

COURT OF APPEALS
STATE OF WASHINGTON

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No. 44306-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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

v.

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

BRIEF OF RESPONDENTS

Jerret E. Sale, WSBA #14101
Deborah L. Carstens, WSBA #17494
BULLIVANT HOUSER BAILEY PC
1700 Seventh Avenue, Suite 1810
Seattle, Washington 98101-1397
Telephone: 206.292.8930
Facsimile: 206.386.5130

John H. Wiegenstein, WSBA #21201
HELLER WIEGENSTEIN PLLC
144 Railroad Ave., Ste. 210
Edmonds WA 98370
Telephone: (425) 778-2525
Facsimile: (425) 778-2566

Attorneys for John H. Leach

P/m 7/3

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I. INTRODUCTION

This case involves a boundary dispute between neighbors Ellen Levack¹ and John Leach² who own adjoining properties on Fawn Lake, in Mason County. Levack filed suit after a survey revealed that portions of two walls built by the Leaches encroached on the Levack property.³

The encroachment resulted because the parties and their predecessors treated what is known as the “Pipe to Pipe Line” as the boundary between the Leach and Levack properties. Levack does not dispute the trial court’s finding that the Pipe to Pipe Line was the boundary line. She argues, however, that because the walls built by the

¹ The complaint names Levack Family Trust, Ellen Levack Trustee, and Ellen Levack, individually, as plaintiffs. CP 289. For convenience, reference is made only to Levack individually. It should be noted, however, that the Trust is the present owner of the Levack property. CP 8.

² Marilyn Leach, who is also named as a respondent, passed away while this case was in the trial court.

³ Levack was previously aware that a third wall (the “Rock Wall”) had been built on her property in 1999. RP 437–38. Although she agreed to allow the wall to be built, she testified she believed it would be temporary. RP 438. She did not, however, seek removal of the wall before filing this lawsuit in 2009. In any event, the trial court ordered Leach to remove that wall, and he has not appealed from that ruling.

Leaches still encroach upon her property even using the Pipe to Pipe Line as the boundary, the trial court should have ordered Leach to remove those walls instead of allowing them to remain and directing Leach to pay damages to Levack.

A trial court's decision whether to order removal of an encroachment is an equitable one, reviewed for abuse of discretion. In making this decision, the court applies a five-part test developed by the Washington Supreme Court in *Arnold v. Melani*⁴ and refined in *Proctor v. Huntington*.⁵ The trial court in this case carefully considered each element of the *Arnold* test and determined that it would be inequitable to require removal of two walls that encroached slightly onto Levack's property.

Levack has not established, in her opening brief, that the trial court abused its discretion in reaching this result. Instead, her brief mischaracterizes and misstates the evidence. Levack asserts that Leach's motives were bad and that Mason County will require him to remove the

⁴ 75 Wn.2d 143, 449 P.2d 800 (1968).

⁵ 169 Wn.2d 491, 238 P.3d 1117 (2010).

walls at issue. Neither assertion is true, much less established by the evidence. The trial court's decision is well supported by the evidence. The court acted within the scope of its discretion in fashioning a remedy for the minor encroachments on Levack's property resulting from the walls constructed by Leach on the property line. The trial court's decision should be affirmed.

II. ASSIGNMENTS OF ERROR

Levack assigns error to Findings of Fact Nos. 33, 35, and 36 and to Conclusions of Law Nos. 5, 6, 7, 10, and 11.⁶

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. This Court has recognized that, while a neighboring landowner has standing to enforce zoning

⁶ While Levack purports to challenge Conclusions of Law Nos. 5 and 6 in a footnote, she offers no authority (such as a discussion of the elements required to establish adverse possession) to support her assertion that the doctrine of adverse possession does not apply with respect to Leach's construction activities. See Appellant Ellen Levack's Opening Brief ("Appellant's Brief") at 24 n.4. Nor does Levack offer any evidence, authority, or argument to support her challenges to Conclusions of Law Nos. 10 and 11. The Court should therefore decline to consider Levack's assignments of error to these conclusions of law. *Hirata v. Evergreen State Ltd. P'ship*, 124 Wn. App. 631, 639 n.7, 103 P.3d 812 (2004) (assignment of error not supported by argument is deemed abandoned).

regulations, the court should balance the equities of the parties when fashioning relief. Does Leach's alleged violation of Mason County and Fawn Lake Home Owners Association ("HOA") building regulations automatically entitle Levack to an injunction requiring removal of the encroachments on her property?

2. The trial court considered Leach's state of mind and the respective impacts on the parties, among other factors, in fashioning an equitable remedy. Evidence supported the trial court's finding that Leach was not negligent with respect to the disputed walls and that removing the walls would have a much greater impact on Leach than retaining them would have on Levack. Did the trial court abuse its discretion in declining to require Leach to remove the walls?

