

69428-6

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No. 69428-6-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ZOYA SPENCER,
a single woman,

Appellant,

vs.

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

Respondents.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

BRIEF OF RESPONDENTS

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ORIGINAL

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I. INTRODUCTION

The Lutons own property in West Seattle located at 7135 44th Avenue S.W., Seattle, Washington. They purchased this property in May of 2005. The appellant, Zoya Spencer, owns the property directly to the west of the Luton property. Her property is located at 7130 Woodside Place S.W. in Seattle, Washington. The Luton property is higher in elevation than the Spencer property and the Luton house is built on a cut slope. Dividing the two properties is a rockery which is located almost entirely on the Luton property. This rockery is approximately 30 years old and has been, for the most part, stable over the past 30 years.

Due, in part, to dissatisfaction over the appearance of the rockery Spencer filed a lawsuit against the Lutons on February 2, 2010. In her lawsuit she alleged trespass and nuisance. The case proceeded to arbitration and, in response to an arbitrator's award of \$1,200, Spencer requested a trial de novo. At trial, King County Superior Court Judge Patrick Oishi found in favor of the Lutons on both of Spencer's claims and entered judgment in favor of the Lutons in the amount of \$14,081.25 due to Spencer's failure to improve her position following her request for a trial de novo. Spencer now appeals.

In her opening brief, Spencer asserts the majority of the trial court's findings of fact were not supported by substantial evidence. In

making this assertion, she ignores the large body of evidence supporting the trial court's findings of fact and conclusions of law and also erroneously alleges the parties stipulated the rockery at issue had encroached 220 feet onto the Spencer property. As will be seen, there is substantial evidence supporting all of the trial court's findings and this Court should affirm the trial court's decision in this matter.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court err in finding there was “[c]ompetent evidence establish[ing] that the rockery is situated upon the Luton property” (Finding of Fact No. 1) when there was substantial evidence introduced by the Lutons that all of the rockery, except a very small portion of the middle of the rockery, was completely on their property?

Did the trial court err in finding that “[t]he rockery is in reasonably good condition and shows no evidence of past lateral or rotational movement” (Finding of Fact No. 2) when Jamey Battermann, Brad Biggerstaff and Robert Luton all testified there was no evidence of past lateral or rotational movement of the rockery?

Did the trial court err in finding that the rockery was an erosion control rockery rather than a structural retaining wall that was not affected by placement of railroad timbers and additional soil (Finding of Fact No. 3) when Jamey Battermann, a qualified geotechnical engineer, testified the

rockery was an erosion control rockery that did not provide any structural support for the cut slope behind it?

Did the trial court err in finding that the “planter container . . . abutted the rockery” and that “[p]art of the toe of the rockery in the northeast corner was removed during excavation of the backyard of the new Spencer house” when there was testimony from Jamey Battermann, Enzo Modella, Eric Robison and Robert Luton supporting this finding of fact?

Did the trial court err in finding that the removal of the northeastern toe of the rockery likely weakened the support for the rockery at the location of the removal of the toe likely resulting in loss of support for the rockery (Finding of Fact No. 6) when Jamey Battermann testified that is what occurred and when Enzo Modella testified his crew placed additional rocks at this location to shore up the support for the rockery?

Did the trial court err in finding the removal of the northeastern toe of the rockery likely resulted in rocks in the rockery becoming displaced (Finding of Fact No. 6) when the testimony from Robert Luton establishes there were no complaints made to him regarding the condition of the rockery nor did he notice any rocks out of the rockery until after the removal of the northeastern toe of the rockery?

Did the trial court err in finding that “due to a complaint the Lutons filed with the City of Seattle during the construction of the new residence at 7130 Woodside Place S.W. [Costello] would make sure the Lutons replaced the rockery” (Finding of Fact No. 8) when there was testimony from Luton indicating that was exactly what Costello said to him?

Did the trial court err in finding the opinion of Jamey Battermann, a licensed geotechnical engineer, that the rockery was designed to function as an erosion control rockery and that other than the necessity of replacing some displaced rocks and replacing the toe support at the north end of the rockery, the rockery was structurally sound was credible (Finding of Fact No. 9) when that was exactly what Battermann testified to?

Did the trial court err in finding that “the rockery was inspected by City of Seattle Department of Planning and Development inspector Dan Richardson” and that the “rockery passed the inspection of Mr. Richardson on February 17, 2011,” (Finding of Fact No. 11) when exhibit 11 specifically stated the rockery was inspected and passed on February 17, 2011?

Did the trial court err when it found that “Dan Richardson inspected and passed the rockery” (Finding of Fact No. 12) when Exhibit

11 specifically established Dan Richardson inspected and passed the rockery?

Did the trial court err when it found the Lutons did not act intentionally by trespassing onto the Spencer property and that the Lutons did not omit to perform any duty owed to Spencer in regard to the rockery (Finding of Fact No. 14) when substantial evidence established as soon as they were made aware of issues with the rockery they hired a competent geotechnical engineer to assess the structural soundness of the rockery, they hired a qualified landscaping firm to perform the recommended repairs to the rockery and the qualified landscaping firm repaired the rockery?

Did the trial court err in finding 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” (Finding of Fact No. 15) when that was precisely what Jamey Battermann, a qualified geotechnical engineer, testified to?

Did the trial court err when it found that “an occasional rock has fallen from the rockery but that these events have been rare” and that “at the time of trial there was one rock from the rockery that was out of place”

when all of the competent evidence introduced by both Spencer and the Lutons established this was true?

Did the trial court err when it concluded “the rockery in question is in generally good condition and is structurally sound and therefore conclude[d] as a matter of law it [did] not constitute a nuisance as defined by RCW 7.48.010 and RCW 7.48.120” (Conclusion of Law No. 2) when there was substantial evidence to support this Conclusion of Law?

Did the trial court err when it concluded that “as a matter of law the defendants did not breach their duty to the plaintiff to maintain the rockery” (Conclusion of Law No. 3) when the evidence showed as soon as the Lutons were made aware of any issues with the rockery they hired a qualified geotechnical engineer to evaluate the structural integrity of the rockery whose recommendations they closely followed to ensure the structural integrity of the rockery?

Did the trial court err when it concluded “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” and further found in favor of the defendants and dismissed the matter with prejudice (Conclusion of Law No. 4) when there was substantial evidence supporting each of these conclusions of law?

Did the trial court err when it determined that “since Ms. Spencer ha[d] not lived a 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” (Finding of Fact No. 13) when Spencer’s own testimony supported this finding of fact?

Did the trial court err in dismissing Spencer’s claim for intentional trespass at the close of her case in chief when there was no evidence supporting a claim for intentional trespass and when Spencer failed to seek review of this ruling in her Notice of Appeal?

Did the trial court err in denying Spencer’s motion to reconsider when there was no evidence of error committed by the trial court?

If the Lutons prevail in responding to Spencer’s appeal, are they entitled to their reasonable attorney fees and costs pursuant to MAR 7.3?

III. STATEMENT OF THE CASE

1. **Procedural History.** Appellant Spencer filed a complaint for nuisance and trespass against defendants Luton on February 2, 2010. CP 1-4. In her complaint she alleged claims for common law trespass and common law and statutory nuisance. CP 3-4. She did not allege any claims for statutory trespass pursuant to RCW 4.24.630. CP 1-4.

