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NO. 52687-5-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

LESTER RILEY and SUSAN RILEY,

Plaintiffs/Appellants,

vs.

DAVID VALAER, et al,

Defendants,

and

BLAINE HUNTER and MELISSA HUNTER,
husband and wife; FRANKLIN AMERICAN
MORTGAGE COMPANY,

Respondents.

APPEAL FROM THE SUPERIOR COURT

HONORABLE SUZAN CLARK

BRIEF OF APPELLANTS

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INTRODUCTION

The garage of the residence of Blaine Hunter and Melissa Hunter purchased in 2016 encroaches on property owned by Lester Riley and Susan Riley. The Hunters knew about this encroachment and the litigation surrounding it long before their purchase. Their knowledge precludes them from relief under the Liability Rule set out in *Arnold v. Melani*, 75 Wn.2d 143, 437 P.2d 908 (1968), and its progeny. The trial court erred by ruling to the contrary.

ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The Trial Court Erred by Entering the Findings of Fact, Conclusions of Law, and Judgment.

ASSIGNMENT OF ERROR NO. 2: The Trial Court Erred by Entering the Order Denying Reconsideration.

ISSUES PRESENTED

1. Do the Court's findings of fact support its conclusions of law?
2. Can an owner of real property avoid ejectment requiring removal of an encroachment when that person purchased the property with full knowledge of the encroachment and also full knowledge of pending litigation concerning the encroachment?
3. Did the trial court make sufficient findings of fact?

STATEMENT OF THE CASE

I. Introduction.

This is the second appeal of this matter. The first was *Riley v. Valaer*, Court of Appeals No. 46120-0-II (*Riley I*), an unpublished opinion. The facts presented in that appeal carry over here. Additional facts related to the claims made at trial are also discussed in this section of the brief.

II. Facts Through the Conveyance to the Hunters.

The dispute between the parties focuses on two city lots located at or near the southwest corner of the intersection of 36th St. and Daniels St. in Vancouver. The lot on the corner will be referred to as the East Lot. The lot directly west of it will be referred to as the West Lot. (CP 241, FF1)¹

In January of 1951, Fred Neth and Alice Neth purchased the East Lot. They built a home on that lot. Some of the improvements they made encroached on the West Lot. In July of 1951, they purchased the West Lot. (CP 241, FF 1-2; Ex. 1, 2)

¹ The designation “FF” refers to the number of a Finding of Fact in the trial court’s Findings of Fact, Conclusions of Law, and Judgment located at CP 240-50. The designation “CL” refers to the trial court’s Conclusions of Law in the same document. .

The Neths sold both lots to LaVern Boespflug and Elaine Boespflug in 1971. The Boespflugs sold both lots to Michael Holman and Suzann Holman in 1975. (CP 241-42, FF 3; Ex. 3-4)

In October of 2000, Plaintiffs Lester Riley and Susan Riley entered into a real estate contract to buy both lots from Ms. Holman for a total of \$295,000.00. The Rileys paid \$60,000.00 down with the rest to be paid over time under the terms of the contract. Prior to closing, Ms. Holman advised Mr. Riley that part of the garage and patio of the home encroached on the West Lot. (CP 242, FF 4; Ex. 4)

The Rileys paid off the real estate contract and received a fulfillment deed to both lots in January of 2004. They obtained the funds to do so through a loan from Argent Mortgage, LLC, (Argent) in the amount of \$265,000.00. They pledged only the East Lot as security for the loan in a deed of trust that they executed. During the loan process, Argent did not ask the Rileys about the existence of any encroachment. It would also have been standard practice for Argent to have obtained an appraisal of the property. (CP 242, FF 5-6; Ex. 6-7) Such an appraisal may have discovered the encroachment.

The Rileys applied for a short plat of the West Lot in 2007. As part of that process, they planned to do a boundary line adjustment that would have put the encroaching garage and patio solely on the East Lot. The

Rileys did not complete the short plat process or the boundary line adjustment. (CP 242, FF 7)

Also in 2007, the Rileys demolished the swimming pool, the pool house, and steps associated with the pool. All of these structures were on the West Lot. They rebuilt the area to blend with a preexisting retaining wall that was also on the West Lot. (CP 242-43, FF 8) The retaining wall benefits the West Lot by keeping the East Lot at bay. The Rileys have no interest in demolishing it.

The Rileys defaulted on the Argent loan during the economic downturn. The deed of trust given to Argent had been transferred to Deutsche Bank National Trust Company as beneficiary in 2008. At length, Deutsche Bank saw to the institution of non-judicial foreclosure proceedings. These culminated in a trustee's sale held on November 29, 2010. David Valaer purchased the East Lot for \$350,001.00 at the trustee's sale and received a Trustee's Deed to that lot recorded on December 14, 2010. (CP 243, FF 9; Ex. 8)

Mr. Valaer became aware of the East Lot and the foreclosure a few days before the sale. He drove by the property and viewed it from the street. He did not ask his realtor about the property's boundary lines. He made no survey. He did not contact the Rileys before the purchase of the property. He did not attempt to seek information about the property from

Clark County's online property information center that is commonly referred to as Clark County GIS. (CP 243, FF 9) That site has a "Maps Online" feature for each parcel of land in the County. The map on the website at that time shows the encroachment. (Ex. 45)

A survey has shown in particular that the garage encroaches onto the West Lot by approximately 3.9 feet.² (CP 250)

In March of 2012, the Rileys commenced this action to eject the Valaers from the West Lot, among other things. (CP 1-7; CP 243, FF 10)

