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I. Introduction.

Respondents David Valaer and Susan E. Valaer (hereinafter “Valaer”) submit the following Response to the Brief of Appellants.

II. Statement of the Case.

The area in dispute in this case is a strip of land approximately nine feet (9’) wide between two adjacent tax parcels, an “east parcel” and a “west parcel.” (CP 2, ll. 18–20; CP 9, ll. 17–22; CP 17, l. 15; CP 381–82, l. 25 on 381 to l. 6 on 382). The nine feet strip includes a portion of the house and patio that is mostly located on the east parcel as well as a substantial concrete and steel retaining wall which were built together with the house on the east parcel. *Id.*

Riley, Appellants herein and Plaintiffs below (hereinafter “Riley”), acquired both parcels from Holman in 2000 and lived there in a house that is located mostly on the east parcel until 2010. (CP 320, ll. 4 – 12; CP 342–43). Riley lost the east parcel together with all improvements in 2010 when the lender foreclosed on the trust deed Riley granted to Argent Mortgage in 2003. *Id.*

The house occupied by Riley between 2000 and 2010 was built in 1951 by Neth and is located mostly on the east parcel. When Neth built the house in 1951, Neth only owned the east parcel. (CP 320). However,

Neth constructed a portion of the house (and adjacent concrete retaining wall) over the legally described property line between the east and west parcels. *Id.* Neth then purchased the west parcel from Walter in July of 1951 to resolve the encroachment he created by building the house and retaining wall over the line. *Id.* The house and retaining wall have remained in the same location since 1951, and the concrete retaining wall has, since its construction, been a permanent and obvious demarcation of the western boundary of the east parcel. (CP 574 – 594).

In 2003, Riley granted a deed of trust with power of sale on the east parcel to Argent Bank, “[t]ogether with all the improvements now or hereafter erected on the property and all easements, appurtenances, and fixtures now or hereafter part of the property.” (CP 343, ll. 11–17, along with CP 413). To be clear, the house Riley was living in and granted to Argent Bank in that deed of trust is the very same house Neth built in 1951; and the very same house for which Neth purchased the west parcel to resolve the encroachment created in 1951. The encroachment that Neth resolved with the 1951 purchase of the west parcel is the disputed approximately nine feet (9’) wide strip of land at issue in this case.

Now, over 60 years later, Riley, having lost the house and the east parcel through foreclosure, seeks to recover damages from Valaer (the

purchaser from the Argent Mortgage foreclosure) for the alleged encroachment of the house and retaining wall on the vacant west parcel; the very same encroachment Neth resolved in 1951 and the very same encroachment Riley twice in 2007 represented to the City of Vancouver was part of the east parcel.

On March 7, 2007, prior to the Argent Mortgage foreclosure, Riley applied to the City of Vancouver (“City”) for a demolition permit to remove a pool that had been on the vacant lot. (CP 140). Included with the demolition permit application is a rendering of the two parcels at issue here showing the east parcel with the house on it as the larger of the two lots. (CP 141). In fact, the graphic submitted with the demolition permit specifically identifies the dimension of the east parcel as 110 feet and the west parcel as only 90 feet. (*Id.*)

On November 19, 2007, Riley applied to the City for approval to subdivide the west parcel. (CP 189). The application for subdivision submitted to the City of Vancouver, which was signed by Riley, expressly states that the proposal is “[t]o divide 8,993 s.f. (square feet) into 2 residential lots under the infill ordinance.” *Id.* The application, executed by the then property owner Riley, also lists the sizes and dimensions of the proposed two new parcels at 4,496 and 4,497 square feet, with dimensions

of forty-five feet wide by ninety-nine feet deep. *Id.* The sum of the two forty-five feet width dimensions is ninety feet, or ten feet shy of the hundred feet included in the legal description of the west parcel. In other words, in the 2007 application to the City of Vancouver, executed by Riley, Riley told the City of Vancouver that the west parcel was only ninety feet wide, expressly acknowledging that the house and retaining wall were considered part of the east parcel. These are the same dimensions Riley submitted to the City with his demolition permit. (CP 141). Riley proposed to the City of Vancouver that the west parcel would be divided into two new lots, and that the disputed strip would remain part of the east parcel. *Id.*

