No. 34189-5

COURT OF APPEALS, DIVISION III
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

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This was an action for ejectment and damages. The actions of the Respondents Ted and Audean Henley which gave rise to the complaint of the Appellants Ricardo and Luz Garcia (the "Appellants" or "Plaintiffs") was the rebuilding of a fence between the occupied portions of the properties of the Henleys and Plaintiffs. The rebuilding of the fence took place in 2011 and was believed to be in the location of a fence which had been in place since at least 1997. The rebuilding of the fence took place before any survey of the property by Plaintiffs.

After a bench trial, the trial court found that a portion of the rebuilt fence had been constructed approximately 6 inches farther on to the property of Plaintiffs than the fence if replaced. The length of the fence which had been moved was 67 feet. The total area of encroachment was 33.5 square feet.

Instead of ordering injunctive relief, the trial court awarded damages to the Plaintiff for the value of 33.5 square feet in the sum of $500.00. The Court also quieted title in the disputed property in the Henleys.

In making its ruling, the trial relied upon the holding in *Proctor* v. *Huntington* 169 Wn 491, 238 P.3d 1117 (2010). In *Proctor*, the Supreme

Court held that a court may deny injunctive relief in appropriate cases and award damages for the taking in an encroachment case. The trial court stated: "Normally, the Plaintiffs would be entitled to an injunction, directing the Defendants to remove the fence and restore the property line as determined by the Court. However, in *Proctor v. Huntington*, 169 Wash.2d 491, 238, P.3d 1117 (2010), the Supreme Court recognized in certain adverse possession cases, equitable principles might dictate a different result as to an appropriate remedy. I believe this case does warrant application of those equitable principles." CP 72.

Despite the trial court's clear statement in its memorandum opinion, Appellants claim that the trial court failed to reason through the test set out in Proctor. The Appellants claim that the trial court abused its discretion in awarding damages of $500.00 to Appellants and the disputed property to the Henleys.

This appeal then, concerns a 6 inch encroachment along 67 feet of a 115 foot property line. The total area is 33.5 square feet. Of Appellants' lot, the encroachment is .61 percent (.61%) of the total area of the lot. [Appellants' lot in 2011, before the encroachment was, 5438.5 square feet, 5750 square feet less 311.5 square feet obtained by the Henleys through adverse possession (67 feet of 2.5 feet and 48 feet of 3 feet)]. CP 72. The

appeal concerns less than 1 percent (1%) of the total property of the Appellants.

The trial court heard the testimony of the Appellants, their son and a neighbor. The trial court heard the testimony of the Henleys. The trial court reviewed a myriad of pictures and other documentary evidence. The trial court, specifically mentioning the test and principles in *Proctor*, concluded that the evidence justified his ruling.

The Court should let stand the Judgment and Decree.

II. RESPONSES TO APPELLANTS' ASSIGNMENT OF ERRORS

A. Response to Assignment of Error No. 1. The trial court did not err in entering the January 19, 2016 Judgment and Decree which awarded the Defendants a portion of the Appellants' land, denied the Appellants' request for an injunction requiring the Henleys to move their fence and instead awarded the Appellants nominal monetary damages.

B. Response to Assignment of Error No. 2. The trial court did not err in entering Conclusion of Law 6:

> Although Plaintiffs typically would be entitled to 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. Response to Assignment of Error No. 3. The trial court did not err 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. Response to Assignment of Error No. 4. The trial court did not err 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 APPELLANTS' ASSIGNMENT OF ERROR

A. Whether the Judgment and Decree denying injunctive relief

requiring removal of an encroaching fence and transferring ownership of the Plaintiffs' land to the Henleys must be reversed and remanded where the court reviewed the evidence presented at trial including, but not limited to, testimony of the parties and other witnesses, photographs and specifically referred to the principles and holding in *Proctor* was appropriate and justified. (Assignment of Error No. 1 and No. 2).

B. Must the trial court's conclusion of law finding that equitable grounds exist to award the Henleys the Appellants' land and deny injunctive relief be reversed where the trial court reviewed the evidence presented at trial including, but not limited to, testimony of the parties and other witnesses, photographs, specifically referred to the principles and holding in *Proctor* and concluded the relief granted was appropriate and justified. (Assignment of Error No. 1 and No. 2.)

C. Whether the trial court's Judgment and Decree should be remanded to the trial court with instruction to enter an amended Judgment and Decree to require Defendants to obtain and pay for a new survey to replace the survey and legal description prepared by a Professional Land Surveyor and obtain a boundary line adjustment from Yakima County when Yakima County does not have jurisdiction.

IV. SUPPLEMENTAL STATEMENT OF THE CASE

A. Statement of Facts

In 2011, the Henleys decided to replace their old chain link fence with a new, solid fence. They believed it necessary because the Appellants were mowing their lawn and shooting rocks and debris onto the Henleys' property damaging their vehicles and travel trailers. RP 74.

In 2011, over the course of several weeks, the Henleys replaced the old fence with a more substantial one to protect their property. RP 74-75.