Blaine Hunter and Melissa Hunter became interested in the two lots. By no later than April of 2012, they were aware of the encroachment. (CP 245, FF 16) At that time, they wrote to the Rileys and expressed an interest in purchasing both lots. In the letter they acknowledged that improvements on the East Lot encroached onto the West Lot. They were interested in resolving the encroachment issue in some way or by purchasing both lots. (CP 243, FF 11; Ex. 9)

In October of 2012, the Hunters leased the East Lot from Mr. Valaer. Mr. Valaer also granted the Hunters an option to purchase the property for \$375,000.00. (CP 244, FF 12; Ex. 10-11) By no later than

² No finding of fact was made on this point. But it is not disputed.

that time, Mr. Hunter was licensed as a real estate appraiser, and Ms. Hunter was licensed as a real estate broker. (CP 244, FF 12)

Meanwhile, the litigation between the Rileys and Mr. Valaer proceeded. The trial court granted Mr. Valaer's summary judgment motion based on the common grantor doctrine. It also ruled that Mr. Valaer was entitled to relief under the Liability Rule. (CP 138-139; CP 146-48) It entered judgment in Mr. Valaer's favor quieting his title to a strip of land nine feet in width on the West Lot (the Strip). (CP 155-58) The encroachment is on this Strip. (CP 158) The Rileys appealed. (CP 159-69), The Court reversed in *Riley I*, by decision filed on July 7, 2015. It ruled in essence that issues of fact remained concerning both the applicability of the common grantor doctrine and the Liability Rule. (CP 170-82)

On August 5, 2015, the Hunters wrote to the Rileys again. The letter acknowledged the ongoing litigation. The Hunters indicated a desire to purchase the residence. They also stated:

We would like to see this come to an end so we have decided to ask you about purchasing your vacant lot next door and combining the two lots back together.

(CP 244, FF 14; Ex. 12)

On February 3, 2016, the Hunters entered into an agreement with Mr. Valaer to purchase the East Lot for \$375,000.00. On the same day, the

parties entered into the Indemnity Agreement. The agreement contained the following language in Recital C:

Valaer's (sic) are currently party to a lawsuit initiated by Lester and Susan Riley, the owners of an adjacent lot. That lawsuit is currently pending in the Clark County Superior Court under Cause No. 12-2-00943-4. A true copy of the complaint filed by Riley is attached hereto as Exhibit A and incorporated herein. That complaint sets forth in more detail the allegations of Riley. Riley alleges, in essence, that the house encroaches upon his lot and that (a) portion of the home should be removed and/or Riley should receive compensation. Valaer's (sic) have denied these allegations. The case was recently remanded by the Washington State Court of Appeals, Division II (herein "Lawsuit and/or claims by Riley"). Hunter desires to purchase the house despite the pending lawsuit by Riley.

The agreement went on to state that the Hunters released the Valaers and would indemnify them from claims made by the Rileys in the suit. (CP 244-45, FF 15; Ex. 13-14)

The Hunters ultimately received a deed dated April 1, 2016. (CP 245, FF 17) In it, Mr. Valaer and his spouse conveyed to them the East Lot and the Strip. (Ex. 32) They financed 95% of the purchase price through a loan from Bank of the Pacific. They pledged the property conveyed to them as security for the loan by executing a deed of trust. (Ex. 33)

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III. Course of Proceedings after the Conveyance to the Hunters.

On June 28, 2017, the Rileys filed the Second Amended Complaint. It also sought ejectment. It named the Valaers, the Hunters, and Bank of the Pacific as Defendants. (CP 183-85)

The Valaers and the Hunters moved for summary judgment to dismiss the Valaers based on the conveyance to the Hunters. The trial court granted that motion. (CP 186-88)

At length, Bank of the Pacific assigned to Franklin Mortgage Company the deed of trust given by the Hunters. (CP 194-97)

The matter was tried to the Court on June 18, 2018. One issue was presented—the applicability of the Liability Rule. Only two witnesses testified at trial—Mr. Riley and Mr. Hunter. No one from or related to Argent was called as a witness either in person or through deposition. The Hunters did not call an engineer or a contractor to discuss the cost or feasibility of removing the encroachment. (CP 221-24)

The trial court gave a written decision on July 6, 2018. (CP 228-31) The Findings of Fact, Conclusions of Law, and Judgment were entered on August 24, 2018. (CP 240-50) In it, the Rileys were denied ejectment, and the Hunters were granted title to the Strip. The Rileys also received a judgment in the amount of \$11,753.84. The Rileys then moved for reconsideration. (CP 251-54) The trial court denied their motion by

order entered on September 17, 2018. (CP 255) The Rileys then appealed. The Hunters did not cross appeal.

ARGUMENT

I. Standards of Review.

This case was resolved through a bench trial culminating in the entry of findings of fact and conclusions of law as required by CR 52(a)(1). On review, the appellate court determines whether disputed factual findings are supported by substantial evidence and whether the findings of fact support the trial court's conclusions of law. The trial court's legal conclusions are reviewed *de novo*. *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003); *Hegwine v. Longview Fibre Co.*, 132 Wn.App. 546, 555, 132 P.3d 389 (2006).

