NO. 34189-5

COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

RICARDO G. GARCIA and LUZ C. GARCIA, husband and wife

Appellants/Plaintiffs

v.

TED HENLEY and AUDEAN HENLEY, individually and the marital community of them composed,

Respondents/Defendants

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

To protect their established property rights, Appellants Ricardo and Luz Garcia ("Garcias) filed a complaint for ejectment and damages after their neighbors Ted and Audean Henley (the "Respondents" or "Defendants") repeatedly moved the fence between their adjoining properties, each time moving the fence further onto the Garcias' property. When the Defendants moved the fence in 1997, the Garcias verbally protested to the Defendants but the Defendants failed to move the fence back. In 2011, as the Defendants began moving the fence again, the Garcias' verbally protested and put up apple bins to stop the encroachment. The Defendants persisted in their activity despite the Garcias' efforts to warn them that the fence was on the Garcias' land. The Garcias' hired a surveyor and obtained a survey. The survey demonstrated that the fence had migrated 2.5 to 3 feet from the property line onto the Garcias' land.

Following a bench trial, the court found that the Defendants' fence encroached upon the Garcias' property. Instead of granting the Garcias an injunction requiring the Defendants to remove their fence, the Court allowed the Defendants to keep their fence in place and in return ordered Defendants to pay the Garcias a nominal payment. The trial court stated that the case of *Proctor v. Huntington*, 169 Wn.2d 491, 238 P.3d 1117 (2010) allowed the court to apply unnamed "equitable principles" and award the Defendants a portion of the Garcias' land.

As part of a court's duty to do fairness to the parties, *Proctor v. Huntington* held that a trial court asked to eject an encroacher must "reason through" the five-factor test established by *Arnold v. Melani*. The encroacher must prove the five elements by clear and convincing evidence. The court may exercise discretion to award damages in lieu of injunctive relief if the encroacher establishes the five elements.

The trial court failed to reason through the *Arnold* five element test. The trial court's failure to enter any findings of fact on the five elements demonstrates the trial court's failure to apply the *Arnold* test. The trial court abused its discretion when it gave a portion of the Garcias' land to the Defendants without any written or oral findings of just and compelling reasons to override the Garcias' property rights.

The Court should reverse the Judgment and Decree and remand the case to the trial court with instructions to grant an injunction requiring removal of the fence.

II. APPELLANTS' ASSIGNMENTS OF ERROR

A. Assignment of Error No. 1. The trial court erred in entering the January 19, 2016 Judgment and Decree which awarded the Defendants a portion of the Garcias' land, denied the Garcias request for an injunction requiring the Defendants to move their fence off the Garcias' land and instead awarded the Garcias nominal monetary damages.

B. Assignment of Error No. 2. The trial court erred in entering Conclusion of Law 6:

> Although Plaintiffs typically would be entitled to an injunction, the Washington Supreme Court in *Proctor v. Huntington*, 169 Wn.2d 491, 238 P.3d 1117 (2010) recognized in certain adverse possession cases that equitable principles may dictate a different result as to an appropriate remedy. The court concludes that this case does warrant application of such equitable principles, and thus the court concludes that the fence between the Plaintiffs' and Defendants' properties should remain in its current location, and that title to the Plaintiffs' property that is subject to ejectment should be granted to the Defendants.

C. Assignment of Error No. 3. The trial court erred in entering Conclusion of Law 8:

> The Defendants are granted the following described property:
>
> That portion of lot 16, block 2, of amended plat of taft's addition to Tieton, Washington, according to the official plat thereof, recorded in Volume "G" of plats, page 36, records of Yakima County, Washington, described as follows:
>
> Beginning at the northeast corner of said lot, then north 89° 17' 00" west 115.00 feet to the northwest corner, then south 0° 43' 00" west 3.00 feet to a fence as is existed on June 2, 2011, then south 89° 32' 00' east, along said fence, 115.00 feet to the east boundary said lot, then north 0° 43' 00" east 2.50 feet to the point of beginning.
>
> Situated in Yakima County, Washington.

D. Assignment of Error No. 4. The trial court erred in entering Conclusion of Law 10:

> Any additional relief requested by the parties not specifically addressed in these Findings and Conclusions or the accompanying Judgment and Decree, concerning the allegations in Plaintiffs' Complaint, Defendants' Answer and Counterclaim, and Plaintiffs' answer thereto, is denied.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

3.1 Whether the Judgment and Decree denying injunctive relief to remove an encroaching fence and transferring ownership of the Garcias' land to the Defendants must be reversed and remanded where the trial court failed to follow the precedent of *Proctor v. Huntington* which requires the trial court to reason through the five *Arnold v. Melani* elements before granting or denying a request to eject a trespasser? (Assignments of Error No. 1 and No. 2).

3.2 Must the trial court's conclusions of law finding that equitable grounds exist to award the Defendants' the Garcias' land and deny injunctive relief moving the Defendants' fence be reversed where the trial court failed to enter any findings on the five elements of the *Arnold* test and the record lacks clear and convincing evidence to support such findings? (Assignments of Error No. 1 and No. 2).

