other hand, simply told the court that he did not attempt to assess whether "all" the rocks were stacked with three points of contact. 8/28/2012 RP 158. Nevertheless, Batterman assured the court that he saw no sign that the rockery was unstable due to lack of 3 point contact. Id. at 161. As to the numerous rocks that had repeatedly fallen out of the rockery onto the Spencer property, Batterman speculated that they had been physically pulled out of the rockery. Id. at 170-71. He admitted that his conclusion was based on speculation; according to him, they must have been pulled out, since he believed the rockery was stable and therefore they could not have simply fallen out of their own accord. Id. at 171. "[T]here's no other reason for them to have fallen down."

Biggerstaff noted that during his site evaluation, he saw several rocks that were lying in front of the rockery and appeared to have fallen out of corresponding voids in the rockery. 8/27/2012 RP 49. He explained that when rocks do not have three point contact with other rocks, they can easily fall out. 8/27/2012 RP 64. When asked if the rockery had moved laterally in the years 2009-2011, Biggerstaff answered that he did not know because he did not survey the rockery at those two

times. Id. at 105. He evaluated the site again in November 2011, over a year after the 2010 Creative Brothers repair. Id. at 69. He noted that while rocks had been placed back into the wall, many rocks were still cracked and some had again become dislodged. Id. at 70. He characterized the rockery as partially "failed." Id. 106-07.

For all these reasons, Biggerstaff, who has a Master's of Science and 38 years of experience in geoen지니어ing (Batterman has a Bachelor's of Science and 24 years of experience) explained that the rockery is unstable and needs to be removed and completely rebuilt. Id. at 68.

The trial court's findings did not acknowledge Biggerstaff's testimony. The findings simply term Batterman's opinion "credible." Because Batterman was not provided with all the information he needed, his opinion was too limited to support a conclusion that the rockery is stable and has not moved, particularly in the face of multiple un rebutted personal observations that it had moved, supported by unchallenged photographs showing where the rockery now is in relation to the undisputed property line. As a result, Batterman's testimony does not provide support for the trial court's findings that the rockery was stable and had not moved.

**e. The trial court's finding that Mr. Costello had kicked at the rockery during trial and this could have caused the problems**

**with the rockery is unsupported in the record.** The motion-activated camera Luton placed at the extreme corner of his property photographs the Spencer yard near the rockery. Once during trial in August 2012, the camera photographed one of Costello's legs extended outward with his toes close to and pointing at the north portion of the rockery. The trial court viewed this as a "kick." CP 122. There is no evidence that the rockery was touched by anyone's feet at any point other than that one day in August 2012. Further, it makes no sense that the rockery would be steadily moving toward Spencer's house if it were being repeatedly kicked in the direction of the Luton residence. The trial court's speculative finding on this point is not supported by the facts and should be reversed.

**f. The trial court's finding that Spencer's motivation for bringing suit may be based on Lutons' complaint about the height of her new house is unsupported in the record and should be reversed.**

Finding of Fact 8 speculates that Spencer may have brought suit for reasons other than her concern about the condition and encroachment of the rockery. CP 122. This finding is unsupported because Spencer first expressed her concern about the rockery in writing to the previous owners of the Luton property in 1998, nine years before she built a new, taller home on the lot in 2007. She again contacted the owners about the rockery in 2005, before she began construction. Spencer attempted to

resolve this problem twice before Lutons made any complaint regarding her new home. Finding of Fact 8 is without substantial evidence and should be reversed.

3. **THE TRIAL COURT'S FINDING THAT SPENCER'S 2007 EXCAVATION OF THE WALKWAY AND PLANTER BOX NEAR THE ROCKERY WEAKENED SUPPORT FOR THE ROCKERY AND CAUSED ROCKS TO FALL OUT WAS ENTERED IN THE ABSENCE OF SUBSTANTIAL EVIDENCE**

a. **It is undisputed that Spencer did not remove or touch the portion of her walkway under the center and south portion of the rockery.** As photographic Exh. 16-B (App. B) shows, the concrete walkway underneath the center and south sections of the rockery (the sections that have collapsed) remained untouched by Spencer's excavation. The photograph shows that the walkway was cut at a point slightly in front of the rockery, allowing the rocks sitting on top of the walkway to remain undisturbed. *Id.* The place where it is claimed that there was excavation which may have undermined the rockery is in the north section, where the "toe" of the rockery is. But that section has remained stable, has not moved, and has not had any problem with rocks falling out. As Luton's landscaper, Enzo Morella told the court, the problem of rocks falling out of the rockery "clearly had nothing to do with that undermining of the toe." 8/28/2012 RP 95.