The Rileys base their appeal on Findings of Fact Nos. 1-17. They are not assigning error to these findings of fact. The Hunters and Franklin Mortgage Company have not cross appealed. Therefore, Findings of Fact Nos. 1-17 are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992)

The Hunters may claim that the trial court's decision in this case was an exercise of its discretion and therefore subject to review for abuse. A trial court abuses its discretion when its decision is manifestly

unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) When a trial court relies on unsupported facts or applies the wrong legal standard, its decision is exercised on untenable grounds. *Dreiling v. Jain*, 151 Wn.2d 900, 907, 93 P.3d 861 (2004); *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 684, 132 P.3d 115 (2006). If the trial court applies the correct legal standard to the supported facts but adopts a view no reasonable person would take, its decision is manifestly unreasonable. *Mayer v. Sto Industries, supra*, 156 Wn.2d at 684

The trial court's denial of the Rileys' motion for reconsideration is also reviewed for abuse of discretion. The same test is applied for abuse. *Nichols v. Peterson Northwest, Inc.*, 197 Wn.App. 491, 498, 389 P.3d 617 (2016) Therefore, the trial court abuses its discretion if it denies a reconsideration motion based on an application of an incorrect legal standard.

As will be discussed below, the trial court's findings of fact do not support its legal conclusions. Furthermore, those conclusions are at odds with applicable law therefore amounting to an abuse of discretion.

II. The Liability Rule.

The Rileys sued to recover their property and for ejectment as allowed by RCW 7.28.010. Normally, they would be entitled to this relief.

An encroaching structure is considered a trespass, and the landowner upon whose land the encroachment sits is ordinarily entitled to eject the trespasser by requiring that the structure be removed. *Arnold v. Melani, supra*, 75 Wn.2d at 152; *Proctor v. Huntington*, 169 Wn.2d 491, 496, 238 P.3d 1117 (2010) This right to eject the encroaching structure is among the most precious contained within the bundle of property rights that a landowner possesses.

In exceptional circumstances, however, and when equity so demands, a court may refuse to order ejectment and instead require the landowner to convey property to the encroacher. *Arnold v. Melani, supra*, 75 Wn.2d at 152; *Garcia v. Henley*, 190 Wn.2d 539, 540, 415 P.3d 281 (2018). In order to obtain this relief, the encroacher must prove each of the following propositions 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 landowner is slight and the benefit of removal equally small;
3. There was ample remaining room for a structure suitable for the area and no real limitation on the property's future use;
4. It is impractical to move the structure as built; and
5. There is enormous disparity in resulting hardships.

The encroachment is then allowed to stay in place. But the encroacher must pay the landowner for the land on which the encroachment sits. *Arnold v. Melani, supra; Proctor v. Huntington, supra; Garcia v. Henley, supra.* This is commonly referred to as the Liability Rule.

In order to grant the encroacher relief under the Liability Rule, the trial court must enter sufficient findings of fact and reason through each of the five factors set out above. Any insufficiency in the findings will be viewed as a finding against the encroacher. *Garcia v. Henley, supra*, 190 Wn.2d at 545

The trial court found that the Hunters knew of the encroachment before they purchased the property. This conclusively shows that they are not entitled to relief under the Liability Rule as will be discussed below. The trial court's findings are also otherwise insufficient to grant the Hunters relief under the Liability Rule. Since the Hunters have failed to show that the Liability Rule applies, the Rileys are entitled to ejectment.

III. The Hunters' Knowledge of the Encroachment Precludes Application of the Liability Rule.

As the trial court found, the Hunters purchased the property with full knowledge of the encroachment and the pending litigation concerning the encroachment. Their knowledge eliminates their ability to rely on the Liability Rule.

The Liability Rule provides relief to those who construct encroaching improvements notwithstanding their use of reasonable efforts to locate the correct boundaries of their property. For example, in *Arnold v. Melani, supra*, the encroaching property owner first obtained a survey before placing the improvements at issue. The survey turned out to be in error because it assumed that distances listed on lines in the relevant plat were correct when they were not. In *Proctor v. Huntington, supra*, both parties relied on a representation from the relevant surveyor that a certain monument was at the corner of the encroacher's property when in fact it was not. In both cases, the encroacher did not know of the encroachment and intended not to encroach.

Conversely, a party with prior knowledge of an encroachment cannot take advantage of the Liability Rule. *Bach v. Sarich*, 74 Wn.2d 575, 445 P.2d 648 (1968) In that case, the defendants began building an apartment complex on a lake, an action that would interfere with the rights of other adjacent property owners to use the lake. It did so with the full knowledge of prior Washington precedent setting out the rights of other landowners and also stepped up the pace of its construction efforts after suit was filed. Defendant claimed that it was entitled to a "balancing of the equities," as the Liability Rule allows. The trial court rejected that contention and required it to remove what had been built. The Court

affirmed on the basis that the Defendant had knowledge of the Plaintiffs' protests when it began construction. It stated that the Liability Rule or a balancing of the equities is reserved "for the innocent defendant who proceeds without knowledge or warning that his structure encroaches upon another's property or property rights."³ 74 Wn.2d at 582 Under the authority of *Bach v. Sarich, supra*, the Hunters are not entitled to the benefit of the Liability Rule because they knew of the encroachment before they purchased.