3.3 Whether the trial court's Judgment and Decree should be remanded to the trial court with instructions to enter an amended Judgment and Decree to require the Defendants to obtain and pay for the following:

a. survey to prepare a legal description of the property awarded to the Defendants that is described in metes and bounds and not with any reference to the current fence which could be moved again in the future; and

b. a boundary line adjustment to reflect the new boundary line created by the trial court's ruling so that that the Defendants will pay all future

costs including future taxes and assessments as the new owners of the real estate in question? (Assignments of Error No. 3 and No. 4).

IV. STATEMENT OF THE CASE

A. Statement of Facts.

In 1991, Ricardo and Luz Garcia purchased their home in Tieton, Washington and continue to live there today. (CP 72, 95). Ted and Audean Henley have owned the adjacent property directly to the north of the Garcias since 1985 (CP 72, 94-95). For illustrative purposes, an aerial photo of the two homes showing their relative locations is attached as Appendix 1. (See, also, CP 20).

When the Garcias bought their home in 1991, there was an existing white picket fence between their property and the Henleys' property (CP 72, 95, RP 124-125). The Defendants rebuilt the fence at least twice during the 1990s including after damage by water flooding. Each time the Defendants rebuilt the fence they moved the fence further onto the Garcias' property. (CP 27, 72, 95). The first change to the fence occurred in 1994 when the Henleys moved the fence a small amount closer to the Garcias' property when making fence repairs. (RP 12, 35). A more significant change occurred in 1997.

In 1997, the Garcias took an extended trip away from home. When they returned, they discovered that the Defendants had moved the fence further onto the Garcias' property. (CP 27, 72, 95). The fence had been moved a foot onto the Garcias' land. (RP 13). The Garcias verbally protested to the Henleys. The Henleys did not move the fence or take other action to determine the property

line. (CP 27, 72). When Mr. Garcia tried to talk to Mr. Henley, Mr. Henley "...would always get mad and say bad words to me." (RP 13). Rather than calmly discuss the issue, Mr. Henley became angry and used obscenities. (RP 132).

In 2011, the Henleys started rebuilding the fence again, moving in sections from west to east along the fence line. (CP 66). As before, they placed the new fence further onto the Garcias' property than the fence they were removing. The Garcias placed apple bins against the existing fence on the eastern end of the old fence to prevent the Henleys from moving additional sections of fence toward the Garcias' home. Mr. Henley admitted at trial that the bins were placed against the old fence. (RP 108, lines 22-23). The Henleys continued to replace the fence but angled the remainder of the new fence back toward the previous fence line where the apple bins were protecting against further movement onto the Garcias' property. (CP 72-73, 95). Mr. Garcia tried again to talk to Mr. and Mrs. Henley about the fence location and his intent to obtain a survey. Mr. Garcia testified that Mrs. Henley made very clear her intention to keep her fence on the Garcias' property when she stated, "I won't move not even if I pay $10,000." (RP 132 and 133).

After the 2011 fence move, Mrs. Garcia could no longer maintain her garden as she had previously because the space was significantly reduced. (RP 39). Prior to 2011, Mrs. Garcia had been able to plant corn, mint and zucchini. (RP 39). As Mrs. Garcia testified, "...everything that I used to plant no longer

fits there and all three times they replaced their fence it just keep getting closer and closer." (RP 40).

After the fence was rebuilt in 2011, a survey was completed showing that the Defendants' fence intruded upon the Garcias' property by between three feet, at the west end, and two and one-half feet, at the east end (CP 73, 96 and Ex. 3 from Plaintiffs' Exhibit Notebook Tab 1.1). The fence encroaching on their property restricted areas of their property that had been devoted to the vegetable garden and their son's small pond. (RP 47-49). The Garcias requested that the Henleys remove their fence from the Garcias' property but the Henleys refused (CP 10). Ultimately, the parties were unable to settle their differences regarding the fence and the property line. (CP 73, 96).

B. Procedural History.

Mr. and Mrs. Garcia sued the Henleys on May 17, 2012. (CP 3). They sought to quiet title and for ejectment and injunctive relief seeking to regain possession of the property taken by the successive fence encroachments. (CP 3-6). The Henleys counter-claimed to quiet title in their name to all the disputed property. (CP10).

Following a bench trial, on January 20, 2016, the trial court entered its Judgment and Decree based on Findings of Fact and Conclusions of Law filed that same day. (CP 71-81, CP 94-104). The trial court concluded that the Henleys had adversely possessed the Garcias' property through the creeping movement of the fence in the 1990s. The court quieted title in the Defendants to two and one-half feet along the border between their properties. (CP 68, 97).

That left at issue the property taken when Defendants moved the fence in 2011. The trial court found that the 2011 fence migration was an encroachment on the Garcias' property, concluding that the Garcias had successfully established the elements of an ejectment claim for the Defendants' movement of the fence in 2011. (CP 74, 97).

Instead of applying the typical remedy of an injunction requiring that the fence be moved, however, the trial court granted title to Defendants citing *Proctor v. Huntington*, 169 Wn.2d 491, 238 P3d 1117 (2010) (CP 74-75, 97-98). The court did not review any briefing on the doctrine laid out in *Proctor*. During closing arguments, the Defendants' attorney stated that he believed an equitable doctrine applied to this case although he admitted he had not done any briefing on the issue. (RP 146).