IV. STATEMENT OF THE CASE

A. Factual Background

The Leaches purchased Lot 9 at Fawn Lake in 1996. Ex. 7. At the time they purchased the property, there was a metal pipe located near the northwest corner of the

adjoining lot to the east, Lot 8, near Crescent Drive. CP 9. Another pipe was located at the edge of Fawn Lake near the southwest corner of Lot 8. *Id.* In 1985 or earlier, a wood and wire fence was built on the line between the two pipes (“the Pipe to Pipe Line”). *Id.* In approximately 1992, the owners of Lot 8 replaced the wood and wire fence with a new fence made of wood and concrete blocks. *Id.* The owners of Lots 8 and 9 treated both fences as boundary fences from at least 1985 until late 1998 or early 1999, when the second fence was removed. *Id.*

The Levacks purchased Lot 8 in 1998. Ex. 1. That same year, the Leaches made plans to build a home on Lot 9. CP 12. They hired Evergreen Builders, operated by John Reidel, to build a house and other improvements on Lot 9. CP 12. Reidel was responsible for obtaining a building permit application from Mason County. RP 275, 281–82; Ex. 8. The Leaches were living in Federal Way at the time and were not often at Fawn Lake during the construction process. CP 12; RP 351, 888.

Reidel began clearing, excavating, and grading Lot 9 by November 1998. CP 12. This process included the placement of footings for a poured concrete retaining wall (“Concrete Wall”) along the Pipe to Pipe Line. *Id.* The Leaches asked the Levacks for permission to build a wall on the boundary line, and the Levacks agreed to this request. RP 424, 426, 518.

During construction of the Concrete Wall, Reidel asked Levack for permission to install a rock retaining wall (“Rock Wall”) on the Levack property to provide temporary support for the adjacent Concrete Wall. CP 12–13. Levack agreed to a temporary Rock Wall.⁷ CP 13. Reidel told Leach that Levack had granted permission for the Rock Wall but did not inform Leach that such permission was for a temporary period. *Id.*

Mason County inspected the project on several occasions following the construction of the Concrete Wall and Rock Wall yet the inspectors never mentioned these

⁷ There is no evidence that Levack asked the Leaches to remove the Rock Wall at any time before filing this lawsuit in April 2009.

walls in their reports. CP 12–13; RP 437–38, 732–33, 753; Ex. 8. The County conducted a Final Inspection in February 2000. Ex. 8. The inspection report noted several minor deficiencies which needed to be corrected in order to pass inspection. *Id.* The report did *not* mention either the Concrete Wall or the Rock Wall. *See* RP 223–24; Ex. 8. The deficiencies noted during the February 2000 inspection were corrected, and the Leach home passed a second inspection in April 2000. *Id.* The April inspection report again neglected to mention anything about the Concrete Wall or Rock Wall. *Id.* Thus, although Mason County building inspectors visited the property on several occasions, they never informed the Leaches that the Concrete Wall or Rock Wall violated any County regulations.

After moving in, the Leaches built a lower wall out of cottage blocks (“Cottage Block Wall”) running from the southern end of the Concrete Wall to a point near the edge of the lake. RP 344. The Cottage Block Wall, like the Concrete Wall, followed the Pipe to Pipe Line. CP 13.

In March 2009, Levack obtained a survey of Lot 8 because she planned to build a house on the property. CP 13–14; RP 441. That survey revealed that the true boundary between Lots 8 and 9 was not, in fact, the Pipe to Pipe Line, even though that line had been treated as the boundary line by the Leaches and Levacks and their predecessors. CP 13–14. Instead, the boundary line was several inches to the west. CP 14. Thus, the Concrete Wall, Rock Wall, and Cottage Block Wall all encroached on Levack’s property. *Id.* Levack notified the Leaches of the results of the survey and also informed Mason County. RP 448; *see* Ex. 16. In a letter dated April 1, 2009, the County informed Levack that retaining walls had been constructed on her property “without permits or approval.” Ex. 16. The letter directed Levack to either (1) obtain a building permit for the walls or (2) remove them. *Id.* The County also sent a copy of the letter to the Leaches. *Id.* Leach contacted the County the next day to discuss the matter. RP 222.

Six days later, Levack filed this lawsuit. CP 289–96.

B. Procedural Background

Levack's complaint seeks to quiet title in her name. CP 292. The complaint also asserts claims for indemnification (both common law and equitable) and trespass.⁸ CP 291–92. The Leaches filed an answer together with counterclaims for title to the disputed property based on the doctrines of adverse possession, mutual recognition and acquiescence, location by common grantor, and estoppel in pais. CP 282–88.

After the trial court dismissed the Leaches' counterclaims for estoppel in pais and location by common grantor on summary judgment, the remaining claims proceeded to a nonjury trial. The trial court ruled that Leach was entitled to ownership of the disputed strip of property up to the Pipe to Pipe Line on grounds both of

⁸ In light of testimony from County officials that any enforcement action will only be taken against the property owner, the trial court's transfer of ownership of the disputed property to Leach moots Levack's equitable indemnity claim. *See* RP 308, 488; 10/5/12 RP at 50. Moreover, as noted above, Levack did not submit any argument or authority in support of her challenge to the trial court's dismissal of this claim. Nor did Levack submit any argument or authority regarding the dismissal of her trespass claim. The Court therefore need not consider these claims.

adverse possession⁹ and mutual acquiescence and recognition. CP 18. However, the court found that the Concrete Wall, Rock Wall, and Cottage Block Wall still encroached slightly on Levack's property. CP 15. The Concrete Wall encroached a maximum of 3.5 inches beyond the Pipe to Pipe Line, with the buried footing for that wall extending another three inches. *Id.* A portion of the Cottage Block Wall extended a maximum of 20.5 inches beyond the Pipe to Pipe Line, and a portion of the Rock Wall extended a maximum of 45.5 inches beyond that line. *Id.* Because the walls still encroached on Levack's property even with the boundary adjustment to the Pipe to Pipe Line, the trial court had to determine whether the walls should be removed. CP 18–19. The court applied its equitable authority and adjusted the boundary line further so that the Concrete Wall and Cottage Block Wall would not be on Levack's property. CP 19. Thus, the court

⁹ The Court found that Leach was entitled to ownership of the disputed property on adverse possession grounds because of (1) actions of the owners of the Leach property from at least 1985 to 1998, when the second fence was removed and (2) from November 1998 to the time Levack filed this suit based upon the Leaches' construction activities. CP 18.

declined to order Leach to remove the Concrete Wall and Cottage Block Wall, although the court did require Leach to remove the Rock Wall. CP 18–19. The court also ordered Leach to obtain a survey and pay Levack \$3,559.72 in damages, reflecting the value of the land transferred to Leach together with back property taxes on that land. CP 19–20.