The rule in *Bach v. Sarich, supra*, has been followed in a number of cases. Parties have been denied relief based on balancing of the equities when they had full knowledge of the issue of concern but proceeded to build or take other action anyway. In some of these cases, the party seeking balancing of the equities was aware of pending litigation over the issue in question. See, e.g., *Responsible Urban Growth Group v. City of Kent*, 123 Wn.2d 376, 389, 868 P.2d 861 (1994)—developer not allowed to balance equities when it commenced construction after a community group petitioned for review of a rezone of the property; *Foster v. Nehls*, 15 Wn.App. 749, 753-54, 551 P.2d 768 (1976)—balancing of

³ *Bach v. Sarich, supra*, was also cited by the Court in *Proctor v. Huntington, supra*, as related to application of the Liability Rule or balancing of equities where encroachments are concerned. See 169 Wn.2d at 501

equities not available to property owner who completed construction in violation of covenants after suit was filed. In others, they were warned before taking action. See, e.g., *Hollis v. Garwall*, 137 Wn.2d 683, 699-700, 974 P.2d 836 (1999)—balancing of equities not available to party engaging in rock crushing in violation of covenants; *Mahon v. Haas*, 2 Wn.App. 560, 565, 468 P.2d 713 (1970)—party who was warned that proposed greenhouse would encroach could not rely on the Liability Rule; *Wilhelm v. Beyersdorf*, 100 Wn.App. 836, 846-47, 999 P.2d 554 (2000)—party who knowingly sited a well head on an easement not permitted relief under the Liability Rule. In *Bach v. Sarich*, *supra*, and *Mahon v. Haas*, *supra*, removal of the encroachment was ordered. In *Responsible Urban Growth Group v. City of Kent*, *supra*, further construction was enjoined. And in *Wilhelm v. Beyersdorf*, *supra*, the encroacher was required to relocate the well head if the current location interfered with the use of the easement.

The Hunters nonetheless are expected to argue that they can invoke the Liability Rule perhaps because they did not erect or site the encroachment on the West Lot. That doesn't matter, as is shown by the leading decision of *Benoit v. Baxter*, 196 Va. 360, 83 S.E.2d 442 (1954), a case with parallels to ours. In that case, Mr. and Mrs. Michaels owned three contiguous lots. Their home was primarily on one of the lots but

encroached 1.17 feet onto another lot with their porch extending another five feet. The Michaelses sold their home to the Baxters but did not sell the lot onto which it encroached. Their agreement required the Baxters to remove the encroachment. Six months later, the Michaelses conveyed the other two lots to Ms. Hiner. The Benoits acquired these two lots in a foreclosure sale. The Benoits and Ms. Hiner asked the Baxters to remove the encroachment. When they didn't, the Benoits sued to eject them from the land. The trial court did not require the Baxters to move their home off the adjoining lot. The Court first ruled that the contract between the Michaelses and the Baxters was of no moment because it did not run with the land and was personal to the parties. 196 Va. at 364-65 It rejected the Baxters' argument that the Benoits acquiescence in the Baxters' remodeling of the home gave rise to an estoppel. 196 Va. at 366 It then reversed on the basis that the Baxters knew of the encroachment when the property was conveyed to them. It said:

The cost of moving the appellees' house may be as much as \$3,000, as claimed by them, and the corresponding benefit to the appellants may not be anything like that amount in dollars and cents; but appellees knew that appellants, as owners of Lot 500-A, were entitled to the full use and enjoyment of their property.

We said in *Lindsay v. James*, (184 Va. 646, 661, 51 S.E.2d 326 (1949):

"Relief by way of a mandatory injunction will not be denied merely because the loss caused will be disproportionate to the benefits accruing to the opposing party where it appears that the obstruction or the violation of a right was made with full knowledge and understanding of the consequences which result."

196 Va. at 367 It remanded with directions to enter a mandatory injunction requiring removal of the encroachment.

Our case is on all fours with *Benoit v. Baxter, supra*. The Baxters did not place the encroachments but they knew about the encroachment before they purchased. That knowledge precluded their reliance on a balancing of the equities. The Hunters are in exactly the same position. They did not place the encroachments but they bought the property with full knowledge of the encroachment and the pending litigation. Just as the Baxters, the Hunters cannot rely on the Liability Rule.

There is also no principled reason to treat the person who builds an encroachment with knowledge differently from the person who buys an encroaching property with knowledge. Both have—or had—the opportunity to avoid encroaching. The builder could keep the encroachment on his or her property, and the purchaser could avoid the situation altogether by not buying the property in the first instance.

In any event, the Hunters purchased the property with full knowledge of the encroachment and the litigation over the encroachment.

Their knowledge disqualifies them from relief based on the balancing of the equities allowed by the Liability Rule.

IV. The Hunters Did Not Satisfy the First Requirement of the Liability Rule Because They Took a Calculated Risk or Acted with Indifference.

In order to satisfy the first requirement of the Liability Rule, the Hunters had to prove that they did not take a calculated risk or act with indifference when they purchased the Property. The findings of fact that the trial court made clearly show that the Hunters took a calculated risk. They therefore did not satisfy the first requirement of the Liability Rule.

When the Hunters purchased the East Lot along with the Strip, they were aware of the encroachment. They knew that removal of the encroachment was the subject to pending litigation. They also had the ability to review the opinion of the Court of Appeals in *Riley I* and reflect on what the opinion had to say about the common grantor doctrine and the Liability Rule if they cared to do so. Nonetheless, they bought the property and agreed to indemnify the Valaers from any negative outcome concerning the litigation. It is hard to imagine any better example of a party taking a calculated risk.

As the Supreme Court has made clear, litigation is at best uncertain. *Maytown Sand & Gravel, LLC v. Thurston County*, 191 Wn.2d

392, 436, 423 P.3d 223 (2018), citing *Fleischman Distilling Corp., v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S.Ct. 1404, 18, L.Ed.2d 475 (1967) Anyone who litigates is risking an unfavorable or onerous result. The Hunters willingness to take on the litigation can only be considered a calculated risk. For that reason, they cannot satisfy the first element.