The Garcias' attorney explained that *Proctor* required findings of fact, established by clear and convincing evidence that certain elements are met. The first requirement is that the encroacher had not acted in bad faith or at least indifferently as to the boundary line and another is that it would be an enormous hardship to remove the encroachment. (RP 149-150). Despite the lack of evidence on those elements and the other elements, and the lack of any briefing, the trial court ruled that *Proctor* applied. (CP 28).

The Garcias filed a Motion for Reconsideration on January 29, 2016, asking the trial court to reconsider its decision because the evidence presented at trial did not show that the five elements were met by clear and convincing proof and due to that failure, the court had not applied the elements. The

evidence presented and reasonable inferences therefrom negated the presence of the required elements. (CP 82-89). The Garcias' Motion for Reconsideration was denied without explanation on February 11, 2016 (CP 90). The Garcias filed their Notice of Appeal on March 15, 2016 (CP 91-92).

V. ARGUMENT

A. Standard Of Review.

The primary issue facing this Court is whether the remedy ordered by the trial court should be affirmed regarding the property taken by the 2011 fence encroachment onto the Garcias' property. There are two parts to this issue. First, did the trial court engage in a proper analysis to conclude that *Arnold v. Melani* 75 Wn. 2d 143, 449 P. 2d 800 (as modified on rehearing January 9, 1969) and *Proctor v. Huntington*, supra, apply to the facts in this case to override the traditional property-rights remedy of ejectment?

Second, assuming *arguendo* that the trial court had conducted a thorough analysis, does the record support a conclusion that all five requirements are met sufficiently to overcome the traditional right of a property owner to protect his property from encroachers. Here, the trial court failed to engage in the required analysis, and, even if such analysis had been completed, the findings of fact and evidence in the record fail to support a exception to the rules of Washington property law that uphold a property owner's right to title.

A trial court's denial of an equitable remedy is normally reviewed for an abuse of discretion. *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn. App. 384, 390, 220 P.3d 1259 (2009) (citing *Willener v. Sweeting*, 107 Wn.2d 388,

397, 730 P.2d 45 (1986)). Accordingly, the court's decision is reviewed "to determine whether the remedy is based upon tenable grounds or tenable reasons." *Cogdell v. 1999 O'Ravez Family, LLC.* 153 Wn.App. 384, 391, 220 P.3d 1259 (2009).

In the case at bar, the trial court failed to elucidate any grounds for denial of injunctive relief. Specifically, the trial court failed to apply the five *Arnold* elements. Failure to apply the correct legal standard is an error of law and the standard of review of review is de novo. *Womble v. Local Union 73, Int'l Bhd. of Elec. Workers*, 64 Wn.App. 698, 700, 826 P.2d 224, review denied, 119 Wn.2d 1018, 838 P.2d 691 (1992). See, also, *Buck Mountain Owner's Ass'n v. Prestwich* 174 Wn.App. 702, 714, 308 P.3d 644 (2013) (holding that whether an equitable obligation exists to contribute to costs reasonably incurred for repair and maintenance of a road easement used in common is a question of law)

Furthermore, the encroacher (the Defendants) must prove the five *Arnold* elements by clear and convincing evidence. *Arnold*, 75 Wn.2d at 152.

When findings of fact and conclusions of law are entered following a bench trial, the appellate court must determine whether the findings are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law and judgment. *Sunnyside Valley Irrigation Dist. v. Dickie*, 111 Wn.App. 209, 214, 43 P.3d 1277 (2002). The trial court's findings of fact do not support conclusions of law No. 6 and No. 8.

Assuming arguendo that the trial court made "implicit" findings on the five *Arnold* elements, the appellate court must find whether substantial evidence would support such findings. Because *Arnold* requires clear and convincing proof, the evidence must be more substantial than in the ordinary civil case in which proof need only be by a preponderance of the evidence. On review the appellate court requires "'highly probable'" substantial evidence. *In re Marriage of Schweitzer*, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997) (quoting *In re Pet. of LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986)).

B. The Trial Court Erred When It Failed To Conduct The Five-Part Analysis That Must Be Completed Before Taking Away A Private Landowner's Land And Giving The Land To Another Private Landowner.

The traditional and primary remedy for encroachment when one party builds a structure on another's land, which is a form of trespass, is for the court to eject the trespasser and require him to remove the encroaching structures. *Proctor v. Huntington*, 169 Wn.2d 491, 502, 504, 238 P.3d 1117 (2010), cert. denied, 131 S. Ct. 1700 (2011). If required to avoid an oppressive result, an exception may be made to the right of a property owner to protect title to his property. *Proctor*, supra, citing *Arnold v. Melani*, 75 Wn.2d 143, 449 P.2d 800 (1968). If the exception applies, the trespasser may be awarded the encroached upon land and pay damages to the injured landowner for the fair market value of the land. *Proctor* at 504.