When building the new fence, the Henleys took great pains to place the new fence at the same location as the old fence. RP 79-80, 82, 83, 105, 115.

The new fence, unfortunately, encroached 6 inches more onto the Plaintiffs' property. The old fence had become the property line between the property of the Henleys and Plaintiffs. CP 73. The encroachment was 67 feet long. The encroachment was 33.5 square feet. Id.

Mrs. Garcia has a garden of mint where her former garden was. RP 116. The encroachment where her former garden was is 6 inches.

B. Procedural History

Appellants' view of the procedural history is accurate. Although

very little was mentioned of *Proctor* in argument, the Appellants filed a rather extensive brief in support of their Motion for Reconsideration laying out and arguing their position with respect to *Proctor* RP 82-101.

V. ARGUMENT

A. Standard of Review

A trial court's denial of an equitable remedy is 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).

The issue before this Court is whether the trial court's decision to deny injunctive relief in favor of the remedy and result allowed by *Proctor* is based on "tenable grounds or tenable reasons." In other words, can the trial court's decision and remedy be defended with the evidence before the Court and applying the law.

Appellants suggest that the Court's review is de novo, citing Worble v Local Union 73, Int'l Bld. Of Elec Workers, 64 Wn.App 698, 826 P.2d 224 review denied 119 Wn2d 1018, 838 P.2d 691 (1992)

Appellants assert that the trial court failed to apply the correct legal standard.

The issue here is not whether the trial court failed to apply the correct legal standard, but whether the decision of the trial court, applying the legal standard set forth in *Proctor* is tenable under the evidence. In other words, did the trial court abuse its discretion by denying injunctive relief and concluding that the evidence clearly and convincingly proved the elements of *Proctor*.

B. The Trial Court's Analysis

The Appellants correctly state the analysis the trial court was required to conduct. The traditional primary remedy for encroachment when one party builds a structure on another's land is for the court to eject the encroacher 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.

The purpose of the test was explained in *Arnold v. Melani* 75 Wn.2d 143, 449 P.2d 800 (1968).

> Ordinarily, even though it is extraordinary relief, a

> mandatory injunction will issue to complete the removal of an encroaching structure. However, it is not to be issued as a matter of course. We do not deny that a 'sacred" right exists in a free society as to the protection fo the concept of private property; ww simply hold that when an equitable power of the court is invoked, to enforce a right, the court must grant equity in a meaningful manner, not blindly. "There is no question but that equity has a right to step in and prevent the enforcement of a legal right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable. " *Thisius v. Dealander,* 26 Wash.2d 810, 818, 175 P.2d 619, 623 (1946). If this is so, then equity has the right to deny the extraordinary remedy of mandatory injunction. However, in that the relief granted by the denial of the injunction affected by the owner's possessory rights, as do laches and estoppel, and is exceptional relief for the exceptional case, we further require (as was present in this case) that the evidence of the elements listed above be clearly and convincingly proven by the encroacher.

75 Wn.2d at p. 152

The Court examined all evidence including significant testimony by the parties and photographic evidence and concluded that despite the encroach of 6 inches for 67 feet (33.5 square feet), .61 percent (.61%) of the total areal of Plaintiffs' property the remedy should not be injunctive relief.

> 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

C. The Henleys presented clear and convincing evidence justifying the conclusions of the court

1. Preface

In their argument that the trial court failed to analyze the case in accordance with the test and principles of *Proctor v. Huntington*, the Appellants rely heavily on actions and results in which took place and occurred in 1997 and before. The purpose, of course, it to influence the evaluation of the evidence in this Court, which evidence was not considered by the trial court in its ultimate ruling denying injunctive relief and awarding the disputed property to the Henleys. The trial court ruled that any claim for encroachment which occurred more than ten years prior to the filing of this case was precluded by the statute of limitation. The trial court's inquiry, therefore, concerned only the actions that took place in 2011.

2. The encroachment by the Henleys in 2011 was inadvertent and accidental.

It is clear that the encroachment that resulted from rebuilding the fence was inadvertent and accidental. There was never any intention to encroach upon the Appellants' property beyond the line of the fence that

was being replaced. Mr. and Mrs. Henley both testified that they believed that the new fence was in the same location as the old fence. RP 79-80, 113. Mr. and Mrs. Henley both testified that, as each section of the fence was replaced, the fence posts were placed in either the same holes as the previous fence posts or next to the holes of the previous fence posts. RP 79-80, 100, 113. They were not attempting to take property that didn't belong to them. RP 105.

Although the Appellants requested a survey, it was not accomplished until after the new fence was constructed. CP73. In addition, the Henleys believed that they were constructing the new fence in line with the old fence which defined the property lines between the parties property. A survey would not have changed that boundary.

The Henleys did not take a calculated risk. They believed sincerely that they were building the new fence on the location of the old fence. Neither were they negligently, willfully or indifferently constructing the new fence. They were taking great pains to not encroach upon the property of the Appellants. The de minimus extent of the resulting encroachment is clear and convincing evidence that they encroachment in 2011 was inadvertent and accidental.