In *Arnold v. Melani, supra*, the Court indicated that knowledge of an encroachment will eliminate the encroacher’s ability to rely on the Liability Rule. It noted its decision in *Tyree v. Gosa*, 11 Wn.2d 579, 119 P.2d 926 (1941). In that case, the encroacher built two houses on the questioned area after being warned about a dispute about the boundary line. The Court noted that the encroacher lacked the “entire good faith” necessary to take advantage of the Liability Rule and balancing of the equities. 75 Wn.2d at 150⁴

The Court of Appeals has clearly stated that a person with knowledge of an encroachment or a person who has received a warning cannot satisfy the first requirement. In *Mahon v. Haas, supra*, the Plaintiff built a greenhouse on disputed property after receiving a letter from the Defendant’s attorney advising her of the Defendant’s claim to the property

⁴ The decision in *Tyree v. Gosa, supra*, was based primarily based on the notion that private parties cannot condemn land except for a private way of necessity as set out in Article I, § 16 of the Washington State Constitution. The Court in *Arnold v. Melani, supra*, rejected such a rule and stated that the constitutional reference in *Tyree v. Gosa, supra*, was not necessary to its decision. 75 Wn.2d at 151-52

and warning her not to do so. The trial court directed her to remove the greenhouse, and the Court affirmed. It held that she was not entitled to relief on the basis of the balancing of the equities that the Liability Rule provides. It stated that her taking action after being warned amounted to undertaking a calculated risk. It said:

Plaintiff urges application of the doctrine of relative hardship, or balancing the equities, relying upon *Arnold v. Melani*, (citations omitted) She argues that the greenhouse was erected at a cost of \$5,000, the damage to defendants is negligible and removal of the greenhouse would not substantially increase defendants' freedom of access to the icehouse. With this we cannot agree. While the plaintiff testified to the cost of building the greenhouse, there is no evidence as to the cost of moving it from the disputed area to other property owned by plaintiff. On the other hand, the resulting damage to defendants was substantial. The greenhouse placed a real limitation on the future use of defendants' property. In any event, the benefit of the doctrine of balancing the equities, or relative hardship, is reserved for the innocent party who proceeds without knowledge or warning that his structure encroaches upon another's property or property rights. *Bach v. Sarich* (citations omitted). When plaintiff erected the greenhouse after receiving the warning letter from defendants' attorney before building the greenhouse, she was either taking a calculated risk, or acting with indifference to the consequences. We find no error in the trial court's choice of remedy.

(Emphasis added) 2 Wn.App. at 565 In the same way, when the Hunters purchased the property with full knowledge of the encroachment and the pending litigation, they took a calculated risk or were indifferent to the

consequences. They therefore cannot satisfy the Liability Rule's first requirement.

The Liability Rule is a rule of equity. A conclusion that the Hunters cannot satisfy the first requirement of the Liability Rule is consistent with other equitable principles. First of all, the Hunters were not required to purchase the property. They acted freely and without compulsion. They must therefore be categorized as volunteers. *Goodrich v. Fahey* 55 Wn.2d 692, 694, 349 P.2d 729 (1960) And equity will not aid a volunteer. *Hartford Insurance Company v. Ohio Casualty Insurance Company*, 145 Wn.App. 765, 773, 189 P.3d 195 (2008) Furthermore, the Hunters' knowledge of the encroachment and litigation means that they were buying a lawsuit when they made their purchase. A person who buys a lawsuit cannot expect a court of equity to award him title under the guise of settling a disputed boundary. *Nolan v. Cook*, 81 Or. 287, 290, 158 P. 810 (1916)

The Hunters as volunteers took a calculated risk when they made their purchase. They cannot satisfy the requirements of the Liability Rule for that reason.

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V. The Trial Court Failed to Make Sufficient Findings of Fact as to the Third, Fourth, and Fifth Requirements of the Liability Rule.

The Court made clear the necessity of making adequate findings of fact to support each of the requirements of the Liability Rule in *Garcia v. Henley, supra*. It further noted that the failure to make the necessary findings would be deemed a finding against the encroacher. See pps. 11-12 above. The trial court simply did not make the required findings of fact as to the second, fourth, and fifth requirements of the Liability Rule—the damage to the landowner is slight and the benefit of removal equally small; that it is impractical to move the structure as built; and that there is enormous disparity in resulting hardships.

The second, fourth, and fifth factors are typically proven by comparing the value of the property underlying the encroachment and the cost or difficulty of moving the encroaching structure. For example, in *Arnold v. Melani, supra*, the value of the land on which the encroachment sat had a value of \$125.00, and removal would have led to demolition of the entire residence, only a part of which encroached. In *Proctor v. Huntington, supra*, the value of the land on which the residence was built was \$25,000.00, while the cost of removal and relocation was \$300,000.00. In *Mahon v. Haas, supra*, the Court specifically noted the

absence of these factors because there had been no evidence or findings of the cost of removing the green house. See, p. 19 above.

In our case, there are no findings of fact that address the feasibility of removing the encroaching part of the garage or the cost of doing so. The Hunters proposed none. (CP 232-34) They could also have moved for additional findings after judgment. As CR 52(b) states in pertinent part:

Upon motion of a party filed not later than 10 days after entry of judgment, the court may amend its findings or make additional finding and may amend the judgment accordingly. . .