While both Batterman and Biggerstaff testified that any excavation that may have taken place at the north end of the rockery and toe could have undermined the north end of the rockery, it is undisputed that there have been no problems with the north end of the rockery. No attempt was made to explain how Spencer's excavation at the north end could have undermined support for the north part of the rockery yet only cause problems at the center and south end, leaving the north end completely stable.

**b The rockery collapse began as a result of the 1998 amateur installation of dirt and a retaining railroad tie wall on top of the rockery several years before Spencer's excavation; therefore her excavation did not cause the collapse.** It is undisputed that Spencer wrote to the owners in 1998 expressing concerns that after they placed fill dirt and a railroad tie retaining wall on top of (and 12 inches back from) the rockery, removed the existing plants, and replaced them with ivy, the rockery started having problems. There is no dispute that she again expressed these concerns to the owners in 2005. She did not begin work on her property until 2007, nine years after she first wrote to express concern that the 1998 changes to the rockery had destabilized it.

As a result, the excavation referred to in the court's finding could not have caused the first nine years of the rockery's documented problems.

Given Spencer's written concerns going back nine years before excavation, as well as unrebutted testimony of Costello, King, and Spencer that the rockery started having problems in 1998, the trial court's finding that Spencer's 2007 excavation weakened support for the rockery and caused rocks to fall out simply is without substantial support in the record and should be reversed.

**6. THE TRIAL COURT'S FINDING THAT THE CITY INSPECTOR INSPECTED AND "PASSED" THE ROCKERY WAS ENTERED IN THE ABSENCE OF SUBSTANTIAL EVIDENCE**

**a. The rockery as a whole has never been inspected, permitted, or "passed by the City of Seattle."** Luton's 2010 rockery repair was very limited in scope: "provide proper toe support to north end of rockery (per Geotech recommendations)" and "repair two areas of rockery where rocks had become dislodged (approximately 2' X 3' per area)." Exh. 12. David Cordaro, manager of building inspectors at Seattle Department of Planning and Development, testified that the inspection for the permit only related to the repair of the rockery. 8/27/2012 RP 118. He specifically told the court that the City was "not permitting the rockery per se." Id.

**b. Only the very limited repair to the rockery was inspected and "passed."** Cordaro told the court that there was no

structural review of the rockery, no code review, and no engineering review. 8/27/12 RP 120. What "passing" the inspection meant in this context, he explained, was only that the work to repair the rockery was done in an acceptable manner. Id. at 126-27.

**c. The inspector "passing" the repair does not provide support for the court's finding that the rockery as a whole is stable and sound.** Mr. Cordaro was directly asked whether the fact that his inspector passed the repair meant that the rockery was structurally sound, and he declined to agree:

- Q. If you were reviewing his work, then, and you saw what's in exhibit 11, the building permit field inspection report, and it's checked "passed," what would that mean to you as his supervisor?
- A. I can rely on the work having been done appropriately.
- Q. Meaning that the rockery was structurally sound because if it were not he would not have passed it; is that fair?
- A. I'm not sure I would want to associate structural soundness. Repairing an existing rockery, as stated in the permit, which started from the notice of violation -- if we can refer to that -- was really a minor scope of work to repair -- to put back together an existing rockery that had some defects.

Id. at 129-30. Given Cordaro's clear and consistent testimony that the rockery itself was never inspected or "passed," the trial court's finding that the City inspector inspected and "passed" the rockery is substantially unsupported in the record and should be reversed.

4. **THE TRIAL COURT ERRED IN DISMISSING SPENCER'S CLAIM FOR INTENTIONAL TRESPASS AT THE CLOSE OF SPENCER'S CASE**

a. **Standard of review is *de novo*.** The trial court dismissed Spencer's intentional trespass case based on a misunderstanding of the intentional act element of the statute. This court reviews *de novo* issues of law and a trial court's conclusions of law. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wash.2d 873, 880, 73 P.3d 369 (2003).

b. **The trial court erroneously dismissed the intentional trespass case because it believed that the prior owners' intentional act is not attributable to the Lutons and that an omission cannot satisfy the intent element.**

i. **The court interpreted the intentional act element too narrowly; an omission can satisfy it.** Spencer argued that the previous owners' intentional act (placing the amateur retaining wall and fill dirt above the rockery) was attributable to Lutons, but the trial court disagreed, ruling that the intentional act must be a volitional act by the defendants currently sitting in court. 8/29/2012 RP 94.

