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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

NO. 46120-0-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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

vs.

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

DAVID VALAER,
Third Party Plaintiff,

v.

U.S. DEPARTMENT OF TREASURY; LEE ROBBINS and JANE DOE
ROBBINS, and their marital community thereof,
Third Party Defendants.

APPEAL FROM THE SUPERIOR COURT

HONORABLE BARBARA JOHNSON

BRIEF OF APPELLANTS

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ASSIGNMENTS OF ERROR AND ISSUE PRESENTED

Assignment of Error No. 1: The trial court erred in granting the motion for partial summary judgment made by defendants Valaer.

Assignment of Error No. 2: The Court erred by denying the Motion for Reconsideration made by plaintiffs Riley.

Assignment of Error No. 3: The Court erred by entering the Final Order.

ISSUES PRESENTED

1. Are defendants Valaer entitled to land on lots owned by plaintiffs Riley on the basis of the common grantor doctrine?
2. If the common grantor doctrine is applicable, to what land are the Valaers entitled?
3. Has a genuine issue of material fact been presented on all aspects of the "Liability Rule?"

STATEMENT OF THE CASE

I. Operative Facts.

In January of 1951, Fred Neth and Alice Neth (the Neths) purchased a city lot at the southwest corner of 36th and Columbia in Vancouver (the East Lot). (CP 395) Some of the improvements that the Neths had constructed on the East Lot encroached several feet upon the lot

immediately to the west (the West Lot). (CP 516) In July of 1951, they purchased the West Lot. (CP 397)

The Neths sold both lots to LaVern Boespflug and Elaine Boespflug (the Boespflugs) in 1971. (CP 399) The Boespflugs sold both lots to Michael Holman and Suzann Holman (the Holmans) in 1975. (CP 401) In October of 2000, Ms. Holman entered into a real estate contract to sell both lots to the Rileys. (CP 403-408) The Rileys received a fulfillment deed for their purchase in January of 2004. (CP 409)

Argent Mortgage Company, LLC, (Argent) loaned money to the Rileys at or near the same time that the Rileys received the fulfillment deed. The Rileys executed a deed of trust as security for the loan. The deed of trust encumbered only the East Lot. (CP 411-427)

In 2007, the Rileys made application to the City of Vancouver to short subdivide the West Lot. (CP 189) Their Preliminary Short Plat noted a proposed boundary line adjustment between the East Lot and West Lot that would move the western boundary of the East Lot to the West to avoid the encroachments. (CP 199) They received approval but declined to go forward with the project or the boundary line adjustment due to concerns of expressed by their neighbors over density and related issues. (CP 164-165, 210)

The Rileys subsequently defaulted on the loan from Argent. Nonjudicial foreclosure proceedings were commenced. David Valaer purchased the East Lot at a trustee's foreclosure sale on November 29, 2010. The Trustee's Deed was recorded on December 14, 2010. (CP 429-430)

There is no indication that Mr. Valaer made any sort of investigation prior to the Trustee's Sale that would have alerted him to the fact that the improvements on the East Lot encroached on the West Lot. There is no evidence that he obtained a title report or reviewed surveys, building permits, as built plans, or aerial photographs of the property that might have revealed the encroachment. (CP 344-345)

II. Course of Proceedings.

The Rileys sued the Valaers to quiet title to the West Lot and to remove the encroachments. (CP 1-14) The Valaers answered and sought to quiet title to a strip of land west of the west boundary of the East Lot and upon which the encroachments sit. (CP 15-50)

The Valaers moved for summary judgment in June of 2012 based upon issues not pertinent here. (CP 249-260) That motion was ultimately denied. In their briefing, they mention the "Liability Rule" set out in *Arnold v. Melani*, 75 Wn.2d 143, 449 P.2d 800 (1968) and *Proctor v. Huntington*, 169 Wn.2d 491, 238 P.3d 1117 (2010). They stated that they

did not seek any relief under the “Liability Rule” in their summary judgment motion because the “required findings are generally factual in nature.” (CP 373) In its letter opinion deciding the summary judgment motion, the trial court noted that summary judgment under the “Liability Rule” would not be proper since factual findings would be necessary. It stated:

. . . However, as acknowledged by the parties, (the “Liability Rule”) is not advocated on summary judgment as factual findings will be necessary.

