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I. TABLE OF AUTHORITIES

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II. INTRODUCTION

This legal action involves a serious violation of the constitutional rights of appellants John Dewey and Elizabeth Dewey (hereinafter collectively "Dewey"). Against Dewey's will and solely for the private benefit of respondent Raul Gonzales (hereinafter "Gonzales"), the trial court forced the taking of the Dewey property and transferred it to Gonzales. The trial court's compulsory rewriting of the property boundary to enable Gonzales to retain his encroaching structures is not only not an unavailable remedy under Washington law, but it directly violates the Washington State Constitution. The trial court had two (2) choices here: (1) grant a mandatory injunction requiring Gonzales to remove a portion of the offending residence which he deliberately or haphazardly placed upon Dewey's land, or (2) leave Dewey to their remedy at law, damages. Gonzales failed in their burden of proof to avoid the mandatory injunction, particularly given Dewey's loss of all development rights as long as Gonzales' encroachments remained on their property. This action is properly remanded for a reconveyance of the property wrongfully transferred to Gonzales and a proper determination of injunctive relief so Dewey's development can go forward.

III. RESTATEMENT OF THE CASE

Respondent Raul Gonzales repeatedly resorts to misrepresentations in his bad faith effort to mislead this Court regarding his purported innocence in developing his property. Most notably, the record confirms that Gonzales did **not** have his lots A, B, C, and D surveyed and properly marked, which reasonable action would have prevented this dispute altogether. Gonzales' false claim that he relied on nonexistent survey markers is a fabrication designed to evoke sympathy for the situation he knowingly brought upon himself.

Prior to development, it is true that Gonzales acquired a map of his proposed subdivision into Lots A through D from West Sound Surveying. (Exhibit 1). The map expressly disclaims that it denotes any boundary between Gonzales' Lot D and Dewey's property where it states: NOTE: THIS IS NOT A BOUNDARY SURVEY!" (Exhibit 1). William W. Sleeth, the land surveyor who prepared Exhibit 1 for Gonzales, removed all doubt that a survey was never conducted and lot boundary stakes for Lots A, B, C, and D were never placed when he testified that he never placed any survey markers whatsoever on Gonzales' land. (RP, p. 206, l. 6-21). More critically and further proof of Gonzales' knowing falsehoods, Sleeth confirmed that the

boundary line between Gonzales' Lot D and Dewey's property was precisely the same in Dewey's 2005 survey as it was in Gonzales' survey obtained when Gonzales first acquired his property in 1977. (RP, p. 72, l. 24 - p. 73, l. 3; RP, p. 209, l. 4-10). Gonzales presented no credible evidence to substantiate his self-serving statement that any survey markers existed.¹ The problem for Gonzales is that this is simply untrue.

Prior to the trial court's unconstitutional taking, Dewey's Parcel A measured five and one-quarter (5-1/4) acres in size and was zoned R-1, permitting only one (1) structure. (RP, p. 186, l. 4). The encroaching structures placed by Gonzales on Dewey's Parcel A comprise this single residence permitted by Kitsap County. By the county's violation notice (CP 50, Declaration of John Dewey, Exhibit 4), Dewey was denied the opportunity to develop any part of his property. Given the trial court's untenable and unconstitutional decision mandating reversal by this Court, Dewey cannot develop his property unless and until the encroachments are removed. This fact is critical in the court's analysis of the competing benefit to Gonzales and enormous detriment to Dewey resulting from Gonzales'

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In his desperate attempt to point to something, Gonzales was only able to reference a bit of faded flagging, not from any surveyor, hanging from a tree situated some distance from the true quarter corner. (RP, p. 214, l. 18 - p. 216, l. 10).

unlawful conduct.

IV. ARGUMENT

A. **The Trial Court's Unlawful Remedy, Compelling Conveyance of Appellants' Property, Constitutes an Unconstitutional Taking.**

Gonzales conveniently ignores the significant constitutional violation involved here by deliberately misconstruing Dewey's argument. Certainly this Court is not so easily distracted from the real issue mandating reversal.

