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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

LESTER RILEY, et al., Appellants,

v.

BLAINE HUNTER, et al., Respondents,

and

DAVID VALAER, et al., Defendants.

BRIEF OF RESPONDENTS BLAINE AND MELISSA HUNTER

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I. Introduction

This case involves a dispute over a strip of property that is approximately nine feet wide (east-to-west) by one-hundred feet long (north-to-south). The Superior Court held that under the circumstances of this case the *Arnold* exception applied and ruled in favor of Hunters. This court should affirm.

II. Restatement of Issues Pertaining to Assignments of Error

A. Did the Trial Court error by entering the Findings of Fact, Conclusions of Law, and Judgment?

B. Did the Trial Court error by entering the Order Denying Reconsideration?

III. Statement of the Case

This case involves a dispute over a strip of property (“disputed strip” or “encroachment”) between adjoining land owners that is approximately nine feet wide (east-to-west) by one-hundred feet long (north-to-south). The disputed strip is located between 401 W. 36th Street, Vancouver, Washington (the “East Lot”) and vacant property located immediately to the West (the “West Lot”). CP 251 at FF 1¹.

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 at CP 251.

In January of 1951, Fred and Alice Neth (the “Neths”) purchased the East Lot and constructed a home. Some of the improvements that the Neths made encroached several feet upon the West Lot. Later realizing that the structures extended beyond the West Lot, the Neths purchased the East Lot in July of 1951, treating the two parcels as one adjoining property. CP 251 at FF 1-2, Exs. 1-2.

In 1971, the Neths sold both lots to LaVern and Elaine Boespflug (the “Boespflugs”). In 1975, the Boespflugs sold both lots to Michael and Suzann (“Holman”) Holman. CP 251 at FF 3, Exs. 3-4.

In October of 2000, Holman entered into a Real Estate Contract to sell both lots to Lester (“Riley”) and Susan Riley (the “Rileys”). Prior to conveying the lots to Riley, Holman notified Riley that the garage and patio of the home from the East Lot encroached onto the West Lot. Holman knew of the encroachment because she was informed by the previous owners, the Boespflugs. Riley was not concerned about the encroachment as he was purchasing both lots. CP 251 at FF 4, Ex. 5.

Prior to buying both lots from Holman, Riley only had a conversation with Holman and performed a title search, and nothing else. RP at 40. Riley did not have any survey performed prior to purchase. RP at 40. At time of the real estate contract, a pool was located on West Lot

and was accessed from patio on the south side of house on the East Lot. There were stairs that lead from the patio to the pool and extended beyond the retaining wall encroaching onto the West Lot. RP at 41.

In January of 2004, the Rileys received fulfillment deeds for both lots. In order to pay off the real estate contract and receive fulfillment deeds for both lots, Riley obtained a loan from Argent Mortgage, LLC (“Argent”). The loan was secured by a deed of trust on the East Lot only. Riley intentionally withheld from Argent the encroachment issue. CP 251 at FF 5-6, Exs. 6-7, RP at 42. Riley explained withholding this information from his lender by stating “they’re big boys; they can do their own title search; they can look at it like anyone else.” RP at 42.

In 2007, the Rileys applied for a short plat of the West Lot. In that application, a boundary line adjustment was proposed so that the home would be situated entirely in the East Lot. The short plat was never completed and the boundary line was not adjusted. CP 251 at FF 7.

Later in 2007, Riley demolished the swimming pool, including the steps leading to the swimming pool and pool house. All of the demolition areas took place on the West Lot. Riley subsequently rebuilt the area where the steps had been located to blend with the adjacent preexisting adjacent wall, also located on the West Lot. CP 251 at FF 8, RP at 42.

Riley also added a concrete planter on the East Lot where the access to the stairs had been. RP at 48. Furthermore, Riley admitted at trial that a standard ALTA Title Policy would show recorded encumbrances, but not the location of structures. RP at 45. Hence, a subsequent title report would not reveal an encroachment. The information regarding Riley's building of a portion of the wall was not known until long after the first appeal.

It is important to note that in an interrogatory, Riley was asked whether he or anyone else had constructed "*any portions of the existing wall* running generally North and South and generally West of the East property line of the East parcel?" (emphasis added). On November 8, 2016, Riley's answer under oath pursuant to CR 33 was simply, "No." Ex. 40 at 5.

On September 5, 2017, the same question was asked. It was at this point that Riley finally disclosed that in approximately 2007-2008, he had personally constructed a portion of the retaining wall; the same retaining wall which visibly demarcates the boundary line between the East Lot and the West Lot. Riley further advised that he had "filled in [the] retaining wall with cinder blocks," and "installed [a] planter strip on [the] retaining wall," all of which lie in the disputed property. Ex. 41 at 2.