Levack now appeals, asserting that the trial court should have ordered Leach to remove all three walls.¹⁰ She does not, however, dispute that the trial court’s determination that the Pipe to Pipe Line is the correct boundary between Lots 8 and 9, based on the doctrine of mutual acquiescence.¹¹

¹⁰ Appellant’s Brief at 1.

¹¹ *Id.* at 24. In a footnote, Levack challenges the trial court’s conclusion that the Pipe to Pipe Line is the boundary based on the doctrine of adverse possession to the extent that this conclusion is based upon evidence of construction activities in 2008–09. *Id.* n.4. In fact, the evidence presented at trial supports the trial court’s finding that construction activities occurring before April 7, 1999 (ten years before Levack filed suit) were sufficient to establish adverse possession. *See, e.g.*, RP 730–31. Even if this finding were not supported by the evidence, it is immaterial. Levack does not dispute that the Pipe to Pipe Line is the boundary line between Lots 8 and 9 pursuant to the doctrines of mutual recognition and

V. ARGUMENT

A. The Leaches' alleged failure to comply with applicable County and HOA regulations does not automatically entitle Levack to relief.

Levack devotes several pages of her opening brief to a discussion of the Leaches' alleged violations of Mason County and Fawn Lake HOA regulations governing construction on the Leaches' property.¹² She argues that, as a neighboring property owner, she has standing to enforce these regulations, citing this Court's decision in *Radach v. Gunderson*.¹³ In *Radach*, plaintiffs' neighbors mistakenly built their home closer to the property line than allowed by the zoning code. Although plaintiffs complained about the problem before the home was built, the City failed to take any action. After construction was completed, plaintiffs filed suit against their neighbors and the City for injunctive relief.¹⁴

acquiescence and adverse possession with respect to events occurring before the Leaches began construction on their home.

¹² Appellant's Brief at 4–10, 24–27.

¹³ 39 Wn. App. 392, 695 P.2d 128 (1985).

¹⁴ *Id.*, 39 Wn. App. at 393.

The Court ruled that the City owed a duty to plaintiffs and, in light of the City's "egregious negligence," the City would be required to pay the cost involved to move plaintiffs' neighbors' house away from the property line.¹⁵ The Court reached this result by balancing the equities of the respective parties and determining that plaintiffs were entitled to injunctive relief.¹⁶

The *Radach* court did not rule, as Levack suggests, that a landowner is automatically entitled to injunctive relief whenever a neighbor violates zoning regulations. Instead, the Court used its equitable authority to grant plaintiffs' request for injunctive relief, based upon the particular facts of that case. Here, the trial court used its equitable authority to deny Levack's request, based upon the particular facts of this case.

In sum, while *Radach* stands for the proposition that a landowner has standing to seek injunctive relief for a neighbor's zoning violations, standing is not at issue here. There is no dispute that Levack has the right to seek

¹⁵ *Id.* at 394.

¹⁶ *Id.*

injunctive relief in this case. Instead, the issue is whether the trial court abused its discretion in determining that, under the facts of this case, Levack was not entitled to such relief. As explained below, the trial court did not abuse its discretion in reaching this result, and its decision should therefore be affirmed.

B. The trial court did not abuse its discretion in declining to require removal of the Concrete Wall and Cottage Block Wall.

As noted above, equitable principles apply to a determination as to whether Leach should be required to remove the Concrete Wall and Cottage Block Wall. Just last month, the Washington Supreme Court explained, “The goal of equity is to do substantial justice. Equity exists to protect the interests of deserving parties from the ‘harshness of strict legal rules.’ Washington courts embrace a long and robust tradition of applying the doctrine of equity.”¹⁷

When, as here, the court must determine whether encroachments should be removed, the five-part test

¹⁷ *Columbia Cmty. Bank v. Newman Park, LLC*, 2013 WL 3089572 at *1 (Wash. June 20, 2013).

adopted by the Washington Supreme Court in *Arnold v. Melani* applies to guide the court's equitable determination.¹⁸ In *Arnold*, defendants sought a mandatory injunction requiring removal of encroachments onto defendants' property by plaintiffs, who were adjoining landowners. In denying defendants' request, the court explained that, while an injunction is an appropriate remedy to compel the removal of an encroachment, this remedy is equitable in nature, and the court may decline to issue an injunction in appropriate circumstances.¹⁹ The court explained that an injunction will not issue if the encroacher establishes the following elements, by clear and convincing evidence: (1) the encroacher "did not simply take a calculated risk, act in bad faith, or negligently, willfully, or indifferently"; (2) the damage to the landowner is slight and benefit of removing the encroaching structure is small; (3) there is ample remaining room to build a structure suitable for the area, with no significant limitation on the future use of the landowner's

¹⁸ 75 Wn.2d 143, 449 P.2d 800 (1968).