The course of proceedings described in Riley's brief merits correction on three critical issues. First, Riley sued Valaer to quiet title and to remove encroachments from the east parcel onto the west parcel that Riley promised to Argent Mortgage ("together with all improvements . . . now erected") with the power of sale, and lost through foreclosure.¹

Second, Valaer moved for judgment on the common grantor doctrine and the trial court quieted title to the nine feet wide strip *because* the retaining wall, the physical demarcation on the ground, encroaches

¹ The encroachments at issue are the portions of the house and retaining wall that Riley owned prior to sale of the east parcel by the trustee to whom Riley granted power of sale.

onto the west parcel by approximately nine feet. (CP 664, 677, RP-IV p. 25, ll. 15–22)². The retaining wall is a substantial improvement, as is clear in the photographs submitted to the trial court. (CP 451 – 456).

Third, contrary to Riley’s Statement of Facts, Valaer did present sufficient evidence concerning each of the elements supporting the Trial Court’s decision on application of the liability theory. (CP 691 – 692)

III. ARGUMENT.

A. Introduction.

The Trial Court granted Valaer’s Motion for Partial Summary Judgment on two issues. First, the Trial Court granted Valaer’s Motion for Summary Judgment as to the creation of the boundary line by the common grantor doctrine. Second, the Trial Court granted Valaer’s Motion for Summary Judgment that the liability rule applies to limit Riley’s remedy to the reasonable value of the strip of land in dispute in this action. The Court should deny Riley’s Appeal because (1) the Trial Court did not err in ruling that Valaer is entitled to the disputed strip of land on the basis of the common grantor doctrine; (2) the Trial Court did not err in identifying that the retaining wall constitutes an improvement that has been claimed throughout the proceeding as the boundary to the

² RP-IV refers to the verbatim report of proceedings of the hearing on April 4, 2014.

area in dispute; and should serve as the boundary for application of the common grantor doctrine; and (3) the Trial Court's ruling on the liability theory is well grounded and leaves no genuine issue of material fact for trial.

B. Sufficient evidence was produced to support application of the common grantor doctrine.

The elements of the common grantor doctrine are as follows:

A grantor who owns land on both sides of a line he has established as the common boundary is bound by that line. . . . The line will also be binding on the 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?

Winans v. Ross, 35 Wn.App. 238, 240-241, 666 P.2d 908 (1983).

Valaer provides sufficient evidence to meet all elements of the inquiry. First, there can be no question that Neth, the original grantor, recognized the new boundary in 1951 because *Neth bought the west parcel from Walter to resolve the encroachment* created when he constructed the house and retaining wall over the line described in the east parcel legal description. (CP 320, ll. 6-13). Clearly, Neth's intent was to resolve the

encroachment, and not to simply postpone a property encroachment dispute for sixty years. Second, the land was sold by Neth to Boespflug with the house and retaining wall in place and obvious on the land, with the retaining wall clearly demarcating the intended property boundary. (CP 393; CP 451 - 455). Third, as set forth above, Riley lived in the very same house for ten years and twice represented to the City of Vancouver that the divisible size of the west parcel was 8,442 square feet, the size of the west parcel after taking into account the encroachment resolved by Neth in 1951. (CP 140, 189). Riley's acknowledgement that he considered the boundary between the parcels to be the location of the retaining wall is evidence that Riley and prior owners (all successors in interest to Neth) treated the retaining wall as the true boundary between the parcels.

Additionally, Riley granted the east parcel "together with all improvements" to Argent Mortgage with the power of sale.³ (CP 343, ll. 11-17, along with CP 413). As a result, in addition to Neth, Riley could also be considered an original grantor under the common grantor doctrine. Riley promised the east parcel to Argent Mortgage *together with all improvements*. When Riley granted and Argent Mortgage accepted the

³ Riley is trying to recover through this action property he promised to Argent Mortgage and lost through foreclosure.