The Court finds both *Bradley* and *Grundy* require a volitional act and a failure to act or an omission is not sufficient to prove intentional trespass. The Court further finds the plaintiff has failed to establish or provide any evidence of an intentional or volitional act on the part of either of the defendants resulting in an invasion of her property that would affect her interest in exclusive

possession and therefore the Court GRANTS defendants' motion to dismiss the plaintiff's claims for intentional trespass.

CP 112.

Grundy v. Brack Family Trust, 151 Wash.App. 557, 213 P.3d 619 (2009) does not apply to this situation because it is narrowly tailored to address trespass in a situation related to the "common enemy doctrine." In Grundy, neighbors lived next to one another on the Puget Sound seafront. One neighbor raised his seawall and as a result the other neighbor experienced increased seawater splashing onto his property. 151 Wn. App. at 570.

In Cass v. Dicks, 14 Wash. 75, 44 P. 113 (1896), our Supreme Court held that "[i]f a land[-]owner whose lands are exposed to inroads *of the sea*, or to inundations from adjacent creeks or rivers, erects *seawalls* or dams, for the protection of his land, and by so doing causes *the tide, the current, or the waves* to flow against the land of his neighbor, and wash it away, or cover it with water, the land-owner so causing an injury to his neighbor is not responsible in damages to the latter, as he has done no wrong, having acted in self-defense and having a right to protect his land and his crops from inundation." 14 Wash. at 78. [Emphasis in original.]

Grundy concluded that "[a] property owner is not liable for sea water entering the property of another unless he intentionally or wrongfully directs the water onto his neighbor's property." Id. at 570. This is distinguishable from Spencer's case because a third-party agent, the sea, was the acting party whose motive force directed the offending substance onto the plaintiff's property. Here, there is no third party and the acting party was the owner of the property adjacent to Spencer. Grundy clarifies that property owners are not responsible for the action of the sea. It does not stand for the proposition that intentional trespass requires a volitional act and that a failure to act or an omission is insufficient to prove that element.

Bradley v. Am. Smelting & Ref. Co., 104 Wn.2d 677, 709 P.2d 782 (1985), the other case upon which the trial court relied, is also inapposite. It deals with emissions from the American Smelting And Refining Company ("ASARCO") copper smelter at Ruston, Washington which floated to Vashon Island. Landowners on Vashon Island sued for damages in trespass and nuisance from the deposit on their property of microscopic, airborne particles of heavy metals. 104 Wn.2d at 679.

ASARCO's defense to intentionality centered mainly on a "we just put it up there, we aren't responsible for where it comes down" theory. Our Supreme Court disagreed, holding that it was enough for ASARCO to

know that the particles would eventually land somewhere, and said that the defendant therefore had the requisite intent to commit intentional trespass on specific Vashon island land as a matter of law. Id. at 688. ASARCO had stipulated that they committed the affirmative act of placing the particles into the air. Id. at 681. The intent issue in Bradley related to whether the defendants had to know that their particles would descend in a particular place, and desired for that result to occur.

Grundy and Bradley are not directly analogous to the intent issue raised in this case. Luton's action in allowing their wall to continue to collapse onto Spencer's property and move into her land is not like the action of the sea independently spraying itself onto someone's land. Nor does the issue here concern the relevance of desire for the offending matter to arrive on another's property, as it did in Bradley. Neither Grundy nor Bradley stand for the proposition that an omission cannot satisfy the intent element; the trial court's legal conclusion otherwise is erroneous.

To the contrary, Bradley's treatment of the intent element of intentional trespass illuminates the Spencer trial court's error. Bradley reminds us that an omission, a failure to remove an offending substance, can satisfy the element of an intentional act in trespass. In Bradley, our Supreme Court reiterated:

The Restatement (Second) of Torts § 158 (1965) states:

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

- (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
- (b) remains on the land, or
- (c) fails to remove from the land a thing which he is under a duty to remove.

104 Wn.2d at 681-82. [Emphasis added.] Here, Luton's wilful failure to remove the offending portions of the rockery and take care that rocks did not continue to spill onto Spencer's land constitute an intentional failure to "remove from the land a thing he is under a duty to remove." Luton was under a duty to remove it because it was encroaching onto Spencer's land and she had asked him to remove it. Luton's decision to ignore his duty satisfies the intentional act element of intentional trespass.

**ii. The prior owner's intentional act -- placement of the amateur retaining wall and fill dirt -- is attributable to Luton.**

Successive owner liability in trespass is not statutorily based, as it is in nuisance, but instead based in case law. Washington courts have repeatedly recognized that successive owners are responsible for prior owners' intentional acts.

