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' REPLY BRIEF

LINDA A. SELLERS, WSBA#18369
Attorneys for Appellants
Halverson | Northwest Law Group P.C.
P.O. Box 22550
Yakima, WA 98907
509.248.6030

Table of Contents

Table of Authorities

Cases

Other Authorities

I. SUMMARY

The trial court found the Defendants Ted and Audean Henley trespassed and built a fence on Plaintiffs Ricardo and Luz Garcia's yard. Despite the clear encroachment, the trial court did not grant the normal remedy of ejectment. The trial court gave the Garcias' property to the Henleys and ordered the Henleys to pay the Garcias $500.00.

This unusual remedy can only be affirmed with a significant expansion of *Proctor* v. *Huntington* beyond its unique facts. In *Proctor*, the court denied ejectment and removal of permanent improvements including a home, garage and well at a cost of at least $300,000. The homeowner mistakenly built these improvements on his neighbor's property in good faith reliance on a survey pin that both landowners wrongly thought marked a boundary.

In contrast, the Defendant Henleys obtained no survey and ignored their neighbors when the Garcias informed them more than once that the fence was not in the right location. Furthermore, the Henleys' fence is not a permanent structure that is difficult or prohibitively expensive to move. The undisputed facts conclusively establish that the Defendants repeatedly moved their fence over the years onto the Garcias property. Requiring the Defendants to move their fence one more time back onto their own land is the appropriate remedy.

Before denying ejectment of a trespasser and forcing a sale of private property to the trespasser, the Supreme Court requires the trial court to reason through each of the five factors set forth in *Arnold v. Melani*. Furthermore, the encroacher must prove each factor by clear and convincing evidence. In the instant case, the trial court did not enter findings of fact on any of the five factors. The trial court simply stated that unnamed equitable principals applied.

The Defendants concede no findings were entered and are forced to argue that facts exist in the record that would have supported findings if made. This does not meet the Supreme Court's requirement that the trial court expressly reason through and apply each of the five required elements. Even if one assumes the trial court silently weighed and reasoned through the five elements, the Defendants did not meet their burden of proving each element by clear and convincing evidence.

The Court should remand to the trial court and instruct it to enter a judgment requiring removal of the fence.

II. REPLY TO LEGAL ARGUMENTS

A. Standard of Review.

The standard of review requires a two-step analysis. Defendants had the burden of proving each of the elements required to establish a right to relief under the rule articulated in *Arnold v. Melani*, 75 Wn. 2d 143, 437 P.

2d 908 (1968) by clear and convincing evidence. *Arnold*, 75 Wn. 2d at 152 ("[T]he evidence of the elements listed above [must] be clearly and convincingly proven by the encroacher"). This Court should review the factual findings to see whether they are supported by evidence in the record. Because the relevant burden of proof is by clear and convincing evidence, this Court may uphold the trial court's factual findings only if they are supported by evidence which makes them "highly probable." *In re Marriage of Schweitzer*, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997).

The problem in the instant case is that the trial court did not enter any findings of fact on the five *Arnold* elements. Furthermore, the evidence in the record fails to support findings on the *Arnold* elements that would justify application of the limited exception to the grant of a mandatory injunction for trespass and encroachment. Questions of law and conclusions of law are reviewed de novo. *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn.App. 384, 220 P.3d 1259 (2009), citing, *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369 (2003). In addition, any conclusion of law erroneously denominated a finding of fact is also subject to de novo review. *Id.*

B. The Trial Court Erred in Giving a Portion of the Garcias' Property to the Defendants Instead of Requiring the Defendants to Move Their Fence.

The Defendants agree that the traditional and primary remedy for encroachment when one party builds a structure on another's land 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). In exceptional cases where necessary to avoid an oppressive result, the court may deny the rights of private property and allow a trespassing structure to remain. *Arnold*, 75 Wn. 2d at 152, see, also, *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn.App. 384, 220 P.3d 1259 (2009)

In *Proctor v. Huntington*, the Huntingtons built their house, well and garage on Noel Proctor's property. The Huntingtons mistakenly believed that a survey pin marked the corner of their property and Mr. Proctor believed the pin marked the corner. 169 Wn. 2d 491, 494. Mr. Proctor sued for ejectment eight years after the home was built.

