94511-0

Court of Appeals, Division III, Cause No. 341895

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,

vs.

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

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Mr. and Mrs. Ricardo Garcia and Luz Garcia ("Garcias") seek review of the Court of Appeals' decision terminating review designated in Section II.

II. DECISION BELOW

The Court of Appeals, Division III, filed an unpublished decision in this case on April 11, 2017. A copy of the opinion is included in the Appendix at pages 1 through 22.

III. ISSUES PRESENTED FOR REVIEW

A. Whether review should be accepted where the decision of the Court of Appeals is in conflict with prior decisions of the Washington State Supreme Court which require the trial court to reason through the five *Arnold v. Melani* elements before granting or denying a request to eject a trespasser?

B. Whether this Court should review the Court of Appeals' decision that conflicts with prior decisions of this Court and the Court of Appeals, which require a trial court to consider all of the relevant factors on the record and enter findings of fact on the material facts?

C. Should review be accepted where the decision of the Court of Appeals is in conflict with prior decisions of the Washington State Supreme Court that require an encroacher to prove the five *Arnold v. Melani* elements

by clear and convincing evidence before a court will take fee title from the innocent landowner in exchange for monetary damages?

IV. STATEMENT OF THE CASE

A. Statement of Facts.

In 1991, Ricardo and Luz Garcia purchased their home in Tieton, Washington. Ted and Audean Henley have owned the adjacent property directly to the north of the Garcias (CP 9-10) since 1985.

When the Garcias bought their home, there was an existing fence between their property and the Henleys' property (CP 72). The Henleys rebuilt the fence at least twice during the 1990s. Each time the Henleys rebuilt the fence they moved the fence further onto the Garcias' property. (CP 27, 72). The most significant encroachment occurred in 1997.

That year, the Garcias took an extended trip away from home. When they returned, they discovered that the Henleys had moved the fence a foot onto the Garcias' land (CP 27, 72; VP 13). The Garcias verbally protested. The Henleys did not move the fence back or take action to determine the correct 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." (VP 13). Mr. Henley became angry and used obscenities. (VP 132).

The Henleys started rebuilding the fence again in 2011, 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. 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). Mr. Garcia tried again to talk to Mr. and Mrs. Henley about the fence location and 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." (VP 132 and 133).

After 2011, Mrs. Garcia could no longer maintain her garden in the significantly reduced area. (VP 39). Prior to 2011, Mrs. Garcia had been able to plan corn, mint and zucchini. (VP 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." (VP 40).

After the 2011 fence, a survey was completed showing that the Henleys' 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 and Exhibit 3 from Plaintiffs' Exhibit Notebook Tab 1.1). Areas of their property which had been devoted to the vegetable garden and their son's small pond were

restricted by the fence encroachment. (VP 47-49). The Garcias requested that the Henleys remove their fence from the Garcias' property but the Henleys refused (CP 10).

B. Procedural History.

The Garcias sued the Henleys on May 17, 2012 (CP 3). They sought ejectment and injunctive relief 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, 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 Henleys to two and one-half feet along the border between the properties (CP 68).

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

Instead of applying the typical remedy of an injunction requiring fence removal, the trial court granted fee title to the Henleys citing *Proctor v. Huntington*, 169 Wash.2d 491, 238 P3d 1117 (2010) and ordered the Henleys to pay $500.00. (CP 74-75, 77) The trial court did not enter any findings of fact on the five elements affirmed in *Proctor* as a basis for

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denying ejectment and did not review any briefing on *Proctor*. During closing arguments, the Henleys' attorney stated a doctrine called "de minimus encroachment" applied to this case although he admitted he had not done any briefing on the issue. (VP 146).

The Garcias' attorney explained that the *Proctor* case required the encroacher to establish particular elements by clear and convincing proof, including a lack of bad faith and enormous hardship to move the encroachment. (VP 149-150). Despite the lack of evidence on these issues, 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 trial court did not:

> ...reason through the *Arnold* elements as part of its duty to achieve fairness between the parties. *Proctor*, 169 Wash.2d at 503. In contrast, the Court's letter ruling and corresponding Findings of Fact and Conclusions of Law indicate that equitable principles in *Proctor* "may indicate a different result," and that this case "warrants the application of such principles. No further findings ...findings are provided. (CP 85).

The Motion for Reconsideration further argued that 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.

The Court of Appeals affirmed the trial court's judgment in an unpublished opinion filed April 11, 2017.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) sets forth the criteria governing review by the Supreme Court. Review is appropriate here because the Court of Appeals decision conflicts with decisions of this Court and with the Courts of Appeal.

A. The Decision of the Court of Appeals Conflicts with Prior Decisions of the Washington State Supreme Court That Require the Trial Court to Engage in a Reasoned Analysis Under *Arnold v. Melani*.

1. Ejectment is the Appropriate Remedy Unless Ejectment would be Oppressive under Exceptional Circumstances Established by the *Arnold* Five Factor Threshold Test

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 v. Melani*, 75 Wn. 2d 143, 152, 449 P. 2d 800 (1968) see, also, *Cogdell v. 1999 O'Ravez Family, LLC*,

153 Wn.App. 384, 220 P.3d 1259 (2009). The court in *Arnold* established five factors an encroacher must prove by clear and convincing evidence to avoid an ejectment order. *Id.* at 915.

Proctor v. Huntington affirmed utilization of the *Arnold* five factor test. *Proctor* held that if an encroacher can meet the five-part test set out in *Arnold*, the court may deny an injunction and award the plaintiff-landowner damages:

> [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 invoke the equitable exception articulated by the Supreme Court in *Arnold*, the Henleys have the burden of establishing each of the five elements by clear and convincing evidence. *Arnold v. Melani*, 75 Wn. 2d at 152.

The Court of Appeals' decision does not follow these precedents. While the Court of Appeals reviews the factual record and holds that the trial court could have found facts supporting the five elements, the Court of

Appeals majority opinion does not require a written finding on each element. The majority opinion states that the *Arnold* factors are simply a "focusing mechanism" that applies when a "property rules" approach might otherwise be applicable. Appendix at 8 - 9. However, the *Proctor* opinion specifically refers to the *Arnold* grounds as a "test" for when a court may deny injunctive relief. *Proctor* at p. 500. The *Arnold* "test is something more than merely balancing the equities." *Id.* This Court held that when a court is asked to eject an encroacher, it must "reason through the *Arnold* elements as part of its duty to achieve fairness between the parties." *Proctor*, 169 Wn.2d at 502-03.

At least one other Division III decision applied the five *Arnold* factors as a threshold. *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn.App. 384, 220 P.3d 1259 (2009) held that the court will grant ejectment unless an ejectment order would be oppressive and cited to *Proctor v. Huntington*, 146 Wash.App. 836, 846, 391, 192 P.3d 958 (2008). *Cogdell* held that for the exception to apply, the encroacher must prove the five Arnold elements by clear and convincing evidence. *Id.*

Similarly, the Division 1 appellate court also affirmed a trial court's denial of a mandatory injunction where it found that the trial court's findings of fact on the five *Arnold* factors were supported by substantial evidence. *Castanza v. Wagner*, 43 Wn.App. 770, 776-77, 719 P.2d 949

(1986). While the opinion does not address if the five factors are a test or a focusing mechanism, the five factors were applied as a limitation to determine when denial of ejectment is appropriate. *Id.*

While unpublished, the Court of Appeals decision is also at odds with the Division 1 case of the *Levack Family Trust v. Leach*, 71431-7-I (Div. 1, 2014) which states that the threshold inquiry is if the encroacher proved each *Arnold* element by clear and convincing evidence. Appendix p. 24. This case was decided after the *Proctor* opinion and the court continues to apply the five factors as the minimum starting point to determine if denial of an injunction is just and equitable. The court carefully reviewed the trial court's written findings on each *Arnold* element demonstrating the importance of a finding on these elements before denying an injunction. Appendix p. 29.

In another unpublished case, Division II also applied the *Arnold* factors as a test to determine if an injunction should be granted. *Riley v. Valaer*, No. 46120-0-II (Div. 2, 2015), Appendix pp. 30 to 33. The court held that since the first element was not met, the court did not need to address the other factors or elements. Appendix p. 33. While unpublished, these cases from Divisions I and II demonstrate that the Court of Appeals treatment of the Henley encroachment conflicts with the other appellate divisions regarding application of the *Arnold* factors as a test.

The Court of Appeals' interpretation that *Arnold* is merely a "focusing mechanism" is also at odds with the express language of the *Proctor* opinion, which stated that *Arnold* "distilled our cases into a test for when a court may substitute a liability rule for the traditional property rule in an encroachment case." *Proctor*, 169 Wn. 2d 491, 500. The five *Arnold* factors are not merely a "focusing mechanism" but are a threshold that the encroacher must meet to avoid an order of ejectment.

2. Meaningful Appellate Review Requires The Trial Court Record to Show that the Arnold Five Factors Were Met

The trial court did not enter any findings of fact on the five material elements of the Henleys' *Arnold* defense to ejectment. Despite the lack of findings, the Court of Appeals affirmed the trial court's decision to transfer fee title to the Henleys upon payment of $500.00 to the Garcias.

This decision is at odds with other appellate decisions. While the issue in *Castanza v. Wagner*, 43 Wn.App. 770, 719 P.2d 949 (Div. 1 1986) was not whether written findings of fact are required, that requirement is implicit in the appellate court's review of the trial court's findings. The trial court entered findings that the defendant installed encroaching utilities in good faith and removal of the utilities would provide very slight benefit and result in severe damages to the defendant resulting in an enormous disparity in benefit and hardship. The appellate court reviewed these trial

court findings to determine if the trial court properly denied a mandatory injunction under the *Arnold* factors. *Id.*

In addition to a lack of findings, the trial court did not devote a portion of its letter opinion to the material facts on the five legal elements of the Henleys' ejectment defense. Finally, the trial court did not issue an oral opinion that discussed or applied the required five elements to the facts of the case. The trial court simply stated that unnamed "equitable principles" under *Proctor* warranted denial of an injunction requiring removal of the encroaching fence.

Rather than require the trial court to enter findings of fact, the Court of Appeals itself reviewed the record and determined that the trial court could have made findings that supported the *Arnold* factors. Appendix pp 7 – 8. However, the credibility of the Henleys is key to the *Arnold* factors and the trier of fact should be weighing credibility not the Court of Appeals. Essentially, the Court of Appeals found that since the trial court hypothetically could have engaged in a proper *Arnold* analysis, the court would affirm the decision without the trial court's written or oral analysis.

This does not comport with the standard set forth in *Proctor*. 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 502-503. Without findings

on the five *Arnold* factors, it is impossible for a reviewing court to determine if the trial court did engage in a reasoned analysis.

The purpose of findings on decisive issues is to enable the appellate court to review intelligently the relevant questions. As the dissenting opinion states, the trial court fulfills this requirement when both the questions the trial court considered and the manner in which the questions were decided are clearly disclosed. *Schoonover v. Carpet World, Inc.*, 91 Wn.2d 173, 177, 588 P.2d 729 (1978), citing *Heikkinen v. Hansen*, 57 Wash.2d 840, 360 P.2d 147 (1961). If the findings of the trial court are incomplete, the appellate court may look elsewhere in the record such as the court's oral opinion to eliminate speculation as to the grounds upon which the trial court decided. *Id.* Here, the trial court did not issue an oral opinion nor did its letter opinion elucidate the basis for its conclusion that equitable principles justified denial of an injunction. The record below is insufficient for the appellate court to review the trial court's decision denying ejectment.