In Woldson v. Woodhead, 159 Wash.2d 215, 149 P.3d 361 (2006), our Supreme Court was perfectly willing to hold a successive property owner liable for damaging effects of a sliding rockery. Woldson is strikingly similar to Spencer's situation. Woldson and Woodhead were neighbors who owned homes separated by a basalt rubble rockery wall built almost a hundred years ago. Id. at 216-17. The rockery was on Woldson's property. Id. at 217. As the Supreme Court described it,

During the 1960s, fill dirt was used to artificially raise the level of Woodhead's property. The rubble masonry wall became a retaining wall for the extra dirt on Woodhead's land, a use not contemplated by its original design. Woodhead was not himself the cause of the wall's conversion; this was done by prior owners of the land who later built a carport next to the wall. Subsequent owners built a garage using the carport as a base, increasing the pressure exerted against the wall. The Woldson family purchased their home in 1943 ... Woodhead purchased his home in 1986. Over time, Woldson's basalt wall crumbled and cracked due to lateral earth pressure exerted against the wall by Woodhead's dirt. As the fill dirt stressed the wall, it seems it also strained the harmony between the neighbors.

Id. Among other causes of action, Woldson sued for continuing intentional trespass. Id. Our Supreme Court held that Woldson could recover damages from three years before filing until the trespass is abated or, if not abated, until the time of trial. Id. at 223.

In terms of successive owner liability, this case is virtually identical to the situation Spencer presents. A rockery ran the length of the

property between the neighbors, as in Spencer's case. It was built before either party owned their property, as here. The prior owners of defendant's property used fill dirt to raise the level of their property, as did prior owners of Luton's property. A load on the rockery was introduced, as occurred here, and the rockery "became a retaining wall for the extra dirt ... a use not contemplated by its original design" just as happened here. When the Woldson rockery failed, the Supreme Court did not hesitate to hold the current defendant responsible as a successive owner for the intentional acts of the prior owner. By concluding that the Lutons are not liable for the intentional act of the prior owners, the trial court ruled contrary to Woldson.

In Wallace v. Lewis County, 134 Wash.App. 1, 137 P.3d 101 (2006), the Court of Appeals held that even though a large pile of tires had been placed on the property by a previous owner, the defendant could prevail on intentional trespass against the current owner if he were able to substantiate claims that rodents and mosquitoes from the tire pile had been causing ongoing harm to his properties. 134 Wash. App. at 15. Successive owner liability was not a bar to recovery.

Holding successive property owners responsible for prior owners' damaging intentional acts is good policy. If it were otherwise, owners and developers could easily trespass on their neighbor's property, then deprive

the neighbor's right of remedy by quickly selling the property on to a new owner. Prevention of this sort of mischief is one of the aims of Form 17 (RCW 64.06.020). The trial court erred in concluding that the prior owner's intentional act is not attributable to Luton.

**5. THE TRIAL COURT ERRED IN CONCLUDING THAT LUTON DID NOT BREACH ANY DUTY TO MAINTAIN THE ROCKERY**

**a. Standard of review is mixed *de novo* and substantial evidence standard.** To the extent that the trial court ruled that Lutons owed no duty to Spencer relating to the prior owners' intentional act of loading fill dirt and installing a retaining wall above the rockery, review is *de novo*. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wash.2d 873, 880, 73 P.3d 369 (2003). Review of the trial court's findings as to whether Luton's specific actions fulfilled the duty owed to Spencer to remove the trespassing portions of rockery, and all other factual findings, are reviewed under the substantial evidence standard. Pardee v. Jolly, 163 Wn.2d 558, 566, 182 P.3d 967 (2008).

**b. Luton had a duty to remove the encroaching portions of the rockery from Spencer's property, and take steps to ensure that rocks would no longer fall onto her property.** Luton was on notice that the rockery was trespassing and creating a nuisance. In Bradley, our Supreme Court reiterated that for intentional trespass, "one is

subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally . . . (c) fails to remove from the land a thing which he is under a duty to remove." 104 Wn.2d at 681-82. Because Luton is responsible for the load placed on the rockery by the previous owner, Luton is responsible for remedying the problem that load created; this means Luton has a duty to move the offending portions of rockery and rebuild or repair it such that no further rocks fall on Spencer's property.