(CP 376)

On May 30, 2013, the Valaers moved for partial summary judgment. They sought to establish a boundary line between the East Lot and the West Lot at the western end of the improvements that encroached on the West lot. (CP 377-378) They produced no evidence concerning any investigation they made prior to the 2010 Trustee’s Sale that would have alerted them that improvements from the East Lot encroached on the West Lot. They also did not discuss how much it would cost them to remove the encroachments and what the value of the West Lot might be with or without the area on which the encroachments sit. (CP 574-621)

The Court orally granted the Valaers’ partial summary judgment motion on August 2, 2013. It stated that all elements of the common grantor doctrine had been satisfied. It also concluded that all elements of

the “Liability Rule” had been met. It stated that the only issue reserved for trial would be the amount of damages the Valaers would have to pay to the Rileys under the “Liability Rule.” (RP-I 21-22)¹ The Rileys moved for Reconsideration on August 22, 2013. (CP 468-476) The trial court entered the Order Granting Valaers’ Motion for Partial Summary Judgment on August 23, 2013. (CP 477-479) It denied the Motion for Reconsideration by order dated October 1, 2013. (CP 522-523)

The Rileys then sought discretionary review in *Riley v. Valaer*, Court of Appeals No. 45500-5-II. Commissioner Bearse denied the petition. In her ruling, she noted that the Valaers would not have to pay damages under the “Liability Rule” if they were entitled to adjust the boundary line between the East Lot and the West Lot based upon the common grantor doctrine. (Ruling Denying Review, p. 7 fn.7)

The Valaers then moved for judgment on the common grantor doctrine. (CP 482-87) They sought to quiet title to a nine foot wide strip to the west of the west boundary line of the East Lot. The trial court quieted title in that disputed strip to them notwithstanding the fact that the improvements extended slightly less than four feet from the west boundary

¹ “RP-I” refers to the verbatim report of proceedings of the hearing on August 2, 2013. “RP-II” refers to the verbatim report of proceedings of the hearings held on August 23, 2013.

of the East Lot and did not cover the whole of the disputed strip. (CP 524-527)

The Rileys then appealed.

ARGUMENT

I. Standard of Review.

The trial court decided this matter on summary judgment. This Court reviews the matter *de novo*. Engaging in the same inquiry as the trial court. *Jumamil v. Lakeside Casino, LLC*, 179 Wn.App. 665, 677, 319 P.3d 868 (2014).

A party moving for summary judgment must show both that there is no genuine issue of material fact when those facts are viewed in the light most favorable to the nonmoving party and that the moving party is entitled to judgment as a matter of law. *Ranger Insurance Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). A genuine issue of material fact exists when reasonable minds could reach different conclusions. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009).

Summary judgment is also subject to a burden shifting scheme. The moving party must first submit adequate affidavits showing the absence of any issue of material fact and entitlement to a judgment as a

matter of law. *Ranger Insurance Co. v. Pierce County*, *supra*, 164 Wn.2d at 552; *Michael v. Mosquera-Lacy*, 165 Wn.2d at 601. If the moving party does not sustain its initial burden, summary judgment must be denied “regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition of the motion.” *Hash v. Children’s Orthopedic Hospital & Medical Center*, 110 Wn.2d 912, 915, 757 P.2d 507 (1998). The burden of creating a genuine issue of material fact shifts to the nonmoving party only when the moving party has met its initial burden. *Ranger Insurance Co. v. Pierce County*, *supra*, 164 Wn.2d at 552.

In this case, the Valaers did not sustain their initial burden of demonstrating the absence of a genuine issue of material fact or that they were entitled to judgment as a matter of law based upon the facts that they submitted. For those reasons, the trial court should have denied their summary judgment motion.

II. Insufficient Evidence Was Produced to Support Application of the “Common Grantor” Doctrine.

The trial court ruled that the boundary between the East Lot and the West Lot should be established on the basis of the “common grantor” doctrine. This ruling was incorrect because there was insufficient evidence to satisfy the elements of that doctrine.

The typical situation involving the “common grantor” doctrine involves a situation where one person owns adjoining parcels and sells each parcel to a different person. The requirements for the applicability of the doctrine were set out in *Winans v. Ross*, 35 Wn.App. 238, 666 P.2d 908 (1983), the leading case on “common grantor” doctrine for establishing a boundary line.² Summarized, the elements and requirements of the doctrine are the following:

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. . . The common grantor doctrine involves two questions: (1) was there an agreed boundary established between the common grantor and the original grantee, and (2) if so, would a visual examination of the property indicate to subsequent purchasers that the deed line was no longer functioning as the true boundary?