The trial court found that the Garcias had established that they are entitled to the ejectment remedy. (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 Henleys' properties should remain in its current location, and that title to the Plaintiffs' property that is subject to ejectment should be granted to the Henleys.
> (CP 74-75, 97-98, 28.)

The trial court said nothing else about *Proctor* or *Arnold.*

The trial court must act in a meaningful manner and not "blindly" when asked to invoke its equitable powers. *Arnold v. Melani*, at 152; *Proctor* at 504. Respectfully, the trial court acted "blindly" when it simply pronounced that unelucidated equitable principles required denial of an injunction.

As the dissenting opinion notes, Washington law is replete with examples where the appellate court reverses and remands if a trial court failed to consider all of the relevant factors on the record. Appendix p. 18, pp. 21 – 22. The Henleys had the burden to prove all five *Arnold* elements by clear and convincing evidence.

The Court of Appeals faults the Garcias for a lack of findings and states that since the Garcias failed to include the *Proctor* and *Arnold* cases in their trial brief they cannot complain of the trial court's failure to enter findings. Appendix p. 7. This assertion ignores the fact that the Henleys never raised the *Arnold* elements as a defense to ejectment and ignores that

it is the Henleys burden to prove application of *Arnold* by clear and convincing evidence. The Garcias do not have the burden to disprove application of the doctrine. Furthermore, the Garcias' did try to get the trial court to correct the lack of findings in their Motion for Reconsideration that asked that the trial court to address the *Arnold* elements. The trial court denied the motion without explanation. (CP 105).

The trial court completely failed to explain its denial of injunctive relief. The trial court did not address even one of the five *Arnold* elements much less all five and therefore abused its equitable discretion. The Court of Appeals erred in affirming the denial of injunctive relief where the trial court record fails to show a reasoned analysis of the *Arnold* elements.

3. The Encroacher Must Prove The Five Arnold Factors By Clear and Convincing Evidence

Proctor affirmed that courts will normally order removal of encroachments. *Proctor v. Huntington*, 169 Wn. 2d 491, 503-504, 238 P. 3d 1117 (2010). For the exception to apply, the encroacher must prove the five *Arnold* elements by clear and convincing evidence. *Id.* p. 505 (dissenting opinion without disagreement from the majority), *Arnold v. Melani*, 75 Wn 2d at 152; *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn.App. 384, 220 P.3d 1259 (2009).

The trial court failed to enter a conclusion of law or other finding that the Henleys had met their burden of clear and convincing evidence which standard of proof 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)). The Court of Appeals compounded that error and ignored the requirement that the Henleys prove application of the *Arnold* factors by clear and convincing evidence and misapplied the factors.

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. This element, in particular, involves judging the credibility of the witnesses' testimony. The trial court did not find the Henleys acted in good faith and there is ample evidence in the record to find the Henleys acted in bad faith in the pattern of moving their fence onto the Garcias' land not once, not twice, but three separate times.

The Court of Appeals finds that the Henleys "did not necessarily take a calculated risk in moving the fence." Appendix p. 7. This is the wrong standard. The Garcias do not have the burden to prove that the Henleys "necessarily" took a calculated risk. Rather, the Henleys have the

burden to prove by clear and convincing evidence that they acted in good faith and did not take a calculated risk.

The present case is in stark contrast to the encroachment in *Proctor*, based upon a good faith, mutual mistake between the parties as to the meaning of a surveyor's mark. 169 Wn. 2d 491, 493. Similarly, a difference in surveys occurred in *Arnold v. Melani,* 75 Wn. 2d 143.

To meet the second element of the *Arnold* test, Henleys had to prove by clear and convincing evidence that the damage to the landowner was slight and the benefit of removal equally small. The trial court did not make any findings regarding the damage to the landowner or the benefit of removal. The Henleys did not present any evidence on these points at trial. The Court of Appeals nonetheless found the factor was met because the size of the last encroachment was six inches wide over a length of 67 feet. Appendix pp. 7 – 8.

Focus on the size of the encroachment ignores the pattern of encroachments. As noted in the dissenting opinion, the Henleys now know that each time they replace the fence, they are free to encroach further onto the Garcias land and "oblige the Garcias to sue, with the end result that the Henleys receive more territory while the Garcias receive damages exponentially lower than the cost of litigation." Appendix p. 17. The benefit of removal is more than the benefit of returning the Garcias' garden

to a useful size. Requiring the Henleys to move their fence would send a message to the Henleys to stop their repeated pattern of encroachments and would stop future disputes and litigation.

The third *Arnold* element requires the Henleys 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 Court of Appeals found that since the last encroachment was approximately six inches over a 67 foot distance, that "small figure also easily satisfied" the third element. Appendix p. 8. However, the Henleys did not present any evidence regarding the ability to utilize fully the Garcia property with the fence encroachments given building setbacks and other requirements applicable to their property. The Henleys presented no evidence and the court made no findings regarding zoning, impact on potential future uses of the property, building requirements or improvement restrictions. The Court of Appeals incorrectly found that there was ample room on the property for other structures because no evidence was presented on these issues.

To satisfy the fourth *Arnold* requirement, there must be clear and convincing evidence that it is impractical to move the structure as built. The majority opinion misconstrues this third element and states that the fourth *Arnold* factor is met because the fence cannot be removed "as built" but

"must be unassembled and moved." Appendix p. 8. Without disassembly, very few permanent structures can be moved. Rather than focusing on whether a structure can be picked up and moved in its entirety with no disassembly, the fourth factor requires a look at the practicalities of the removal and reconstruction as in the case of the removal and reconstruction of an entire house, garage and well in *Proctor*. 169 Wn. 2d 491, 503.

Because the Henleys have moved their fence several times, is reasonable to find that the Henleys can, as a practical matter, move the fence once more. Moving a fence is much different from moving a house and fence, as was the case in *Arnold* and *Proctor*.

The final *Arnold* element requires clear and convincing evidence of an enormous disparity in resulting hardships. The Court of Appeals found that the adjective "enormous" did not apply but nonetheless found that this factor was met. Appendix p. 8. The trial court did not make a finding on this element; the Henleys did not present clear and convincing evidence upon which to base a hardship finding such as exorbitant cost to move a fence. To presume that the facts of this case meet the hardship requirement in favor of the Henleys sends 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. In particular, it sends a message to the Henleys that they may continue their pattern of encroachment.

The Court of Appeals majority opinion states that the trial court decision is "about as win-win as could happen given the circumstances." Appendix p. 11. The trial court is not charged with finding a "win-win" in determining private property rights. To the contrary, clear and convincing evidence in the record must exist before a court will deny fundamental property rights and allow an encroaching structure to remain.

The Court of Appeals decision affirming the trial court's ruling should be reversed because the Henleys have not met their burden of proof by clear and convincing evidence on each of the five *Arnold* factors in contravention to the dictating of *Proctor* and *Arnold.*

B. Review Should Be Granted Because This Is A Matter of Substantial Public Interest.

Proctor explicitly stated that nothing in the opinion undermined "fundamental property rights: it remains true that a landowner may generally obtain an injunction to eject trespassers." 169 Wn. 2d at 504. The Court of Appeals decision allows for fee title to be taken from a landowner and given to a trespasser without any reasoned analysis on the record to justify this action which does violate fundamental property rights. Review should be accepted so that private property rights are respected by requiring written findings and a reasoned analysis on each of the *Arnold* elements in an ejectment case.

VI. CONCLUSION

This Court should accept review of the Court of Appeals decision, which is at odds with this Court's rulings in *Proctor* and *Arnold*. In *Proctor*, this Court required the trial court to conduct a reasoned analysis of the five elements laid out in *Arnold v. Melani*. The appellate court cannot determine if the trial court conducted the proper analysis without any written findings and conclusions on the elements. The proper analysis is required before transferring fee title away from a landowner and awarding it to an encroacher.

Furthermore, the encroacher must prove all five elements of the *Arnold* test by clear and convincing evidence. Both the trial court, and the Court of Appeals, fail to find the Henleys met this higher burden of proof.

The Garcias respectfully request this Court to accept review of the Court of Appeals decision. Review is in the public interest to ensure a reasoned analysis justifies leaving the encroachment in place and terminating a private landowner's fee title.

Respectfully submitted this 10th day of May, 2017.

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

By _____
LINDA A. SELLERS (WSBA #18369)

CERTIFICATE OF SERVICE

I certify that on the 10th day of May, 2017, I caused a true and correct copy of the above to be served on the following in the manner indicated below:

Court of Appeals Division III 500 N. Cedar Street Spokane, WA 99201	☒ UPS Overnight Delivery
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 10th day of May, 2017.

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

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

RICARDO G. GARCIA and LUZ C. GARCIA, husband and wife, Appellant, v. TED HENLEY and AUDEAN HENLEY, individually and the marital community of them composed, Respondent.	)	No. 34189-5-III UNPUBLISHED OPINION

KORSMO, J. — The trial court denied the request of Luz and Ricardo Garcia to eject a fence their neighbors, Audean and Ted Henley, had built six inches on to the Garcia property. Dissatisfied with the $500 damage award, the Garcias appeal to this court. Concluding that the trial court acted within its discretion in designing a remedy, we affirm.

FACTS

With each succeeding repair or replacement of the fence between their respective properties, the Henleys moved it further and further on to the Garcia property. A chain link fence, in place long before either the Henleys (1985) or the Garcias (1991) purchased

their properties, was believed to mark the boundary line. The trial court ultimately found that it, too, had always been located on the Garcia property.

The next significant intrusion onto the Garcia property came in 1997 when the Henleys replaced the final 67 feet of the eastern end of the chain link fence with a wooden fence supported by metal poles. This adjustment occurred while the Garcias were out of the country. Upon their return, they protested the intrusion, but no legal action was taken.

However, when the next revision to the fence line occurred in 2011, the Garcias responded with the current action to eject the Henley fence and to recover damages for trespass. The Henleys testified that they believed they were replacing the fence in the same location it already stood. The trial court found that in replacing the eastern portion of the fence in 2011, the new location intruded an additional six inches on to the property over the final 67 feet, resulting in the Henleys encroaching on an additional 33.5 square feet of Garcia property.

At the ensuing trial, the court found that the Garcias had established the elements of their ejectment claim for the 2011 encroachment. The court also determined that the most significant intrusions had occurred long before the 2011 action, resulting in the Henleys gaining all land down to the fence line by adverse possession. Noting that the Garcias otherwise were entitled to an injunction, the trial court recognized pursuant to *Proctor v. Huntington*, 169 Wn.2d 491, 238 P.3d 1117 (2010), that equitable principles

sometimes dictated a different remedy. Believing that this case was an appropriate one to consider an alternative remedy, the trial court decided that the fence should remain in its current location and title to the land be granted to the Henleys. The court ordered them to pay the Garcias $500 for the value of the additional 33.5 square feet taken by the 2011 revision.

