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Court of Appeals  
Division II  
State of Washington  
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NO. 52687-5-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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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.

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APPEAL FROM THE SUPERIOR COURT

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HONORABLE SUZAN CLARK

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REPLY BRIEF

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## INTRODUCTION

This Reply Brief will address the arguments made on behalf of Blaine Hunter and Melissa Hunter (the Hunters) in the Brief of Respondents Blaine and Melissa Hunter (Hunters' Brief). It will not directly address the Respondent Franklin American Mortgage Company's Response to Appellant's Opening Brief since that brief referred to and incorporated the Hunters' arguments.

Many of the points raised in the Hunters' Brief were anticipated in the Brief of Appellants submitted on behalf of Lester Riley and Susan Riley. This brief will attempt not to reiterate or repeat what is set out in the Brief of Appellants. It will direct the reader to relevant pages in the Brief of Appellants.

## DISCUSSION

I. The Hunters' Prior Knowledge of the Encroachment Forecloses Them from Relief under the Liability Rule Even Though They Did Not Erect the Encroaching Structure.

The Hunters are not entitled to relief under the Liability Rule because they had full knowledge of the encroachment by no later than April of 2012—before they purchased the East Lot and even before they leased it in October of 2012. As discussed in the Brief of Appellant, pps. 10-21, this conclusion follows from the rule that “the benefit of the

doctrine of balancing the equities, or relative hardship, is reserved for the innocent defendant who proceeds without knowledge or warning that his structure encroaches upon another's property or property rights” as discussed in *Bach v. Sarich*, 74 Wn.2d 575, 582, 445 P.2d 648 (1968). It also follows from the Hunters inability to satisfy the first requirement of the Liability Rule as set out in *Arnold v. Melani*, 75 Wn.2d 143, 437 P.2d 908 (1968), that the encroacher did not simply take a calculated risk.

The Hunters argue that neither of these rules apply to them because they did not build the residence on the East Lot. They do nothing more than note that cases addressing this rule have involved persons who actually built encroaching structures. They do not cite to any Washington case announcing that persons who purchase encroaching improvements with full knowledge of the encroachment and pending litigation have nonetheless satisfied the first requirement of the Liability Rule because they did not build the improvement in question. Critically, they do not even attempt explain how their argument can survive in light of the law of the case doctrine and the Court’s decision in *Riley v. Valaer*, Court of Appeals No. 46120-0-II (*Riley I*) as discussed in the Brief of Appellants, pps. 27-30.

The Hunters also do not give any reason why persons who purchase encroachment improvements with full knowledge of the

encroachment and pending litigation concerning the encroachment should have the benefit of the liability Rule. No such reason exists. The right to eject an unlawful encroaching structure is among the most precious contained within the bundle of property rights and can only be denied under exceptional circumstances. *Garcia v. Henley*, 190 Wn.2d 539, 540, 415 P.3d 281 (2018) The person who invades the landowner's rights to exclusive possession is considered a trespasser. *Garcia v. Henley, supra*, 190 2d at 545-46, Yu, J. concurring. And it is clear that both the builder of an encroaching structure and the person who maintains an encroaching structure are trespassers. 75 Am.Jur.2d *Trespass* § 44 In other words, on this question, the law doesn't recognize a difference between the person who built the encroaching structure and the person who currently owns it.

Furthermore, the rule that the Hunters espouse would lead to absurd and unjust results as the following example demonstrates:

Sam and Dave own adjoining subdivision lots. Sam asks a surveyor to mark his property line with Dave. Sam then builds his house which encroaches on Dave's land by three feet. Sam does this intentionally because his lot was too small to build a house of the size that he wanted. When Dave protests, Sam conveys the house and land to his son who has full knowledge of the encroachment and Dave's. Sam's son then leases the property back to his father.

Under the Hunter's proposed rule, Sam's son could take advantage of the Liability Rule in any litigation with Dave because he did not build the house.

The Hunters have cited no authority in favor of the rule they support. Cases from other jurisdictions reject any distinction based on the defendant's not having erected anything. The fact that nothing was built by the offending party did not bother the Court in upholding the grant of an injunction in *Papanikolas Brothers Enterprises v. Sugarhouse Shopping Center Associates*, 535 P.2d 1256 (Utah 1975). In that case, the plaintiff received a covenant reserving certain land for automobile parking. The land was later leased to defendant. The lease included a rider acknowledging the covenant and requiring the defendant to indemnify the lessor from any losses associated with the enforcement of the covenant. Nothing had been built on the servient parcel at that time although a sign for a service station and a prefabricated building had been built on adjacent land. The Court rejected arguments based on principles similar to the Liability Rule as follows:

Defendants urge that the "balance of injury" test should have been applied by the trial court in making its determination to issue the mandatory injunction. Under this theory where an encroachment does not irreparably injure the plaintiff; was innocently made; the cost of removal would be disproportionate and oppressive compared to the benefits derived from it, and plaintiff can be compensated

by damages; equity may in its discretion elect not to compel removal.