35 Wn.App. at 240-41. The first element requires a meeting of the minds on the boundary established between the common grantor and the initial grantee. It is critical because it is based on the special relationship between the common grantor and that original grantee. *Levien v. Fiala*, 79 Wn.App. 294, 302, 902 P.2d 170 (1995). An agreement need not be a written instrument executed with the formality of a deed. It can take the form of a

² Professors Stoebeck and Weaver agree. Stoebeck and Weaver, *Real Estate: Property Law*, 17 Wash.Prac. §8.22.

discussion between the common grantor and the first grantee as in *Strom v. Acorace*, 27 Wn.2d. 478, 178 P.2d 959 (1947); it can be based on the common grantor staking out the boundary as occurred in *Windsor v. Bourcier*, 21 Wn.2de 313, 150 P.2d 717 (1944), and *Atwell v. Olson*, 30 Wn.2d 179, 190 P.2d 783 (1948); or the common grantor can measure off the boundaries of the lot that is being sold as in *Thompson v. Bain*, 28 Wn.2d 590, 183 P.2d 785 (1947).

There is no evidence of any agreed boundary line between any common grantor and any original grantee. This should be expected because both the East Lot and the West Lot were conveyed together in all transactions prior to 2010. The Neths owned both the East and the West Lot by July of 1951. They sold both lots to the Boespflugs. The Boespflugs sold both lots to the Holmans. Ms. Holman sold both lots on a real estate contract to the Rileys. There is no indication of any agreement changing the true boundary line in connection with any of these transactions.

Argent Mortgage Company, LLC agreed to take the East Lot as security for a loan made to the Rileys in late 2003 or early 2004. There is no evidence of any sort of meeting of the minds between Argent Mortgage Company, LLC and the Rileys establishing any boundary other than the true boundary between the two lots. In any event, counsel has been unable

to locate a case where the common doctrine was applied when the initial grantee was the trustee under a deed of trust. This is not surprising because lenders typically take security based upon the true boundary line as shown in the legal description.

The Valaers are expected to claim that the element of agreement is made out by Mr. and Mrs. Neth building a house on the East Lot and then acquiring the West Lot; the sale of the lot from the Neths to the Boespflugs; and Mr. Riley's application to subdivide the West Lot. None of these show the critical element of an agreement between the common grantor and the initial grantee. The Neths built a house on the East Lot and acquired the West Lot. Their doing so is not an agreement between a common grantor and an original grantee that sets the boundary line at something other than the true line. The element of an agreement with an original grantee is not met by the conveyance to the Boespflugs because both lots were conveyed and because there is no evidence of any agreement concerning the boundary line. Finally, Mr. Riley's short plat application is not a conveyance at all.

In conclusion, there is no evidence of one critical element required to apply the common grantor doctrine — the existence of any agreement between any common grantor and any original grantee placing a boundary at something other than the true boundary line. That means that the Valaers

did not meet their burden of showing that they are entitled to judgment as a matter of law based upon the facts submitted. For that reason, the trial court erred in entering the Order Granting Valaers' Motion for Partial Summary Judgment; the Order Denying Motion for Reconsideration; and the Final Order.

III. The Trial Court Improperly Designated the Land That the Valaers Received.

The trial court quieted title in a strip of land nine (9) feet in width running from the north side of both lots to the south side of both lots. (CP 516) This was error because improvements from East Lot do not cover that entire strip.

The legal description for the property that went to the Valaers was prepared by Carl A. Beseda, a licensed Professional Land Surveyor. (CP 515) The drawing of the land delineated in the legal description is attached to the Final Order. (CP 516) It shows a strip of land, nine (9) feet in width and approximately ninety (90) feet in length. Slightly less than four (4) feet of the improvements from East Lot extend onto that strip over a distance of approximately twenty-four (24) feet. In other words, improvements from the East Lot occupy about ninety-six (96) square feet of the strip the trial court gave to the Valaers. And that strip has an area of about eight hundred ten (810) square feet.

The Valaers claim that the boundary is consistent with a retaining wall at the west side of the East Lot. That wall is not an improvement as such. It is associated with the West Lot because its purpose is to keep material from East Lot off the West Lot. (CP 508)

No reason appears for the retaining wall to be included in the grant. The common grantor doctrine allows a boundary to be established between two lots owned by a common grantor if that grantor pointed out something that was represented to be the boundary. (See, p. 8 above) There is certainly no evidence that the retaining wall was pointed out to any grantee as the boundary between the two lots. For that reason, the retaining wall can't serve as the boundary under the common grantor doctrine.