The Henleys were also ordered to pay all taxes associated with the corrected boundary lines, have survey markers installed, and both parties were directed to cooperate in signing all forms and documents necessary to carry out a boundary line adjustment.

After judgment was entered, the Garcias timely appealed to this court. A panel considered the matter without argument.

ANALYSIS

The Garcias argue that the trial court did not properly consider the governing equitable factors, resulting in a failure to enforce their property rights. Their argument reads too much into the governing cases.

The decision to eject a trespasser is an equitable remedy. *Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800 (1968). Similarly, the decision not to eject a trespasser is also equitable in nature. *Id.* The goal of a court acting in equity is to do substantial justice and end litigation. *Carpenter v. Folkerts*, 29 Wn. App. 73, 78, 627 P.2d 559 (1981). A trial judge has broad discretionary powers to achieve those ends. *In re*

Foreclosure of Liens, 123 Wn.2d 197, 204, 867 P.2d 605 (1994). The judge's equitable decision is therefore reviewed for abuse of discretion. *Id.* Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The governing cases are *Arnold* and *Proctor*. *Arnold* involved a situation where the plaintiff's house and fence intruded two- to eight-feet on to their neighbors' property. 75 Wn.2d at 145-146. The defendants removed the fence and demanded that the plaintiffs remove the house. Finding no adverse possession had occurred and that value of the loss of use of the land to the plaintiffs was no more than $125, the trial court declined to enjoin the encroachment or require removal of the home. *Id.* at 153-154. It granted the defendants an easement for the encroaching portions of the house. *Id.* at 154. The question presented was whether the trial court had the discretion to refuse to grant the plaintiffs equitable relief. *Id.* After considering and rejecting other equitable theories of relief, the court finally turned to the injunction issue.

Upon reviewing three of its older cases, the *Arnold* court noted that it was particularly appropriate to withhold a mandatory injunction as oppressive when (1) the encroacher did not act in bad faith or take a calculated risk to 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 suitable structure and no limitation was

imposed on the land's future use, (4) it was impractical to remove the structure as built, and (5) there is an enormous disparity in resulting hardships. *Id.* at 152.

> Ordinarily, even though it is extraordinary relief, a mandatory injunction will issue to compel 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 of the concept of private property; we 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.

Id. The court then concluded that the trial judge had correctly declined to order the removal of the home. *Id.* at 154.

Proctor revisited *Arnold* and provided a detailed history of encroachment actions in Washington. Washington initially followed the "property rules" concept in encroachment cases, an approach that gave the landowner an absolute right to eject encroachers. 169 Wn.2d at 497. In time, however, Washington also recognized the "liability rules" approach that granted damages in exchange for property rights. *Id.* at 497-499. *Proctor* noted that *Arnold* represented Washington's first attempt to reconcile the two approaches. *Id.* at 499-500.

Proctor involved a house built one acre onto the plaintiff's rural property due to joint confusion concerning the meaning of a boundary marker. *Id.* at 494. Eight years later the plaintiff noted the intrusion while having the boundary lines clarified due to a dispute with another neighbor. After negotiations to amend the boundary lines failed, the plaintiff sued to eject the defendants from his land. *Id.* at 494-495. The trial court

declined to eject the defendants, finding that the acre of land was worth $25,000 and that moving the house elsewhere would cost $300,000. The court ordered the plaintiff to sell the acre to the defendants for $25,000. *Id.* at 495. Both parties appealed, with the plaintiff arguing that he was entitled to the injunction because the intrusion on to his property was not "slight." *Id.* at 495-496.

Reviewing *Arnold* and its older decision in *Bank v. Bufford*, 90 Wash. 204, 155 P. 1068 (1916), the *Proctor* court stated that *Arnold* had "settled the point" that "liability rules" were permissible. *Id.* at 499. *Proctor* read *Arnold* as based in the trial court's general equity power and that the test was more than a balancing of equities. Instead, it was "concerned with the reasoned use of injunctive relief only when an absolute property rule is appropriate." *Id.* at 500. Reviewing the case in light of the *Arnold* factors, the decision to deny an injunction was upheld. *Id.* at 501-504. Acknowledging that the acre-sized encroachment was not slight, the *Proctor* majority nonetheless recognized the issue "was not the key question before the trial court. The question was whether, in equity, it would be fair and just to require the Huntingtons to remove their entire house" due to a mutual "good-faith surveying mistake." *Id.* at 503. In the big picture, the trial court was permitted to view the costs to the plaintiff as minimal, while the costs to the defendant were great. *Id.* at 503-504. Recognizing the "evolution of property law," the court affirmed the trial court. *Id.* at 504. The dissenters would have treated the *Arnold* test as

an absolute threshold a party seeking to avoid ejectment must meet. *Id.* at 504-505 (Sanders, J., dissenting).

With these considerations as background, it is time to consider the arguments raised by the Garcias. They argue that the trial court failed to find the five *Arnold* factors on the record and that the evidence did support implied findings for any of the factors. We disagree with their contentions.

First, there is no support in the case law for requiring a trial court to enter *Arnold* factors on the record. It certainly did not happen in *Arnold* itself, and it is unclear on the face of the *Proctor* opinion whether or not the trial court made record findings on the *Arnold* factors. Since neither party called *Arnold* or *Proctor* to the trial court's decision in its trial briefing, they are not in a position to complain about lack of record findings on the five factors. The Garcias mentioned *Proctor* in their rebuttal argument, claiming that the Henleys took a calculated risk in moving the fence. The trial judge discussed the *Proctor* decision in its letter opinion, further indicating the court's awareness of the issues. On this record, we do not believe the trial judge can be faulted. If the parties had considered *Arnold* important, they would have tried the case from that perspective.

Nonetheless, the record evidence does support finding the presence of the *Arnold* factors. First, the Henleys did not necessarily take a calculated risk in moving the fence. Mr. Henley testified that he thought he was putting up the replacement fence in the same location. Second, the determination that the damage to the Garcias was slight is amply

supported in the trial record. The court found that only a six inch encroachment occurred over the final 67 feet. That small figure also easily satisfied the third *Arnold* factor—there was still ample room on the property for other structures.

The fourth factor also could be found by the trial judge. This *Arnold* factor looks at whether or not a structure can be moved "as built." *Arnold*, 75 Wn.2d at 152. A fence, of course, cannot be moved "as built," but must be unassembled and moved. Semantic points aside, however, it certainly would be possible to move the fence. This factor does not weigh heavily in the calculus.

The final factor is whether there is an enormous disparity of the resulting hardships. Although the adjective "enormous" likely does not apply here, the hardship disparity favors the Henleys. Working only on weekends, Mr. Henley took a month to replace the damaged section of fence. In contrast, the damages for the loss of the land totaled only $500, and the Henleys would have the additional expenses of conforming the legal description of the property to the actual fence line. In contrast, the Garcias would lose six inches of apparently unused property.

On balance, all of the factors favor the Henleys to varying degrees. The Garcias, advancing arguments similar to the *Proctor* dissenters, essentially read the *Arnold* factors as a significant limitation on a trial judge's equitable authority to refuse to enjoin encroaching neighbors. However, the *Proctor* majority rejected that interpretation, reasoning that the *Arnold* factors were more of a focusing mechanism that had

application only in those situations where a "property rules" approach might otherwise be applicable. 169 Wn.2d at 500-501. Indeed, even the appellants in *Proctor* believed that the *Arnold* factors did not justify injunctive relief in the situation where the encroachment was slight. *Id.* at 502. The position the Garcias advance here is more rigid than that proposed—and rejected—in *Proctor*. As in that case, the trial judge did not err in refusing to enjoin the Henleys and eject the fence.

Accordingly, the trial court did not err in applying a "liability rule" approach instead of the "property rule" approach advocated by the Garcias. Moreover, the resulting decision was not an abuse of discretion. The trial court's equitable decision here took into account the entire changes in the boundary line rather than simply the changes engendered by the 2011 replacement of the eastern edge of the fence. By the time an action was finally filed following the 2011 repairs, the court was facing a *fait accompli*. The major variance between the property line and the fence line had been in place for years, resulting in the Henleys (and their predecessors in interest) having acquired title to that strip of land by adverse possession. The last major change to the boundary occurred with the 1997 incursion that the Garcias did not challenge in court. Title to that land, too, passed to the Henleys by adverse possession several years prior to the 2011 action. Accordingly, the trial court understandably believed there was need to adjust the boundaries to account for the land acquired by adverse possession.

On top of those changes, not formally recognized until the present case was concluded, there was the additional six inches of land taken by the 2011 fence replacement. That *de minimis* amount of land had no special economic significance to either the Garcias or to the Henleys. Understandably, moving the fence back six inches made little sense at this point. Instead, the trial court looked at the entire picture and came up with a comprehensive solution designed to fix the situation once and for all. The boundary would be legally adjusted, at the expense of the Henleys, to recognize the new property description, which the Henleys had to have marked by a surveyor rather than by their measurably imprecise fencing practices.[1] The formal adjustment would save the Garcias some tax assessments in the future and place those costs on the property that gained from the adjustment. The Garcias would be paid a token sum for the loss of the six inches.

Since the vast majority of the property taken by the Henleys (and their predecessors) could no longer be recovered by the Garcias, the outcome was about as good as the Garcias could hope. They would gain little or nothing from having the fence moved six inches back, but they did stand to gain some relief in the future when the adjusted boundaries were

[1] The Garcias ask this court to order the Henleys to formalize the boundary line adjustment. We believe the judgment already does so, although the pendency of this appeal might understandably prevent the parties from acting on it. Clerk's Papers at 78. If the Henleys fail to adjust the boundary, the Garcias are in a position to enforce the judgment. If the Henleys believe a formal adjustment is not contemplated by the ruling, they could seek clarification from the trial court.

officially recognized by the taxing authorities. The damages, minimal though they may be, recognized the righteousness of their position. The boundary adjustment created certainty for the future when the current owners eventually seek to sell their respective properties.

The result here was about as win-win as could happen given the circumstances facing the trial court. The trial judge exercised his discretion on very tenable grounds and did not abuse the significant discretion accorded him.

The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

I CONCUR:

Siddoway, J.

No. 34189-5-III

FEARING, C.J. (dissenting in part) — This appeal tests the nature of appellate review. The majority and I agree that an appellate court should defer to factual evaluations of the trial court. Our disagreement lies in the steps a trial court must adopt before a reviewing court defers to those evaluations and specifically whether written findings relevant to the *Arnold v. Melani*, 75 Wn.2d 143, 449 P.2d 800 (1968) encroachment factors are required. Our trial court's findings of fact and memorandum opinion do not address those factors. I would remand the case to the trial court for entry of findings of fact and a further hearing in the event the court deems additional evidence is needed to enter sufficient findings. To the extent that the majority affirms the trial court's ruling without entry of additional findings, I dissent.

Ricardo and Luz Garcia sue neighbors Ted and Audean Henley because, in 2011, the Henleys situated a fence further south on the Garcias' Tieton land. Earlier replacements of the fence also invaded the Garcias' property. The trial court recognized the encroachment, but refused to order the Henleys to return the fence to its pre-2011 location. The trial court instead granted the Garcias damages of $500 representing the fair market value of the taken land.