3. There was clear and convincing evidence to demonstrate that the damage to the appellants was small and benefit of removal equally small.

Appellants either misunderstand or misrepresent the trial court's finding on this issue. The Appellants state that the encroachment as a result of the rebuilding of the fence is 2.5 to 3.0 feet the length of the property. This is wrong. CP 73.

The Court found that the encroachment resulting from the rebuilding of the fence in 2011 was only six inches and ran 67 feet. CP 73.

The total area of Appellants' property lost to the 2011 encroachment was only .61 percent (.61%) of the total area of the lot. There was no demonstrable loss to the use of the property and no demonstrable benefit to the property of restoring the property lost by the encroachment.

All activities that took place prior to the 2011 encroachment could take place after the encroachment. The claims of an inability to maintain a garden as a result of the encroachment is simply not credible. The loss of 6 inches of garden is simply not fatal to the garden.

The loss to the Appellants was small. Likewise the benefit of restoring the property lost to the encroachment is small.

4. There was clear and convincing evidence that there is ample room for a structure suitable for the area and no real limitation on the property's future use.

The property of Appellants is occupied by a house and a substantial outbuilding. They were relatively close to the north boundary line of the Appellants' property before the 6 inch encroachment of 2011. The loss of property as a result of the 2011 encroachment is 33.5 feet or .61 percent (.61%) of the total property of the Appellants. The use and future use of the Appellants' property has not been impacted except in an infinitesimal near immeasurable way. The use and future use of the property is what is and will be. The trial court had clear and convincing evidence before it that there remained ample room for the structures and there was no real limitations on the future use of Appellants' property.

5. It is not practical to move the fence built in 2011.

Impractical is defined as "not adapted to use or action, not sensible . . ." Concise Oxford English Dictionary, Eleventh Edition, 2004. Notes on the usage of impractical are, " Although similar in meaning, *impracticable* and *impractical* are not used in exactly the same way. *Impracticable* means 'impossible to carry out', as in the proposals would be impracticable for most small companies, whereas *impractical* tends to be used to mean 'not sensible', as in impractical high heels." Id. Clearly, moving the fence built in 2011 is impractical. Simply put, moving the fence built in 2011 is not sensible.

The fence took weeks to build and it could not be built without

trespass. The Henleys took great pains to avoid trespass. RP 100, 105.

Moreover, the land recovered by removing the fence would be incredibly small and is not necessary to make practical use of the Appellants' property. The land recovered would be a mere 6 inches over 67 feet and would be virtually of no practical use by the Appellants.

There was sufficient, clear and convincing evidence that it was not sensible to take down and rebuild the fence.

6. There was clear and convincing evidence of enormous disparities in resulting hardships.

The Henleys did not intend to encroach upon the Appellants' property. They took great pains to avoid encroachment. They used slow and painstaking efforts to avoid encroachment. Unfortunately, the fence built in 2011 encroached on a portion of the Appellants' property by a mere six inches.

The Appellants demonstrated no hardship resulting from the 2011 fence. Appellants merely presented alleged hardships as a result of the 1997 fence.

The encroachment of the 2011 fence by 6 inches for 67 feet prevents no activity on the Appellants' property. There is no demonstratable hardship.

In contrast, removal and rebuilding the fence would result in

significant hardship to the Henleys. This is especially true of the need to remove the fence and painstakingly rebuild the fence without trespassing on Appellants' property.

While the Henleys may have been aware of Garcias' complaints, they, in good faith, were attempting to avoid encroachment. They believed they had avoided encroachment.

7. A boundary line adjustment is not required.

The Appellants requested that the trial court require the Henleys to obtain and pay for a formal boundary line adjustment with Yakima County. The Appellants cited Yakima County Code 19.34.020.

The Yakima County Code is not applicable here. The property is within the City of Tieton, Washington, which has its own provisions for boundary line adjustments. See City of Tieton, code of Ordinances 16.04.070. CP 72 The merger of a portion of the Appellants' property with the Henley's property is an exemption to the subdivision rules of the City of Tieton.

8. There is not need for a new survey.

The Appellants are unhappy with the legal description utilized by the trial court describing the boundary line between the Garcia and Henley properties. They demand different legal description and that the Henleys pay for it.

The legal description utilized by the trial court was prepared by a Professional Land Surveyor who had been retained by the Appellants. CP 18. The Appellants cite no authority or reasons for rejecting the legal description proposed by a Professional Land Surveyor.

CONCLUSION

There was clear and convincing evidence to support the Court's conclusion that it should deny injunctive relief and quiet title to the 6 inch encroachment in the Henleys. The trial court did not abuse its discretion in concluding the relief it granted pursuant to *Proctor v. Huntington.* The loss of less than one percent (1%) of fully developed and fully usable property warranted the trial court's decision.

RESPECTFULLY SUBMITTED this 9th day of September, 2016.

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By 

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I certify that on the 9th day of September, 2016 I caused a true and correct copy of Respondents' Brief to be served on the following in the manner indicated below:

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