Spencer's complaint was predicated on concerns she had about the rockery that was situated on the Luton property. CP 2. She alleged rocks, rock fragments, soil and debris from the rockery dislodged from the rockery and fell onto her property. CP 2. She did not allege the rockery itself was migrating laterally onto her property. CP 2. The Lutons denied Spencer's allegations. CP 5-6.

The parties stipulated to removing the case from the trial calendar and agreed to place the case in mandatory arbitration. CP 13-14. The case was heard in arbitration and on December 8, 2011, an arbitration award in favor of Spencer was entered in the amount of \$1,200.00. CP 171. Not satisfied with this award, Spencer requested a trial de novo. CP 15. This case proceeded to trial on August 23, 2012, and closing arguments were presented to the trial court on August 31, 2012. CP 120. On September 10, 2012, the trial court entered findings of fact and conclusions of law and found in favor of the Lutons and dismissed the Spencer complaint with prejudice. CP 120-125. Spencer filed a motion for reconsideration of the trial court's Findings of Fact and Conclusions of Law which was denied on October 1, 2012. CP 143-144. She then filed a notice of appeal on October 9, 2012, requesting this Court to review the trial court's Findings of Fact and Conclusions of Law along with the trial court's denial of Spencer's Motion for Reconsideration. CP 145-154. She did not

appeal the trial court's dismissal of any allegations of intentional trespass on the part of the Lutons. CP 145-154. Judgment was entered on October 11, 2012, CP 157-159, and an amended judgment was entered on October 31, 2012. CP 203-205. An order granting the Luton's motion to amend the verbatim report of proceedings was granted on May 30, 2013. CP 206-207.

2. Relevant Facts

The rockery at issue runs the length of the Luton property and is approximately 50 to 55 feet in length. 8/29/12 RP 100. The height of the rockery is between 3 and ½ and 5 feet. 8/29/12 RP 99-100. The rockery is estimated to be approximately 30 years old. 8/28/12 RP 150. The rockery was built as an erosion control rockery and was not designed as a weight bearing rockery nor does it currently act as a weight bearing rockery. 8/28/12 RP 150, 165, 172. The Luton property, located at 7135 44th Avenue S.W. in Seattle, Washington, sits higher than the Spencer property located at 7130 Woodside Place S.W. CP 2.

In 1997, Eric Robison and his partner purchased the house at 7135 44th Avenue S.W. While they owned this property they undertook to level the backyard in 1998. This project involved removal of vegetation from the rockery, the placement of railroad ties back from the edge of the rockery and placement of fill dirt behind the railroad ties. When

confronted by James Costello, a resident of 7130 Woodside Place S.W., regarding the work he was doing, Robison and his partner commissioned a survey of their property. 8/29/12 RP 50, 54, 59, CP Exhibit 12B.¹ This survey demonstrated all but a very small portion of the center of the rockery was on their property. 8/29/12 RP 100, CP Exhibit 12B.

Robison utilized approximately 6 railroad ties at the north end of the rockery with the use of railroad ties tapering down to just one railroad tie at the south end of the property. 8/29/12 RP 54-58. He then filled behind the railroad ties with fill dirt. 8/29/12 RP 54. Following placement of the railroad ties and the fill dirt Robison noticed no change in the structural integrity of the rockery. 8/29/12 RP 60-61. Contrary to Spencer and Costello's claims, he denied there was any collapse of the rockery while he lived at 7135 44th Avenue S.W. after he had added the railroad ties and fill dirt. 8/29/12 RP 60-63. Robison lived at 7135 44th Avenue until 2005. 8/29/12 RP 60-61.

In early spring of 2005, Robison and his partner put the 7135 44th Avenue house up for sale. 8/29/12 RP 62-63. Robison is and was a realtor and is very familiar with the importance of Form 17 disclosures.

¹ The Lutons filed their designation of exhibits with the trial court and this Court on June 13, 2013 and the exhibits have not yet been provided specific clerk's papers numbers. Therefore, the exhibits will be referred to by the number utilized at the time of trial. Counsel for the Lutons apologizes for this error.

8/29/12 RP 67. Robison had periodically checked on the integrity of the rockery and, having found no issues with the integrity of the rockery² he did not list any problems with the rockery on the Form 17 disclosure as he believed there were none. 8/29/12 RP 69.

In 2005, the Lutons purchased the 7135 44th Avenue S.W. property. 8/29/12 RP97. Robert Luton looked at the rockery at the time of their purchase of the home and found no issues with it. 8/29/12 RP 99. From the time they purchased the house until 2009, neither Costello nor Spencer contacted the Lutons about any issues associated with the rockery. It was not until the Luton's put the 7135 44th Avenue S.W. house up for sale in August of 2009 that any issues associated with the rockery were brought to the Lutons' attention. 8/29/12 RP 106.

Between 2005 and 2009, Spencer decided to destroy the existing home and build a new home for investment purposes. 8/23/12 RP 39. The existing home was demolished in 2007 and when it was demolished the concrete walkway and concrete planter box at the back of the property were also demolished. 8/29/12 RP 21. Both the walkway and the concrete planter box abutted the rockery. 8/29/12 RP 20-21. When the planter box and the concrete walkway were removed, the soil in the north

² He had found a couple of smali rocks that had fallen out over the years and he had replaced them back into the rockery. 8/29/12 RP 61.

corner of the rockery was also removed, resulting in a lack of support for the toe of the rockery. 8/28/12 RP 153, 156. It was only after the removal of the concrete walkway, concrete planter box and soil in the northern corner of the rockery that any issues regarding the rockery and/or its stability began. 8/29/12 RP 20.

In 2009, Costello contacted Robert Luton about the rockery and alleged there were problems with the rockery. 8/29/12 RP 106. He also made the statement that since the Lutons had complained about the height of the house at 7130 Woodside Place S.W., he would be sure they would have to remove the rockery. 8/29/12 RP 133-134. This was the first notice the Luton's had there were any issues with the rockery. 8/29/12 RP 107. In response to this complaint, they retained Jamey Battermann, a qualified geotechnical engineer, to assess the rockery. 8/29/12 RP 123. It was Battermann's opinion the rockery was an erosion control rockery and that it did not provide any type of structural support. 8/28/12 RP 164-165. He further believed the toe support at the north end of the rockery had been removed. 8/28/12 RP 155-156. He recommended reinstalling the toe support and restacking the rocks that had fallen out. 8/28/12 RP 156. In July of 2010, the Lutons hired Creative Bros. Landscaping to reinstall the toe support and restack the rocks. 8/29/12 RP 123. This work was supervised by Enzo Morella. 8/28/12 RP 96. Morella described the work

that was done and told the trial court his crew had reinstalled the toe support for the rockery at the north end and that they had also restacked the rocks. 8/28/12 RP 96.

Battermann subsequently returned to the Luton property after the work was done by Creative Bros. Landscaping and it was his opinion the rockery was now stabilized and that it should continue to function properly into the future as an erosion control rockery. 8/28/12 RP 157. He further explained why he felt the rockery was an erosion control rockery rather than a structural rockery and explained the lot where the rockery was located was a cut slope lot. 8/28/12 RP 164-165. This meant the rockery did not provide any support for the land and it was not holding the land back from moving onto the Spencer property. 8/28/12 RP 164-165. He saw no evidence of the rockery overturning, no evidence of lateral movement of the rockery (the creeping Spencer claimed was occurring) and no evidence of hydrostatic pressure behind the rockery. 8/28/12 RP 167, 165, 163. Based on his review of the rockery after the repair work that had been done, it was his opinion the rockery had no issues and was stable. 8/28/12 RP 157.