The *Proctor* court cited *Arnold v. Melani* and held that if an encroacher can meet the five-part test set out in *Arnold*, then the court may deny an injunction and instead award the plaintiff damages. The

Washington Supreme Court held that the Huntingtons met the following 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). In order to invoke the equitable exception articulated by the Supreme Court in *Arnold*, the Defendants have the burden of establishing each of the five elements by clear and convincing evidence. *Id.*

The Defendants Henley agree that the *Arnold* test is designed to ensure that exceptions to established property rights are granted only in worthy cases. Reply Brief of Respondents p. 9. 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 immediately concluded that equitable principles in this case dictate a taking of the Garcias' 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.)

No other findings were made by the trial court relating to either *Proctor* or *Arnold*.

Arnold stressed that the trial court must act in a meaningful manner and not "blindly" when it is asked to invoke its equitable powers and *Proctor* emphasized that fundamental property rights must be respected. *Arnold v. Melani*, at 152; *Proctor* at 504. The trial court's failure to conduct a thorough examination of the facts under the standards set forth by the Washington Supreme Court is directly contrary to the mandates of *Proctor* and *Arnold* and constitutes an error of law and an abuse of discretion.

C. Defendants Failed to Meet Their Burden of Proof on Each of the Five Arnold Factors.

The Defendants bear the burden of proving each of the five *Arnold* elements by clear and convincing evidence. An examination of the record as a whole reveals the Defendants have failed to meet their burden of proof.

1. The Defendants acted in bad faith or at least took a calculated risk and negligently, willfully and indifferently located their fence.

The trial court simply did not enter any findings of fact on the first *Arnold* factor. This factor requires the Defendants to establish that:

> The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure.

Arnold, 75 Wn.2d at 152. Not one of the 13 findings of fact the trial court entered relate to the Defendants' intent or good faith. Without a specific finding of fact on the first *Arnold* element, the court cannot conclude as a matter of law that the doctrine of *Procter v. Huntington* applies.

The Court may and should consider the Defendants' actions prior to the most recent fence movement in 2011. Defendants repeatedly moved the fence prior to 2011 and this activity is very relevant to the first *Arnold* factor. The previous fence movements reveal the Defendants' lack of good faith and reckless disregard of boundary lines. Unlike the *Proctor* case

where both homeowners were mistaken about the boundary lines, the Garcias told the Henleys that their fence was encroaching. CP 72, RP 132.

The Henleys persisted in putting the fence up in the face of the protests. During construction of the 2011 fence, Mr. Garcia informed the Henleys that he was obtaining a survey. RP 132. Rather than waiting for the survey results, the Henleys took the calculated risk of continuing with putting up the new fence and take the risk of having to move the fence later. RP 132. Mr. Henley testified that he never took any measurements on any of the occasions when he moved his fence in order to make sure he did not encroach on his neighbors' property. RP 99-100. Mr. Henley understood the importance of a survey and had one done to determine his property line on the other side of his land. RP 90. Despite that, Mr. Henley either intentionally or with reckless indifference put up a fence on the Garcias' land without first obtaining a survey to locate the boundary line. In addition, a neighbor observed the fence construction and testified the new fence was about a foot further onto the Garcias' land. This contradicts the Henleys' claim of good faith. RP 59.

The acts of the Henleys in repeatedly moving the fence onto the Garcias land in prior years, in ignoring the Gracias protestations in 2011 and rushing to put in the fence without the survey, all show the Henleys bad faith and reckless indifference. The first *Arnold* element is not met.

2. Defendants failed to prove that the damage to the landowner was slight and the benefit of removal equally small.

The court's legal conclusions must be supported by findings of fact. The court failed to enter any findings on the second *Arnold* element. The Defendants argue in their brief that there is substantial evidence in the record that the damage to the Defendants is slight. However, the evidence in the record is that the Garcias could no longer grow the same crops in their garden due to the defendants' activities. The Defendants introduced no evidence to contradict the testimony that the encroaching fence and its resulting restrictions made the Garcias unable to plant the same crops. The Garcias were left with an area that could no longer support their existing garden. (RP 39). The garden had been planted right up to the fence. RP 39. In light of the undisputed testimony of the Garcias, the Defendants failed to meet their burden of proving the second *Arnold* element by clear and convincing evidence.

The Defendants are correct that the trial court found the encroachments prior to 2011 amounted to a loss of two and one-half feet to three feet along the length of the fence line. Mr. Garcia's action of putting apple bins along his fence line saved him the loss of an additional one-half foot in 2011. CP 73. When only a few feet separate the homes, the loss of another half foot is substantial.