east parcel together with all improvements (with power of sale) as security on Riley's loan, the parties certainly had a meeting of the minds as to what, exactly, Riley promised Argent Mortgage.⁴ Riley did not promise seven-eighths of the structure built on the east parcel as security, he promised the parcel, the house, and all other improvements. As such, when Argent Mortgage sold the property by exercising the power of sale granted by Riley, Argent Mortgage essentially stepped into Riley's shoes and sold the east parcel with all improvements. Riley cannot now, after alienating the east parcel by granting a power of sale and defaulting on his obligation, recover from Valaer the strip that Riley himself treated as east of the true boundary between the east and west parcels. Riley can be considered the original grantor (to Valaer) of the east parcel and, by operation of the common grantor doctrine, as owner of the west parcel,

⁴ Contrary to Riley's unsupported assertion that "lenders typically take security based upon the true boundary line as shown on the legal description" (Appellants' Brief, p. 10), the Deed of Trust Riley granted to Argent Mortgage contains very broad language which encumbers "*401 West 36th Street, Vancouver WA 98660, Together With all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All of the foregoing is referred to in this Security Instrument as the "Property."* (CP 413). Moreover, Riley covenanted in that same Deed of Trust that Riley was "*lawfully seised . . . and that the Property is unencumbered, except for encumbrances of record.*" (CP 413). If the property promised in the Deed of Trust included the house and retaining wall, and it clearly did by virtue of the broad language within the Deed of Trust, and if Riley covenanted to Argent Mortgage that there was no encumbrance then upon the property, Riley cannot now claim any right, title or interest to the house, the garage, the patio and the retaining wall, all of which are within the disputed strip and have been a part of the east parcel since 1951.

should now be estopped from claiming any right title or other interest to any portion of the disputed strip.

“The common grantor doctrine recognizes the original grantee's good faith reliance on the boundary description provided by the common grantor who originally owned both lots in their entirety and thus had it completely within his power to determine the location of that boundary. It is for this reason that subsequent grantees of the common grantor are bound by the location of that boundary, as long as it is apparent by a visual examination of the property.” *Levien v. Fiala*, 79 Wn.App. 294, 302, 902 P.2d 170, 174 (1995) (internal citation omitted). In the instant controversy, Neth had it completely in his power to determine the location of the boundary between the two parcels because he built the house and retaining wall and purchased the west parcel to remedy the encroachment in 1951. Subsequent owners (grantees of Neth), including Riley, also had it within their power to remove the portions of the house and retaining wall that encroached on the west parcel, but none, including Riley did. Instead each owner treated the retaining wall as the true boundary. Nothing more is needed for application of the common grantor doctrine.

Thus, there is no deficiency in the factual record considered by the Trial Court and Valaer is entitled to judgment as a matter of law on the common grantor doctrine.

C. The Trial Court properly designated the retaining wall as the physical boundary demarcating the true boundary line on the ground.

Riley's argument that the Trial Court erred in quieting title to the entire nine foot strip in dispute in this controversy is entirely without merit. First, Riley's Complaint (¶ 3) specifically identifies "[t]he two car garage and patio with built in amenities that encroach at least 9 feet into the Riley property." (CP 9). Second, Riley refers to the patio, garage and retaining wall as the encroachments at issue in this dispute throughout the proceedings. (*See, e.g.*, CP 381-382; RP-I – pp. 9-10, starting at l. 24 on p. 9; RP-I, p. 22). Third, the Trial Court specifically found that the retaining wall was an "improvement" and that the retaining wall, as the physical demarcation on the ground since 1951, should be the boundary to which the common grantor doctrine would be applied. (RP IV- p. 25, starting on l. 15).

Riley cannot claim through the course of over two years of proceedings (Riley's Complaint was filed in March of 2012) that the concrete retaining wall encroaches on the west parcel by nine feet, only to

now, in the twilight of this case's day, claim that the wall is not an improvement or encroachment. This Court should decline Riley's invitation to reinvent long-established facts of this case and should, accordingly, deny this appeal.

D. There is no genuine issue of material fact as to applicability of the liability rule.

Under the liability rule, a party can establish the right to purchase property underlying an encroachment where:

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 use;
4. It is impractical to move the structure as built; and
5. There is enormous disparity in resulting hardships.

Arnold v. Melani, 75 Wn.2d 143, 152, 449 P.2d 800 (1968).