¹⁹ *Id.*, 75 Wn.2d at 146-47.

property; (4) it is impractical to move the encroaching structure; and (5) “there is an enormous disparity in resulting hardships.”²⁰

The supreme court recently revisited the *Arnold* test in *Proctor v. Huntington*.²¹ In that case, defendants inadvertently built their home, well, and garage entirely on their neighbor’s property. After the neighbor discovered the encroachment, he filed suit seeking to eject defendants from his property.²² The trial court denied the neighbor’s request for injunctive relief, instead requiring him to transfer ownership of the disputed property to defendants in return for payment for the value of the land.²³ Both parties appealed, the court of appeals affirmed the trial court’s decision, and the supreme court accepted review.²⁴

The neighbor acknowledged that, in accordance with *Arnold*, a court may refuse to enjoin an encroachment. He

²⁰ *Id.* at 152.

²¹ 169 Wn.2d 491, 238 P.3d 1117 (2010). Although Levack’s counsel acknowledged in his closing argument that *Proctor* “softened” the court’s analysis in *Arnold* (RP 1007), Levack’s opening brief does not address the *Proctor* decision at all.

²² *Proctor*, 169 Wn.2d ¶ 1.

²³ *Id.*

²⁴ *Id.* ¶ 7.

argued, however, that defendants' encroachment, which occupied an entire acre of his land, could not possibly be deemed to be "slight," and thus defendants could not satisfy the requirements set forth in *Arnold*.²⁵ The court disagreed, declining to adopt the neighbor's proposed rule that an encroachment must be "slight" in an absolute sense before an injunction may be denied. Instead, a court applying the *Arnold* factors must "grant equity in a meaningful manner, not blindly" and must "reason through the *Arnold* elements as part of its duty to achieve fairness between the parties."²⁶ The court explained, "This is the essence of the court's equity power, which is inherently flexible and fact specific." Flexibility is crucial in fashioning remedies that do equity to the parties."²⁷

Applying these principles, the *Proctor* court ruled that, although defendants' encroachment could not be characterized as "slight" in the absolute sense, the issue was whether it would be "fair and just" to require

²⁵ *Id.* ¶ 17.

²⁶ *Id.* ¶ 20.

²⁷ *Id.* (citing *Young v. Young*, 164 Wn.2d 477, 495, 191 P.3d 1258 (2008)).

defendants to remove their entire house, garage, and well.²⁸ Given the fact that the landowner's parcel was 30 acres, the court concluded the trial court did not abuse its discretion in refusing to issue a mandatory injunction.²⁹

It is apparent from *Proctor* that the *Arnold* factors should not be applied in a mechanical manner. As the court explained, property law in Washington has evolved “away from rigid adherence to an injunction rule and toward a more reasoned, flexible approach.”³⁰ That is precisely the approach the trial court followed here, and, as explained below, the court did not abuse its discretion in declining to require Leach to remove the Concrete Wall and the Cottage Block Wall.

1. Leach was not required to plead a “claim” for relief pursuant to *Arnold* or *Proctor*.

Levack notes that Leach did not plead a claim for relief pursuant to “the equitable doctrine articulated by the Supreme Court in *Arnold*.”³¹ As Leach pointed out to the

²⁸ *Id.* ¶ 21.

²⁹ *Id.*

³⁰ *Id.* ¶ 22.

³¹ Appellant's Brief at 29.

trial court, he was under no obligation to assert such a “claim.” CP 54. The application of the *Arnold* factors determines the *remedy* granted by the trial court; those factors do not create a separate cause of action. Even if they did, the trial court was free to grant relief under the equitable doctrine set forth in *Arnold* and *Proctor* in accordance with CR 54(c).

2. The trial court did not abuse its discretion in determining that Leach did not take a calculated risk, or act in bad faith, negligently, willfully, or indifferently.

Levack argues that the first *Arnold* requirement has not been satisfied because Finding of Fact No. 33 does not precisely track the language of *Arnold*. She adds that the court’s failure to use the identical language found in *Arnold* constitutes an insufficient finding regarding the first requirement that must be construed against Leach.³² Levack is wrong on both counts.

Finding of Fact No. 33 states:

The Leaches did not act negligently, recklessly, or intentionally, or “wrongfully” as that term is

³² *Id.*

defined in RCW 4.24.630(1),³³ 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. The Leaches were not aware of these encroachments past the Pipe to Pipe Line until after this lawsuit was filed.

CP 16. The trial court specifically addressed the first *Arnold* factor during the April 25, 2012, proceedings, stating that this factor required a showing that the encroacher “did not simply take a calculated risk, act in bad faith or negligently or willfully locate the structures”

CP 156. The court then ruled that Leach did not act negligently with respect to the placement of the Concrete Wall or Cottage Block Wall.³⁴ CP 156–57.

Although the language of Finding of Fact No. 33 is not identical to that found in *Arnold*, it is apparent that the trial court expressly considered and applied each of the

³³ RCW 4.24.630(1) applies when a person causes damage to land. A person acts “wrongfully” under the statute if he or she “intentionally and unreasonably commits the act or acts [causing the damage] while knowing, or having reason to know, that he or she lacks authorization to so act.”