Denying the rights of private property occurs only in an "exceptional case". *Arnold*, 75 Wn. 2d at 152. Before a court may exercise its equity power

to transcend the application of property rules, a high standard must be met. The Washington Supreme Court has framed this standard in a five-part test:

> [A] mandatory injunction can be withheld as oppressive when, as here, it appears . . . that: (1) The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use; (4) it is impractical to move the structure as built; and (5) there is an enormous disparity in resulting hardships.

Proctor at 500, citing *Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800 (1968).

To ensure that exceptions to established property rights are granted only in worthy cases, the Washington Supreme Court made clear that a court must, when asked to eject an encroacher, "reason through the *Arnold* elements as part of its duty to achieve fairness between the parties." *Id.* at 503.

Here, the trial court found that the Garcias had established that they are entitled to an ejectment for the property taken by Defendants when the Defendants moved the fence line further onto the Garcias' property in 2011 (CP 74, 97). Mentioning *Proctor*, the trial court then jumped directly to the conclusion that equitable principles in this case dictate erasure of the property owners' title to their land:

> Although Plaintiffs typically would be entitled to an injunction, the Washington Supreme Court in *Proctor v. Huntington*, 169 Wn.2d 491, 238 P.3d 1117 (2010) recognized in certain adverse possession cases that equitable principles may dictate a different result as to an appropriate remedy. The court concludes that this case does warrant application of such equitable principles, and thus the court concludes that the fence between the Plaintiffs' and Defendants' properties should remain in its current location,

and that title to the Plaintiffs' property that is subject to ejectment should be granted to the Defendants.

(CP 74-75, 97-98, 28.)

The Garcias' Motion for Reconsideration asked the trial court to address each of the *Arnold* elements. Without explanation, the trial court denied the Motion. (CP 105).

Arnold stressed that the trial court must act in a meaningful manner and not "blindly" when it is asked to invoke its equitable powers. *Arnold v. Melani*, at 152. The trial court's failure to conduct a thorough examination of the facts under the standards set forth by the Washington Supreme Court are directly contrary to the mandates of *Proctor* and *Arnold* and constitutes an error of law.

C. Even If The Five *Arnold* Elements Had Been Considered, The Record Provides No Support For Finding That Any, Much Less All, Of Those Five Elements Have Been Satisfied By Clear And Convincing Evidence.

Assuming, *arguendo*, that the trial court silently gave due consideration to each of the five *Arnold* elements and found them to be met, those unexpressed findings are unsupported by the record. Indeed, the facts of this case as reflected in the record and the trial court's Findings of Fact themselves demonstrate that the *Arnold* elements remain unmet.

The threshold inquiry is whether it is necessary to take a private landowner's property to avoid an oppressive result. That threshold is met if the encroacher proves each of the five required elements by clear and convincing evidence. *Arnold*, 75 Wn.2d at 152. The facts of this case fail to meet that

threshold for any of the five elements. In truth, the evidence presented to the trial court negates the presence of the *Arnold* elements. There is simply no evidence suggesting that respecting the Garcias' property rights and requiring the Defendants to move their fence leads to an oppressive result.

The encroachment in *Proctor* was based upon a good faith, mutual mistake between the parties. Relying on an incorrect representation from a surveyor, the Huntingtons and *Proctor* had a mutual, mistaken belief as to the boundaries of the northwest corner of the Huntington's property. *Proctor*, 169 Wn.2d 491, 494. The mistake was due to a surveyor's pin that the parties believed represented the northwest property corner, but actually did not. *Id.* In 1995, the parties met at the property and Robert Huntingon pointed out the surveyor's pin and identified it as the northwest corner of the Huntington property. *Id.* *Proctor* did not question or object to the accuracy of the identification. *Id.* The Huntingtons later built their house, garage and well in the area that they believed was their property based on this exchange between the parties in 1995. *Id.*

In 2004, *Proctor* surveyed his property out of concern over a potential encroachment from a different neighbor. That survey revealed that the Huntington's house, well, garage and yard were located entirely upon *Proctor*'s property. *Id.* at 495. After this surprising discovery, the parties attempted to work out a settlement, but negotiations failed and *Proctor* sued to eject the Huntingtons from his land. *Id.* The trial court found that the Huntingtons were encroaching upon *Proctor's* property. The trial court further found that the

Huntingtons acted in good faith, that the value of the land upon which the Huntingtons' home was built was $25,000 and that moving the house elsewhere would cause considerable emotional hardship and cost at least $300,000, and that moving their home would be oppressive and inequitable. The trial court allowed an exception to traditional property rules and granted title to the Huntingtons in exchange for payment for the value of the land. *Id.* The Court of Appeals affirmed.

Proctor appealed to the Washington Supreme Court, arguing that that the second element of the *Arnold* test was not met because the encroached-upon area of land comprised an acre and therefore could not be "slight". *Id.* at 501. The Court affirmed the *Arnold* 5-factor test and considered the size of the disputed area in the context of the circumstances. The Court concluded that the acre could be viewed as providing minimal benefit to *Proctor* in light of its prior use and location within the 30 acres owned by *Proctor*. *Id.* at 503, n. 9. The Court also considered the great hardship that would result if the Huntingtons had to move their home and garage and drill a new well. *Id.* at 503-504. The Court emphasized that its ruling does nothing to "undermine[ ] fundamental property rights: it remains true that a landowner may generally obtain an injunction to eject trespassers." *Id.* at 504.