The benefit of the doctrine of balancing the equities, or relative hardship, is reserved for the innocent defendant, who proceeds without knowledge or warning that he is encroaching upon another's property rights.<sup>1</sup> Where the encroachment is deliberate and constitutes a wilful and intentional taking of another's land, equity may require its restoration, without regard for the relative inconveniences or hardships which may result from its removal.

In the instant action defendants with full knowledge of the covenant took a calculated risk that plaintiffs would not assert their rights. The provisions of the lease rider clearly substantiate the finding that the defendants wilfully and intentionally encroached upon the parking easement. There is no basis to find an abuse of discretion on the part of the trial court in ordering its removal.

535 P.2d at 1259

The Court in *Benoit v. Baxter*, 196 Va. 360, 83 S.E.2d 442 (1954), held that a landowner could require the owner of encroaching structure to remove the structure when that owner did not place the encroachment but took with full knowledge of it. See Brief of Appellants, pps. 15-17 The Hunters attempt to distinguish this decision on the basis that the holding is not based on Washington law. Hunters' Brief, pps. 13-14 The opinion tracks well with the five factors discussed in *Arnold v. Melani, supra*, in that it discusses how the cost of moving the structure is greatly in excess

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<sup>1</sup> The Court cited to *Bach v. Sarich, supra*, in making this statement. See footnote 2, 535 P.2d at 1259

of the benefit to the property on which the encroachment sits. See Brief of Appellant, p. 16 The Hunters do not explain how Washington law is different from what the Court applied in *Benoit v. Baxter, supra*.

In short, any distinction based on whether the defendant actually built the encroachment is not supported by any announced rule of law or any authority. It is also not sensible. The Hunters' argument based on that distinction must be rejected.

## II. Our Case Does Not Resemble *Proctor v. Huntington*.

The Hunters have also suggested that our case is similar to *Proctor v. Huntington*, 169 Wn.2d 491, 238 P.3d 1117 (2010). That is simply not accurate. The Huntingtons mistakenly built their home on land belonging to Mr. Proctor. Their mistake was based on erroneous information they had received from a surveyor concerning the significance of a monument that had been placed. 169 Wn.2d at 494 In short, the Huntingtons had no knowledge they were encroaching when they built their residence and intended not to encroach. By contrast, the Hunters knew of the encroachment and the pending litigation before they leased the property in 2012 and before they purchased it in 2016.

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### III. The Hunters Took a Calculated Risk.

The Hunters clearly and obviously took a calculated risk by leasing and purchasing the property when they knew of the encroachment and the litigation surrounding it and when they also agreed to indemnify Mr. Valaer. See Brief of Appellant, pps. 18-21 The Hunters contend that they did not take a calculated risk because the encroachment was already present.<sup>2</sup> Hunters' Brief, p. 17 The Hunters argument makes no sense. They could have easily protected themselves by not buying the property. Had they taken that tack, they would not have been exposed to the risk of a negative outcome in the litigation. They chose, however, to purchase the property and submit to the risks inherent in any litigation. These included the possibility that they would not be allowed relief under the Liability Rule.

Parenthetically, the Hunters contend that the term "locate" in the first requirement of the Liability Rule pertains only to the act of building the encroachment. This Court ruled to the contrary in *Riley v. Valaer*, Court of Appeals No. 46120-0-II (*Riley I*), when it stated that Mr. Valaer

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<sup>2</sup> The Hunters' Brief spends time arguing that Mr. Valaer satisfied the first requirement of the Liability Rule. He was dismissed as a party defendant on a joint motion made by him and the Hunters. (CP 186-88) His status cannot rescue the Hunters when they clearly took a calculated risk.

may have acted negligently in locating the encroachment. And the law of the case doctrine precludes further discussion of this question. See Brief of Appellant, pps. 28-30

The overriding issue, however, is that the Hunters took a calculated risk by buying the East Lot and the residence. This deprives them of relief under the Liability Rule regardless of what the definition of “locate” might be in the first requirement of the Liability Rule.

#### IV. The Hunters Cite to No Established Equitable Principles.

The Hunters complain that denying them relief under the Liability Rule is not equitable chiefly because Mr. Riley did not specifically disclose the encroachment to Argent Mortgage when it inexplicably did not include both lots as security on its deed of trust; because of work Mr. Riley did on the property; and because denying them relief would cause them a hardship. These arguments will not help the Hunters. Equity can only be exercised within the framework of established equitable principles. Brief of Appellant, pps. 26-35

Specifically, whatever Mr. Riley did or did not say to Argent Mortgage is not germane because it did not rise to the level of an estoppel. Brief of Appellant, pps. 32-34 The Hunters do not contend otherwise, and the trial court made no findings or conclusions that there was any estoppel

that would deprive the Rileys of their right to eject the Hunters. Likewise, the appearance of the property in 2012 doesn't matter as far as the Hunters are concerned. However it may have looked, the Hunters knew of the encroachment by no later than April of 2012, long before they leased the property in October of that year or before they bought it in 2016.