He has failed in this duty because as the photographs demonstrate, significant portions of the rockery encroach on Spencer's property, and many sizable rocks have fallen out of it onto her yard. This is the state of the rockery after Luton's latest repair, the 2010 repair by Creative Brothers. Creative Brothers did not move the rockery in any way, and after their repair, at least three more rocks fell out of the rockery. To the extent that the trial court ruled that Luton did not have a duty to remove the encroaching portion of the rockery, that ruling is erroneous and should be reversed.

The trial court incorrectly found that having the rockery evaluated by geotech expert Batterman and having the firm Creative Brothers perform the work recommended by Batterman satisfied any duty Luton may have had to Spencer. These efforts did not suffice because Luton did

not provide Batterman with any of the information indicating that the rockery had moved since 1998. As a result, the quality of Batterman's recommendation was critically undermined by the very limited scope of information provided by Luton. Luton's failure to provide his consultant with any evidence that the rockery had moved is a key component of his breach of duty to maintain the rockery. Accordingly, the trial court's conclusion that Luton did not breach his duty to maintain the rockery is erroneous and should be reversed.

**7. THE TRIAL COURT ERRED IN CONCLUDING THAT WHEN SPENCER RENTED OUT HER HOME, SHE DEPRIVED HERSELF OF THE ABILITY TO RECOVER FOR NUISANCE**

**a. Standard of review is *de novo*.** While the trial court characterized this as Finding Of Fact 13, it is a legal conclusion regarding the ability of any landlord to recover for nuisance. This court reviews *de novo* issues of law and a trial court's conclusions of law. Sunnyside, 149 Wash.2d at 880.

**b. There is no authority for the court's theory of nuisance recovery.** The trial court's Finding of Fact 13 states that because Spencer has not personally lived at her property since 1996, any issues associated with rocks falling onto the property have not interfered with her enjoyment or use of her property or caused her to be insecure in

the use of her property. In other words, because she is a landlord, she has lost the right to recover in nuisance.

Although characterized as a finding, this is a legal conclusion, albeit a novel and erroneous one. There is no basis for the court's imposition of a new threshold requirement for recovery in nuisance action, i.e., that the landowner must personally occupy the property for any percentage of time. While a scattering of cases across the nation have held that in some circumstances both a property owner and a tenant may have standing to sue a third party for nuisance, there is no authority for the proposition that renting a property to another summarily deprives the property owner of the ability to recover for nuisance.

Such a result would be absurd. A tenant does not have the same incentive as a landlord to defend a landlord's property interests, and is not obligated to do so. If a tenant's use, enjoyment, or security is impaired, the tenant's right of redress generally lies with the landlord by way of reduced rent or other compensations. The trial court's conclusion that Spencer's use, enjoyment and security in her property was *per se* unimpaired because she did not personally occupy the property is erroneous and should be reversed.

**8. TRIAL COURT ERRED IN CONCLUDING THAT THE ROCKERY DID NOT CONSTITUTE A NUISANCE AND THAT THERE HAD BEEN NO TRESPASS, NEGLIGENT OR INTENTIONAL, BY LUTON**

**a. The rockery is a nuisance.** Washington defines

“nuisance” in RCW 7.48.010, which provides in relevant part:

[W]hatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.

In Bradley, our Supreme Court noted that the line between trespass and nuisance has grown increasingly blurred in recent years. 104 Wn.2d at 684-85. In 1998, our Supreme Court summarized nuisance as "an unreasonable interference with another's use and enjoyment of property." Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 592, 964 P.2d 1173 (1998).

Here, Luton unreasonably interfered with Spencer's use and enjoyment of her property in multiple ways. First, rocks fall from Luton's rockery onto her property and have done so since the 1998 modification. As shown in the photographs, these are not pebbles; they are of a significant size and would harm a person if the rock fell while a person was using that part of Spencer's yard. Additionally, Luton stipulated that the rockery has taken 220 feet of Spencer's property.

A second form of interference with Spencer's property is Luton's claim at trial that Spencer's excavation destabilized his rockery. Spencer had the right to excavate her property. When she did, Luton argued to the court that she should not have excavated her property as allowed by law because it destabilized his rockery. If it destabilized his rockery, it was only because his rockery was already unstable and had moved onto Spencer's property. In this way, according to Luton's argument and the trial court's finding, the encroaching rockery thus limited Spencer's use of her property to two choices; either not excavating part of her property because it will destabilize the rockery, or excavating the property, destabilizing it, and suffering the consequences of falling rocks and further movement of the rockery. For this reason, if the trial court's finding that her excavation undermined the rockery is correct, the negative consequence to Spencer's lawful use of her property is a nuisance.