³⁴ The trial court also addressed this issue during the October 5, 2012, hearing on Levack's motion for reconsideration. 10/5/12 RP at 23–24, 47.

elements contained in the first *Arnold* factor. And, by determining that the Leaches did not act negligently, the court necessarily found that their conduct did not rise to the more egregious level of taking a calculated risk, or acting willfully or in bad faith. Thus, Finding of Fact No. 33 plainly and completely addresses the issue of intent that is the subject of the first *Arnold* factor.

Levack also asserts that the trial court's "confusion" regarding the nature of the Leaches' conduct is reflected by statements made during the court's oral ruling on April 25, 2012.³⁵ The court found that Leach did not act negligently with respect to the Concrete Wall or Cottage Block Wall but that he was negligent regarding the Rock Wall. CP 16. Levack mistakenly attributes the trial court's negligence finding to the fact that Leach did not obtain a permit for the Rock Wall.³⁶ A review of the transcript excerpt cited in Levack's brief makes clear that the court did not base its finding on the failure to obtain a permit.³⁷ Instead, the

³⁵ Appellant's Brief at 30.

³⁶ *Id.*

³⁷ *Id.*

court pointed to Leach's testimony that (1) he had been told by Levack that she would not allow the Rock Wall to be built on her property, (2) he was surprised when he saw the wall, knowing Levack had denied permission, and (3) after discovering the wall had been built, he did not make any attempt to determine whether it had been authorized by Levack.³⁸

The basis for the trial court's distinction between the Concrete and Cottage Block Walls and the Rock Wall also is explained in Finding of Fact No. 34, which Levack does not challenge. That Finding states:

Reidel was an independent contractor and installed the rock buttress on Lot 8 after discussing this with Ellen Levack. The Leaches did not install the rock buttress or direct Reidel to do so. However, once the Leaches realized that Reidel had installed the buttress, John Leach failed to obtain a clear understanding from Levack as to exactly what Ellen Levack had agreed to, i.e., the scope and extent of Ellen Levack's permission. John Leach was negligent in this regard, but did not act recklessly, intentionally, or "wrongfully" as that term is defined in RCW 4.24.630(1).

CP 16.

³⁸ *Id.*

Contrary to Levack's assertion, the trial court was not confused at all. Instead, the court correctly recognized that, while Leach did not know that the Concrete Wall or Cottage Block Wall encroached upon Levack's property until shortly before Levack filed suit, he was aware that the Rock Wall had been built on her property and that she had not given the Leaches permission to build the wall there. The trial court's distinction between the Concrete Wall and Cottage Block Wall on the one hand and the Rock Wall on the other is not based upon whether the Leaches obtained permits for the walls but upon the differing factual circumstances surrounding the construction of those walls.

In addition, the trial court's finding that Leach did not act negligently is supported by substantial evidence. Contrary to Levack's assertion, Leach did not deliberately disregard applicable Mason County and Fawn Lake HOA requirements regarding setbacks and building permits. At trial, Leach presented evidence establishing that:

- The parties and their predecessors treated the Pipe to Pipe Line as the boundary between Lots 8 and 9. CP 9-11, 14.

- Levack did not know, until the March 2009 survey, that the Pipe to Pipe Line was not the boundary between Lots 8 and 9. CP 14.
- Leach did not know, until after this lawsuit was filed, that the Concrete Wall and Cottage Block Wall were over the Pipe to Pipe Line. CP 16; RP 95.³⁹
- Leach was generally aware of Mason County and Fawn Lake HOA setback requirements but believed that the setback requirements applied only to the residence, not to the Concrete Wall or Cottage Block Wall. RP 240–43, 257–58. His testimony makes clear that he was not “acutely aware” of these regulations, as Levack claims.⁴⁰ RP 240–42, 257–58.
- Leach had no involvement with the process of obtaining a building permit from Mason County. RP 275, 282; Ex. 8.
- County inspectors were on site several times after the Concrete Wall had been constructed and raised no issues regarding the wall. Ex. 8.
- Although Leach’s neighbor on the other side provided a letter authorizing Leach to build his home to within five feet of the property line, Leach did not, as

³⁹ While Levack challenges Finding of Fact 33, she does not challenge the portion of that finding in which the trial court stated that the Leaches were unaware of encroachments past the Pipe to Pipe Line until after this lawsuit was filed. Appellant’s Brief at 30. In fact, she does not include that statement in her quotation of Finding of Fact No. 33. *Id.*

⁴⁰ Appellant’s Brief at 8.

Levack alleges, request this letter. RP 340.

- Leach did not know he needed to obtain a permit to build the Cottage Block Wall, and Mason County Building Inspector Debbera Coker was not sure whether a permit was required for that wall.⁴¹ RP 303, 314–15, 344.
- Levack agreed that the Leaches could build the Concrete Wall on the property line. RP 424, 426, 518.
- Leach contacted the County immediately after receiving the April 1, 2009, violation notice and thereafter provided information to the County regarding the wall.⁴² RP 221–22, 225.⁴³

⁴¹ Levack asserts that the cottage block wall is over four feet tall and supports a surcharge, thus requiring a building permit from Mason County. Appellant’s Brief at 6. In support of this assertion, Levack cites the testimony of Debbera Coker. *Id.* It is clear, however, that Coker is testifying about the Concrete Wall and the Rock Wall, not the Cottage Block Wall. RP 219–20. Coker later testified that she was not sure whether the Cottage Block Wall would require a permit (RP 303, 314–15), and Levack does not cite to any other evidence in the record to show that the Cottage Block Wall was four feet tall and/or supported a surcharge.