After the repair work was done by Creative Bros. Landscaping, Costello filed a complaint with the City of Seattle Department of Planning and Development (DPD). 8/28/12 RP 80. Eventually the City sent out an

inspector who found the repair work required a permit and confirmed no permit had been obtained. The Lutons were given a correction notice and were required to obtain a permit. 8/29/12 126-127. Eventually they obtained a permit and the work was inspected and passed by the DPD inspector, Dan Richardson. CP Exh. 11. Dave Cordaro, Dan Richardson's supervisor from DPD, explained that had any of his field inspectors observed any structural defects in the rockery they would not have passed the work and would have required further repairs. 8/27/12 RP 127. He further explained that the fact that Mr. Richardson had passed the rockery meant there were no structural abnormalities to the rockery that caused his department any concerns about the safety and stability of the rockery. 8/27/12 RP 127, 128, 135.

Since the rockery was repaired in July of 2010, only three rocks have become dislodged from the rockery. 8/29/12 RP 125. It appeared to Mr. Battermann these rocks had not become dislodged by natural means. 8/28/12 RP 170-171. In addition, Robert Luton had replaced two of the rocks that had become dislodged and they had not become dislodged again. 8/29/12 RP 125. At the time of trial, only one rock had become dislodged and was on Spencer's property. 8/29/12 RP 125.

Luton testified it was his belief, based on his observation of the rockery, that the only portion of the rockery that was possibly encroaching

on the Spencer property was a very small portion of the middle of the rockery and that this had been the condition of rockery back in 1998 when Robison had commissioned the survey. 8/29/12 RP 100. In addition, during the course of Luton's testimony, photographs of the rockery were admitted that were taken from the motion activated camera Luton installed east of the property line. 8/29/12 RP 135, CP Exhs. 35 A-B. These photographs clearly demonstrate there has been no "creep" of the rockery as alleged by Spencer. CP Exhs 35 A-B. In fact, these photographs demonstrate the continued batter of the rockery, which means the rockery is still sloped toward the Luton property. CP Exhs. 35 A-B. Exhibits 38 A-F also clearly showed the view from the camera installed to the east of the property line and demonstrated there is no "creeping" of the rockery toward the Spencer property. CP Exhs. 38 A-F.

The case was first heard in arbitration and the arbitrator awarded Spencer \$1,200 for nuisance damages. CP 171. She found in favor of the Luton's on Spencer's trespass claim. CP 155-156 (sealed). Spencer requested a trial de novo. CP 15. Contrary to Spencer's claim, there was never a stipulation at the beginning of trial that the rockery had taken approximately 220 feet total of the Spencer property. 8/23/12 RP 32. This issue was resolved by the trial court when it granted the Lutons' Motion to Amend the Verbatim Report of Proceedings and changed the

verbatim report to correctly reflect the statement as “Mr. Schwanz and myself, in agreement with my client, they’ll stipulate to the value **if** 220 feet were taken from my client’s property.” CP 206-207.

Even without this order correcting the verbatim report of the proceedings, there was no stipulation between the parties regarding the rockery encroaching on the Spencer property. Spencer’s reference to this “stipulation” is taken both out of context and misstates the agreement. Earlier in the colloquy before the trial court, the Lutons argued that the plaintiff’s damages expert, Richard Hagar, should be excluded from testifying. 8/23/12 RP 12-33. Eventually the issue boiled down to whether Mr. Hagar would be able to testify to the value of the land **if** Spencer had to build a wall on her property to protect her from the rockery, which would result in her losing approximately 220 square feet of land (according to Mr. Hagar). 8/23/12 RP 26. The stipulation that Spencer’s counsel stated was as to what the value of this amount of land would be if she had to build the wall, not that the Lutons agreed the rockery had encroached 220 feet onto Spencer’s property. 8/23/12 RP 26, 27, 32, 33. There is no mention at any point in time throughout the remainder of the trial (which lasted until August 31, 2012) of any agreement between the parties that the rockery had encroached on 220 feet of the Spencer property. In fact, the opposite is true: this issue was hotly

contested. The rockery is 55 feet in length and no one ever alleged, nor did any evidence submitted by any party establish, that any part of the rockery had encroached by an average of up to **four** feet onto the Spencer property.³ Finally, the trial court had asked Spencer to reduce the agreement as to what Hagar would testify to regarding the value of the land lost should Spencer put up a wall on her property to writing and this was never done. 8/23/12 RP 33.

Judge Oishi dismissed Spencer's claim for intentional trespass when Spencer rested. Spencer never again raised this issue. It was not mentioned in her motion for reconsideration, CP 130-142, nor was it referenced in her Notice of Appeal, CP 145-154.

IV. SUMMARY OF THE ARGUMENT

Spencer claims the vast majority of the trial court's findings of fact and conclusions of law were in error. She claims it was in error because she asserts substantial evidence did not support its findings. She also alleges the trial court incorrectly ruled that a current owner was relieved of the liability for the intentional acts of a prior owner thus barring recovery in trespass for those acts. She also claims the trial court erred in deciding

³ In order for 220 feet of the Spencer property to have been "taken" by the rockery the rockery must have intruded onto the Spencer property by an average of 4 feet (55 times 4 equals 220 square feet). As indicated, not only did Spencer never argue this was the case, but there is clearly no evidentiary support for such a claim.

a landowner could not recover in nuisance if the landowner does not personally occupy the land. She argues these erroneous legal conclusions should be reversed. In large part, she bases these claims on what she alleges was a stipulation that 220 feet of the Spencer property had been taken by the rockery. She requests reversal or, in the alternative, a new trial.

There is no merit to any of Spencer's claimed errors. Initially, her reliance on a claimed stipulation of the parties is erroneous and stems from a misunderstanding of the issue being addressed by the parties and the court at the time of the stipulation.

Secondly, there is substantial evidence supporting the trial court's findings of fact that Spencer fails to acknowledge. In reality, she is simply upset that the trial court did not believe her or her witnesses and instead believed the Lutons and their witnesses. She is dissatisfied with the trial court's findings as to the credibility of the witnesses presented at trial.

Thirdly, the trial court was correct in determining there was no evidence presented by the plaintiff supporting any intentional conduct on the part of the Lutons. Although she would like to bootstrap the actions of an owner prior to the Lutons, the statute of limitations for that trespass claim long since ran and could not have been attributed to the Lutons by the trial court anyway.

Finally, Spencer misunderstands the trial court's findings in regards to whether she proved nuisance. Spencer apparently believes that the trial court held that she could not bring a claim for nuisance because she did not reside at the property at issue. This is untrue. Actually, the trial court found that the rockery at issue was stable, that it was structurally sound, and that the occasionally displaced rocks that came onto the Spencer property did not rise to a sufficient level to establish nuisance. It further found there was no competent evidence of any silting from the rockery had created a nuisance. Finally, the trial court found there was no competent evidence to support a claim the sale of her home had been delayed or impacted in any way by the rockery and therefore there was no evidence supporting her claims the rockery was a nuisance. The fact that she did not live on the property was part of the equation the court utilized to determine whether the rocks established a nuisance, but it was not the sum total of the analysis. For these reasons, the trial court's decision should be affirmed.