In sharp contrast to the facts in *Proctor*, the facts in the present case do not support the conclusion that traditional property rights must be erased to avoid an oppressive and unjust result. A reasoned analysis of the five *Arnold*

elements and application of the elements to the Defendants' encroachment reveals that equity supports removal of the fence.

1. The Henleys took a calculated risk in moving the fence further and further onto the Garcias' property and cannot seek an equitable exception to property rules without showing they acted in good faith.

The first *Arnold* element requires clear and convincing evidence that "[t]he encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure." *Arnold* at 152.

The trial court did not specifically address this element of needing to come to the table with clean hands, and Defendants did not present evidence to support a finding on this element. The trial court's Findings of Fact state that the Defendants moved their fence further onto the Garcias' property, not once, not twice, but three times (CP 72, 95). One of the encroachments occurred while the Garcias' were away from home, and they did not discover it until they returned to find the newly rebuilt fence. (CP 72, 95). The Garcias protested to the Defendants at the time, but the Defendants did not move the fence or take any action to determine the actual property line. *Id.*

With this history in mind, the Garcias took action when the Defendants started moving the fence again in 2011. Partway through the Defendants fence-moving project, the Garcias placed apple bins as a barrier to further encroachment for the balance of the fence. The Garcias also requested a survey. Despite the Garcias past protestations about the movement of the fence,

Defendants did not discuss the 2011 rebuilding with the Garcias in advance, they did not obtain a survey, nor did they take other action to determine the property line before rebuilding the fence and moving it further onto the Garcias' property. (RP 100, 120).

Defendants' actions demonstrate that they took a calculated risk or at the very least acted negligently, willfully and indifferently when they moved the fence in 2011. The Defendants knew that the Garcias disputed the location of the fence. The Garcias verbally informed them of the dispute and physically blocked the encroachment with apple bins. (CP 72-73, 95-96 and RP 132). The facts also support an inference of bad faith. The Defendants did not speak to the Garcias about the boundary line before moving the fence in 1997. In fact, the 1997 fence movement occurred when the Garcias were out of the country on an extended trip. (CP 72, 95). While the 1997 encroachment was not subject to ejectment due to the timing of this suit, the circumstances surrounding that encroachment show bad faith and exemplify how the Defendants acted toward the Garcias regarding the repeated movement of the fence onto the Garcias' property despite the Garcias' protests.

When the Defendants wanted to know where their fence was in relation to neighbors other than the Garcias, they had a survey done "...because it was cheap and to have a survey to see where the line was at on the other side." (RP 90). In contrast, the Defendants did not have a survey done before putting up their new fence next to the Garcias' property line.

The present case is in stark contrast to facts underlying the encroachment in *Proctor*, which was based upon a good faith, mutual mistake between the parties as to the meaning of a surveyor's mark. Similarly, in *Arnold* the encroachment was based upon a surveying mistake. *Arnold*, 75 Wn.2d at p. 145. No such good faith or mistake is present in this case. Instead, the Defendants took a calculated risk that they could yet again move the fence further onto the Garcias' property. The Defendants plainly could have conducted a survey prior to moving the fence in 2011, but they did not. They could have replaced the fence in its immediately prior location, but they chose to try to gain more land. Defendants must assume the risk that the Garcias would seek to enforce their property rights.

Defendants' failure to meet the first element of the *Arnold* test by itself renders the *Arnold* exception inapplicable in this case as they cannot satisfy all of the *Arnold* factors with clear and convincing evidence. A review of the remaining four factors demonstrates a similar failure of proof.

2. Defendants presented no evidence to demonstrate an imbalance in equities between the damage to the landowner and the benefit of removal.

To meet the second element of the *Arnold* test, Defendants must show by clear and convincing evidence that the damage to the landowner was slight and the benefit of removal equally small. *Arnold*, Supra, p. 152. The trial court did not make any findings regarding the damage to the landowner or the benefit of removal. The Defendants did not present substantial evidence on these points at trial. The Garcias presented testimony as to their diminished use of the

property due to the encroachments. The encroaching fence restricted the areas of their property that had been devoted to a garden and their son's small pond. The Garcias were left with an area that could no longer support their existing garden—it was too small. (CP 39). Defendants did not present any evidence to suggest that the reduction in space and resulting limitation on use or the benefit of removing the encroachment is slight.