⁴² In an apparent attempt to show that Leach acted wrongfully, Levack asserts that (1) Leach knew Reidel was not an “honest operator” and (2) he sometimes paid Reidel in cash to avoid paying sales tax. Appellant’s Brief at 11. Even if true, neither fact has any relevance to the issues before the Court. And, the evidence presented at trial established that (1) Leach did not learn of any problems with Reidel until after he had been hired (RP 373), and (2) Leach paid Reidel in cash, on one documented occasion, for convenience (RP 275; Ex. 14). Levack’s counsel

In sum, the trial court thoroughly considered whether Leach satisfied the first *Arnold* requirement, and this determination is supported by the evidence. Levack's assertion to the contrary must be rejected.

3. The trial court did not abuse its discretion in determining that the damage to Levack was slight and that there was no real impact on Levack's ability to use her property.

The trial court found that the encroachments of the Concrete Wall (3.5 inches plus 3 inch footing) and Cottage Block Wall (20.5 inches) did not have a material impact on the value or use of Levack's property, describing the impact as "*de minimis* at best." CP 17. The court directed Leach to pay Levack \$3,559.72, representing the value of the property that had been encroached upon together with the amount of property taxes paid by Levack and attributable to that property. CP 19–20.

repeatedly asked Leach whether he paid in cash to avoid sales tax, and Leach repeatedly denied doing so. RP 375, 377.

⁴³ Levack asserts that Leach "persuaded" the County to suspend enforcement action pending the resolution of this lawsuit. Appellant's Brief at 17. While it is true that the County has not pursued enforcement action while this lawsuit has been proceeding, there is *no* evidence to show that Leach had anything to do with the County's decision.

Levack contends that, in finding that the encroachments had minimal impact on her property, the trial court improperly relied upon the testimony of Jeff Conklin, a real estate broker who is not licensed as an appraiser. She argues that such testimony was inadmissible pursuant to RCW 18.140.020.⁴⁴ RCW 18.140.020(6) provides that brokers may offer a “brokers price opinion.” If that opinion is given as evidence in a legal proceeding, the broker must specify that the opinion is not an appraisal.⁴⁵

After explaining that he had been a licensed real estate broker for 36 years and had been trained (although not licensed) as an appraiser, Conklin testified as follows:

Q I’m going to be asking you some

⁴⁴ Appellant’s Brief at 34–35.

⁴⁵ RCW 18.140.020(6). Levack also cites RCW 18.140.020(1) for the proposition that a broker may not offer appraisal testimony. Appellant’s Brief at 34. That provision states, “No person other than a state-certified or state-licensed real estate appraiser may receive compensation of any form for a real estate appraisal or an appraisal review, except that a state-registered appraiser trainee may receive compensation from one or more supervisory appraisers or the supervisory appraiser’s employer for appraisal assignments supervisory appraisers or the supervisory appraiser’s employer for appraisal assignments.” The statute has nothing to do with the type of testimony that can be offered at trial.

questions today with respect to your opinions about the value of the Levack lot and the effect on that caused by the encroachments that have been shown on a survey Are you offering an appraisal in that regard?

A No. I'm—I'm simply offering my opinion as a licensed broker, not as a licensed appraiser.

RP 826–27.

The trial court's decision to admit Conklin's testimony is reviewed for abuse of discretion.⁴⁶ The court cannot be said to have abused its discretion here. It was clear from Conklin's testimony that he was providing a brokers price opinion, not an appraisal. His testimony complied with the requirements of RCW 18.140.020(6) and was properly admitted.

Even if the trial court had abused its discretion in admitting Conklin's testimony, the outcome would not differ. The trial court did not adopt Conklin's analysis in determining the financial impact on Levack's property. Conklin suggested that the encroachments resulted in \$2 per square foot of impact for a total of \$1,090. RP 842.

⁴⁶ *Diaz v. State*, 175 Wn.2d 457 ¶ 7, 285 P.3d 873 (2012).

Rick Wells, an appraiser retained by Levack, testified that the effect of the encroachments should be calculated based upon the value per foot of the property fronting the lake. RP 935. Using this method, Wells calculated the market value of Levack's property to be \$119,000 (54 feet of lakefront property multiplied by \$2,200 per foot and rounded up slightly). RP 937. He then determined that, with all three encroachments, including the Rock Wall that the trial court ordered Leach to remove, the impact on Levack's property was between \$35,500 and \$42,000. RP 945. Wells' calculations were based upon the surveyed boundary line, not the Pipe to Pipe Line, and also factored in damages for a nonexistent cloud on the title.⁴⁷

The trial court used the precise figures proposed by Wells, agreeing with him that Levack's lot should be valued at \$2,200 per foot of lakefront property for a total value of \$119,000. CP 15–16. The court then multiplied the \$2,200 per foot figure by the maximum encroachment of

⁴⁷ Because the purpose of this lawsuit was to determine who owned the disputed property, the trial court's resolution of this issue necessarily resolves the issue of title.

20.5 inches all the way down to the edge of the lake to come up with a figure of \$3,000 for the value of the property impaired by the Concrete Wall and Cottage Block Wall. CP 16.

Thus, the trial court adopted the analysis proffered by Levack's own expert in calculating the impact on the Levack property. Because the trial court did not use the calculations provided by Conklin, the court's admission of his testimony on this issue had no effect on the decision.