V. ARGUMENT

A. SPENCER FAILED TO PRESERVE THE TRIAL COURT'S DISMISSAL OF HER INTENTIONAL TRESPASS CLAIMS FOR APPELLATE REVIEW.

- 1. In order to preserve an issue for appellate review Spencer needed to designate the specific trial court's order in her notice of appeal**

A party must seek review of a court's order before the appellate court will entertain an appeal arising from that order. *Ortblad v. State*, 88 Wn.2d 380, 385, 561 P.2d 201 (1977); *Wagner v. Beech Aircraft Corp.*, 37 Wn. App. 203, 212-13, 680 P.2d 425 (1984); RAP 2.4(a). Specifically, in both Spencer's motion for reconsideration of Judge Oishi's Findings of Fact and Conclusions of Law and in her Notice of Appeal, she failed to mention this ruling as a ruling she was appealing. CP 130-142, 145-154. Spencer failed to preserve for appeal any objection or disagreement she had with Judge Oishi's granting of Lutons' motion to dismiss her claim the Lutons acted intentionally and therefore this Court should decline to review any claimed error regarding the trial court's dismissal of Spencer's claim of intentional trespass by the Lutons.

B. EVEN IF SPENCER PROPERLY PRESERVED FOR APPEAL THE TRIAL COURT'S DISMISSAL OF HER INTENTIONAL TRESPASS CLAIMS THE TRIAL COURT DID NOT ERR IN DISMISSING THESE CLAIMS.

1. **Standard of review is de novo.** The Lutons agree with Spencer that the standard of review for questions of law and conclusions of law are reviewed de novo.

2. **The trial court correctly dismissed Spencer's intentional trespass claim.**

Spencer argues *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 566, 213 P.3d 619 (2009) *review denied* 168 Wn.2d 1007 (2010) does not apply to the facts before this court as it relates only to a “common enemy doctrine” situation. Brief of Appellant 31. She misses the point of *Grundy*. *Grundy* states very clearly “[i]ntentional trespass requires an intentional act. But the defendant need not have intended the trespass; he need only have been substantially certain that the trespass would result from his intentional acts.” *Id.* at 569. In *Grundy*, the court stated the obvious, the Brack’s intentionally raised their bulkhead. Even despite this fact, the court found there was no evidence that the Brack’s knew or should have known raising their bulkhead would result in a trespass on Grundy’s property and affirmed the dismissal of the plaintiff’s claim. Just as the court in *Grundy* held 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 so too the Lutons are not liable as they did nothing to intentionally or wrongfully direct silt or rocks onto Spencer’s property. Plaintiff’s interpretation of this case that it stands for the proposition property owners are not responsible for the action of the sea is erroneous and ignores the clear holding of *Grundy* which requires an intentional act before liability can be imposed. i.e., erection of the sea wall.

This conclusion is consistent with *Wallace v. Lewis County*, 134 Wn. App. 1, 137 P.2d 101 (2006) where the intentional act was disposal of tires on the defendant’s property. It is also consistent with *Bradley v.*

American Smelting and Refining Co., 104 Wn.2d 677, 709 P.2d 782 (1985), where the defendant, a copper smelting company, intentionally allowed arsenic and cadmium to be emitted from the smelter, which ultimately was deposited on the plaintiff's property. The court's analysis centered on the defendant's intentional act of emitting arsenic and cadmium. The court quoted from section 8A of the Restatement (Second) of Torts, concluding "[t]he word 'intent' is used . . . to denote that the **actor** desires to cause consequences of his **act**, or that he believes that the consequences are substantially certain to result from it." (emphasis added). *Bradley*, 104 Wn.2d 682. The court in *Bradley* was faced with determining whether intent required an intent to bring about a harm or to intentionally cause damage. The court held all that was required to find an intentional trespass was that a volitional act had taken place. However, the court still required that a volitional act occur. Nowhere did the court state the failure to act was sufficient to find an intentional trespass.

Spencer cites the court to *Woldson v. Woodhead*, 159 Wn.2d 215, 149 P.3d 361 (2006), for the proposition that the Lutons can be liable for the intentional acts of the prior owners. Specifically, she argues the Lutons are responsible for the prior intentional acts of their predecessor owners according to the holding of *Woldson*. *Woldson* is a statute of limitations case regarding continuing trespass. *Woldson* does not stand for the proposition that an intentional act of a predecessor can create intentional tort responsibility on the part of the current owner. It is not clear whether the plaintiff in *Woldson* was alleging common law negligent

trespass, statutory trespass or intentional trespass⁴, but nowhere in the opinion does the court state the intentional acts of a predecessor owner are imputed to the successive owner. Furthermore, *Woldson* is distinguishable in that Woldson was the owner of the rockery and it was the defendant's successors who allegedly damaged her rockery. Here, the Lutons are the owner of the rockery and it is Spencer's allegation it was their predecessor in ownership who allegedly placed the surcharge onto their own rockery, not the rockery of someone else resulting in damage to someone else's rockery. These are two entirely distinct situations and *Woldson* has no applicability to the issue of whether the trial court was correct in dismissing Spencer's claim for intentional trespass.

Spencer produced no evidence the Lutons took any act at all in entering onto her property, much less an intentional act, other than their act of retaining Creative Bros Landscaping to *fix* the rockery (which clearly caused no damage to Spencer). There is no evidence Spencer can point to indicating any intentional act by the Lutons resulted in any damage to her. The trial court was correct in its application of *Grundy* to the facts of this case and its dismissal of Spencer's claim for intentional trespass should be affirmed.

C. THE TRIAL COURT WAS CORRECT IN CONCLUDING THE LUTONS DID NOT BREACH THEIR DUTY TO SPENCER TO MAINTAIN THE ROCKERY

⁴ Spencer claims Woldson sued for continuing intentional trespass but nowhere in the opinion is this made clear.

1. The standard of review is a substantial evidence standard.

The trial court correctly ruled the Lutons did not breach their duty to Spencer to maintain the rockery. CP 125. Implicit in this finding is a ruling by the trial court that the Lutons had a duty to Spencer to maintain their rockery. Therefore, this court's review is under the substantial evidence standard. Findings of fact are reviewed under a substantial evidence standard, which requires that there be a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). If substantial evidence supports a finding of fact, an appellate court should not substitute its judgment for that of the trial court. *Id.* at 879–80.

There is a presumption in favor of the trial court's findings and the party claiming error has the burden of showing the trial court's findings are not supported by substantial evidence. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990); *Standing Rock Homeowner's Ass'n v. Misich*, 106 Wn. App. 231, 243, 23 P.3d 520 (2001). The appellate court's review is deferential and it must view the evidence and all reasonable inferences in the light most favorable to the prevailing party, in this case, the Luton's. *Korst v. McMahon*, 136 Wn.

App. 202, 206, 148 P.3d 1081 (2006). Where there is substantial evidence the appellate court should not substitute its judgment “for that of the trial court even though the court might have resolved a factual dispute differently.” *Korst*, 136 Wn. App. at 206. As the challenging party, Spencer bears the burden of showing the trial court’s findings were not supported by the record. *Standing Rock Homeowner's Ass'n v. Misich*, 106 Wn. App. 231, 243, 23 P.3d 520 (2001). Furthermore, the issue of credibility is for the trier of fact to determine, in this case, the trial court. This court cannot substitute its judgment as to the credibility of witnesses for that of the trial court in reviewing findings of fact. *Fisher Properties, Inc.* at 369-70; *Miles v. Miles*, 128 Wn. App. 64, 70, 114 P.3d 671 (2005). When experts testify, the trial court is free to reject or accept expert testimony in whole or in part according to its judgment of the testimony’s persuasiveness. *In re Marriage of Pilant*, 42 Wn. App. 173, 179, 709 P.2d 1241 (1985).