Contrary to Gonzales' claim, Dewey does **not** contend and never stated that "by denying his demand for a mandatory injunction, the trial court effectuated an unlawful taking in violation of the Washington Constitution. (Respondent's Brief, p. 4). Had the trial court merely denied the injunction and restricted Dewey to their remedy at law, *i.e.*, damages, it might have been acting within its discretionary authority. The problem here is that the trial court exceeded its authority by fashioning a remedy not supported by Washington law. By way of an involuntary boundary adjustment, the trial court effectively stole Dewey's property from them and conveyed it to Gonzales.

The trial court's unconstitutional taking of Dewey's land for Gonzales' private benefit is not tolerated by the Washington State Constitution, Article 1, § 16 (amendment 9). This constitutional prohibition

presently provides:

EMINENT DOMAIN. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches . . .

Without doubt, the boundary adjustment forced on Dewey by the trial court directly contradicts this prohibition against eminent domain and must be reversed.

Again, Gonzales attempts to misconstrue the issue presented here, arguing that denial of injunctive relief as presented in *Arnold v. Melani*, 75 Wn.2d 143, 449 P.2d 800 (1968) does not give rise to a constitutional challenge. The *Arnold* court did not effectuate an involuntary taking of property, an improper fate suffered by Dewey here. In reference to the lower court's refusal to grant a mandatory injunction, the *Arnold* court merely stated that Washington State Constitution Article 1, § 16 (amendment 9) does not "divest[s] a court of equity of the power to refuse a mandatory injunction . . ." and, accordingly, reference to the constitution was not required for its opinion. *Id.* at 805.

While creative, the lower court's rewriting of the property boundary and taking of Dewey's property for the sole benefit of Gonzales, constitutes an undeniable violation of the Washington State Constitution. This Court

must reverse this serious infringement on Dewey's property rights.

B. The Trial Court Failed to Consider and Enter Findings to Meet the Arnold Test.

Nearly the entire memorandum opinion of the lower court and its findings of fact (CP 48, RP, p. 310-12) relate to Gonzales' failed adverse possession claim. With respect to Gonzales' conduct which resulted in his trespass on Dewey's property, the trial court's only finding (labeled as a Conclusion) was:

The court does not find that Mr. Gonzales has acted in bad faith. (CP 48, p. 8, l. 24; RP, p. 310, l. 4-5).

This brief statement falls woefully short of Gonzales' requisite showing to have avoided the injunctive relief sought by Dewey. Contrary to Gonzales' argument, the court was not presented with nor did it find clear, cogent and convincing evidence of the five (5) elements required by *Arnold v. Melani, supra*:

- (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 enormous disparity in resulting hardships.

Id. at 152.

The trial court's error can only be rectified by remand to consider appropriate relief, including removal of the encroaching structures.

1. Gonzales Is Not An Innocent Party; He Took a Calculated Risk in Declining to Survey His Property.

Gonzales is in no way an innocent party, entitled to protection against a mandatory injunction under the *Arnold* test. By his own admission, Gonzales secretly developed his several lots to circumvent applicable Kitsap County building department requirements for provisions of roads and utilities. (RP, p. 18, l. 1-12). Although Gonzales did obtain a short plat for these lots, he deliberately elected not to survey the property boundaries, which would have avoided this litigation.

After completing the development of Lot A, Gonzales testified that he obtained a short plat which he identified as Exhibit 1. (RP, p. 13-23). Gonzales went on to perjure himself by claiming that the surveyor from West Sound Surveying who prepared the short plat (Exhibit 1) also placed survey markers along the boundary of Lot B at the time. (RP, p. 25, l. 7-21).² The

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Gonzales contradicts his own claim of relying on numerous survey markers in establishing the eastern boundary of his Lot D by testifying that he set this boundary fence roughly along the top of a ravine. (RP, p. 38, l. 1-11).

West Sound surveyor, William W. Sleeth, contradicted Gonzales false statements through his testimony that:

1. He owned Westsound Engineering from 1981 through 1998 (RP, p. 205, l. 1-3);
2. He prepared the subject short plat, including map and legal descriptions, (Exhibit 1) for Gonzales in 1986 (RP, p. 205, l. 12-16);
3. Neither he nor anyone in his office conducted any survey of Gonzales' property at the time of the short plat or at any time (RP, p. 206, l. 9-17);
4. Neither he nor anyone from his office ever placed any flaggings or other survey markers of any sort on Gonzales' property at any time (RP, p. 206, l. 18-21).