The Defendants assert that the loss of land of one-half of a foot is minimal and therefore they have met their burden of proof. However, the size of the encroachment 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 fence encroachment. Removal of the fence would restore full use of their property and allow for more space, light and air for the garden.

Defendants have not pointed to any testimony in the record that disputes the Garcias' inability to garden after the encroachment because the Defendants did not present any evidence to the contrary. The Defendants ask this court to switch the burden of proof to the Plaintiffs by arguing in their brief that there "was no demonstrable loss to the use of the property and no demonstrable benefit...." Reply Brief of Respondents at p. 13. However, the burden of proof lies with the Defendants and the Henleys failed to prove the second *Arnold* element by clear and convincing evidence.

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. The Defendants claim they met their evidentiary burden by simply stating that "the use and future use of the property is what is and will be." Reply Brief of Respondents p. 14. Conclusory statements are not evidence.

The Plaintiffs are not required under *Arnold* to prove that the trespassing fence restricts any future modifications to the property or creates an existing nonconforming use under current codes. If the Defendants want to keep their fence on the Garcias' land, the Defendants are required to prove that their fence does not restrict use of the property. Defendants do not cite to any evidence in the record regarding building uses or restrictions because they 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 is no evidence regarding zoning, impact on potential future uses of the property, building requirements or improvement restrictions.

There is no evidence presented, 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 future improvements or other structures suitable for the area in the future. The Defendants failed to meet their burden of proof.

4. The Defendants failed to introduce any evidence to show 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 assert that the impractical standard of *Arnold* means "not sensible." However, the *Arnold* court used the term "impractical" in its standard North American usage of non-viable or incapable of being done without extreme trouble, hardship or expense. *Webster's Third New International Dictionary* (2002). A good application of the concept is found in the case of *Harrington v. McCarthy*, 169 Mass. 492, 48 N.E. 278 (1897), to which *Proctor* cited. The cornice of McCarthy's wooden building projected 18 inches into the space above Harrington's land. *Id.* at 493. The foundation of the building also encroached slightly, but only underground. *Id.* at 494. As to the cornice, the court applied the traditional ejectment remedy and required McCarthy remove projecting portions of the building encroaching on Harrington's lot. *Id.* Because the foundation would be "difficult and expensive" to trim and caused no appreciable damage, the court refused to require McCarthy to remove or trim the foundation. *Id.* at 494-95. Removing portions of the foundation was impractical.

The Defendants introduced no evidence of cost, lack of feasibility, or other unusual hardship or difficulty in moving their fence. In contrast, in *Proctor* the trial court found that moving the house elsewhere would cause considerable emotional hardship and cost at least $300,000. *Id* at 495. The record below is devoid of any evidence of the cost of moving the Henleys' fence or the impracticality of moving the fence.

The Defendants ask this court to find that the fourth *Arnold* element is met because the land taken by the Defendants is of "no practical use by the Appellants." Reply Brief of Respondents p. 15. This statement misconstrues the requirement. The fourth *Arnold* element does not require the Plaintiffs to prove what use they would make or could make with their land upon removal of the trespassing structure and does not require the court to weigh any benefit to the Plaintiffs. Rather, the Henleys have the burden to prove that they cannot move the fence without considerable cost and hardship.

Since the Defendants have moved their fence multiple times in the past, the Defendants could move their fence again. The Defendants failed to fail to meet their burden of proof to show by clear and convincing evidence that moving their fence is impractical.

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. Because the trial court made no express finding on this issue, its findings do not support its conclusion that *Proctor v. Huntington* applies. Furthermore, Defendants did not present clear and convincing evidence upon which to base a hardship finding, and weighing the hardships balances in favor of the Garcias, not the Defendants.

The Garcias are without fault and tried to inform their neighbors that their fence was in the wrong location. Unfortunately, each time Mr. Garcia tried to talk to his neighbor Mr. Henley "... was always mad, always. He always behaved angry towards me." RP 132-33. When Mr. Garcia informed Mrs. Henley that he was obtaining a survey, she stated, "I won't move not even if I pay $10,000.00." RP 132. Any minimal hardship to the Defendants would have been easily avoided if they simply waited for the Garcias' survey.