2. The trial court was correct in finding the Lutons did not breach their duty to maintain the rockery.

Spencer initially argues that the Lutons are responsible for the load placed on the rockery by the previous owners and, because this load is causing the rockery to encroach on Spencer’s property, they are under a duty to remove the offending load. Brief of Appellant, 37-38. This

argument ignores the findings of the trial court that are supported by substantial evidence. Specifically, the trial court found the rockery was an erosion rockery and not a structural retaining wall. CP 121. The trial court further found the placement of railroad timbers and additional soil by the prior owners did not add an undue or improper weight or surcharge to the rockery. CP 121. The trial court found the toe support of part of the rockery had been removed during the construction of the new Spencer home thus causing some rocks to become dislodged from the rockery. CP 122. Once these dislodged rocks were brought to the Lutons attention, they immediately retained a geotechnical engineer to address Spencer's concerns and then remediated the problem by restoring the removed toe slope and reconstructing the rockery. CP 123. Since that time, only an occasional rock has fallen onto the Spencer property, and these events have been rare. Specifically, at the time of trial of this matter only one rock was on the Spencer property. CP 124. Most importantly, the trial court found there was no evidence of lateral movement of the rockery onto Spencer's property. CP 121. Each of these findings of fact is supported by substantial evidence.

- a. **The trial court's finding of fact that the rockery is on the Lutons property is supported by substantial evidence.**

There was no stipulation between the parties that the rockery encroached on Spencer's property. The passage cited by Spencer in the verbatim report of the proceedings does not support Spencer's claim there was a stipulation. The passage cited was incorrectly transcribed by the court reporter, so the Lutons filed a Motion to Amend the Verbatim Report of Proceedings, which was granted by the trial court. CP 206-207. The trial court agreed with the Lutons that the sentence, as stated by Spencer's counsel was, "they'll stipulate to the value **if** 220 feet were taken from my client's property." CP 206-207. This ruling by the trial court resolves the issue of whether there was a stipulation by the parties that the Luton rockery encroached 220 feet onto the Spencer property.

Regardless, substantial evidence supports there was no stipulation that the rockery had encroached onto the Spencer property. The colloquy between the parties and the court beginning on page 12 of the verbatim report of the proceedings and culminating on page 33 of the verbatim report of proceedings confirms there was no stipulation that the Luton rockery had taken over 220 feet of the Spencer property. 8/23/12 RP 12-33.

The lack of agreement on this issue is illustrated in the arguments of counsel on the record with regard to the Lutons motion to exclude the testimony of Richard Hagar, Spencer's valuation expert. 8/23/12 RP 12-

33, CP 101-102. During the argument, counsel for both parties agreed that Mr. Hagar's valuation analysis was correct. The real area of dispute was whether it was necessary for Spencer to construct a wall on her land to support the rockery, thus resulting in a loss of land to Spencer. This issue was hotly contested, both during argument and throughout the course of the trial.

During argument on whether to grant this motion, counsel for the Lutons told the court, "I don't have a problem if [Hagar] is going to testify that if Ms. Spencer has to build a wall to prevent the rockery from coming onto her property and if the court finds, yes, that's a necessary act the plaintiff needs to take, I don't have a problem if Mr. Hagar testifies to losing that little slice of land . . ." 8/23/12 RP 26. Further, counsel for the Lutons stated "And he's indicated in his report what he thinks that is, and I want to say it's about \$1,500; it may be more, it may be less, but somewhere in that range. I don't have a problem with that testimony." 8/23/12 RP 26. Shortly after these statements, after the trial court ruled Mr. Hagar could not testify regarding diminution of value because the alleged continuing trespass was potentially abatable, the trial court stated it would allow him to testify about how putting up her own wall would affect Spencer's property value. 8/23/12 RP 27. It was only after this colloquy between the trial court and counsel that the agreement was

reached as to Mr. Hagar's testimony regarding the value of the loss of land if Spencer erected a wall to protect her property from the rockery.

As can be seen from both the argument of counsel and the order that was entered by the trial court in regards to the motion in limine, the discussion regarding the 220 feet of land was based on whether Spencer decided to erect a wall on her own property in response to the rockery, which would result in a loss of 220 square feet of her property. The stipulation was that Mr. Hagar would, if called to testify, testify the value of this 220 square feet of property was in the range of \$1,500 to \$1,600 per his land analysis (exhibit 21). 8/23/12 RP 32, CP 102. There was never a stipulation between the parties that the rockery had "taken" 220 feet of the Spencer property.

Not only does the colloquy between the trial court and counsel and the order subsequently entered in response to Lutons motion in limine regarding Hagar support this conclusion but the testimony throughout the trial supports this conclusion. Never again was 220 feet mentioned by any witness, either of the attorneys or the trial court. No argument was made that there was a stipulation by the parties that the rockery had "taken" 220 feet of the Spencer property. Appellate counsel is attempting to lift a poorly phrased statement by Spencer's trial counsel from pages upon pages of argument and testimony to the level of a binding stipulation on

the parties. There simply was and is no stipulation between the parties regarding an encroachment by the Luton rockery of 220 feet onto the Spencer property.

Finally, even assuming the statement was some form of stipulation, the trial court ordered the parties to reduce it to writing which was never done.⁵ In *Owens-Corning Fiberglas Corp v. Department of Labor and Industries*, 25 Wn. App. 658, 660, 612 P.2d 799 (1980), the court affirmed the trial court's holding that no stipulation existed because it had not been reduced to writing and signed by the parties. The court stated "[a] party seeking to establish a stipulation has the burden to see that such document is prepared and filed. In the event it is not, as here, the party may not rely on the alleged stipulation." Furthermore, the statement Spencer is relying on is ambiguous at best and is not agreed to by either the Luton's or their counsel. 8/23/12 RP 32. In *Hogenson v. Service Armament Co.*, 77 Wn.2d 209, 214, 461 P.2d 311 (1969) the court stated "[t]his court has long held that '[a]n admission, by an attorney, to be binding upon his client, must be distinct and formal, and made for the express purpose of dispensing with the formal proof of some fact at the trial.'" *State v.*

⁵ The Lutons maintain there is absolutely no basis to find there was a stipulation that the rockery encroached 220 feet onto the Spencer property. This argument is only being made out of an abundance of caution and should in no way be construed as an admission such a stipulation was even contemplated. Robert Luton's testimony regarding Exhibit 12 and the location of the rockery in relation to what he believed the property line was should make this abundantly clear.

Wheeler, 93 Wash. 538, 161 P.2. 373 (1916), see also *Dodge v. Stencil*, 48 Wn.2d 619, 296 P.2d 312 (1956). The statement by trial counsel for Spencer was ambiguous at best and, if taken in the context of the preceding discussion and subsequent trial, was clearly only correct as to the *value* of 220 feet of Spencer's property and nothing more. Reliance on this so-called stipulation allegedly establishing a trespass is clearly misplaced.

b. The trial court's finding of fact that the rockery is an erosion control rockery and not a structural retaining wall is supported by substantial evidence.