Finally, Mr. Sleeth confirmed that the eastern boundary of Gonzales' Lot D and the western boundary of Dewey's Lot A were staked as the same line according to both Dewey's 2005 survey and the 1977 survey obtained by Gonzales prior to purchasing his property. (RP, p. 209, l. 4-10). Quite obviously, Gonzales knew he was building his residence beyond his property line on land he did not own.

Based on this overwhelming evidence of Gonzales' indifference in constructing his residence on Dewey's land, Gonzales fails to satisfy even the first *Arnold* element, *i.e.*, that he did not simply take a calculated risk. Moreover, other than merely concluding that Gonzales did not act in bad

faith, the trial court did not properly address this issue. Gonzales was in no way innocent here. He is not entitled to protection from the requested injunctive relief.

2. **Dewey's Damage from the Encroachment, Loss of All Development Rights, Is Not Slight, and Benefit of Removal, to Permit Development, is Not Small.**

Due to Gonzales' encroaching structures on Dewey's property (which Gonzales constructed without a building permit), Dewey was precluded from developing **any part** of his Lot A. (CP 50, Declaration of John Dewey, Exhibit 4, violation letter from Kitsap County Department of Community Development). According to Kitsap County, Dewey already had the one (1) structure on his five (5) acre parcel permitted under R-1 zoning. Accordingly, Dewey cannot develop and he cannot sell this property until the encroachment is removed. Under the second *Arnold* prong, the question is whether Dewey's damage, being deprived of all development value for the entire parcel (not merely the northwest corner), is slight and the benefit of removing the Gonzales' encroaching structures equally small. Clearly the answer is "no" to both inquiries.

The trial court misconstrued the issue here when it balanced the equities and determined removal of Gonzales' encroachment on Dewey's

property would be “inordinately severe in light of the benefit to Mr. Dewey.” (CP 48, p. 9, l. 18-20; RP, p. 311, l. 3-5). More particularly, the court improperly focused on the particular area of Dewey’s entire five (5) acre parcel in the vicinity of the encroachments:

While such a removal would eliminate the encroachment, it is very unlikely Mr. Dewey could build at the same location in the northwest corner of Parcel A or that there is any particular use that can be made of that area.

(CP 48, p. 9, l. 20-24; RP, p. 311, l. 5-11). After missing the issue, the court then took the erroneous leap to an unconstitutional taking of Dewey’s property by way of a boundary line adjustment as the “most equitable result.” (CP 48, p. 9, l. 29; RP, p. 311, l. 17-18).

But for Gonzales’ encroachments, Dewey could have constructed a residence on virtually the same footprint where Gonzales house stands. Gonzales argues that this area in the northwest corner of Dewey’s property had no suitable building sites. (Respondent’s Brief, p. 11). Obviously this is not the case because Gonzales constructed his own residence there, thus precipitating this legal action.

As long as the encroachments remain on Dewey’s property,³ Dewey

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and assuming this Court reverses the unconstitutional taking of Dewey’s property for Gonzales’ private benefit

has been deprived of all development potential for his entire Parcel A. Accordingly, Dewey's damages caused by the encroachment, as well as the benefit of removal, are tremendous, not slight. This matter must be remanded for an appropriate consideration of the second *Arnold* factor, which will warrant injunctive relief.

3. **Gonzales' Encroachments Not Only Limit, But Eliminate, Future Use of Dewey's Property.**

Under applicable Kitsap County zoning laws, only one (1) structure is permitted to be built on Dewey's Parcel A, measuring five and one-quarter (5-1/4) acres. Unfortunately for Dewey, Gonzales placed the lone permitted structure on his property, thus eliminating all development potential. Gonzales' argument that the encroachment only reduced the overall square footage by 1,500 and reduced the acreage from 5.25 to 5.216 (Respondent's Brief, p. 14) is irrelevant to the fact that future use of Dewey's property for **any** development is entirely lost as long as the encroachments remain. Gonzales also argues that only the southeast corner of Dewey's property (not the northwest corner) is suitable for development. (Respondent's Brief, p. 14). Again, even if this were true, the fact remains that Gonzales' encroachments have totally deprived Dewey of any development potential. Gonzales is unable to satisfy the third prong of the *Arnold* test, which was

ignored by the trial court.