The Washington Supreme Court has occasionally addressed the circumstances under which a trial court may deny a landowner the remedy of ejectment when a neighbor encroaches on the landowner's property with the assumption that, if the trial court denies the remedy, the court will award damages for the private taking of property. The high court's decision in *Proctor v. Huntington*, 169 Wn.2d 491, 238 P.3d 1117 (2010) includes an excellent historical narrative of the high court's treatment of this question beginning with early twentieth century decisions. Initially, Washington, under the concept of the sacred standing of property rights, always granted the remedy of ejectment for an encroachment. As time passed, the Washington high court, citing equity and contemporary notions of justice, permitted trial courts to deny ejectment and award money damages under limited circumstances. These later Supreme Court rulings engendered strong dissents that lamented the eroding of property rights and complained of unconstitutional takings of private property.

In 1968, our Evergreen State Supreme Court formulated five factors that a trial court must find before denying an ejectment or injunctive relief for an encroachment. *Arnold v. Melani*, 75 Wn.2d 143. The court held that a mandatory injunction can be withheld as oppressive when:

> (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.

Arnold v. Melani, 75 Wn.2d at 152. The high court reaffirmed utilization of these factors in *Proctor v. Huntington*, 169 Wn.2d 491 (2010). Since the high court listed the factors in the conjunctive, presumably the trial court must find all five factors for the court to deny ejectment.

The Washington Supreme Court, in *Arnold v. Melani*, added parameters to the application of the five factors. A property owner still enjoys a sacred right to the protection of private property, and this protection is essential to a free society. *Arnold v. Melani*, 75 Wn.2d at 152. Therefore, a mandatory injunction will ordinarily be issued to compel the removal of an encroachment. *Arnold v. Melani*, 75 Wn.2d at 152. Denial of an injunction is for the exceptional case. *Arnold v. Melani*, 75 Wn.2d at 152. The encroacher must prove the five elements by clear and convincing evidence. *Arnold v. Melani*, 75 Wn.2d at 152.

Proctor v. Huntington, 169 Wn.2d 491 (2010) does not detract from the important constraints announced in *Arnold v. Melani*. Proctor reinforced the general rule as requiring an injunction. *Proctor v. Huntington*, 169 Wn.2d at 504. The dissent, without disagreement from the majority, emphasized the need to find each of the five elements by clear and convincing evidence. *Proctor v. Huntington*, 169 Wn.2d at 505 (Sanders, J., dissenting).

The trial court in this appeal entered a conclusion of law that reads:

> 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 [encroachment] cases that equitable principles may dictate a different result as to an appropriate remedy. . . . [T]he 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.

Clerk's Papers (CP) at 74-75. Nevertheless, the court entered no findings of fact that addressed the five *Arnold* factors. The trial court wrote in its memorandum opinion:

> 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 [Wn].2d 491, 238 P.3d 1117 (2010), the Supreme Court recognized in certain adverse possession [encroachment] 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 at 28. The memorandum opinion lacks a discussion of any facts supporting this ruling. Both the conclusions of law and the memorandum opinion lack any mention of the controlling *Arnold* factors so we cannot be certain that the trial court reviewed all of the factors.

We do not know whether Ted and Audean Henley acted in good faith when moving the fence line in 2011. Ricardo and Luz Garcia readily saw that the relocated fence was further south when they returned from their trip. Ted and Audean Henley could have also readily observed that they encroached on the Garcias' land when erecting the new fence. The record shows no steps having been taken by the Henleys in 2011 to

ensure they did not move the location of the fence further south. When re-erecting the fence twice earlier, the Henleys trespassed further on the Garcias' tract. One might wonder why each time the Henleys reinstalled a fence the three mistaken locations always benefited them.

The fence is the only object encroaching on Ricardo and Luz Garcia's land. Ted and Audean Henley have already moved the fence at least thrice. The record contains no evidence of any impracticality of returning the fence to its earlier 2011 location. The record contains no evidence of the cost of moving the fence or a weighing of that cost with the harm to Ricardo and Luz Garcia of the taking of their land.

The majority faults Ricardo and Luz Garcia for not discussing the *Arnold* factors with the trial court before the court's ruling. In doing so, the majority blames the Garcias for failing to respond to a claim about which they lacked notice. The Garcias wanted ejectment, not damages. In their answer to the complaint and cross claim, Ted and Audean Henley denied that the Garcias owned the disputed land. The Henleys' pleading did not seek denial of an ejectment on the basis of the *Arnold* equity principles. In their trial brief, Ted and Audean Henley argued that they owned the property by adverse possession. They did not ask that the court deny ejectment under equity. The Henleys did not raise the *Arnold* factors during closing argument. The Henleys never cited, for the trial court, *Arnold* or *Proctor v. Huntington*. Therefore, the Garcias possessed no reason and no purpose for mentioning or analyzing the *Arnold* factors for the trial court.

If Ted and Audean Henley wanted equitable relief under *Arnold*, the Henleys should have put the Garcias on notice and discussed the factors. Presumably the trial court determined on its own to follow *Arnold v. Melani* and *Proctor v. Huntington*.

The majority emphasizes the area of the encroachment being 33.5 square feet. This small measure should be a factor considered by the trial court. Nevertheless, size does not control.

The majority fails to note the continuing encroachments on Ricardo and Luz Garcia's real property by Ted and Audean Henley. The Henleys now know that each time they replace the fence, they may encroach further on the Garcias' land and oblige the Garcias to sue, with the end result that the Henleys receive more territory while the Garcias receive damages exponentially lower than the cost of litigation.

To repeat a key rule of encroachment law, Ted and Audean Henley carried the burden to prove by clear and convincing evidence all five elements emanating from *Arnold v. Melani*. Ordinarily the failure to enter specific findings as to material facts is equivalent to a finding against the party who has the burden of proof. *Pacesetter Real Estate, Inc. v. Fasules*, 53 Wn. App. 463, 475, 767 P.2d 961 (1989). Therefore, this court could reverse the trial court's judgment and remand for entry of an ejectment. I only advocate a remand for further findings.

The majority correctly observes that no decision expressly requires the trial court to enter findings of fact with regard to all *Arnold* factors. Nevertheless, the opposite is

also true. No decision expressly excuses a trial court from entering findings of fact. Obviously the trial court, in *Arnold v. Melani*, entered no findings of fact relevant to the factors since the Supreme Court had yet to announce the factors. So *Arnold* cannot stand for the proposition that the factors need not be expressed in findings. As conceded by the majority, the record is not clear as to whether the trial court entered sufficient findings in *Proctor v. Huntington*, 169 Wn.2d 491 (2010).

Washington law is replete with examples where the appellate court reverses and remands for a further hearing if the trial court failed to consider all of the relevant factors on the record. I attach an appendix that nonexhaustively lists decisions demanding a review of all factors on the record.

Ideally, trial courts will enter findings of fact on each factor. *In re Marriage of Horner*, 151 Wn.2d 884, 895, 93 P.3d 124 (2004). Findings of fact play a pivotal role upon review. The purpose of findings on ultimate and decisive issues is to enable an appellate court to intelligently review relevant questions on appeal and, only when it clearly appears what questions were decided by the trial court and the manner in which they were decided, are the requirements met. *Schoonover v. Carpet World, Inc.*, 91 Wn.2d 173, 177, 588 P.2d 729 (1978). Nevertheless, the trial court may be excused from entering express findings of fact if a party presented substantial evidence on each factor and the trial court's oral opinion and written findings of fact reflect that the court considered each factor. *In re Marriage of Croley*, 91 Wn.2d 288, 290-93, 588 P.2d 738

(1978). Some decisions even entail the Court of Appeals reviewing the record on its own to determine the satisfaction of legal factors. *State v. Avila*, 78 Wn. App. 731, 735-36, 899 P.2d 11 (1995). Hopefully, the reviewing court's examination of the entire record to find facts is a rare exception, because such review contravenes standards of appellate review.

This reviewing court in this appeal should not independently review the entire record to determine the satisfaction of the *Arnold* factors. The trial court entered no findings of fact on any of the five required factors. The court's memorandum opinion also does not address the factors. The record contains no testimony concerning the cost to move the fence. The credibility of Ted and Audean Henley is key in determining whether they acted in bad faith or good faith. This credibility should be weighed by the trier of fact.

Another reason compels a remand for a further review. Our trial court's decision fails to mention whether the court based its ruling on clear and convincing evidence. For all we know, the trial court based its decision only on a preponderance of evidence. In *In re Custody of A.L.D.*, 191 Wn. App. 474, 363 P.3d 604 (2015), we reversed a trial court's decision awarding custody of a child, in part, because the trial court failed to note that it applied the required clear and convincing evidentiary standard. The majority ignores the burden imposed on Ted and Audean Henley.

An anomaly exists between *Arnold v. Melani* and *Proctor v. Huntington*. In the

former case, the trial court granted, and the Supreme Court affirmed the granting of, an easement to the encroacher. In the latter decision, the trial court granted, and the Supreme Court affirmed the granting of, fee title to the encroacher. Neither opinion weighs the suitability of an easement rather than fee title or vice versa as part of the remedy. I would grant an easement rather than fee title, since the encroacher fails to prove adverse possession. In the event the encroacher abandons its use of the property, the easement could revert or lapse for nonuse. *Smith v. Gilbraith*, 75 Ohio App. 3d 428, 599 N.E.2d 798, 802 (1991); *Oregon Department of Transportation v. Tolke*, 36 Or. App. 751, 586 P.2d 791, 795-96 (1978). A grant of fee title would not revert for nonuse alone.

I would vacate the trial court's decision and remand to the trial court for further entry of findings of fact and, if needed, additional evidence.

Fearing, J.

Fearing, C.J.

APPENDIX

Competency of a child to testify. *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

Admitting evidence of prior misconduct under ER 404(b). *State v. Asaeli*, 150 Wn. App. 543, 576 n.34, 208 P.3d 1136 (2009).

Admissibility of convictions to impeach the accused under ER 609. *State v. Alexis*, 95 Wn.2d 15, 19-20, 621 P.2d 1269 (1980); *State v. Delker*, 35 Wn. App. 346, 349, 666 P.2d 896 (1983); *State v. Barringer*, 32 Wn. App. 882, 885-86, 650 P.2d 1129 (1982).

Imposition of discovery sanctions. *Foss Maritime Co. v. Brandewiede*, 190 Wn. App. 186, 196-97, 359 P.3d 905 (2015), *review denied*, 185 Wn.2d 1012, 367 P.3d 1083 (2016).

Award of spousal maintenance under RCW 26.09.090. *In re the Marriage of Monkowski*, 17 Wn. App. 816, 819, 565 P.2d 1210 (1977).

Division of property and liabilities in a marital dissolution proceeding under RCW 26.09.080. *In re Marriage of Monaghan*, 78 Wn. App. 918, 920, 899 P.2d 841 (1995).

Award of primary residential placement of children during marriage dissolution proceeding under RCW 26.09.187. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993).

Relocation of a child's custodian under RCW 26.09.520. *In re Marriage of Horner*, 151 Wn.2d at 892-93 (2004).

Trial continuances in conflict with speedy trial rules. *State v. Williams*, 85 Wn.2d 29, 32, 530 P.2d 225 (1975); *State v. Freeman*, 38 Wn. App. 665, 667-68, 687 P.2d 858 (1984).