The Court in *Proctor* reviewed a Massachusetts case in which the cornice of a wooden building belonging to McCarthy projected 18 inches into the space above Harrington's land. *See Proctor* 169 Wn.2d 491, 497 (summarizing *Harrington v. McCarthy*, 169 Mass. 492, 48 NE 278 (1897)). The Massachusetts court required McCarthy to remove the overhanging portion of the building that encroached upon the air space above Harrington's land. That same building was built on foundation that also encroached upon Harrington's property, although just slightly and underground. McCarthy was not required to remove the foundation because to do so would have been difficult or impossible and it caused no appreciable harm. *Id.*

The Defendants will likely argue that the loss of two and one-half feet to three feet along the length of the fence line is small or slight. The Garcias would not agree with that characterization and the photographs introduced at trial illustrate that mere feet separate the parties' homes. (Ex 3 from Plaintiffs' Exhibit Notebook Tabs 1.14 and 1.15). Mr. Henley testified that his fence was only six feet from the garage. (RP 99). The City of Tieton requires a minimum sideyard set back of 7 feet for most residential structures. (City of Tieton

Municipal Code 17.08.040 and 17.12.040). In that context, the loss of two and one-half feet is substantial.

However, the size of the property that has been encroached upon does not, by itself, satisfy the second *Arnold* element because the court also has to look at the benefits of removal of the fence. The Garcias presented evidence that their use of their property was diminished by the encroachment. Full use of their property will be restored when the fence is moved off their property. Defendants did not present any evidence to the contrary, and therefore they have not met the requirement to show by clear and convincing evidence that the damage to the landowner was slight and the benefit of removal equally small.

3. Defendants presented no evidence regarding the remaining area of the property and limitations on the property's future use given their encroachment.

The third *Arnold* element requires the Defendants to present clear and convincing evidence that, with the encroaching structure, there remains ample room for a structure suitable for the area and no real limitation on the property's future use. Defendants did not present any evidence regarding Garcias' ability to utilize their property with the fence encroachments given building setbacks and other requirements applicable to their property. There was no evidence presented and no findings made regarding zoning, impact on potential future uses of the property, building requirements or improvement restrictions. There is no evidence presented here, much less clear and convincing evidence, to support a finding that the area remaining to the Garcias after the 2011 fence encroachment (the last in a string of encroachments) results in ample room for

a structure suitable for the area and no real limitation on the property's future use.

4. The Defendants failed to prove the fourth *Arnold* factor because the record lacks any evidence that it is impractical to move the fence.

To satisfy the fourth *Arnold* requirement, there must be clear and convincing evidence that it is impractical to move the structure as built. The fact that the Defendants have rebuilt their fence at least three times demonstrates that it is practical to move the fence. (CP 72, 95).

Defendants did not testify that it would be impractical to move the fence again, this time back onto their own property. It is reasonable to infer, as a practical matter, that the Defendants can move their fence given that the Defendants have moved their fence several times before. Moving a fence is much different from moving a house, garage and well, as was the case in *Proctor*, moving a house and fence, as was the case in *Arnold*, or moving an underground building foundation as in *McCarthy*. *See Proctor*, 169 Wn.2d at 503; *Arnold*, 75 Wn.2d at 145; *McCarthy*, 169 Mass. at 494-95.

The usual remedy for encroachments is to eject the trespasser. The trial court will deny the normal remedy **only if** the trespasser proves ejectment would be unjust or oppressive by demonstrating all five elements of the *Arnold* test with clear and convincing evidence. The Defendants failed to introduce **any** evidence that it is impractical to move the fence.

5. Requiring Defendants to move a fence that Defendants repeatedly rebuilt further and further onto Garcias' property does not lead to an enormous disparity in resulting hardships.

The final *Arnold* element requires clear and convincing evidence of an enormous disparity in resulting hardships. The trial court did not make a finding on this element. The Defendants did not present clear and convincing evidence upon which to base a hardship finding, and weighting the hardships balances in favor of the Garcias, not the Defendants.

To the extent that a court were to conclude that this balancing weighs in favor of a party that repeatedly moves a fence further onto a neighbor's property would shift Washington property law away from the property owner and toward the trespasser. "[T]he doctrine of balancing the equities, or relative hardship, is reserved for the innocent party who proceeds without knowledge or warning that his structure encroaches upon another's property or property rights." *Mahon v. Haas,* 2 Wn. App. 560, 565, 468 P.2d 713 (1970) (citing *Bach v. Sarich*, 74 Wn.2d 575, 582, 445 P.2d 648 (1968)). What is the greater hardship? Having one's real property taken under protest or having to move a fence that was built on someone else's property after protest? To presume that the facts of this case meet the hardship requirement in favor of the Defendants would send the message that property may be taken simply by installing a fence or other structure on someone else's property before they can stop you.

The trial court found that the Defendants knew the Garcias had issues with the fence encroachment. (CP 72, 95). Defendants did not present any

evidence as to the cost of moving the fence or any other hardship. In *Proctor*, the Huntingtons would have had to spend $300,000 to move their encroaching home in contrast to Plaintiff losing property valued at $25,000. This imbalance of disparity does not exist here, nor was there any evidence of such presented at trial. Without such evidence, the Court's ruling is not justified.