**b. Luton committed intentional trespass.** To establish intentional trespass, a plaintiff must show (1) invasion of property affecting an interest in exclusive possession; (2) an intentional act; (3) reasonable foreseeability the act would disturb the plaintiff's possessory interest; and (4) actual and substantial damages. Bradley, 104 Wn.2d at 695. Here, (1) the rockery and its falling rocks have invaded Spencer's property such that she does not exclusively possess a portion of it. Before

trial, Luton stipulated that 220 feet of her property was taken. (2) Luton committed the intentional act of the prior owner in placing a load on the rockery and an amateur retaining wall, as well as failing to remove the encroaching portions of the rockery and preventing rocks from falling on Spencer's property. (3) Luton was on notice that there was a problem because of Spencer's 1998 and 2005 letters to the owner informing him of the problem, as well as the 2008 and subsequent communications with Spencer and Costello. He had the survey and could see the property line, how much of the rockery is over it, and the rocks that had fallen onto Spencer's property. (4) Spencer has had the value of 220 feet of property taken, per the parties' stipulation, plus damages caused by falling rocks. Spencer established intentional trespass.

**c. Luton committed negligent trespass.** When trespass is committed negligently, the elements of negligence also must be proved. Gaines v. Pierce County, 66 Wn. App. 715, 719, 834 P.2d 631 (1992). The elements of negligence are duty, breach, causation and damages. Id. at 720. Here, the trial court recognized that Luton had a duty to maintain his rockery. He breached it because he allowed the rockery to encroach on Spencer's property and allowed rocks to fall into her yard. He caused this to happen, it was not caused by the ocean or wild animals or an act of God. Spencer's damages are limited use of Spencer's property due to the

loss of 220 feet and falling rocks, and, if this court accepts Finding of Fact No. 6, negative consequences to her excavation of her property. Spencer proved negligent trespass.

The trial court erred in concluding that the rockery did not constitute a nuisance and that Spencer had not proved either nuisance or negligent or intentional trespass. This Court should reverse.

**9. SPENCER IS ENTITLED TO FEES AND COSTS AT TRIAL AND ON APPEAL IF SHE PREVAILS**

Pursuant to RAP 18.1, a party may recover attorney fees and costs at trial and on appeal when granted by applicable law. Here, RCW 4.24.630 permits recovery for all attorney's fees, costs, and investigation expenses, including expert and consulting fees, at trial and on appeal. Under RAP 14.2, this Court should award these costs and fees if Spencer is the prevailing party in this action.

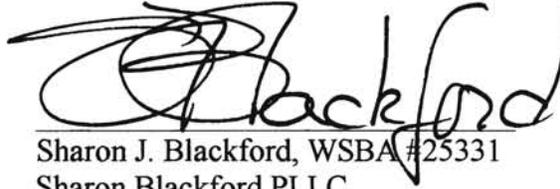
**F. CONCLUSION**

The trial court erred in concluding that Spencer did not prove either nuisance or intentional or negligent trespass. Further, the factual findings supporting these conclusions were entered in the absence of substantial evidence. Spencer respectfully requests this court reverse the trial court's decision and grant her attorney's fees at trial and on appeal. If

this court remands for a new trial, Spencer respectfully requests a new judge be assigned.

DATED this 10<sup>th</sup> day of April, 2013.