They did not do that either.

The only statement that we have is contained in Conclusion of Law No. 5:

. . .The loss of the 10 foot strip has slight impact on Mr. Riley's lot. In contrast, no evidence in the record shows that it is even possible to remove the encroaching structure at a reasonable cost. Mr. Hunter's testimony establishes that removal of the garage would come at a tremendous cost and would likely undermine the structural integrity of the home. . .

(CP 247) This is not a finding of fact. A finding of fact describes something that occurred or existed while a conclusion of law involves legal reasoning from facts in evidence. *Casterline v. Roberts*, 168 Wn.App. 376, 382-3, 284 P.3d 743 (2012) These conclusory statements are not findings of fact because they cry out for more explanation. How

much is going to cost to remove the approximate four feet of the garage that encroaches? Is it more or less than the value of the Strip? What does “tremendous” mean in this context? What facts did Mr. Hunter testify to? What parts of the structure may be undermined? Can that be managed? At what cost? In other words, what exactly are the facts that underlay the trial court’s conclusion? The trial court also did not tell us how it came to this conclusion when no engineer or contractor testified on any of these issues.

At least one similar conclusory statement has been held to be a conclusion of law. In *Ives v. Ramsden*, 142 Wn.App. 369, 395-96, 174 P.3d 1231 (2008), a statement that the victim of securities fraud had “sufficient liquidity” after making the investments at issue without more was deemed a conclusion of law. The statement in Conclusion of Law No. 5 must also be considered a conclusion of law and not a finding of fact.

The trial court simply did not make required findings to support the second, fourth, and fifth requirements. This is fatal to the Hunters’ claims.

VI. Franklin Mortgage Company Has Not Satisfied the Requirements of the Liability Rule.

The Hunters pledged the disputed area on the West Lot to Bank of the Pacific to secure their loan. Bank of the Pacific assigned its rights to

Franklin Mortgage Company. The trial court made no findings of fact addressing the requirements of the Liability Rule as to either Bank of the Pacific or Franklin Mortgage Company. That absence of factual findings amounts to a finding adverse to these two lenders. *Garcia v. Henley, supra*. Therefore, if the Hunters are not entitled to relief under the Liability Rule, neither is Franklin Mortgage Company.

In any event, neither Bank of the Pacific nor Franklin Mortgage Company can satisfy the first requirement of the Liability Rule—that there was no taking of a calculated risk, actions taken in bad faith, or negligent, willful, or indifferent failure to locate the structure. There is no finding that either did any investigation of any kind to determine whether there was an encroachment. The legal description on the deed of trust alone should have alerted either that there was something unusual going on. That description mentioned the disputed strip along with a standard lot description for the East Lot. All either had to do to determine what was going was to ask the Hunters. A title report would also have alerted either to the pendency of the litigation.

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VII. The Trial Court Abused Its Discretion.

a. General Considerations.

As discussed above, a court abuses its discretion when it bases its decision on an incorrect understanding of the law. The trial court's decision amounts to an abuse of discretion for that reason.

The trial court concluded that granting ejectment relief to the Rileys would be "inequitable." (CP 246. CL 4) That statement is not sufficient. Critically, the discretion that a trial court has in matters of equity is not unbridled. A trial court's discretion can only be exercised within the framework of established equitable principles. *Marriage of Shoemaker*, 128 Wn.2d 116, 123, 138 P.3d 1118 (1995) Stated another way, a court's equitable power is not unlimited but requires the guidance of established principles, rules, and practices of equity jurisprudence. *Griffith v. Department of Motor Vehicles*, 23 Wn.App. 722, 733, 598 P.2d 1377 (1979)

The trial court's decision is at clearly at odds with equitable principles as will be discussed below. Its decision therefore amounted to an abuse of discretion.

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b. The Trial Court's Decision Conflicts with the Liability Rule.

The trial court's decision conflicts with the well-established requirements of the Liability Rule as discussed above. First of all, it allowed the Hunters relief under the Liability Rule even though they knew of the encroachment before they purchased the property. Furthermore, it ignored its own factual findings that clearly demonstrate that the Hunters were indifferent to the encroachment or took a calculated risk. The factual findings it made are not sufficient. These actors, taken alone or together, mean that the trial based its decision on an incorrect understanding of the law.

c. The Trial Court's Conclusion Concerning the First Requirement of the Liability Rule Was Incorrect and at Odds with the Court's Decision in *Riley I.*

The trial court appeared to conclude that the first requirement of the Liability Rule was satisfied because "the Valaers and the Hunters did not 'locate' the encroachments on Mr. Rileys' land within the meaning of the *Arnold* test." (CP 246, CL 4) This statement may be based on the fact that neither the Hunters nor the Valaers built the encroaching residence. The Court's reference to *Arnold v. Melani, supra*, is not clear. Counsel has not been able to find anything in the Court's

opinion in *Arnold v. Melani, supra*, or its progeny, saying that the first requirement of the Liability Rule is not applicable when the encroaching property has come to be owned by someone who did not construct the encroachment but bought the property with full knowledge of the encroachment. Who built the encroachment does not matter in this context.

Once again, the key issue is the Hunters' knowledge of the encroachment before they bought the East Lot. This knowledge bars them from relief under *Bach v. Sarich, supra*, and *Benoit v. Baxter, supra*. It also means that they cannot satisfy the first requirement of the Liability Rule because they took a calculated risk in purchasing the property as discussed in *Arnold v. Melani, supra*, and *Mahon v. Haas, supra*.