Jamey Battermann is a geotechnical engineer whom the Lutons hired to evaluate the rockery once it was brought to their attention there were issues with the rockery. Battermann went to the property and evaluated the rockery. It was Battermann's opinion the rockery was an erosion control rockery and that it did not provide any type of structural support. 8/28/12 RP 164-165. He further explained why he felt the rockery was an erosion control rockery rather than a structural rockery and explained the lot where the rockery was located was a cut slope lot. This meant the rockery did not provide any support for the land and it was not holding the land back from moving onto the Spencer property. 8/28/12 RP 164-165.

- c. The trial court's finding that the placement of railroad timbers and additional soil by the prior owners did not add an undue or improper weight or surcharge to the rockery is supported by substantial evidence.**

Battermann also testified the addition of the wood crib wall constructed with the railroad ties and filled with fill dirt on the Luton property added a surcharge to the cut slope. However, it did not add a surcharge to or affect the stability of the rockery itself. 8/28/12 RP 166. He further explained that had the crib wall added a surcharge to the rockery, the rockery would have undergone a lateral translation, it would have begun overturning the tops of the rocks or it would have created bulges in the rockery to show some kind of movement. 8/28/12 RP 167. He further testified he saw no evidence of overturning or bulging of the Luton rockery. 8/28/12 RP 167.

- d. The trial court's finding that the toe support of part of the rockery had been removed during the construction of the new Spencer home, thus causing some rocks to become dislodged from the rockery, is supported by substantial evidence.**

Between 2005 and 2009, Spencer decided to destroy the existing home and build a new home for investment purposes. 8/23/12 RP 39. The existing home was demolished in 2007 and when it was demolished the concrete walkway and concrete planter box at the back of the property

were also demolished. 8/29/12 RP 21. Both the walkway and the concrete planter box abutted the rockery. 8/29/12 RP 20-21. When the planter box and the concrete walkway were removed, the soil in the north corner of the rockery was also removed, resulting in a lack of support for the toe of the rockery. 8/28/12 RP 153, 156, CP Exhs. 36 A-C. It was only after the removal of the concrete walkway, concrete planter box, and soil in the northern corner of the rockery that any issues regarding the rockery and/or its stability began. 8/29/12 RP 20, CP Exhs. 32 A-F.

When Battermann, the geotechnical engineer hired by the Lutons, looked at the rockery for the first time, he noted the toe support at the north end of the rockery had been removed. 8/28/12 RP 155-156, CP Exhs. 36 A-C. He recommended reinstalling the toe support and restacking the rocks that had fallen out. 8/28/12 RP 156. In July of 2010, the Lutons hired Creative Bros. Landscaping to reinstall the toe support and restack the rocks. This work was supervised by Enzo Morella. Morella described the work that was done and told the court his crew had reinstalled the toe support for the rockery at the north end of the rockery and that they had also restacked the rocks. 8/28/12 RP 96. Once this work was done, Battermann's opinion was the rockery was once again stable. 8/28/12 RP 157.

- e. **The trial court's finding that the Lutons immediately retained a geotechnical engineer to address Spencer's concerns and then remediated the problem by restoring the removed toe slope and reconstructing the rockery is supported by substantial evidence.**

In 2009, Costello, who is not the owner of the Spencer property, contacted Luton about the rockery and alleged there were problems with the rockery. He also made the statement that since the Lutons had complained about the height of the house at 7130 Woodside Place S.W., he would be sure they would have to remove the rockery. 8/29/12 RP 133-134. This was the first notice the Lutons had there were any issues with the rockery. In response to this complaint, they retained Jamey Battermann, a qualified geotechnical engineer, to assess the rockery. As previously stated, Battermann recommended reinstalling the toe support and restacking the rocks that had fallen out. 8/28/12 RP 156. In July of 2010, Creative Bros. Landscaping reinstalled the toe support and restacked the rocks. The cost of this work was \$3,586.13. Exh. 30.

- f. **The trial court's finding that since the rockery was repaired only an occasional rock has fallen onto the Spencer property and its finding that at the time of trial only one rock was on the Spencer property is supported by substantial evidence.**

Since Creative Bros. Landscaping repaired the rockery, only three rocks have become dislodged. 8/29/12 RP 125. It appeared to Mr.

Battermann these rocks had not become dislodged by natural means. 8/28/12 RP 170-171. In addition, Luton had replaced two of the rocks that had become dislodged and they had not become dislodged again. 8/29/12 RP 125. At the time of trial, only one rock had become dislodged and was on Spencer's property. 8/29/12 RP 125. The remainder of the rockery was stable.

Luton testified that there was only one rock from the rockery that encroached from his property onto the Spencer property. This rock was depicted in Exhibits 19 A and B. CP Exhs. 19 A-B. This rock had been in this position since May of 2011. 8/29/12 RP 103. From May of 2011 until the time of trial, no other rocks encroached onto the Spencer property from the Luton Rockery. 8/29/12 RP 104. From the time the Lutons purchased the house at 7135 44th Avenue S.W. in 2005 up until they put the house up for sale in August of 2009, periodic inspections by Luton indicated no rocks from the rockery were on the Spencer property. 8/29/12 RP 104-106.

Furthermore, a video of the rockery taken by Luton on October 11, 2009, was entered into evidence as Exhibit 34, and showed no displaced rocks. 8/29/12 RP 114. CP Ex. 34. Luton testified the video was a view from north to south along his property line in order to show the rockery and where it currently sat on the property line. He testified when the

video was taken there were no rocks from the rockery on the Spencer property. 8/29/12 RP 118. Even the testimony referenced by Spencer and the photographs admitted by Spencer only establish only one to two rocks being on the Spencer property at most. Exh. 22-E, F, J, L, N, O, P, R (sic) Brief of Appellant, Appendix A.

- g. There is substantial evidence supporting the trial court's finding there was no evidence of lateral movement of the rockery onto the Spencer property and that the rockery was situated upon the Luton property.**

Spencer tries to support her claim that the rockery moved laterally with three arguments. First, she claims that the Robison survey shows encroachment of the rockery onto her property. Second, she claims that some of the photographs entered into evidence depict trespass. And finally, she claims that it was undisputed that the bulkhead of the rockery gradually slid over the property line onto her lot. Each of these arguments is erroneous.

In regard to her first argument, Spencer is incorrect that the Robison survey establishes a trespass from the Luton rockery. Contrary to her assertion, Robison actually testified that the survey established the rockery was on the Luton property. Robison testified he told Costello that the rockery was actually on the Robison property (subsequently the Luton property) and that he owned the property beyond the rockery by about 12

inches onto what Costello thought was his yard. 8/29/2012 RP 59. Furthermore, Exhibit 12 does not conclusively establish any portion of the Luton rockery is on the Spencer property. At best, Exhibit 12 shows two portions of the Luton rockery abut the Spencer property. CP Exh. 12.

The Costello testimony, which Spencer cites in support of her argument, does not help her. Spencer cites this court to the 8/23/12 report of proceedings pages 44-49 in support of her claim that Costello strung a red line along the property line, from survey marker to survey marker. Appellants brief, page 16. However, the testimony she cites to is from Spencer, not Costello, and nowhere in the cited portion does Spencer talk about the property line or stringing any lines along the property line. There is no support for her argument that there was an encroachment in this testimony.