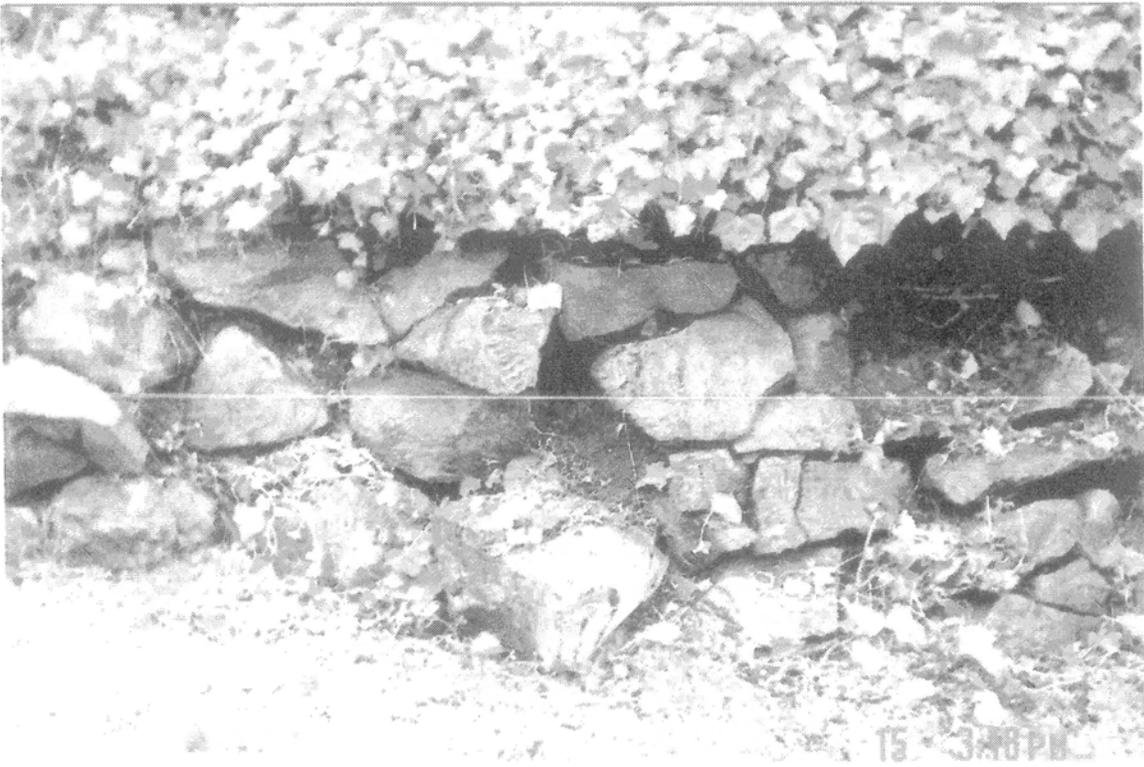
Respectfully submitted:

A handwritten signature in black ink, appearing to read "S. Blackford". The signature is stylized with a large, sweeping initial "S" that loops around the first part of the name.

Sharon J. Blackford, WSBA #25331  
Sharon Blackford PLLC  
Attorney for Appellant Zoya Spencer