Valaer presented clear and convincing evidence of the necessary bases for application of the liability rule to the Trial Court as follows:

1. Valaer purchased a foreclosed property for a residence that has been in place since 1951. They did not create the encroachment or negligently, willfully, or indifferently locate the structure there. On the contrary, Neth constructed the house and the retaining wall in 1951, and then purchased the west parcel to resolve the encroachment. Each subsequent property owner, including Riley herein, recognized that the concrete retaining wall was the western boundary of the east parcel because it was constructed with the house and clearly demarcated the east parcel's western boundary.

2. The damage to Riley is slight because, first, Riley lived in the home for ten years and made positive representations to the City of Vancouver that the west parcel was reduced by the amount of the alleged encroachment. Second, Riley received approval from the City of Vancouver to further subdivide the west parcel into two new residential parcels, even taking into account the alleged encroachment. Thus, removal of the portion of the house and the retaining wall built by Neth in 1951 yields Riley no benefit of use or potential use they do not already have.

3. As set forth above, and as included in the evidentiary record before the Trial Court, the west parcel here is zoned for single family residential structures. (CP 160). Riley, while they still owned the east parcel, received approval from the City of Vancouver to build two new single family homes on the west parcel, after accounting for the disputed strip. (CP 158). Thus, there is no limitation on the property's use resulting from the Valaer's retention of the disputed strip.

4. As to the fourth criterion, the Trial Court considered the photographs of the encroachment and recognized that demolition of a retaining wall and portions of the attached garage and family room of a home that was built in 1951 is, at best, impractical.

5. Finally, because there is no limitation on use of the west parcel and because failure to apply the liability rule in this case would lead to the necessary outcome of demolition of a substantial retaining wall and portions of Valaer's house that have been in place since 1951 on the east parcel, there is a clear, convincing and enormous disparity in resulting hardships.

The Trial Court's decision that no genuine issue of material fact existed concerning each element of the liability rule is sufficiently

supported by evidence submitted in the pleadings, declarations and exhibits included in the record. Consequently, Riley's appeal of the Trial Court's ruling on the liability rule should be denied.

IV. Conclusion.

Riley filed this action in an attempt to recover damages from Valaer for an alleged encroachment by a retaining wall that has existed since 1951 and which Riley lived with for 10 years and twice presented to the City of Vancouver as the true boundary between the east and west parcels. Riley lost the house and east parcel through foreclosure and now, after the foreclosure, seeks to recover from an innocent third party purchaser damages for the very same property Riley lost through foreclosure.

Riley's claims are meritless as a matter of law. The Trial Court, with the benefit of a full evidentiary development that includes several volumes of documents, ruled that the boundary between the two parcels was established at the retaining wall via the common grantor doctrine and that, to the extent Riley is due any compensation whatsoever, that compensation would be limited by the liability rule.

As set forth above, the Trial Court's decisions are based on a full evidentiary record and leave no genuine issue of material fact for trial.

Based on the foregoing, Valaer respectfully requests that the Court deny this Appeal.

Respectfully submitted this 30 day of July, 2014.

DUGGAN SCHLOTFELDT & WELCH PLLC



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

2014 JUL 31 11:51:40
STATE OF WASHINGTON
BY [Signature]
CLERK

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

vs.

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

LESTER RILEY,
Third Party Plaintiff,

vs.

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

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STATE OF WASHINGTON)
) ss.
County of Clark)

ALBERT F. SCHLOTFELDT, being first duly sworn, does hereby depose and states:

1. I am one of the attorneys representing Respondents, I am competent to be a witness herein and I base the following on my own, personal knowledge.

2. On July 30, 2014, I caused a true and correct copy of the Brief of Respondents to be served by hand-delivery upon the following:

Mr. Ben Shafton
Caron, Colven, Robison & Shafton
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3. On July 30, 2014, I caused a copy of the Brief of Respondents to be served by U.S. First Class Mail upon the following:

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ALBERT F. SCHLOTFELDT, WSBA# 19153

SUBSCRIBED AND SWORN to before me this 30th day of July,



Notary Public in and for the State of
Washington, residing at Vancouver
Commission expires: 12/15/14