Spencer also argues that the photographs in Exhibits 14 – E, F, L, N, O, P, and R, which are attached as Appendix A to her brief, depict a trespass by the rockery. Exhibits 14 A through R are photographs of the rockery, some of which were taken in 1998. 8/23/12 RP 44-45. There is no support for her claim these photographs document a trespass. It appears she is actually citing to Exhibits 22 E-F, J-L, N-O and P-R, but there is no testimony regarding these exhibits in the 8/23/12 RP 44-49 cited by Spencer. Furthermore, Luton testified that nearly all of the

rockery, except a small portion of rock in approximately the middle of the rockery, was completely on the Luton property. 8/29/12 RP 100.

Finally, Spencer argues that it is undisputed that the bulkhead of the rockery slid onto her lot over the course of time. This is entirely untrue. As Luton testified, only one rock from the rockery encroached onto the Spencer property. This rock was depicted in Exhibits 19 A and B. CP Exhs 19 A-B. This rock had been in this position since May of 2011. 8/29/12 RP 103. From May of 2011 until the time of trial, no other rocks encroached onto the Spencer property from the Luton rockery. 8/29/12 RP 104. Luton also testified the bulkhead at the south end of the rockery was, based on his observation, entirely on his property. 8/29/12 RP 150. Even the testimony referenced by Spencer and the photographs admitted by Spencer establish only one to two rocks being on the Spencer property at most. Exhs. 22-E, F, J, L, N, O, P, R (sic) Appellant's Appendix A. The fallen rocks from the rockery were insufficient to amount to an encroachment. Nor did the bulkhead of the rockery itself move. Jamey Battermann testified that he found no evidence the cut slope was moving and it appeared to him it had been stable for an extended time. The rockery itself was not holding back the cut slope and was not acting as a retaining wall. 8/28/12 RP 165. There was no evidence the rockery had overturned, meaning that the rockery did not lean out over the

Spencer property. 8/28/12 RP 167. There was no evidence of separation between the cut slope and the rockery, which would be indicative of movement by the rockery toward the Spencer property. 8/28/12 RP 170. Finally, it was his opinion that the rocks that were depicted in Exhibit 15 A and B were pulled out of the rockery intentionally and were not deposited at their location by any natural means. 8/28/12 RP 170-171, CP 15 A-B. It was his professional opinion the rockery was stable, it did not need to be replaced and it was likely to remain stable into the foreseeable future. 8/28/12 RP 172-173.

Spencer tries to support her argument by comparing the Robison survey, which was completed in 1998, with the photographs admitted at trial, but this comparison is crude at best, and cannot dispositively establish any movement of the rockery. In order to compare apples to apples, Spencer should have obtained a survey in 2008 or 2009 when she filed this lawsuit, and then made a comparison between what the two surveys showed in terms of whether the rockery had moved. There is no basis upon which to compare a survey with what photographs show as there were no photographs taken 1998 showing the property line. Furthermore, there is substantial evidence in the record from Luton indicating the rockery was not encroaching onto the Spencer property. 8/29/12 RP 100; CP Exhs. 19 A-B; 8/29/12 RP 103-106, 114, 118, 150.

Spencer's claim that it is undisputed that the bulkhead slid several inches over the property line is also at odds with the testimony of Luton.
8/29/12 RP 150.

Q. Was that your bulkhead or the Spencer bulkhead?

A. I believe it was originally part of the Spencer house that was build in 1921. It remains today. It is on my property line or on my property.

Q. By how much?

A. Based on observation of the property marker I believe it is entirely on my property.

Q. Okay. So you don't really know for sure. We'd have to have someone run a line; is that correct?

A. Based on my observation of where the property marker it to the south of that bulkhead, I believe it is on my property.

Q. And when was that observation made?

A. I observed the property line in 2009 with a property marker in 2009. And I have viewed it subsequently.

Q. And what?

A. I have seen it subsequently.

Luton provided the trial court with sufficient evidence, if believed, established the bulkhead had not moved onto the Spencer property.

In addition, Jamey Battermann testified that the rockery had remained stable between his visits on January 29, 2010, August of 2010 and May of 2011. 8/28/12 RP 150, 165, 172-173. Furthermore, he described the cut slope behind the rockery as being stable with no evidence the cut slope had moved for an extended period of time. Battermann explained that if the cut slope had moved, he would have seen a crack or void between the rockery and the cut slope, not an extension of the space between the railroad ties and the rockery as argued by Spencer. 8/28/12 RP 170. Battermann saw no evidence of any signs of separation at his visits to the rockery. 8/28/12 RP 170. As the rockery was not holding back the cut slope he would not have expected to see any evidence of movement of the rockery because there would be no reason for the rockery to have moved. 8/28/12 RP 169. Finally, Battermann had no concerns about the rockery moving onto Spencer property as it was only an erosion control rockery which was not holding the land behind it in place. 8/28/12 RP 172-173. There is ample evidence supporting the trial court's decision the rockery was stable and had not moved.

Luton testified he saw no evidence of the rockery creeping toward the Spencer property. Specifically, he testified it was his belief, based on his observation of the rockery, that the only portion of the rockery that was possibly encroaching on the Spencer property was a very small portion of

the middle of the rockery and that this had been the condition of rockery back in 1998 when Robison had commissioned the survey. 8/29/12 RP 100. In addition, during the course of Luton's testimony, photographs of the rockery were introduced that had been taken from the motion activated camera Luton had installed east of the property line. 8/29/12 RP 135, CP Exhs. 35 A- B. These photographs clearly demonstrate there has been no "creep" of the rockery as alleged by Spencer. In fact, these photographs demonstrate that the rockery is still sloped toward the Luton property. CP Exhs. 35 A- B. Exhibit 38 A-F also clearly shows the view from the camera installed to the east of the property line and demonstrates there is no "creeping" of the rockery toward the Spencer property.

Bradley Biggerstaff, a geotechnical engineer hired by the plaintiff, testified that between 2009 and November 2, 2011, the "condition of the rock wall hadn't changed significantly." 8/27/12 RP 69-70. He further testified as the soil was being removed from behind the rockery the rockery face, or batter, would actually cause the rockery to start to lean back towards the Luton property. 8/27/12 RP 71-72. Biggerstaff never testified there was any evidence the rockery had migrated towards the Spencer property or was moving in any way other than some rocks being dislodged from the rockery. 8/27/12 RP 43-81.

When Biggerstaff returned to the Spencer property in November of 2011, he was only able to document a single rock from the Luton rockery on the Spencer property. 8/27/12 RP 96. He had no other photographs of any rocks that had dislodged from the Luton rockery onto the Spencer property other than the one rock that was depicted in Exhibit 4-B. CP Exh. 4-B; 8/27/12 RP 97. Biggerstaff saw no evidence of bulging of the rockery when he returned to the site in November of 2011. 8/27/12 RP 101. The silting he observed from the rockery only went one to two feet onto the Spencer property. 8/27/12 RP 102. In fact, other than the one rock he saw on the Spencer property and silting of maybe one to two feet onto the Spencer property, he saw no other damage that the rockery had done to the Spencer property. 8/27/12 RP 102-103. He saw no evidence of loss of the batter of the rockery which would have been indicative of collapse or disintegration of the rockery. 8/27/12 RP 103. He also saw no evidence the rockery was overturning or leaning out over the Spencer property. 8/27/12 RP 104. In fact, Biggerstaff testified he saw **no evidence of migration** of the rockery toward the Spencer property between his visit in December of 2009 and his visit in November of 2011, a period of almost two years. 8/27/12 RP 105. Finally, he testified that although there was a portion of the rockery that was not standing for a

period of time, it had been repaired when he returned in November of 2011. 8/27/12 RP 108.