If a common grantor specifically represents where a boundary line, that representation will be binding on the common grantor and all persons taking from the common grantor. But if there is no express representation, the party claiming the benefit of the common grantor doctrine can only take the area on which encroachments sit. That was the ruling in *Roe v. Walsh*, 76 Wash. 148, 135 P. 1031, 136 P. 1146 (1913). Due to an incorrect survey, the owner of two lots located the boundary between them 21.6 inches from its correct location. The building he built extended eaves over and a sidewalk on that 21.6 inch wide strip. He conveyed the lot

conveying the 21.6 inch strip with the representation that all the improvements were on the other lot. The trial court decided the matter on a demurrer to the allegations of the owners of the lot on which the 21.6 inch strip sat. The Court held that if his representation was proven, the purchasers of the lot from common grantor would have title to the 21.6 inch strip. The parties asked for clarification on rehearing en banc. The Court stated:

...if the allegations...are proved to the effect that the vendors represented to the vendees that the building and walk were wholly upon lot 10, the vendors and their successors are bound by that representation to the extent thereof and title vested according to the representation. If the representations were implied, the title of the strip vests in the vendees only in so far as it is covered by the improvement...

76 Wash. at 157

In our case, no one represented to anyone else where the property line was. Therefore, even if the common grantor theory applies—which it does not, the Valaers are entitled to title only on the land on which the encroaching improvements sit. The trial court erred by granting them title to the entire nine foot wide strip.

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IV. Genuine Issues of Material Fact Exist as to the Applicability of the “Liability Rule.”

The trial court initially concluded on summary judgment that all elements of the “Liability Rule” had been satisfied. After Commissioner Bears denied discretionary review, the trial court focused on the common grantor doctrine to enter the Final Order. As has been demonstrated, that was error that requires remand. The trial court’s decision that no genuine issue of material fact existed concerning the applicability of all elements of the “Liability Rule” was also incorrect. Since this issue is likely to arise on remand, the Court should review the trial court’s summary judgment decision concerning the “Liability Rule.” Doing so is appropriate. See, e.g., *Chunyk & Conley/Quad-C v. Bray*, 156 Wn.App. 246, 255, 232 P.3d 564 (2010); *State v. Hummel*, 169 Wn.App. 797, 282 P.3d 126 (2012).

In their complaint, the Rileys sought to eject the Valaers from the West Lot and to enjoin them from encroaching upon the West Lot. (CP 10-11) The Valaers can avoid having to remove the encroachments if they can prove each of 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 locate the encroaching structure;
2. The damage to the land owner was slight and the benefit of removal equally small;

3. There is 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.

Arnold v. Melani, supra, 75 Wn.2d at 152; *Proctor v. Huntington, supra*, 169 Wn.2d at 500. When each of the requirements has been proven, the encroaching property purchases the land on which the encroachment sits in an amount that the Court sets.

Since the proof at trial is clear and convincing evidence, the Valaers must present evidence at summary judgment that would allow a rational trier of fact to find that they had supported each element by clear and convincing evidence. *Margoles v. Hubbart*, 111 Wn.2d 195, 198, 760 P.2d 3234 (1988); *Gossett v. Farmers Insurance Company of Washington*, 133 Wn.2d 954, 973, 948 P.2d 1264 (1997); *Kefmehl v. Baseline, LLC*, 167 Wn.App. 677, 693, 275 P.3d 328 (2012).

The first element requires due diligence of the encroaching party. There is no evidence that the Valaers made any inquiry or investigation before purchasing the property at the Trustee's Sale. Such diligence would have included, among other things, getting a title report, reviewing maps and surveys and looking at aerial photographs of the area.

The Valaers may contend that this element does not apply to them because they did not build the encroachment. They want to focus on the Neths' actions. There is no evidence as to what actions the Neths took or why they constructed improvements that encroached onto the West Lot. The good faith sufficient to satisfy the first element can be shown when a party builds an encroaching structure in reliance on an inaccurate survey as in *Arnold v. Melani, supra*, 75 Wn.2d at 145-146, or in reliance on the incorrect representations of a surveyor as in *Proctor v. Huntington, supra*, 169 Wn.2d at 494. There is no similar evidence here. Therefore, if the Valaers want to rely on the actions of the Neths, they cannot satisfy this first element. This is so because there is no evidence that the Neths did not act in a way that was negligent, willful, or indifferent to the location of the encroaching structure.