The trial court awarded Levack \$3,000 to compensate for the value of the property encroached upon by the Concrete Wall and the Cottage Block Wall. CP 19. This figure represents approximately 2.5 percent of the value of Levack's property and is commensurate with the encroachment onto a small portion of Levack's property. The trial court did not abuse its discretion in determining the impact on the property to be minimal.

Nor did the trial court abuse its discretion in finding that the Concrete Wall and Cottage Block Wall did not have a material impact on Levack's ability to use her property.

Levack does not argue that the Cottage Block Wall has had any impact on her ability to use her property. She focuses instead on the impact of the Concrete Wall, complaining that she cannot perform any excavation on her property for a distance equal to the height of the wall.⁴⁸

Levack's argument avoids the fact that she agreed to waive the setback requirement and to allow the Leaches to build the Concrete Wall at the property line. Thus, the only issue is whether the portions of the wall that now encroach upon her property, given the new boundary line drawn by the trial court, have significantly affected her ability to use the property. Levack has not made any showing that the 3.5 inch encroachment of the Concrete Wall or the additional 3 inches of the buried footing for the wall have had any impact on her ability to use her property whatsoever. For example, she has not shown, or even

⁴⁸ Appellant's Brief at 33–34. Although Levack asserts that Mason County would “forbid” any excavation equal to the height of the wall, she does not cite to the testimony of any of the three Mason County employees who appeared at trial. Instead, she relies upon testimony by her engineer who (1) obviously does not speak for the County and (2) was discussing the impact of the Rock Wall, not the Concrete Wall. *See* RP 154.

argued, that these encroachments will prevent her from building a reasonably-sized house on the lot, and the evidence presented at trial was to the contrary.⁴⁹

The walls at issue encroach only slightly onto Levack's property and do not significantly limit her ability to use that property to build a house. The trial court did not abuse its discretion in determining that the impact on Levack if the walls are allowed to remain is *de minimis*.

4. The trial court did not abuse its discretion in determining that it is impractical to move the Concrete Wall and Cottage Block Wall.

In contesting the trial court's finding on this issue, Levack asserts that "Mason County will require Leach to remove the walls, whether it is 'practical' for Leach to do so or not."⁵⁰ She adds that the County has "effectively" required Leach to remove the walls.⁵¹

⁴⁹ Real estate broker Conklin testified that (1) there are several lots on Fawn Lake that are smaller than Levack's, (2) the average size of a home in the area was approximately 1,350 square feet, and (3) Levack would be able to build an appropriately-sized house. RP 829, 836, 845. Although Levack challenged Conklin's ability to testify regarding the financial impact of the encroachments on her property, she did not dispute Conklin's testimony regarding the use of her property.

⁵⁰ Appellant's Brief at 36.

⁵¹ *Id.*

In fact, Mason County has done no such thing. Levack does not cite testimony from any of the three Mason County employees who appeared at trial to support her assertion that the County will require Leach to remove the Concrete Wall and Cottage Block Wall. Instead, she relies on a Correction Notice issued by the County on December 2, 2010. RP 227–29; Ex. 17. The notice states, “Retaining wall system⁵² was constructed without a building permit or approval. Obtain a permit within 21 days or remove.” Ex. 17. The notice directed the recipient to contact Debbera Coker “to discuss and make arrangements.” *Id.*

Coker testified that the County posted the Correction Notice because of concerns that the wall could not support an RV that had been parked on top of it. RP 229, 382. She added that, the day after the notice was posted, she received a call from Jayne’ Nelson, an engineer retained by the Leaches. *Id.* Coker explained, “So I did receive a

⁵² Although the reference to “retaining wall system” is not completely clear, it is apparent from the context of County employee Coker’s testimony that the County’s sole concern was the Concrete Wall. RP 229–31. Coker later testified that she was not sure that the Cottage Block Wall would even require a permit. RP 303, 314–15.

response, which satisfied the concern. And in my opinion, we were back to we still are waiting for the civil action to be resolved before the permitting would be necessary.” *Id.*

Coker also testified regarding the April 1, 2009, letter she sent to Levack, with a copy to the Leaches. She explained that, as in the case of the 2010 Correction Notice, the County gave the parties two options—either get a building permit or remove the Concrete Wall. RP 224. Shortly after Coker sent the 2009 letter, Levack filed this lawsuit. Coker testified that the County has not pursued any enforcement action with respect to the Concrete Wall and will not do so until this lawsuit is resolved. RP 226–27, 229, 307. She added that she had asked Nelson to keep her informed as to the status of the lawsuit so the County would be “aware that the parties are working toward a resolution and ultimate building permit submittal.”⁵³ RP 230.

⁵³ During the October 5, 2012, hearing, Levack’s counsel acknowledged, “And then, you know, Mason County. Their position basically has been, well, this is a civil dispute and it depends where the Court draws the line. The Court draws the line where the Pipe to Pipe Line is even though his walls exceed

Thus, contrary to Levack's repeated assertions, there is *no* evidence that Mason County will require Leach to remove either the Concrete Wall or the Cottage Block Wall. Instead, as Coker testified repeatedly, Leach has the option to apply for a building permit and, to the extent necessary, a variance.⁵⁴ RP 221, 224, 227, 230, 307, 308, 315–16, 319.