Departure from standard range sentence under Sentencing Reform Act of 1981, chapter 9.94A RCW. *State v. Cardenas*, 129 Wn.2d 1, 5-6, 914 P.2d 57 (1996).

Review of *Ishikawa* or *Bone-Club* factors before closing courtroom to public. *State v. Rainey*, 180 Wn. App. 830, 836, 327 P.3d 56 (2014); *State v. White*, 152 Wn. App. 173, 180-81, 215 P.3d 251 (2009).

Applying the most significant relationship test for a choice of law determination. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 735-36 n.6, 254 P.3d 818- (2011).

LEVACK FAMILY TRUST, Ellen Levack Trustee, and ELLEN LEVACK, individually, Appellants,

v.

JOHN H. LEACH and MARILYN D. LEACH, husband and wife, Respondents.

No. 71431-7-I

Court of Appeals of Washington, Division 1

March 31, 2014

UNPUBLISHED OPINION

LAU, J.

In this quiet title action involving ownership of a disputed strip of property between neighbors Ellen Levack and John Leach, Levack appeals the court's decision to award her damages in lieu of an injunction ordering Leach to remove walls that encroached on Levack's property. Because substantial evidence supports the trial court's findings under each of the Arnold[1] elements, and because those findings support its conclusions that injunctive relief would be oppressive, we conclude that the court properly exercised its discretion by awarding damages in lieu of an injunction. We affirm.

FACTS

John Leach, the owner of lot 9 on Mason County's Fawn Lake, [2] built a concrete wall, a rock buttress along the base of the concrete wall, and a cottage block wall that extended from the south end of the concrete wall to a point near the lakeshore. Leach built all three structures on land he believed to be located on his side of a mutually-recognized boundary line, known as the Pipe to Pipe Line, which separated his property from adjacent lot 8, a 50 foot-wide, unimproved lot situated to the east. Construction was completed in 1999. In March 2009, lot 8 owner Levack[3] commissioned a survey that showed the deeded boundary lay to Leach's side of the Pipe to Pipe Line. Subsequent investigation revealed that the concrete wall, rock buttress, and cottage block wall all encroached to varying degrees over the deeded boundary.

In April 2009, Levack sued Leach to quiet title up to the deeded boundary, as revealed by the March 2009 survey. Leach counterclaimed to quiet title up to the Pipe to Pipe Line, based on mutual recognition and acquiescence, location by common grantor, and estoppel in pais. After a bench trial, the court awarded Leach title up to the Pipe to Pipe Line on grounds of adverse possession and mutual recognition and acquiescence. After adjusting the boundary, however, it found that the concrete wall, rock buttress, and cottage block wall still encroached slightly onto Levack's property:

- A portion of the concrete wall encroached a maximum of 3.5 inches onto lot 8.
- A portion of the concrete wall's buried footing encroached a maximum of 6.5 inches under lot 8.
- A portion of the rock buttress encroached a maximum of 45.5 inches.
- A portion of the cottage block wall encroached a maximum of 20.5 inches.

Levack asked the court for an injunction requiring Leach to remove all three walls. The court declined Levack's request and instead imposed the following remedy:

- Leach must remove the rock buttress.
- Leach may leave in place the concrete wall and the cottage block wall.
- Leach must pay Levack $3,559.72, representing the value of the encroached land and a reimbursement for property taxes paid by Levack.

Levack appeals the court's decision to withhold injunctive relief.

ANALYSIS

Levack does not challenge the location of the boundary fixed by the trial court. She concedes, "[T]here is sufficient evidence in the record to support the trial court's judgment quieting title up to the Pipe to Pipe line by mutual recognition and acquiescence." Br. of Appellant at 24. She solely challenges the court's decision to award damages in lieu of an injunction mandating removal of the concrete and cottage block walls.[4] For the reasons discussed below, we affirm.

The parties agree that an abuse of discretion standard applies to the trial court's decision to withhold injunctive relief. *See Steury v. Johnson*, 90 Wn.App. 401, 405, 957 P.2d 772 (1998) ("A suit for an injunction is an equitable proceeding addressed to the sound discretion of the trial court, to be exercised according to the circumstances of

each case."). Accordingly, we review the court's decision "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) (trial court abused its discretion when awarding encroacher an easement without providing any counterbalancing compensation to the injured landowner).

In *Arnold v. Melani*. 75 Wn.2d 143, 449 P.2d 800 (1968), a house and fence encroached onto an adjacent lot. The trial court awarded damages in lieu of an injunction, reasoning the offending house was worth far more than the land on which it encroached. *Arnold*, 75 Wn.2d at 145-46. Our Supreme Court upheld the remedy despite the traditional property law rule requiring removal of encroaching structures. It held that a court may refuse to enjoin an encroachment under certain circumstances:

[A] mandatory injunction can be withheld as oppressive when ... 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.

Arnold, 75 Wn.2d at 152. It is now well established that a court asked to eject an encroacher must "reason through the *Arnold* elements as part of its duty to achieve fairness between the parties." *Proctor v. Huntington*. 169 Wn.2d 491, 502-03, 238 P.3d 1117 (2010). The threshold inquiry is whether the encroacher proved each element by clear and convincing evidence. *Arnold*, 75 Wn.2d at 152. If so, the court may exercise its discretion to award damages in lieu of injunctive relief. *See, e.g., Hanson v. Estell*, 100 Wn.App. 281, 288-89, 997 P.2d 426 (2000) ("Balancing the negligible impact of the barn encroaching on the easement by one foot with the likely prohibitive costs of moving the barn, the equities support rejection of mandatory injunction, leaving the Estells to their remedy at law."). This approach ensures that injunctive relief will not "mechanically follow from any encroachment." *Proctor*, 169 Wn.2d at 502.

First Arnold Element

Levack contends that Leach failed to prove the first *Arnold* element. As stated above, the first *Arnold* element requires clear and convincing proof 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*, 75 Wn.2d at 152. On this element, the trial court found:

33. The Leaches did not act negligently, recklessly, or intentionally, or "wrongfully" as that term is defined in RCW 4.24.630(1), [5] with respect to the location and construction of the poured concrete wall and cottage block wall, or with respect to the fact that those walls (and the poured wall's footing) extend a few inches past the Pipe to Pipe Line [i.e., the boundary line fixed by the court]. The Leaches were not aware of these encroachments past the Pipe to Pipe Line until after this lawsuit was filed.

Levack assigns error to this finding, contending it does not support the court's decision to withhold injunctive relief.

Levack first contends that finding 33 fails to expressly address whether Leach took a "calculated risk, " "act[ed] in bad faith, " or "indifferently locate[d] the encroaching structure." *Arnold*. 75 Wn.2d at 152. Citing *In re Welfare of A.B.*, 168 Wn.2d 908, 232 P.3d 1104 (2010), he argues that the absence of these express findings counts as an implicit finding that Leach did take a calculated risk, did act in bad faith, and did indifferently locate the encroaching structure. Br. of Appellant at 32. In *A.B.*, the court noted that "lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof" AJ3, , 168 Wn.2d at 927. But it also held that an appellate court reviewing an order terminating parental rights may imply the essential finding of current parental unfitness when the record clearly demonstrates the finding "was actually intended, and thus made, by the trial court." *A.B.*, 168 Wn.2d at 921. The latter holding is consistent with the rule that "[inadequate written findings may be supplemented by the trial court's oral decision or statements in the record." *Lawrence v. Lawrence*, 105 Wn.App. 683, 686, 20 P.3d 972 (2001); *see also Wallace Real Estate Inv. Inc.. v. Groves*, 72 Wn.App. 759, 770, 868 P.2d 149 (1994) (oral decision may be used to interpret and explain court's written order, provided no inconsistency arises). These cases demonstrate that the absence of an express finding does not always count as an implicit finding against the party with the burden of proof.

Here, although finding 33 only discusses negligence and the absence of reckless and intentional misconduct, our record shows the court intended the finding to address all criteria within the first *Arnold* element.[6] The record shows that the court understood and applied the proper legal standard. And it clearly intended to enter findings that addressed each of what it called the "*Arnold* factors." Under these circumstances, we treat as an implicit trial court finding that under the first *Arnold* element, Leach did not take a calculated risk, did not act in bad faith, and did not indifferently locate the walls.

The next issue is whether substantial evidence supports the court's express and implicit findings under the first *Arnold* element. See *Sunnyside Valley Irrigation Dist. v. Dickie*,

111 Wn.App. 209, 214, 43 P.3d 1277 (2002) ("When findings of fact and conclusions of law are entered following a bench trial, appellate review is limited to determining whether the findings are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law and judgment.").

Because *Arnold* requires clear and convincing proof, we require "'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)). Notwithstanding this relatively exacting standard, the appellant must "present argument to the court why specific findings of fact are not supported by the evidence" and "cite to the record to support that argument." *Inland Foundry Co. v. Dep't of Labor & Indus.*, 106 Wn.App. 333, 340, 24 P.3d 424 (2001); *see also Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990) (appellate courts presume propriety of trial court's findings). Unchallenged or inadequately challenged findings become verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992); *Inland Foundry*, 106 Wn.App. at 340.

The court expressly found that Leach did not negligently or intentionally construct the walls on Levack's property. As discussed above, it implicitly found he did not take a calculated risk, act in bad faith, or indifferently locate the walls. Levack has the burden to explain why these findings were not supported by substantial evidence. Our review of her briefing shows she challenges only (1) the court's express finding that Leach "did not act negligently . . . with respect to the location and construction of the poured concrete wall and cottage block wall, or with respect to the fact that those walls (and the poured wall's footing) extend a few inches past the Pipe to Pipe Line" and (2) its implicit finding that Leach did not indifferently locate the walls.

Levack first claims substantial evidence did not support the court's express finding that Leach did not negligently locate the concrete and cottage block walls. Without citing the record, she argues Leach acted negligently in failing to obtain necessary building permits for those walls. This argument is misplaced because, under the first *Arnold* element, whether Leach possessed building permits is immaterial to the pivotal question of whether he negligently located the walls.

In any event, the record adequately supports the court's finding that Leach did not negligently locate the concrete and cottage block walls. A key undisputed fact is that Leach did not learn that the concrete and cottage block walls encroached over the Pipe to Pipe Line (i.e., the mutually-recognized boundary) until that information was revealed to him at trial. The following unchallenged findings are verities on appeal:

21. Up until March 2009, when Ellen Levack obtained a survey of Lot 8 from Holman & Associates, the poured concrete wall, cottage block wall, and rock buttress remained in place. During that time both the Leaches and the Levacks treated the edge of the poured wall and cottage block wall as defining the boundary between Lot 8 and Lot 9; i.e., that the edges of those walls were right at the boundary line.

23. The March 2009 survey ... did not show whether the poured concrete wall or cottage block wall extended past the Pipe to Pipe Line onto Lot 8.

25. In late March or early April 2009, Ellen Levack communicated the March 2009 survey results to John Leach. This was the Leaches' first notice that the Pipe to Pipe Line did not match the deeded boundary line.