In summary, the trial court incorrectly concluded that *Proctor* applies in this case to prevent application of the remedy to which the Garcias are rightfully entitled. The trial court did not "reason through the *Arnold* elements as part of its duty to achieve fairness between the parties". *Proctor v. Huntington* at p. 503. Even if we assume that the trial court had considered each of the five *Arnold* elements and found for Defendants on each one, that conclusion would also be in error. The record does not contain clear and convincing evidence to establish an equitable remedy in Defendants' favor. To the contrary, clear and convincing evidence in the record support an opposite result, one in favor of the Garcias. The law does not permit an equitable remedy to be applied in place of an established property right simply because it would be an effort or a bother to move the offending structure. Nor does an equitable remedy trump property rights simply because the amount of encroachment is a matter of feet or inches.

This case is not the "exceptional case" that requires the "exceptional relief" of denying an injunction to remove Defendants' fence from the Garcias' property. See, *Arnold v. Melani* 175 Wn.2d at 152. Neither the record nor the trial court's findings of fact and conclusions of law show the clear and convincing evidence needed to establish all five *Arnold* factors required to

escape the ordinary property rights remedy of ejectment. The trial court's ruling as to the proper remedy in this case should be overturned, and Defendants should be required to remove the portion of their fence that encroaches on the Garcias' property.

D. The Property Line Between The Parties Should Be Established Using Neutral Survey Measurements And Without Reference To The Disputed Fence.

Conclusion of Law Number 8 purports to assign a description of the disputed land. To the extent that the Court agrees that the *Arnold* factors were improperly invoked here to grant title to the 2011 encroachment to Defendants, the legal description included in the trial court's Conclusions of Law no longer applies. To the extent that title to the property in dispute from the 2011 fence encroachment remains with the Garcias, the entire Conclusion of Law should be struck and replaced. Even if this court affirms the trial court's remedy giving the Garcias' land to the Defendants, the description in Conclusion of Law No. 8 should be revised because it is based on the fence's current location.

The legal description that is entered in this case with regard to the disputed property should be described using survey practices that do not include reference to the fence. Even if the *Arnold* factors could be met in this case, the legal description in Conclusion of Law No. 8 refers to the existing, disputed fence, which has been a source of dispute precisely because it has not been a landmark with a constant location. Given the history between the parties, the legal description to memorialize any change in the parties' property boundaries

should not be based on the fence, which has moved in the past and could move again in the future.

An appropriate legal description would use a metes and bounds description designating the exact path of the boundary as it is determined through these proceedings. Such a description would survive any changes to or removal of the fence and provide clarity as to the boundary far into the future.

The trial court ordered the Henleys to "be responsible for arranging the placement of pins or monuments along new property line" (CP 78). That process should include engaging a surveyor to create a standard, enduring, and non-controversial legal description. The trial court should modify its Order to direct the Henleys to pay for and obtain an appropriate survey that describes the new boundary line without reference to the fence.

E. Defendants Should Be Required to Obtain and Pay for A Boundary Line Adjustment to Reflect the new Property Lines Ordered by the Court and to Ensure the Defendants Pay Property Taxes and other Assessments for Their New Larger Parcel of Land.

The Garcias asked the trial court to require the Defendants to pay for and obtain a formal boundary line adjustment with Yakima County to memorialize the changes in title of the disputed property. Yakima County Code 19.34.020 allows for adjustment to boundary lines of existing lots where no new lot is created. Until the changes are recorded with the County, all property tax and other assessments will be overstated for the Garcias and understated for the Henleys. Requiring a formal boundary line adjustment will ensure that all such costs are appropriately attributed between the parties. In addition, a boundary

line adjustment will be needed before either party sells or transfers his property, for the County, title insurance purposes and all future owners.

The trial court ordered "all future costs and expenses associated with the property granted for Defendants, including all real estate taxes and assessments, shall be the responsibility of Defendants (CP 78). It follows that Defendants' responsibility for these items should include preparing and filing a boundary line adjustment (based on an appropriate legal description as addressed above) with the County. The trial court's Order should clarify that the Defendants' obligation to assume responsibility for all future costs and expenses associated with the property granted under this decision includes the requirement to promptly file a boundary line adjustment with the county.

VI. CONCLUSION

The relief the trial court granted based on *Proctor v. Huntington* is contrary to both law and the evidence on record. *Proctor v. Huntington* requires the trial court to conduct a reasoned analysis of the five elements laid out in *Arnold v. Melani*. The trial court erred by not conducting an *Arnold* analysis. No findings of fact were entered on any of the *Arnold* elements. Under *Arnold*, denial of bedrock property rights is exceptional relief for the exceptional case. *Proctor v. Huntington* affirmed that absent exceptional circumstances, fundamental property rights must be respected and a landowner should normally obtain an injuction to eject trespassers. Defendants have not presented an exceptional case here. To deny a property owner's right to retain his own property, the elements of the *Arnold* test must be met by a showing of

clear and convincing evidence. The facts of this case fail to meet the required standard and, to the contrary negate the presence of the *Arnold* elements.

The Garcias respectfully request this Court reverse and remand the case to the trial court and direct entry of a conclusion of law that the record is insufficient to satisfy the five *Arnold* tests and with instructions to grant an injunction requiring removal of the fence.

The Garcias further request that this Court remand the case to the trial court with instructions to enter an order requiring the Defendants to obtain a survey to develop an appropriate legal description of the new boundary between the properties at issue and to clarify that the Defendants' future obligations for the property it has gained from the Garcias include promptly preparing and filing a boundary line adjustment with the County.