Levack apparently contends that the Concrete Wall must be torn down because it was not properly built and is not structurally sound. She asserts that: (1) Leach did not have an engineer design the wall; (2) the wall is only eight inches wide instead of the 12 inches provided for by the Concrete Reinforcing Steel Institute guidelines; (3) Mason

that. If they're allowed to remain, the County's not going to take any action against him." 10/5/12 RP at 25. And during that hearing the trial court confirmed that "it's not automatic that the wall has to come down if someone didn't get a permit." *Id.* at 46.

⁵⁴ Levack also disputes whether the impact to Leach of removing the Cottage Block Wall would be slight. Appellant's Brief at 36. She argues that the trial court's finding on this issue is not supported by the evidence but cites no evidence to support her assertion that the impact would be minimal. *Id.* In fact, the evidence before the trial court established that, in addition to the anomalous result of having the Concrete Block Wall and Cottage Block Wall be offset from each other, it would cost in excess of \$8,000 to move the Cottage Block Wall. Ex. 20.

County inspectors found no evidence of rebar in the wall; and (4) the wall is failing.⁵⁵ The evidence presented at trial established that (1) no one could say whether an engineer had designed the Concrete Wall (RP 127–28, 352); (2) the Concrete Reinforcing Steel Institute guidelines are just that—guidelines—and are not followed by all engineers (RP 817); (3) Mason County inspectors did not inspect the wall to determine whether it had rebar, and the expert witnesses for both parties testified that the wall did contain rebar (RP 127, 770, 812); and (4) while the Concrete Wall has some cracks and is not up to code, it is not failing and, in fact, has performed well (RP 812, 820). To the extent that Levack claims the Concrete Wall must be removed because of structural deficiencies, that claim is not supported by the evidence.

Levack also asserts that there is “an absence of evidence in the record” to support the trial court’s finding that removal of the three walls would cost \$40,000 and

⁵⁵ Appellant’s Brief at 12, 13–14.

would risk damaging the Leach residence and Lot 8.⁵⁶ Levack is wrong. Jayne' Nelson, the engineer retained by Leach, testified that she obtained estimates from three contractors of the cost to replace the Concrete Wall.⁵⁷ RP 776–77. One estimate was \$61,142.90, one was \$30,086, and one was approximately \$60,000. RP 779; Ex. 20. Nelson explained that she obtained the third bid because of concerns about the significant discrepancy between the first two. RP 776–77. Because both the first and third bids were very close, she believed that these bids more accurately represented the cost to build a new Concrete Wall. RP 777–78. Nelson also testified that she believed the cost to remove the Cottage Block Wall would be approximately \$8,700. RP 779; *see* Ex. 20.

Thus, the testimony at trial established that the cost to remove both the Concrete Block Wall and Cottage Block

⁵⁶ Appellant's Brief at 2. While Levack makes this assertion with respect to her Assignments of Error, she does not include any argument regarding this point in her brief.

⁵⁷ Nelson also put together an "engineer's estimate" which she acknowledged would likely be off by a considerable amount. RP 775–76. That estimate totaled the quantitative costs for each element of the project based upon numbers in a means guide. *Id.*

Wall would be nearly \$70,000. The trial court's finding that this cost would be at least \$40,000 is supported by substantial evidence.

Nelson also testified about the impact of removing the Concrete Wall on Leach's property, explaining that removal of the wall would risk destabilizing Leach's home and garage. RP 774–75. The trial court's finding of fact in this regard is supported by substantial evidence.

5. The trial court did not abuse its discretion in finding an enormous disparity in the resulting hardships.

Although the findings of fact do not separately address this issue, the findings regarding the respective impacts on the parties establish that the impact to Leach of removing the Concrete Wall and Cottage Block Wall significantly outweighs the impact to Levack if those walls remain in place. As discussed above, the evidence presented at trial established that it would cost at least \$40,000 and up to \$70,000 to remove the walls and that removing the Concrete Wall might damage Leach's home. On the other hand, the Concrete Wall and Cottage Block

wall minimally encroach on Levack's property, and have no significant impact on her ability to use that property to build a house. Under these circumstances, the trial court cannot be said to have abused its discretion in declining to require Leach to remove the Concrete Wall and Cottage Block Wall.

VI. CONCLUSION

For the reasons set forth above, Leach respectfully requests that the trial court's decision be AFFIRMED.

DATED July 3, 2013.

BULLIVANT HOUSER BAILEY PC

By



Jerret E. Sale, WSBA #14101

Deborah L. Carstens, WSBA #17494

HELLER WIEGENSTEIN PLLC

By



John H. Wiegenstein, WSBA #21201

Attorneys for John H. Leach

CERTIFICATE OF SERVICE

The undersigned certifies that on this 3rd day of July, 2013, I caused to be served the foregoing document to:

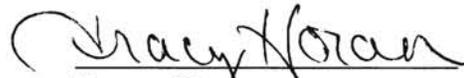
Scott M. Ellerby
Mills Meyers Swartling
1000 2nd Ave., Suite 3000
Seattle, WA 98104-1064

via hand delivery
 via first class mail
 via Fed Ex
overnight

Matthew B. Edwards
Owens Davies Fristoe Taylor
& Schultz, P.S.
1115 W. Bay Drive NE
Suite 302
Olympia, WA 98502-4658

via hand delivery
 via first class mail
 via Fed Ex
overnight

I declare under penalty of perjury under the laws of the state of Washington this 3rd day of July, 2013, at Seattle, Washington.


Tracy Horan