26. Ellen Levack . . . filed this lawsuit on April 7, 2009.

30. Subsequent analysis by Mr. Holman showed that (a) a portion of the face of the poured concrete wall extended a maximum of about 3.5 inches past the Pipe to Pipe Line, with the buried footing of the wall extending another 3 inches further under Lot 8, (b) a portion of the face of the cottage block wall extended a maximum of about 20.5 inches past that line, and (c) a portion of the rock buttress extended a maximum of 3 feet 9.5 inches past that line. This information was not presented on the March 2009 survey map, and was *revealed for the first time during trial*. This was the first time that Leach was put on notice that any portion of the poured concrete wall or cottage block wall extended past the Pipe to Pipe Line.

(Emphasis added.) The court's undisputed findings show Leach constructed the concrete and cottage block walls on land he reasonably believed to be his own, long before he learned that the Pipe to Pipe Line was not the true (deeded) boundary. Substantial evidence thus supports the court's determination that Leach "did not act negligently . . . with respect to the location and construction of the poured concrete wall and cottage block wall, or with respect to the fact that those walls (and the poured wall's footing) extend a few inches past the Pipe to Pipe Line."

Levack next claims substantial evidence did not support the court's implicit finding that Leach did not indifferently locate the concrete and cottage block walls. Without citing the record, she claims the record shows Leach "abdicat[ed]" responsibility for the location of the walls to his contractor. Br. of Appellant at 32. The implication of this unsupported claim is that Leach permitted his contractor to build the concrete and cottage block walls without any concern by either party for the boundary line. Substantial evidence

supports the court's contrary finding. The following unchallenged findings, which are verities on appeal, provide substantial evidence that Leach and his contractor recognized and respected the Pipe to Pipe Line boundary:

16. Beginning in 1998, the Leaches moved forward with design and planning for construction of a residence on Lot 9, and in doing so *relied on the Pipe to Pipe Line as being the property boundary*. The Leaches contracted with Evergreen Builders, a business operated by John Reidel, to build the residence and construct the various related improvements to Lot 9. During construction, the Leaches lived in Federal Way and were only at Lot 9 on a sporadic basis.

17. Clearing, grading, and excavation for the Leach construction project began no later than November 1998. .. . This excavation and grading work included that needed for placement of the footings for a poured concrete retaining wall that was to be located *up against the Pipe to Pipe Line*.. . .

20. Within months after the poured concrete wall was complete, the Leaches installed a shorter (lower) cottage block wall that ran more or less from the south end of the poured concrete wall down to a point near the edge of Fawn Lake. The Leaches placed this wall *so as to follow and abut the Pipe to Pipe Line.*

(Emphasis added.) These unchallenged findings provide substantial evidence that Leach did not "indifferently locate" the concrete and cottage block walls. *Arnold*, 75 Wn.2d at 152. We conclude the trial court properly found that Leach proved the first *Arnold* element by clear and convincing evidence.

Remaining Arnold Elements

Under *Arnold*, the party seeking to avoid an injunction must also prove:

(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.

Arnold, 75 Wn.2d at 152. As discussed above, the court analyzed these elements and expressly or implicitly found that Leach proved each by clear and convincing evidence. Levack contends the court's findings were not supported by substantial evidence.

Levack first contends substantial evidence did not support the court's implicit finding that "(2) the damage [caused by the encroachment] to the landowner was slight and the benefit of removal equally small." *Arnold*, 75 Wn.2d at 152. Contrary to her argument, substantial evidence supports this finding.

In *Proctor*, our Supreme Court addressed *Arnold*'s requirement that damage to the landowner be "slight." The court held that an encroachment of an acre was "slight" because the acre, though sizeable in absolute terms, comprised only 3.3 percent of the encroached lot. *Proctor*, 169 Wn.2d at 502. The court relied in part on *People's Savings Bank v. Bufford*, 90 Wn. 204, 155 P. 1068 (1916), in which the court, sitting in equity, declined to eject encroachers who occupied a landowner's entire lot. In light of *Proctor*, substantial evidence amply supports the court's finding that the damage to Levack was slight and the benefit of removal equally minor. As noted above, it is undisputed that a portion of the concrete wall encroached a maximum of 3.5 inches onto Levack's 50 foot-wide lot, that a portion of the buried footing encroached a maximum of 6.5 inches, and that a portion of the cottage block wall encroached a maximum of 20.5 inches. Substantial evidence thus shows the encroachments were slight in both absolute and relative terms. *See Hanson*, 100 Wn.App. at 288-89 (for purposes of *Arnold*, impact of barn that encroached on easement by one foot was "negligible").

Citing the testimony of Rick Wells, a licensed real estate appraiser, Levack claims that "the presence of walls has diminished value of Levack property by 30 to 35 percent or by $35, 500 to $42, 000." Br. of Appellant at 34. This assertion is misleading. Wells calculated diminishment in value under the assumption that the deeded boundary remained viable. He acknowledged his calculation did not account for the possibility of a redrawn boundary based on mutual recognition and acquiescence:

Q. So when it's all said and done, you haven't made an assessment of the loss in value to Mrs. Levack if the boundary line were redrawn by the Court along her side of the encroachments, such that they're no longer encroaching on her property, right?

A. Not specifically, no.

Report of Proceedings (RP) (Feb. 2, 2012) at 964. Because Wells relied on the deeded boundary, the above-quoted calculations are irrelevant.

Levack next contends substantial evidence did not support the court's implicit finding that "(3) there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use . . . ." *Arnold*, 75 Wn.2d at 152. The trial court expressly found, "The encroachments of the poured concrete wall face and footing and the cottage block wall face past the Pipe to Pipe Line do not have any material impact on the value or use of Lot

8; the impacts are de minimis at best." Substantial evidence supports this finding. Jef Conklin, a real estate broker with experience selling waterfront property in Mason County, opined that even if all encroachments remained, he would be "happy" to market Levack's unimproved lot as a property capable of supporting a reasonable house with a lake view:

Q. . . . And have you been able to ascertain a view impact based on the probable location of a house on Lot 8 if these encroachments were to remain and the boundary line were to be redrawn to narrow the lot a little and leave the encroachments on what would then be the Leach property?

A. I don't think it impacts view whatsoever.

Q. If the Judge were to redraw—at the end of this process, redraw the boundary line to basically move [it] over towards Levack and put the concrete wall and the cottage block wall on the Leach property, thereby narrowing down a little bit the Levack property on Lot 8, would you have any hesitation in terms of listing it and trying to sell it?

A. No, happy to do it.

Q. What if the rock wall is still there?

A. And it becomes the line?

Q. Yeah.

A. I'd still list it. It's still developable.

RP (Jan. 31, 2012) at 848-49. He added that, on average, comparable lots supported 1, 350 square foot houses. Regarding Levack's lot, he testified, "I still think the reality is that we could put a 2000 square foot structure on that lot." RP (Jan. 31, 2012) at 840. He summarized, "I don't think there is significant impact to developability because we can still build a house of ample size for the neighborhood." RP (Jan. 31, 2012) at 841.

Levack claims, "Mason County would forbid [her] from performing any excavation on her property for a distance equal to the height of the wall." Br. of Appellant at 34. Engineer James Ashley-Cole testified he "wouldn't excavate within 4 [feet]" of the rock buttress. RP (Jan. 25, 2012) at 154. But the court ordered Leach to remove the rock buttress, and Ashley-Cole gave no similar testimony regarding the concrete wall. Further, Ashley-Cole noted, "That would be a rule of thumb." RP (Jan. 25, 2012) at 154. He did not claim that as a matter of code enforcement, Mason County would definitely "forbid" excavation near any of the walls. Wells similarly testified that the owner of lot 8 might want to avoid construction within eight feet of the concrete wall. He explained, "Do I want to build a house any closer than 8 [feet] to this structure because if it fell down, you know, I don't want it falling on my house." RP (Feb. 2, 2012) at 927. But he offered no evidence that collapse was imminent or even likely. He also offered no evidence that Mason County planned to forbid excavation near the wall. He testified, "I don't know that the County really cares whether you build [a house] right immediately next to the wall or not, because ... I'm not an expert on building codes." RP (Feb. 2, 2012) at 925.

Levack next contends substantial evidence did not support the court's implicit finding that "(4) it is impractical to move the structure as built. . . ." *Arnold*, 75 Wn.2d at 152. The court expressly found:

35. The impact to Leach if the court were to order removal of all encroachments past the Pipe to Pipe Line would be significant. Removal of such encroachments would require removal of the rock buttress, poured concrete wall, and the cottage block wall, an effort which would cost approximately $40, 000, and perhaps much more. The removal would also risk damage to the Leach residence and its foundation, and risk injury to Lot 8 as well. Moving the poured concrete wall would be impractical regardless of whether or not the rock buttress remains in place or is moved.

Without citing the record, Levack first argues this criterion is irrelevant because the walls violate Mason County regulations and, therefore, must be removed regardless of cost or difficulty. She explains, "Because the County has effectively required Leach to remove the walls, as a matter of law, the Court erred in finding it was 'impracticable' for Leach to do so." Br. of Appellant at 36. This claim fails because Levack speculates on whether the county will require Leach to remove the walls.

Levack also argues, without citation to the record, that "Leach could easily remove the cottage blocks, perform the necessary excavation, and replace the blocks at the setback." Br. of Appellant at 36. The record does not support this argument. Engineer Jayne Nelson testified it would cost approximately $8, 700 to relocate the cottage block wall. RP (Jan. 31, 2012) at 779. Levack also challenges the court's finding that removal of all three walls would cost approximately $40, 000. Leach submitted evidence that removal of the concrete wall alone could cost as much as $61, 000. RP (Jan. 31, 2012) at 778-79. Nelson explained, "[I]t's difficult because it's a tight site." RP (Jan. 31, 2012) at 775. Finally, Levack challenges the court's finding that "removal would also risk damage to the Leach residence and its foundation, and risk injury to Lot 8 as well." Nelson testified:

First of all the old wall would have to be demolished and the old backfill would have to be removed in order to do this.. . . You need to have some care as you remove that existing backfill so that you don't destabilize his existing

garage, and that you have safety for the workers as they work on this retaining wall.

RP (Jan. 31, 2012) at 774-75. The court's findings were adequately supported.

Levack also contends substantial evidence did not support the court's implicit finding that "(5) there is an enormous disparity in resulting hardships." *Arnold*, 75 Wn.2d at 152. The trial court is in the best position to balance the equities, and its determination is entitled to deference on appeal. *See Farmer v. Farmer*, 172 Wn.2d 616, 634, 259 P.3d 256 (2011) (recognizing Supreme Court's "tradition of deference to the exercise of a trial court's equitable authority . . . ."). We decline to substitute our judgment for that of the trial court. The walls encroached a maximum of 20.5 inches onto Levack's 50-foot unimproved lot. The concrete wall encroached a maximum of 3.5 inches above ground. Finally, removal would be costly and difficult. On these facts, the trial court did not abuse its discretion in determining that the equities favored Leach.