The Henleys were intent on putting their fence where they had decided the fence belonged and presented no evidence of any unusual hardship in moving their fence. The Henleys argue that *Proctor* allows

them to keep their fence where it is and not move it. However, in *Proctor*, the encroaching party proved that it would cost at least $300,000 to move their home, well, and garage. *Proctor, supra* at 495. No such evidence exists in this case and the trial court abused its discretion in applying the *Proctor* doctrine to the case at bar where the Defendants failed to meet their burden of proof.

D. The Property Line Between the Parties Should be Established Without Reference to the Disputed Fence.

Conclusion of Law No. 8 establishes a legal boundary based on the fence's current location. As the testimony in this case shows, fences decay, fences are washed out by flooding, and fences are moved. 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 that has been a source of dispute precisely because it is not a landmark with a constant location.

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 must apply equitable remedies in a meaningful manner. This Court should reverse an equitable remedy that creates continuing conflict between neighbors. See, *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn.App. 384, 220 P.3d 1259 (2009) (party argued that granting an easement to the encroacher creates continuing conflict). Using the existing fence to establish the boundary for the existing fence creates a situation for on-going conflict in the future where the fence itself is the issue.

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 Court should direct the trial court to enter an order requiring the Henleys to pay for and obtain an appropriate survey that describes the new boundary line without reference to the fence.

E. A Boundary Line Adjustment is Required to Reflect the New Property Lines and Ensure the Defendants Pay Property Taxes 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 to memorialize the changes in title of the disputed property. All property tax and other assessments are currently overstated for the Garcias because the County

continues to show the Garcias as the landowners of real property that the trial court awarded to the Henleys. If the trial court decision stands, the County will continue to assess the Garcias for property taxes on land they no longer own. 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 in the future for title insurance purposes.

The Defendants do not dispute that the Garcias are now paying real property taxes for the property now owned by the Defendants. Instead, the Defendants simply state that the County short plat requirements are inapplicable and cite to the City of Tieton municipal code. However, the City of Tieton municipal code also requires a boundary line adjustment. While the City may exempt a boundary line adjustment from formal short plat requirements, action is still needed to fix the boundary line. To obtain an exemption, the Henleys must obtain an application from the City and submit it with the required fees. Tieton Municipal Code 16.04.070 (B). After obtaining the exemption from the City, the Henleys must then file the:

> ...instrument of merger ... with the Yakima County auditor's office and a copy submitted to the town administrative official. The exemption shall become null and void if required filing with the county auditor is not accomplished within ninety (90) days of granting the exemption.

Tieton Municipal Code 16.04.070 (A) (1). The Henleys have not taken any of these steps.

The trial court order requires Defendants to pay all future real estate taxes and assessments for their new larger parcel. (CP 78). However, the trial court's order fails to require the Defendants to prepare and file a boundary line adjustment (based on an appropriate legal description as addressed above) with the County and the City so that the Garcias do not have to pay the Henleys real property taxes. While the trial court's order appears to relieve the Garcias of liability for the Defendants' property taxes, in reality it leaves the Garcias financially responsible and the order should be reversed.

III. CONCLUSION

The trial court abused its discretion in refusing to eject the Defendants from the Garcias property. *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 and failed to enter any findings on any of the *Arnold* elements. Under *Arnold*, denial of bedrock property rights is exceptional relief for the exceptional case. Fundamental property rights must be respected. Absent exceptional circumstances, the trial court must grant a landowner an injunction to eject trespassers. Defendants have not presented an

exceptional case and failed to present clear and convincing proof on each required element.

Before forcing a sale of land to a trespasser, the trial court must reason through the *Arnold* factors and determine that a forced sale is the only option to avoid an oppressive result. The trial court may not take private property from one landowner and give it to another simply because it would be a bother to move the fence. Private property rights are not ignored because the amount of encroachment is a matter of feet or inches.

The Court should reverse the trial court and remand the case with instructions to grant an injunction requiring removal of the fence. The Court should further direct the trial court to enter an order ordering the Defendants to pay for and obtain a survey to create an appropriate legal description and file a boundary line adjustment so that the Defendants pay for their own property taxes.

RESPECTFULLY SUBMITTED this 12th day of October 2016.

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

By: 
Linda A. Sellers, WSBA No. 18369

CERTIFICATE OF SERVICE

I, Nancy Rutherford, 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 October 12, 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 October 12, 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 12 day of October, 2016.

Nancy Rutherford, Legal Assistant
HALVERSON | NORTHWEST Law Group P.C.

G:\LAS\GARCIA-20797\Appeal-002\Pleadings\Appellant's Reply Brief with Tables.docx