The trial court's conclusion also conflicts with the law of the case, established in *Riley I*. In considering the applicability of the Liability Rule as to Mr. Valaer, the Court stated:

The first element of the Arnold test requires clear and convincing proof that "(t)he encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure." (Citation omitted) Viewed in the light most favorable to Riley, genuine issues of material fact exist as to this first element. The record does not demonstrate that Valaer acted with due diligence when purchasing the property. Valaer did not inspect the property or review surveys prior to purchasing the east parcel at the trustee's sale. The record is void of facts to establish that Valaer did not simply take a

calculated risk or act negligently in locating the encroaching structure. Thus, the trial court erred by granting Valaer summary judgment.

Slip Opinion, p. 10 Mr. Valaer was in the same position as the Hunters. He did not create any of the encroachments. Nonetheless, the Court required that he meet the first requirement of the Liability Rule.

The Law of the Case Rule is set out in RAP 2.5(c)(2) and is phrased in the following discretionary terms:

The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

While the rule is phrased in discretionary terms, it limits the authority of the second appellate court. As was stated in *Greene v. Rothschild*, 68 Wn.2d 1, 10, 414 P.2d 1013 (1968)

Under the doctrine of "law of the case," as applied in this jurisdiction, the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until such time as they are "authoritatively overruled." (Citations omitted) Such a holding should be overruled if it lays down or tacitly applies a rule of law which is clearly erroneous, and if to apply the doctrine would work a manifest injustice to one party, whereas no corresponding injustice would result to the other party if the erroneous decision should be set aside.

Under this formulation, a prior appellate decision can be revisited only if it is clearly erroneous or where there has been an intervening change in

controlling precedent. *Roberson v. Perez*, 156 Wn.2d 33, 43, 123 P.3d 844 (2005) As discussed above, the decision is not clearly erroneous and there has been no new appellate new decision that would require a different result. Therefore, the law of the case doctrine prevails, and the Hunters must satisfy the first requirement of the Liability Rule.

Finally, focusing on “locating” the encroachment for the purpose of the first requirement of the Liability Rule misses the most salient point. The Hunters clearly took a calculated risk in buying the property with full knowledge of the encroachment and the pending litigation. They are not entitled to relief under the Liability Rule for that reason regardless of issues of “location.”

d. The Trial Court’s Reasons for Its Decision Are Outside the Liability Rule.

The Conclusions of Law give the trial court’s reasons for its decision. These factors are not part of the Liability Rule calculus.

The trial court based its decision in part on Mr. Riley’s knowledge of the encroachment. (CP 246, CL 3) The Liability Rule and the opinion in *Bach v. Sarich, supra*, focus on the knowledge of the encroaching party, not the landowner. Mr. Riley’s knowledge has no significance.

The trial court was also concerned about Mr. Riley's removing certain other encroachments—a swimming pool, a pool house, and steps to the pool house—in 2007 at the time that the Rileys applied to short plat the West Lot. (CP 242-43, FF 8; CP 246, CL 3) The Rileys had the perfect right to remove encroachments and otherwise deal with their property at that time. This factor could possibly affect the third Liability Rule requirement—that there be sufficient space to build a structure in spite of the encroachment. The elimination of the pool and related structures increases the space for building a residence on the West Lot. The Rileys haven't contested the presence of the third requirement, however. Their elimination of other encroachments can have no effect—one way or another—on the Hunters' entitlement to relief under the Liability Rule. This factor simply does not fit into any of the other four requirements.

Similarly, the trial court also mentioned that the removal of the pool, the pool house, and the steps, along with replacing areas in the retaining wall where the steps had been made the lots look like one big lot. (RP 246, CL 3) It is submitted that leaving the pool in place would make the West Lot look more like part of the East Lot. In any event, the trial court does not mention how this conclusion affects the applicability of the

Liability Rule. Once again, it does not relate to any factor under than, perhaps, the third factor as discussed above.

e. There Was No Estoppel.

The trial court also based its decision on the Rileys' failure to advise Argent of the encroachment. This is not sufficient either in law or in fact to work any sort of estoppel.

In Conclusion of Law No. 3, the trial court said that "(I)t is ludicrous to posit that Argent would have loaned money secured by a house land entirely owned by Mr. Riley." (CP 246 CL 3) A different conclusion is more apt. The Riley's borrowed money from Argent to pay off what was owed on their real estate contract with Ms. Holman. The contract required the sale of both the East Lot and the West Lot as the legal description states. (Ex. 5) What is truly inexplicable is why Argent chose not to take both lots as security for a loan to pay off the real estate contract. It is submitted that virtually all lenders would have simply copied the legal description from the real estate contract onto the deed of trust.

At any rate, there was no estoppel in favor of Argent or anyone else. Estoppel is not favored. It requires proof by clear and convincing evidence of each of the following elements: (1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) action by

another in reasonable reliance on that act, statement, or admission; and (3) injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission. *Berschauer/Phillips Construction Co., v. Seattle School District*, 124 Wn.2d 816, 831, 881 P.2d 996 (1994) There are no findings of fact here that would support estoppel.