Relevance of Mason County Ordinances and Fawn Lake Covenants

Levack contends, "The trial court should have considered whether Mason County would require Leach to remove the walls." Br. of Appellant at 27. She argues, without citing the record, that following completion of this lawsuit, Mason County will order Levack to tear down all three walls for failure to obtain building permits. She asserts Leach will not be able to obtain building permits even if he applies, because he knowingly violated setback requirements under the county's zoning and shoreline master program regulations and under restrictive covenants promulgated by the Fawn Lake Maintenance Commission. Finally, she claims the walls must be removed due to substandard construction, as defined by the county's development regulations:

[T]he eight-foot-tall concrete retaining wall is only eight-inches-wide, rather than the twelve inches that Mason County would have required. The wall was not properly reinforced with steel. The wall was improperly installed "on grade, " rather than being properly embedded in native soils. There are no footing drains. The soils behind the wall were not properly backfilled.

As a result of the defects in its construction, the concrete wall had developed cracks, and is failing.

Br. of Appellant at 25 (citations omitted).

Leach does not dispute that he obtained no building permits for the concrete and cottage block walls. He also does not argue that the walls meet all of Mason County's development regulations. He acknowledges that the concrete wall "has some cracks and is not up to code .. . ." Resp't's Br. at 36. But as noted above, the assertion that Mason County plans to order removal on this basis is speculative. Likewise, the record contains no evidence of enforcement or planned enforcement by the Fawn Lake Maintenance Commission.

Levack emphasizes that Mason County issued Leach a "Correction Notice" on December 2, 2010. The handwritten portion of the notice—issued nearly a year and eight months after Levack filed her complaint—alleged a permitting violation:

Retaining wall system was constructed without a building permit or approval. Obtain a permit within 21-days OR remove.

NOT APPROVED FOR USE.

Failure to make arrangements to resolve will result in additional enforcement actions including recording nonconformance activities against the affected parcels.

Ex. 17. The notice claimed failure to obtain a permit or remove the structure "will result in additional enforcement actions . .. ." Ex. 17. But county building inspector Debbera Coker testified at trial, "[W]e still are waiting for the civil action to be resolved before the permitting would be necessary." RP (Jan. 25, 2012) at 229. She confirmed that, as of trial, the county had not yet taken any enforcement action against Leach.

Levack faults the trial court for failing to consider the interests of Mason County and the Fawn Lake Maintenance Commission. But even if the court affirmatively found that Leach violated various permitting obligations, setback requirements, and construction regulations, *Arnold* permits the trial court to award damages in lieu of an injunction. Levack proposes that *Arnold* might not apply when a landowner knowingly violates a development regulation or restrictive covenant—i.e., that such violations automatically warrant injunctive relief. She cites no controlling authority, and her reliance on *Larsen v. Town of Colton*, 94 Wn.App. 383, 973 P.2d 1066 (1999), and *Radach v. Gunderson*, 39 Wn.App. 392, 695 P.2d 128 (1985), is misplaced. *Larsen* and *Radach* merely held that injunctive relief *may* be appropriate when a private landowner sues another landowner to enforce a municipal zoning provision. *See Larsen*, 94 Wn.App. at 391 (citing *Radach* for the proposition that "[a]n action for injunctive relief is an appropriate way for an aggrieved property owner to contest erection of a structure he believes to be in violation of a zoning ordinance."). *Radach* cited *Arnold* for the proposition that "in certain instances, courts should refuse equitable remedies where legal rights have been violated." *Radach*, 39 Wn.App. at 398. In sum, even if we accept each

of Levack's allegations regarding code and covenant violations, Levack cannot show she was "entitled" to injunctive relief. Br. of Appellant at 27.

Levack also alleges that the walls violated Mason County shoreline master program use regulations. This assertion fails. "Either a private citizen or a governmental entity may base an action for damages on the SMA [Shoreline Management Act], RCW 90.58.230, but only a governmental entity may base an action for injunctive or declaratory relief on the SMA." *Hedlund v. White*, 67 Wn.App. 409, 414, 836 P.2d 250 (1992) (footnote omitted). Thus, even if we assume Leach violated the Shoreline Management Act (SMA), the trial court lacked authority to award injunctive relief premised on an SMA violation.

Expert Testimony

Conklin, the real estate broker who testified about the marketability of Levack's unimproved lot, also opined that the concrete and cottage block walls damaged Levack's property by a factor of $2 per square foot, for a total impact of $1, 090. RP (Jan. 31, 2012) at 842. Levack argues that the trial court's admission of this testimony was an abuse of discretion since real estate brokers are not licensed to give appraisals.[7] Even if the trial court improperly allowed Conklin's valuation testimony, the error was harmless because the court ultimately rejected the testimony. It instead credited the testimony of Levack's expert witness, Rick Wells, who calculated that Leach's walls damaged Levack by a factor of $2, 200 per linear foot ("front foot") of encroached lakefront. RP (Feb. 2, 2012) at 936. Its unchallenged finding states:

32. As measured from the Pipe to Pipe Line, the maximum encroachment onto Lot 8 is approximately 20.5 inches, not including the rock buttress. Applying the $2, 200 per front foot value, and assuming that the 20.5 inch encroachment can be considered to impact Lot 8 all the way down to the edge of Fawn Lake, this results in a value of $3, 000 for property impaired by the encroachments—not including the rock buttress—that extend beyond the Pipe to Pipe Line.

Because Conklin's valuation testimony ultimately had no effect on the court's damages calculation, Levack demonstrated no error.

CONCLUSION

Because substantial evidence supports the trial court's findings under each of the *Arnold* elements, and because those findings support its conclusion that injunctive relief would be oppressive, we conclude that the court properly exercised its discretion by awarding damages in lieu of an injunction. We affirm.

Notes:

[1] *Arnold v. Melani*, 75 Wn.2d 143, 449 P.2d 800 (1968).

[2] John Leach and his wife, Marilyn Leach, purchased lot 9 in 1996. Marilyn Leach was a party to this action but died after its commencement.

[3] The record owner of lot 8 is the Levack Family Trust. Ellen Levack serves as trustee for the Levack Family Trust.

[4] Levack assigns error to conclusion of law 11, which states, "Plaintiffs' claims for indemnity are dismissed." We do not review this claim, since Levack failed to address it in her opening brief. See *Norcon Builders, LLC v. GMP Homes VG. LLC*, 161 Wn.App. 474, 486, 254 P.3d 835 (2011) ("We will not consider an inadequately briefed argument.").

[5] RCW 4.24.630(1) provides in part: "Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury." On appeal, neither party raises an issue under this statute.

[6] We specifically note the trial court's April 25, 2012 oral ruling, particularly at Clerk's Papers (CP) at 156, and its written conclusion of law 7, CP at 18-19.

[7] Under RCW 18.140.020(6), a real estate broker may give a "brokers price opinion" in a legal proceeding, provided he or she testifies, in substance, that the price opinion is not an appraisal. Levack contends Conklin failed to give a proper disclaimer. But Conklin testified that, although he had been trained as an appraiser, he was "not licensed as one." RP (Jan. 31, 2012) at 826. He added, "I'm simply offering my opinion as a licensed broker, not as a licensed appraiser." RP (Jan. 31, 2012) at 827. Levack does not explain what was missing from Conklin's disclaimer.

LESTER RILEY and SUSAN K. RILEY, husband and wife, Appellants,

v.

DAVID VALAER and SUSAN E. VALAER, husband and wife, - Respondents.

No. 46120-0-II

Court of Appeals of Washington, Division 2

July 7, 2015

UNPUBLISHED OPINION

Melnick, J.

Lester and Susan Riley (Riley) appeal from the trial court's order granting partial summary judgment to David and Susan Valaer (Valaer) and quieting title to a disputed strip of property. Riley argues that Valaer did not prove the elements of the common grantor doctrine and that the trial court erred when it established the disputed strip of property's boundary. Alternatively, Riley argues that Valaer did not present evidence to establish the applicability of the equitable liability rule. We agree with both of Riley's arguments and reverse.

FACTS

This case involves a dispute over a strip of property that is approximately nine feet long and lies between two adjacent tax parcels. The east parcel contains a house and the west parcel is vacant. The disputed strip contains a portion of the attached garage of the house, a patio, and a retaining wall. The retaining wall demarcates the approximate west edge of the disputed strip.

In 1951, Fred and Alice Neth (Neth) purchased the east parcel. On it Neth constructed a house, patio, and retaining wall, a portion of which extended several feet over the legally described property line onto the west parcel. The portions extending over the property line are clearly visible. Later in 1951, Neth purchased the west parcel. In 1971, Neth sold both parcels to Boespflug, who in turn sold both parcels to Holman, subject to easements and restrictions of record.

In 2000, Riley entered into a contract with Holman to purchase both parcels. In 2003, Riley obtained a loan from Argent Mortgage Company (Argent). As security for the loan, Riley executed a deed of trust with power of sale for the east parcel "[together with] all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property." Clerk's Papers (CP) at 413. Riley retained title on the west parcel. In 2010, Riley defaulted on the loan, and Argent commenced a non-judicial foreclosure. On November 29, 2010 Valaer purchased the east parcel at a trustee's sale. Valaer did not inspect the property or review surveys prior to purchasing the east parcel. Procedural History

In 2012, Riley filed a complaint against Valaer to remove all physical encroachments on the west parcel and to reimburse Riley for damages. Valaer moved for partial summary judgment, arguing that the retaining wall established a new boundary line as of the date Neth sold the property to Boespflug and that subsequent purchasers, including Riley, treated the retaining wall as the true boundary between the parcels. Valaer further argued that Riley's damages should be limited to the value of the disputed strip of land under the equitable liability rule.

In support of the motion for partial summary judgment, Valaer presented copies of Riley's 2007 application to the city to subdivide the vacant west parcel, a demolition permit, the deed of trust from Riley to Argent, the deed conveying title to the property to Valaer, and all prior deeds and parcel descriptions dating back to 1951. Riley's application to subdivide the west parcel identified the total size of the parcel as 8, 993 square feet and the subdivided lots as totaling 90 feet in width, which accounted for the retaining wall as part of the east parcel. The demolition permit application identifies the east parcel as 110 feet wide and the west parcel as 90 feet wide, acknowledging the retaining wall as part of the east parcel. Valaer also presented photographs of the house, patio, and retaining wall. The photographs denoted the actual deed line between the two parcels. Valaer declared that if the actual deed line was used, it would significantly cut into the structure of the home. In response, Riley filed a deed history for both parcels.

The trial court orally granted Valaer's motion for partial summary judgment because "the theory of the common grantor does show that there was an [agreed] boundary line established." Report of Proceedings (RP) (Aug. 2, 2013) at 21; CP at 693 (Stipulated order to modify the report of proceedings so that the word "aggrieved" on page 21 is changed to the word "agreed."). The trial court ruled that Neth purchased the vacant parcel "in order to be able to legally establish that the home was not subject to a divided

situation" and adopted the common grantor doctrine. RP (Aug. 2, 2013) at 21. The trial court entered a written order granting Valaer's motion for partial summary judgment, but it did not quiet title in Valaer.

Riley moved for reconsideration on the grounds that Valaer did not present evidence to satisfy the common grantor doctrine's requirements.[1] The trial court denied Riley's motion for reconsideration.