V. The Rileys Did Not Have an Eternity to Act.

The Hunters also contend that the rejection of their position would open similarly situated persons to suit for an indefinite period of time. That is not accurate. The law of adverse possession applies to encroaching structures. *Shelton v. Strickland*, 106 Wn.App. 45, 51, 21 P.3d 1179 (2001) The Rileys had ten years to take action to eject the Hunters and their predecessor, Mr. Valaer. If no suit was filed within that period, the Hunters would then gain full title to the disputed area. RCW 4.16.020(1); *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984)

In any event, this suit was timely filed in 2012, less than two years after Mr. Valaer purchased the East Lot at a foreclosure sale. Therefore, the Hunters cannot rely on adverse possession.

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VI. The Trial Court Did Not Make Sufficient Findings of Fact.

As pointed out in the Brief of Appellant, the trial court did not make sufficient findings concerning other of the requirements of Liability Rule. In particular, the trial court did not make sufficient findings concerning the cost of removing the encroachment compared to the cost of value of the property being encroached upon. This would inform its decision on the other elements of the Liability Rule. Brief of Appellant, pps. 22-24

This failure is critical. The purpose of findings of fact is to ensure that the decisionmaker has dealt fully and properly with all the issues in the case before the decision is made so that the appellate court can be fully informed as to the basis of the decision. Statements of the positions of the parties, and a summary of the evidence presented, with findings which consist of general conclusions drawn from an indefinite, uncertain, undeterminative narration of general conditions and events, are not adequate. *Weyerhaeuser v. Pierce County*, 126 Wn.2d 26, 36, 873 P.2d 498 (1994)<sup>3</sup> The trial court's discussion in its memorandum decision or in

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<sup>3</sup> This case involved a review of an administrative decision. The Court noted, however, that findings of fact by an administrative agency are subject to the same requirement as are findings of fact drawn by a trial court. 126 Wn.2d at 36

the Findings of Fact and Conclusions of Law that were entered simply does not measure up. See Brief of Appellant, pps. 23-24

In response, the Hunters obtained a verbatim report of proceedings to show what testimony was given.<sup>4</sup> Mr. Hunter testified that he could not obtain a bid to deal with the encroachment because contractors wanted to have an engineer determine how the removal should be done. RP Vol. 3, p. 18 There is no evidence that Mr. Hunter ever contacted an engineer to see what could be done. While the record can conceivably be used to bolster findings of questionable sufficiency, that method won't help the Hunters here. The Hunters never followed through on the suggestion they were given to determine the feasibility of dealing with the encroachment and therefore were unable to show what the cost and feasibility would be. This testimony and lack of testimony bolster the conclusion that there were no sufficient findings.

#### CONCLUSION

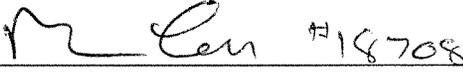
The Hunters knew about the encroachment and the pending litigation before they leased the East Lot and before they purchased it.

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<sup>4</sup> The verbatim report of proceedings was produced in three volumes each beginning with page 1. They will be referred to as "RP Vol." along with the page number.

This knowledge precludes them from relying on the Liability Rule. Their arguments to the contrary simply cannot carry the day. The trial court also did not make sufficient findings of fact on the remaining requirements of the Liability Rule. The Hunters' arguments to the contrary are unavailing. Franklin American Mortgage Company has presented no other arguments. Therefore, the judgment of the trial court should be reversed and the matter remanded with directions to enter an order ejecting the Hunters and Franklin American from the West Lot.

DATED this 15<sup>th</sup> day of March, 2018.

  
GIDEON CARON WSB#18707  
Of Attorneys for Lester Riley and  
Susan Riley

**CARON, COLVEN, ROBISON & SHAFTON PS**

**March 15, 2019 - 3:47 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
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**Appellate Court Case Title:** Lester and Susan Riley, Appellants v. David and Susan Valaer, et al. ,  
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APPEAL FROM THE SUPERIOR COURT

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HONORABLE SUZAN CLARK

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DECLARATION OF SERVICE

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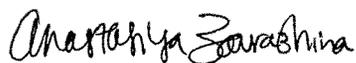
COMES NOW Anastasiya Zavrazhina and declares under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of her knowledge, information, and belief:

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 March 15, 2019, I hand delivered a copy of the Reply Brief and this declaration to the office of Albert Schlotfeldt, 900 Washington, Suite 1020, Vancouver, WA 98660.

3. Also on March 15, 2019, I placed a copy of the Reply Brief with this declaration in the mails of the United States of America, postage prepaid, and addressed to Henry Hamilton, Fidelity Law Group, 701 5<sup>th</sup> Ave., Suite 2710, Seattle, WA 98104-7054.

DATED at Vancouver, Washington, this 15<sup>th</sup> day of March, 2019.



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ANASTASIYA ZAVRAZHINA

**CARON, COLVEN, ROBISON & SHAFTON PS**

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