4. **Gonzales Presented No Evidence that It Was Impractical to Move the Encroaching Structure.**

The *Arnold* court required clear, cogent and convincing evidence of each of the five (5) elements listed above. Gonzales' failure of proof of any one element is fatal to his opposition to grant of the mandatory injunction. Here, Gonzales offered no evidence whatsoever regarding the cost or impracticality of removing the portion of his house, which encroaches on Dewey's property. This was Gonzales' (not Dewey's) burden of proof, which he failed to meet. There was no evidence and no finding by the trial court on this requisite *Arnold* element, necessitating remand for a proper consideration of the requested mandatory injunction.

5. **There Is No Disparity in Resulting Hardships Between Dewey and Gonzales.**

As more fully addressed above, the trial court and Gonzales have misconstrued the real issue here: as long as Gonzales' encroachments remain on Dewey's property, he cannot develop any part of the entire parcel. Where Gonzales may suffer some hardship in removing part of his residence from Dewey's property, **he brought the problem on himself.** This hardship is considerably less than the hardship realized by Dewey, who is left with vacant

land which he can neither develop or sell.

C. The Trial Court's Damage Award Is Not Supported by Substantial and Competent Evidence.

As a direct and proximate result of the Gonzales' continuing trespass, Dewey was unable to develop any part of Parcel A. Dewey was entitled to loss of use damages, as well as treble damages and attorney's fees under RCW 4.24.630.

As noted by Gonzales, the appellate court will not disturb an award of damages unless it is outside the range of substantial evidence in the record. (Respondent's Brief, *citing Mason v. Mortgage America*, 114 Wn.2d 842, 850, 792 P.2d 142 (1990)). Here, the trial court refusal to award Dewey's properly compensable damages and its erroneous analysis of the hardship to Dewey resulting from the encroachments warrants this Court's review.

The trial court rejected Dewey's damages under RCW 4.24.630, stating:

Finally, the court is not persuaded that Mr. Dewey is unable to build on one of the two level areas of parcel A, as a result of encroachment by Mr. Gonzales. Mr. Dewey's inability to build in the northwest corner of his property is not impacted by the encroachment by Mr. Gonzales. Consequently, there is no basis for triple damages and attorneys fees pursuant to RCW 4.24.630.

(RP, p. 312, l. 4-10).

As a result of the encroachments, together with Gonzales' counterclaim for adverse possession and recording of a *lis pendens*, as well as Kitsap County's citation against Dewey for construction of a residence (Gonzales' house) on his property without requisite permits, Dewey was unable to build on **any part** of his Parcel A. Dewey extensively described these impediments to any development of his Parcel A at trial. (RP, p. 234, l. 1 - p. 236, l. 24). The court erred in denying relief to Dewey under RCW 4.24.630, including loss of use damages, trebling of said damages, and attorney's fees, based on its erroneous conclusion.

The ridiculous award of \$795 for Dewey's property was based on incompetent evidence from Jo Schaefer regarding the value of "unbuildable sites." (CP 41; CP 44). The encroachment area was, quite obviously, an improved site. This valuation was also limited to the encroached area, where Dewey lost use of the entirety of his Parcel A. Dewey is entitled to remand of this matter for a proper award of damages, if the mandatory injunction is not ordered.

V. CONCLUSION

Based on the foregoing reasons and authorities, Dewey respectfully requests that this Court remand this matter for issuance of a mandatory

injunction, together with an award of damages for this continuing trespass.

Respectfully submitted this 29th day of September, 2008.

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THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON
No. 37449-8-II

STATE OF WASHINGTON
BY DM
DEPUTY

JOHN AND ELIZABETH DEWEY, husband and wife,

Appellants,

vs.

RAUL GONZALES, a single man, and GLORIA GONZALES,

Respondents.

DECLARATION OF MAILING

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Emily R. Hansen declares and states as follows:

1. I am over the age of majority and am competent to testify to the matters set forth herein.

2. On September 29, 2008, I deposited by First Class U.S. Mail, postage prepaid, a copy of Brief of Appellants and Declaration of Mailing to the following:

Isaac A. Anderson
Isaac A. Anderson, P.S.
P.O. Box 1451
19717 Front Street
Poulsbo, WA 98370

3. On September 29, 2008, I deposited by First Class U.S. Mail, postage prepaid, the original and one (1) copy of Brief of Appellants to the following:

Clerk of the Court
Washington State Court of Appeals
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402-4454

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington, this 29th day of September, 2008.



Emily R. Hansen