The first element is also not satisfied based on the conduct of the Valaers. There is no evidence that they undertook any inspection or investigation concerning the property or whether any encroachments existed. This would have included going to the property to look at it; consulting aerial photographs; or obtaining a title report.

The rest of the requirements are phrased in such a way as to defy any summary determination, let alone summary determination by clear and convincing evidence. The second element requires categorizing the

damage to the West Lot as “slight” and the benefit of removing the encroachment as “small.” The third element discusses “ample” remaining room for a suitable structure with “no real limitation” on the property’s future use. The fourth element is the “impracticality” of moving the encroaching structure. The fifth element discusses “enormous disparity in resulting hardships.” When an element involves such relative terms, there can be no summary determination. The Valaers and the trial court recognized this at the time of the Valaers’ first summary judgment motion.

The fourth and fifth elements revolve around the difficulty or expense in moving or otherwise relocating the encroaching structure or the associated retaining wall. The Valaers have not produced any sort of estimate of the cost of doing the necessary work or any declaration that would discuss whether and how that work could be done. This showing is necessary. In *Arnoid v. Melani, supra*, the trial court found that the cost of removing the encroachment would far exceed the value of the property of the encroaching landowner. 75 Wn.2d at 146. In *Proctor v. Huntington, supra*, the trial court found that the cost of removal was at least \$300,000.00.³ 169 Wn.2d at 494. A conclusion that it is impractical to

³ Presumably the findings in both cases were based on evidence submitted at trial. In *Arnold v. Melani, supra*, the opinion does not state what the cost was.

move a structure, or that there is enormous disparity in resulting hardships can only be based on some evidence about the cost of removal or relocation and how that work would or could be done. Without that evidence, the Valaers simply have not satisfied their burden of showing that they are entitled to judgment as a matter of law on the fourth and fifth elements.

The second element discusses the damage to the Rileys of losing the land on which the encroachment sits. In order to show this, the Valaers would have to show the value of the strip that they seek to annex and how the absence of that strip would affect whatever the Rileys choose to build on the land. They submitted no evidence as to the value of the strip. They haven't satisfied this element either.

A party seeking summary judgment must present sufficient evidence to show that he or she is entitled to summary judgment as a matter of law before the non-moving party is required to present sufficient facts to make out an issue of fact. On this issue, the Valaers simply have not produced sufficient evidence to show that they have satisfied the five elements necessary to apply the "Liability Rule." Therefore, the trial court should not rule summarily on any aspect of the "Liability Rule." The question should be tried.

CONCLUSION

The trial court erred by quieting title in the Valaers to the disputed strip of land as discussed above. It also erred by determining on summary judgment that all five elements of the "Liability Rule" had been satisfied. The trial court's Final Order must therefore be reversed, and the matter must be remanded for trial on all issues related to the "Liability Rule."

DATED this 2 day of July, 2014.



BEN SHAFTON, WSB #6280
Of Attorneys for the Rileys

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U.S. DEPARTMENT OF TREASURY; LEE ROBBINS and JANE DOE
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Third Party Defendants.

APPEAL FROM THE SUPERIOR COURT

HONORABLE BARBARA JOHNSON

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STATE OF WASHINGTON)
)
County of Clark) ss.

THE UNDERSIGNED, being first duly sworn, does hereby depose
and state:

1. My name is LORRIE VAUGHN. I am a citizen of the
United States, over the age of eighteen (18) years, a resident of the State of
Washington, and am not a party to this action.

2. On July 2, 2014, I hand delivered, a copy of the BRIEF OF
to the following person(s):

Mr. Albert Schlotfeldt
Duggan Schlotfeldt & Welch
900 Washington Street, Suite 1020
Vancouver, WA 98660

I SWEAR UNDER PENALTY OF PERJURY THAT THE
FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY
KNOWLEDGE, INFORMATION, AND BELIEF.

DATED this 2nd day of July, 2014.

Lorrie Vaughn
LORRIE VAUGHN

SIGNED AND SWORN to before me this 2 day of July,



Amy L. Arnold
NOTARY PUBLIC FOR WASHINGTON
My appointment expires: 12/10/14