Although Spencer argues there was not substantial evidence supporting the trial court's finding that the rockery was stable and had not migrated onto Spencer's property, the reality is both of the expert geotechnical engineers testified there was no evidence the rockery had migrated and it was only the interested parties who were claiming it had. Credibility calls are for the trial court to make. The trial court's finding of fact regarding the stability of the rockery is supported by substantial evidence.

D. THE TRIAL COURT WAS CORRECT IN FINDING THAT SINCE SPENCER HAD NOT LIVED AT THE PROPERTY, HER USE AND ENJOYMENT OF IT WAS NOT INTERFERRED WITH, NOR WAS SHE INSECURE IN THE USE OF HER PROPERTY.

Spencer makes the sweeping claim that that the trial court concluded as a matter of law that an absent property owner cannot bring a cause of action for nuisance. This is an erroneous and overly broad interpretation of the trial court's Finding of Fact No. 13. CP 124.

In actuality, the trial court made a much narrower finding of fact related to Spencer's admissions regarding her limited use of the property. The trial court found that any issues associated with falling rock and/or

silting had not interfered with her use or enjoyment of the property or caused her to be insecure in the use of her property because she did not live there. Spencer confirmed this. She confirmed from February of 2007 until May or June of 2010 no one lived at 7130 Woodside Place S.W. as during this time the old home was destroyed, the new home was constructed and it was then listed for sale. 8/29/12 RP 18-19. She also testified that at the most she comes over to the property one to two times per month since May of June of 2010. 8/29/12 RP 24. Her argument that Finding of Fact number 13 is actually a conclusion of law is mistaken. The trial court found that because she was at the property so infrequently the one or two rocks and alleged silting of one to two feet onto her property without damaging her grass did not interfere with her use, enjoyment or security in her property.

E. THE TRIAL COURT WAS CORRECT IN CONCLUDING THAT THE ROCKERY DID NOT CONSTITUTE A NUISANCE

The trial court was correct in finding the rockery was not a nuisance. Nuisance is defined in RCW 7.48.010 which includes “. . . an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property . . .” Nuisance is “. . . unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or

safety of others, offends decency . . . or in any way renders other person insecure in life, or in the use of property.” RCW 7.48.210.

In order for nuisance to be found there must be significant harm. *Bradley v. American Smelting and Refining Co.*, 104 Wn.2d 677, 689, 709 P.2d 782 (1985).

Nuisance is a question of degree, depending upon varying circumstances. There must be more than a tendency to injury; there must be something appreciable. The cases generally say tangible, actual, measurable, or subsisting. But in all cases, in determining whether the injury charged comes within these general terms, resort should be had to sound common sense.

Champa v. Washington Compressed Gas Co., 146 Wn. 190, 199, 262 P. 228 (1927) quoting from *Everett v. Paschall*, 61 Wn. 47, 111 P. 879 (1912). “That a thing is unsightly or offends the aesthetic sense of a neighbor, does not ordinarily make it a nuisance or afford ground for injunctive relief.” (citations omitted) *Mathewson v. Primeau*, 64 Wn.2d 929, 938-939, 395 P.2d 183 (1964). The harm alleged from a nuisance must substantially and unreasonably interfere with another’s use and enjoyment of land. *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005). In *Bartel v. Ridgefield Lumber Co.*, 131 Wn. 183, 189, 229 P. 306 (1924), the court stated “[i]t is probable that the rule is, and ought to be, that, before an action for damages may be maintained, the injury or

inconvenience must be substantial, and that redress may not be had for every slight discomfort or inconvenience.”

Spencer had a questionable claim for injury or inconvenience caused by the Luton rockery when she has not lived on the property at issue since **1996**. In addition, the most she can point to is that on occasions when it rains heavily there may be some silting that occurs onto a very small portion of what appears to be an unused backyard. Occasionally an isolated rock may become dislodged from the rockery. The house is oriented to the west to take advantage of the view and the backyard is not only quite small, but it is nonfunctional and poorly maintained. The trial court was correct in finding there was no substantial, unreasonable interference with Spencer using her property that justified a finding against the Lutons pursuant to the nuisance statutes. At most, any intrusion was a minor inconvenience not rising to the level necessary for a finding of nuisance.

F. THE TRIAL COURT WAS CORRECT IN CONCLUDING THAT THE LUTON’S DID NOT COMMIT NEGLIGENT TRESPASS

In order to prevail on an action for trespass, Spencer must establish duty, breach, causation and injury. *Gaines v. Pierce County*, 66 Wn. App. 715, 719-20, 834 P.2d 631 (1992). Presumably, the Lutons duty to Spencer is to prevent their rockery from causing injury to her property.

The trial court found there was no breach of this duty by the Lutons. CP 152. As soon as they were put on notice of a problem with the rockery, they hired a certified geotechnical engineer to assess the structural safety of the rockery and, based on his recommendations, they caused the rockery to be repaired. 8/29/12 RP 123-124. Since that time, possibly a total of three rocks have fallen onto the Spencer property, none of which caused any damage to the Spencer property. 8/29/12 RP 125. Two of those rocks were restacked into the rockery by Luton. 8/29/12 RP 125. At the time of trial only one rock partially encroached onto Spencer's property, again causing no damage to her property. 8/29/12 RP 29, 30, 103, 104, 118, 126. As argued before, there is substantial evidence supporting the trial court's finding that the rockery was on the Lutons' property. Assuming for argument's sake that there was a breach of this duty; Spencer can point to no injury. 8/29/12 RP 9-10, 18-19, 22, 24, 31, 32, 41. The trial court was correct in finding the Lutons did not negligently trespass onto the Spencer property.

G. LUTONS ARE ENTITLED TO ATTORNEY FEES AS THE PREVAILING PARTY ON THIS APPEAL.

The Lutons request this Court award them their fees and costs incurred in responding to the appeal of Spencer. This request is made pursuant to RAP 18.1(a) and MAR 7.3. Assuming this Court affirms the

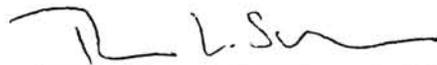
trial court's conclusions of law and affirms the judgment entered against Spencer, the Lutons are entitled to the reasonable attorney fees incurred in having to respond to Spencer's appeal. MAR 7.3.

Spencer is not entitled to attorney fees as she never pled RCW 4.24.630 in her complaint, nor were any findings made by the trial court of any violation of RCW 4.24.630. Attorney fees may only be awarded if authorized by a contract, statute, or recognized ground in equity. *Bowles v. Washington Dept't of Ret. Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993). Here, there is no contract between the parties and no recognized ground in equity for awarding attorney fees. The only statute that provides for attorney fees, RCW 4.24.630, was not pled in plaintiff's complaint and cannot be a basis for an award of attorney fees. Spencer's request for attorney fees, should she prevail on this appeal should be denied.

VI. CONCLUSION

Therefore, for the reasons set forth above, this court should affirm the trial court's findings of fact and conclusions of law in this matter.

RESPECTFULLY SUBMITTED this 17th day of June, 2013.



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