RESPECTFULLY SUBMITTED this 17th day of June, 2016.

HALVERSON | NORTHWEST Law Group P.C.
Attorneys for Appellants

By: Linda A Sellers
Linda A. Sellers, WSBA No. 18369

CERTIFICATE OF SERVICE

I, JENNIFER FITZSIMMONS, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am the assistant to Linda A. Sellers, the attorney for RICARDO G. GARCIA and LUZ C. GARCIA and am competent to be a witness herein.

On June 17th, 2016 I caused to be mailed by U.S. Mail, postage pre-paid, the original and one copy of the foregoing document to the following:

Court of Appeals Division III 500 N. Cedar Street Spokane, WA 99201	☒ First Class U.S. Mail

On June 17th, 2016, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

James K. Adams Wagner, Luloff & Adams 2010 W. Nob Hill Blvd, Suite 2 Yakima, WA 98902	☒ First Class U.S. Mail

DATED at Yakima, Washington, this 17th day of June, 2016.

Jennifer L. Fitzsimmons, Legal Assistant
HALVERSON | NORTHWEST Law Group P.C.

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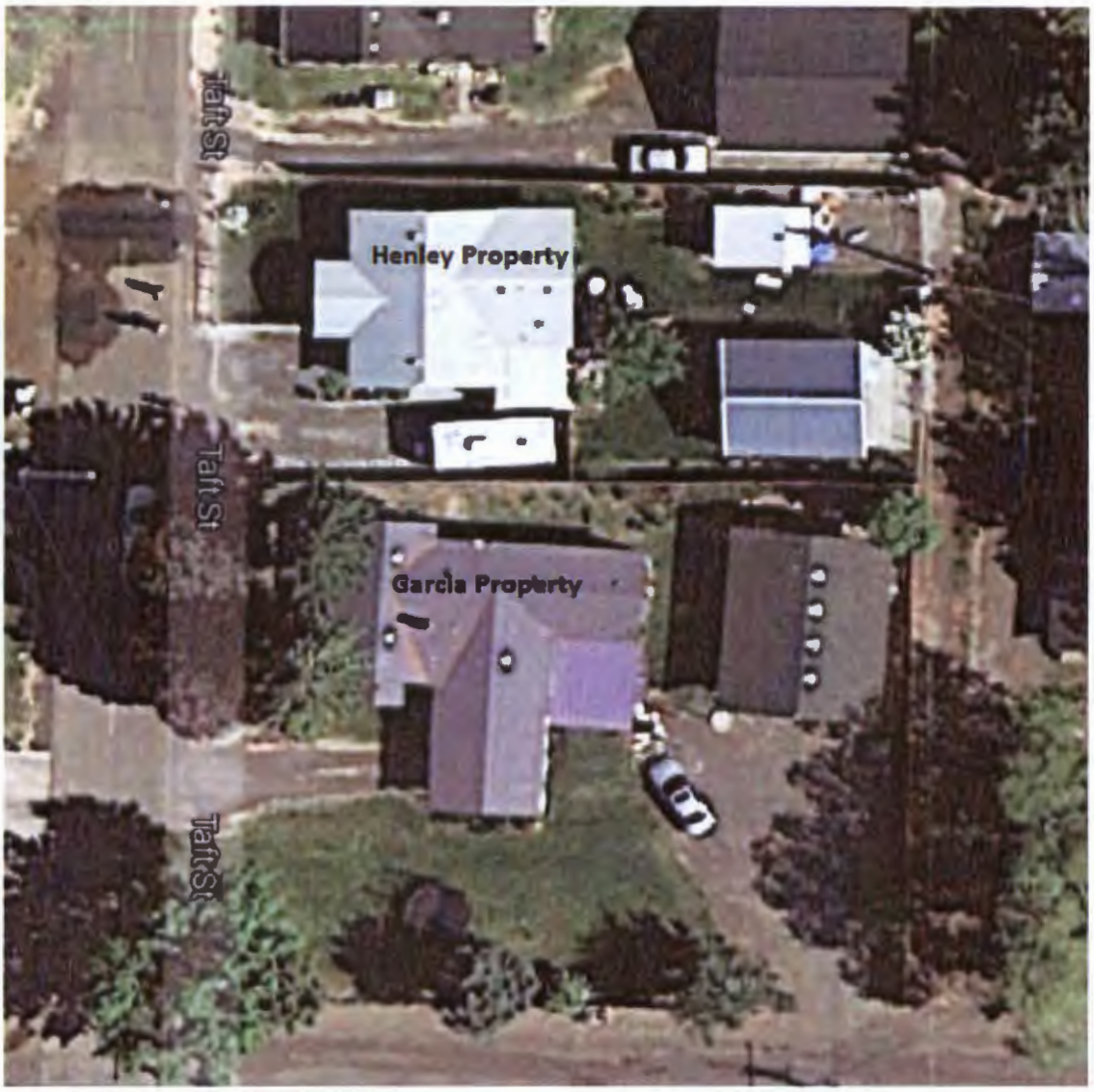
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