# APPENDIX A

**SHARON BLACKFORD PLLC**  
1100 Dexter Ave N. Suite 100  
Seattle, WA 98109/(206) 459-0441



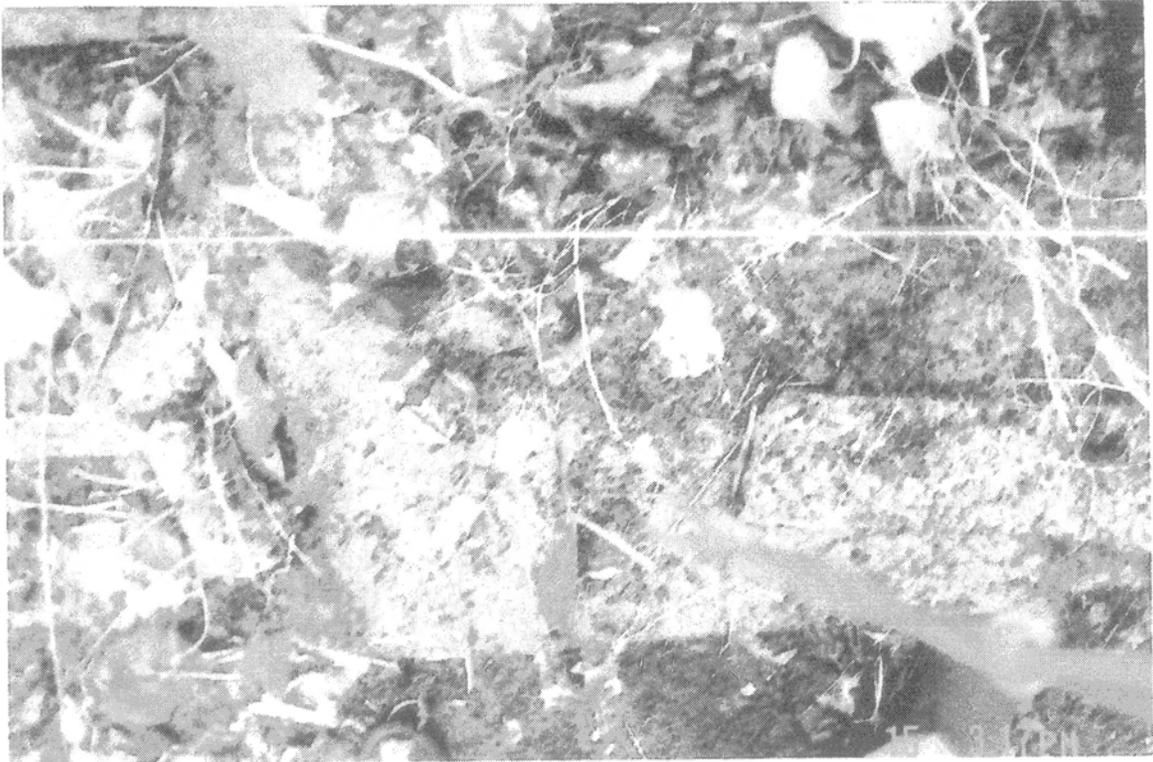
22-E



22-F



22-J

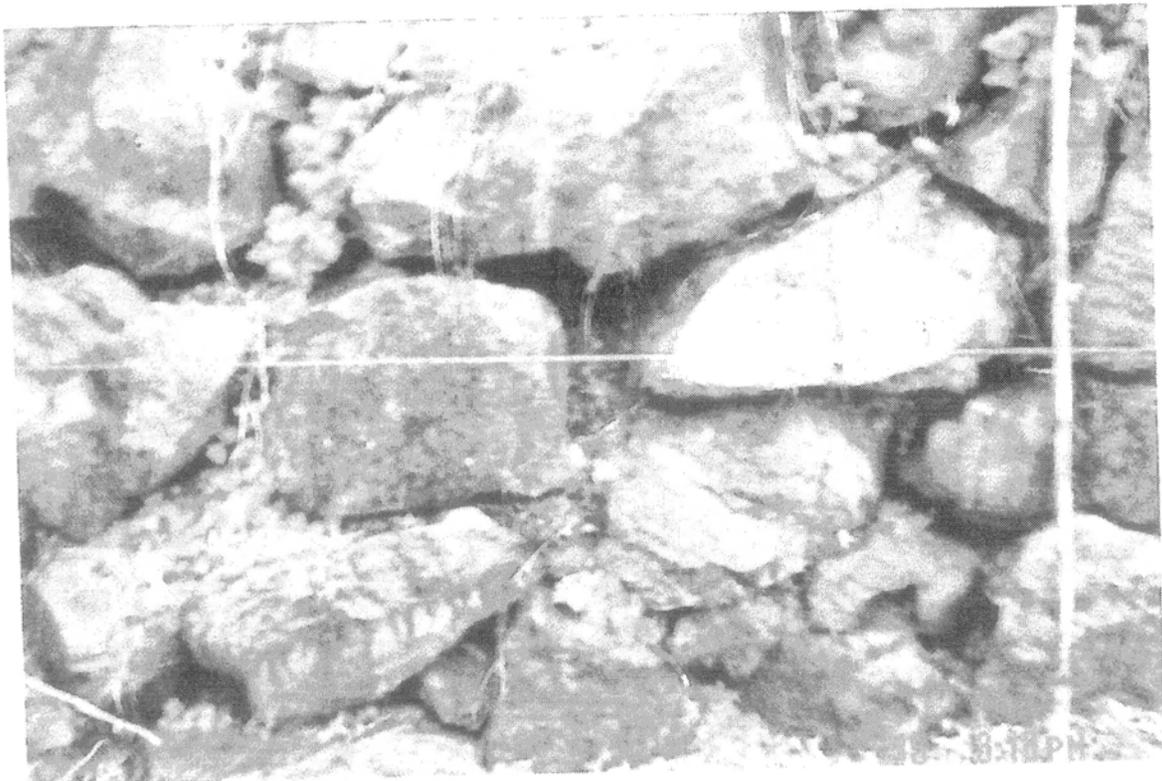


22-L



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22-D

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# APPENDIX B

**SHARON BLACKFORD PLLC**  
1100 Dexter Ave N. Suite 100  
Seattle, WA 98109/(206) 459-0441

12-D

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**ORIGINAL**

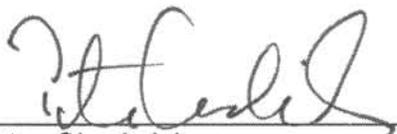
**CERTIFICATION OF SERVICE**

I, Peter Chadwick, certify that on the 1<sup>st</sup> day of April, 2013, I caused a true and correct copy of **Opening Brief Of Appellant** to be served on:

Thomas L. Schwanz  
WIECK SCHWANZ, PLLC  
400 112<sup>th</sup> Avenue NE, Suite 340  
Bellevue, WA 98004  
425.454-5544

VIA FIRST CLASS MAIL, POSTAGE PREPAID

SIGNED in Seattle, Washington, this 1 day of April, 2013.

  
\_\_\_\_\_  
Peter Chadwick

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2013 APR -1 PM 4:45