First of all, there was no representation. As the trial court found, Argent never inquired of the Rileys about any encroachment. (CP 242, FF 6) Estoppel by silence is only available if there is a duty to speak. *McDaniels v. Carlson*, 108 Wn.2d 299, 308, 738 P.2d 254 (1987); *Wilhelm v. Beyersdorf, supra*, 100 Wn.App. at 849 The duty to speak arises only when there is a fiduciary relationship between the parties. *Colonial Imports, Inc., v. Carlton Northwest, Inc.,* 121 Wn.2d 724, 731, 853 P.2d 913 (1993) There was no fiduciary relationship between the Rileys and Argent.

There are also no findings as to what, if anything, Argent relied upon. No one from Argent testified.

Finally, there is no finding that Argent suffered any damage. It assigned its security in the property to Deutsche Bank National Trust Company who foreclosed. (Ex. 8) There is no indication that the consideration it received for this assignment was based in any way on the

present or absence of the encroachment that is the subject of this litigation. There was also certainly no damage to anyone holding the obligation including Deutsche Bank National Trust Company. The Rileys borrowed \$265,000.00 from Argent. Mr. Valaer paid \$350,001.00 at the Trustee's sale. The bidding likely started with Deutsche Bank National Trust Company bidding in what it was owed. Mr. Valaer clearly beat that bid and likely the bids of others. The only reasonable conclusion is that the obligation was paid in full.

In any event, the Hunters may not benefit from any alleged estoppel that Argent could invoke had it been damaged. As the elements of estoppel state, there must be injury to the party who relied. Any estoppel operates only in favor of those who have been misled to their injury, and they alone can set it up. *Smith v. King County*, 80 Wash. 273, 277, 141 P. 695 (1914); *Inland Finance Co. v. Inland Motor Car Co.*, 125 Wash. 301, 305-306, 216 P. 14 (1923) And a successor in interest must show his own entitlement to the benefit of an estoppel and may not make such a showing by merely purchasing property. *Franklin County v. Leisure Properties*, 475 So.2d 475, 480 (Fla.App. 1983)

The Rileys made no representations to the Hunters. They knew of the encroachment by 2012. Therefore, there can be no estoppel as to them.

f. Conclusion.

The trial court's ruling did not utilize the correct legal principles. Therefore, its decision was an abuse of its discretion.

CONCLUSION

The findings of fact that the trial court made do not support its legal conclusions or its decision. Its legal conclusions are at odds with established rules of law. The Hunters are not entitled to relief under the Liability Rule. The trial court erred by ruling to the contrary. The matter should be remanded with directions to enter an order ejecting the Hunters from the West Lot.

DATED this 27th day of November, 2018.



GIDEON CARON WSB#18707
Of Attorneys for Plaintiffs/Appellants

APPENDIX

RCW 7.28.010

Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title; an action to quiet title may be brought by the known heirs of any deceased person, or of any person presumed in law to be deceased, or by the successors in interest of such known heirs against the unknown heirs of such deceased person or against such person presumed to be deceased and his or her unknown heirs, and if it shall be made to appear in such action that the plaintiffs are heirs of the deceased person, or the person presumed in law to be deceased, or the successors in interest of such heirs, and have been in possession of the real property involved in such action for ten years preceding the time of the commencement of such action, and that during said time no person other than the plaintiff in the action or his or her grantors has claimed or asserted any right or title or interest in said property, the court may adjudge and decree the plaintiff or plaintiffs in such action to be the owners of such real property, free from all claims of any unknown heirs of such deceased person, or person presumed in law to be deceased; and an action to quiet title may be maintained by any person in the actual possession of real property against the unknown heirs of a person known to be dead, or against any person where it is not known whether such person is dead or not, and against the unknown heirs of such person, and if it shall thereafter transpire that such person was at the time of commencing such action dead the judgment or decree in such action shall be as binding and conclusive on the heirs of such person as though they had been known and named; and in all actions, under this section, to quiet or remove a cloud from the title to real property, if the defendant be absent or a nonresident of this state, or cannot, after due diligence, be found within the state, or conceals himself or herself to avoid the service of summons, service may be made upon such defendant by publication of summons as provided by law; and the court may appoint a trustee for such absent or nonresident defendant, to make or cancel any deed or conveyance of whatsoever nature, or do any other act to carry into effect the judgment or the decree of the court.

CARON, COLVEN, ROBISON & SHAFTON PS

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NO. 52687-5-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

LESTER RILEY and SUSAN RILEY,

Plaintiffs/Appellants,

vs.

DAVID VALAER, et al,

Defendants,

and

BLAINE HUNTER and MELISSA HUNTER,
husband and wife; FRANKLIN AMERICAN
MORTGAGE COMPANY,

Respondents.

APPEAL FROM THE SUPERIOR COURT

HONORABLE SUZAN CLARK

DECLARATION OF SERVICE

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COMES NOW Anastasiya Zavrazhina and declares under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of her knowledge, information, and belief:

1. My name is Anastasiya Zavrazhina. I am over the age of eighteen years, a citizen of the United States, a resident of the State of Washington, and not a party to this action.

2. On November 27, 2018, I hand delivered a copy of the Brief of Appellant and this declaration to the office of Albert Schlotfeldt, 900 Washington, Suite 1020, Vancouver, WA 98660.

3. Also on November 27, 2018, I placed a copy of the Brief of Appellant along with this declaration in the mails of the United States of America, postage prepaid, and addressed to Henry Hamilton, Fidelity Law Group, 701 5th Ave., Suite 2710, Seattle, WA 98104-7054.

DATED at Vancouver, Washington, this 27th day of November, 2018.



ANASTASIYA ZAVRAZHINA

CARON, COLVEN, ROBISON & SHAFTON PS

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