Valaer moved the trial court to quiet title and for clarification of the trial court's order granting partial summary judgment. In a hearing on Valaer's motion for clarification, the trial court noted that "it was really an inconsistency to rule in favor of Valaer on the subject of the location by a common grantor but to, at the same time, order the trial as to damages with respect to that theory." RP (Feb. 28, 2014) at 11. The trial court then ruled that because Valaer was entitled to judgment based on the common grantor doctrine, it would grant the remedy associated with that doctrine and quiet title in Valaer. The trial court additionally stated, "[T]he [c]ourt had also granted summary judgment with respect to the liability rule. And if the decision is not upheld on the common grantor [doctrine] . . . then the issue as to the liability rule has been decided as to the legal right and the case would at that point be remanded to be reheard ... on the damages issue." RP (Feb. 28, 2014) at 11-12. The trial court entered a final written order consistent with its oral ruling. Riley appeals.

ANALYSIS

I. Standard of Review

We review an order for summary judgment de novo, engaging in the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We construe all facts and their reasonable inferences in the light most favorable to the nonmoving party. *Jones*, 146 Wn.2d at 300.

A party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton*, 115 Wn.2d at 516. If the moving party satisfies its burden, the nonmoving party must present evidence demonstrating that a material fact remains in dispute. *Atherton*, 115 Wn.2d at 516. If the nonmoving party fails to do so, and reasonable persons could reach but one conclusion from all the evidence, then summary judgment is proper. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

II. Common Grantor Doctrine

The common grantor doctrine is briefly described as follows: "A grantor who owns land on both sides of a line he has established as the common boundary is bound by that line. The line will also be binding on grantees if the land was sold and purchased with reference to the line, and there was a meeting of the minds as to the identical tract of land to be transferred by the sale." *Winans v. Ross*, 35 Wn.App. 238, 240, 666 P.2d 908 (1983) (citations omitted).

The common grantor doctrine is premised on a special relationship between the original grantee and the common grantor, wherein the common grantor had unilateral authority to determine the location of the property boundary. *Levien v. Fiala*, 79 Wn.App. 294, 302, 902 P.2d 170 (1995); *see Strom v. Arcorace*, 27 Wn.2d 478, 481, 178 P.2d 959 (1947); *Thompson v. Bain*, 28 Wn.2d 590, 592-93, 183 P.2d 785 (1947). This special relationship is not found in other boundary adjustment doctrines and justifies the presumption that the grantor's line is the boundary line mentioned in the deed, immediately binding as to the grantee. *See Clausing v. Kassner*, 60 Wn.2d 12, 15, 371 P.2d 633 (1962); *Strom*, 27 Wn.2d at 481; *Levien*, 79 Wn.App. at 302.

Subsequent purchasers are bound to the grantor's line if they purchase the property with actual or inquiry notice that it is the boundary. *Atwell v. Olson*, 30 Wn.2d 179, 183-84, 190 P.2d 783 (1948); *see Strom*, 27 Wn.2d at 481; *Windsor v. Bourcier*, 21 Wn.2d 313, 315-16, 150 P.2d 717 (1944).

"A practical location made by the common grantor of the division line between the tracts granted is binding on the grantees who take with reference to that boundary. The line established in that manner is presumably the line mentioned in the deed, and no lapse of time is necessary to establish such location, which does not rest on acquiescence in an erroneous boundary, but on the fact that the true location was made, and the conveyance in reference to it. However, for a boundary line established by a common grantor to become binding and conclusive on grantees it must plainly appear that the land was sold and purchased with reference to such line, and that there was a meeting of minds as to the identical tract of land to be transferred by the sale."

Strom, 27 Wn.2d at 481 (quoting 11 C.J.S. Boundaries § 77, at 651 (1938)).

Washington courts have reduced the common grantor doctrine to two questions: (1) did a common grantor and

original grantee establish an agreed boundary, and (2) if so, would a visual inspection of the property indicate to subsequent purchasers that the deed line was no longer functioning as the "true" boundary? *Winans*, 35 Wn.App. at 241; *Fralick v. Clark County*, 22 Wn.App. 156, 160, 589 P.2d 273 (1978). A formal agreement is not required; rather, the parties' manifestations of ownership after the sale may show agreement or meeting of the minds. *Winans*, 35 Wn.App. at 241. The party asserting a boundary by common grantor has the burden of establishing these elements by clear and convincing evidence.[2]

Riley argues that Valaer did not present evidence to satisfy the requirements of the common grantor doctrine. Br. of Appellant at 7. Specifically, Riley argues that Valaer did not present sufficient evidence of any agreed boundary line between any common grantor and any original grantee. We agree.

A. Neth as Common Grantor

Riley first argues that the record does not contain evidence to establish an agreement between Neth as a common grantor and Boespflug as an original grantee. We agree.

The undisputed evidence is that Neth purchased the east parcel and then constructed a house, patio, and retaining wall. These structures intruded on the west parcel that Neth purchased in 1951. Neth then sold both parcels to Boespflug in 1971. For approximately sixty years, until 2003 when Riley granted a deed of trust with power of sale on the east parcel to Argent, the two parcels always were conveyed simultaneously to one party. Although Neth could have determined the location of the boundary line between the parcels, a genuine issue of material fact remains as to whether Neth sold the parcels and Boespflug purchased them with reference to an agreed new boundary line. The record contains only the real estate contract between Neth and Boespflug that identifies each parcel with the original boundaries as described in the records of Clark County. Viewed in the light most favorable to Riley, the record contains no evidence that Neth or Boespflug treated the retaining wall as the true boundary between the parcels or that they agreed it was the new boundary.[3] Therefore, because there is a genuine issue of material fact as to this element of the common grantor doctrine, Neth cannot be deemed a common grantor.

B. Riley as Common Grantor

Riley next argues that the record does not contain evidence to establish an agreement between Riley as a common grantor and Argent as an original grantee. We agree.

Although, the evidence shows that Riley considered the retaining wall to be the boundary line between the east and west parcels, [4] a genuine issue of material fact exists as to whether Riley and Argent established the retaining wall as an agreed boundary when Riley conveyed the east parcel to Argent in 2003. For the first time since 1951, the single party that owned both parcels conveyed an interest in only one of them. The record contains the deed of trust between Riley and Argent, in which Riley gave the east parcel as security for Argent's loan. It included the east parcel "[together with] all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property." CP at 413. The deed of trust identified the east parcel by legal description: "Parcel ID Number 001210230, " which currently has the address of 401 West 36th Street, Vancouver, Washington 98660. CP at 413.

Argent accepted the deed of trust, but the record does not contain any evidence that Argent agreed with Riley that the retaining wall constituted the west boundary. It also does not demonstrate that Argent knew of or relied on Riley's attempted short plat, application to subdivide the west parcel submitted to the city, or demolition permit application, in which Riley treated the retaining wall as the boundary of the east parcel. The record also does not contain any evidence that Valaer relied on or knew of Riley's applications to the city at the time Valaer purchased it at foreclosure.

We note that the record does not contain an appraisal of the property Argent took as security in exchange for the loan. Although Riley mentions that "Argent had an appraisal done and obtained title insurance before escrow closed on the refinance, " neither the appraisal nor the title insurance are attached as exhibits or are otherwise contained in the record. CP at 320. We further note that the record also does not contain a title report. Although the record contains the first page of a title commitment for Argent's servicing company, it merely refers to the property by its legal description, "Lot 1, Block 3, SUNSET VIEW ADDITION TO THE CITY OF VANCOUVER, according to the plat thereof, recorded in Book 'D' of plats, page 101, records of Clark County, Washington." CPat361. When viewed in the light most favorable to Riley, genuine issues of material fact exist regarding the information Argent had when it took the east parcel as security for its loan and whether Argent and Riley agreed to the retaining wall as a new boundary. Thus, a genuine issue of material fact exists as to this element of the common grantor doctrine and the trial court erred by granting Valaer summary judgment.

III. Liability Rule

Riley argues that genuine issues of material fact exist as to the applicability of the liability rule. We agree. Although the trial court's final written order quieted title in Valaer under the common grantor doctrine only, the trial court

noted in the reconsideration hearing that it had alternatively granted partial summary judgment to Valaer under the liability rule. Generally, Washington courts will order an encroacher to remove encroaching structures. *Arnold v. Melani,* 75 Wn.2d 143, 152, 437 P.2d 908 (1968). However, where such an order would be oppressive, Washington courts recognize an exception. *Arnold,* 75 Wn.2d at 152. To trigger the exception under the *Arnold* test, the encroacher must prove by clear and convincing evidence that

(1) he did not simply take a calculated risk or act in bad faith, or act negligently, willfully, or indifferently in locating the encroaching structure; (2) the damage to the landowner is slight and the benefit of removal equally small; (3) there is ample remaining room for a structure suitable for the area and there is no real limitation on the property's future use; (4) it is impractical to move the encroaching structure as built; and (5) there is an enormous disparity in the resulting hardships.

Proctor v. Huntington, 146 Wn.App. 836, 847, 192 P.3d 958 (2008) (citing *Arnold,* 75 Wn.2d at 152), *affd,* 169 Wn.2d 491, 238 P.3d 1117 (2010). If all the elements are satisfied, the trial court may adjust the boundary of the disputed property. *Proctor,* 146 Wn.App. at 851.

The first element of the *Arnold* test requires clear and convincing proof that "[t]he encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure." 75 Wn.2d at 152. Viewed in the light most favorable to Riley, genuine issues of material fact exist as to this first element. The record does not demonstrate that Valaer acted with due diligence when purchasing the property. Valaer did not inspect the property or review surveys prior to purchasing the east parcel at the trustee's sale. The record is void of facts to establish that Valaer did not simply take a calculated risk or act negligently in locating the encroaching structure. Thus, the trial court erred by granting Valaer summary judgment.

Because the first element of the *Arnold* test is not satisfied, we do not reach the remaining elements.

We reverse.

A majority of the panel- having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J. *J*

We concur: Worswick, J. Johanson, C J.

Notes:

[1] Although the trial court only granted summary judgment based on the common grantor doctrine, Riley also moved for reconsideration on the grounds that issues of fact remained as to the applicability of the liability rule.

[2] No Washington decision has explicitly declared the plaintiffs burden under the common grantor doctrine. However, related doctrines require proof by clear and convincing evidence. *See, e.g., Thomas v. Harlan,* 27 Wn.2d 512, 518, 178 P.2d 965. (1947) ("Title to real property is a most valuable right which will not be disturbed by estoppel unless the evidence is clear and convincing. "); *Merriman v. Cokeley,* 168 Wn.2d 627, 630, 230 P.3d 162 (2010) (Acquiescence and mutual recognition must be proved by clear, cogent, and convincing evidence.); *accord Keierleber v. Botting,* 77 Wn.2d 711, 715, 466 P.2d 141 (1970) (Reformation of a deed conveying a property interest for mutual mistake requires proof by clear, cogent, and convincing evidence.). The common grantor doctrine is similar in kind to these doctrines; the rationale that boundary adjustments require this higher quantum of evidence is equally applicable to it.

[3] From a practical standpoint, there was no need to establish a new boundary because, until 2003, the new owners always owned both parcels.

[4] In Riley's application to subdivide the west parcel identified the total size of the west parcel and the size of the proposed subdivided lots accounting for the retaining wall as part of the east parcel. Riley further submitted these same dimensions with the demolition permit application, acknowledging that the now disputed strip of land, including the retaining wall, would remain part of the east parcel.