Riley filed for a short plat of the West Lot to create two lots, each 45 feet wide. RP at 46, Ex. 23A. In doing so, Riley excluded the disputed strip from the West Lot. RP at 46. Riley's short plat application was approved by the City of Vancouver. RP at 48-49. Riley testified he has no opinion as to the value of the disputed strip. RP at 49.

The Rileys defaulted on the Argent loan and nonjudicial foreclosure proceedings were commenced (the "foreclosure"). David Valaer ("Valaer") became aware of the foreclosure days before the sale and drove by the property. Valaer purchased the East Lot at a trustee's foreclosure sale on November 29, 2010 for \$350,001. Ex. 44 at 29. Valaer made no inquiry from his realtor as to the boundary line of the East Lot. Valaer also did not perform a survey to determine the boundary line of the East Lot. Ex. 44 at 21. Valaer had no contact with the Rileys before purchasing the East Lot. CP 251 at FF 9, Ex. 8. As this was a foreclosure, Valaer did not go onto the East Lot or contact the occupants. Ex. 44 at 16. Valaer did obtain a title report from Stewart Title. Ex. 44 at 19. Riley testified that in the foreclosure process, had potential purchasers come by, he would not have let them in. RP at 49.

In March of 2012, the Rileys filed a lawsuit for removal of the encroachment from the East Lot onto the West Lot. CP 251 at FF 10.

In October of 2012, Blaine and Melissa Hunter (the “Hunters”) entered into a lease/purchase agreement. The terms of the agreement stated that Hunter would rent the home from Valaer at \$1,750 per month until the property dispute between Valaer and Riley was resolved. Once resolved, and contingent upon the Hunters selling their home, the Hunters agreed to purchase the East Lot for \$375,000, the fair market value at that time in 2012. CP 251 at FF 12, Exs. 10-11.

On August 23, 2013, after nearly three years in litigation, the Trial Court granted the Valaer’s Motion for Partial Summary Judgement. The Trial Court held that “the theory of the common grantor does show that there was an [agreed] boundary line established.” The Court found that when Neth purchased the West Lot, he did so to “legally establish that the home was not subject to a divided situation,” adopting the common grantor doctrine. The Court entered a written Order granting the Valaer’s Motion for Partial Summary Judgement, but it did not quiet title. The Court of appeals reversed the Trial Court’s summary judgment rulings and remanded the matter for trial. CP 251 at FF 13.

On August of 2015, the Hunters expressed an interest in purchasing the East Lot from the Valaer. On February 3, 2016, the Hunters and the Valaer entered into an Agreement to Purchase the East Lot for \$375,000. Despite the ongoing dispute, as part of the sales agreement, the Hunters indemnified Valaer of liability. CP 251 at FF 14-15, Ex. 14. On April 1, 2016, the Hunters received a deed to the East Lot. CP 251 at FF 17, Ex. 32.

IV. Argument

A. Introduction.

At a bench trial, the Trial Court found in favor of Hunters. Riley then appealed for the second time.

This court should deny Riley's appeal because (1) the Trial Court did not err in finding that exception under the Arnold test applied; (2) The Trial Court did not err in denying Riley's motion for reconsideration.

B. "Locate" under the Liability Rule means to build or construct upon.

A significant issue underlying this dispute is the interpretation of the word "locate" as used by the Washington Supreme Court in numerous appeals that have come before it, and later partially addressed by this Appellate Court in this matter. In reviewing whether the Trial Court in this

matter properly awarded partial summary judgment, this court found a material issue of fact existed as to the first tenant of the *Arnold* test: whether the homeowner “negligently, willfully, or indifferently locate[d] the encroaching structure.” *Arnold v. Melani*, 75 Wn.2d 143, 152, 437 P.2d 908, 914 (1968).

A full understanding of the word “locate,” requires a historical look at its use by the Washington Supreme Court over the past century:

C. Background of Liability Rule.

In the 1907, the Supreme Court applied a liability rule in *Hart v. City of Seattle*, 45 Wash. 300, 301, 88 P. 205 (1907). In *Hart*, the City built the roadway higher than intended. The City was sued and an injunction was granted, forcing the city to demolish the roadway and reconstruct it at a lower grade. The Court, hearing the case on appeal, found grounds in equity to apply a liability rule, providing the City the option to pay damages instead of demolishing and re-paving the roadway. *Id.*

Approximately ten years later, the Court applied a liability rule in *Bufford*. See *People's Sav. Bank v. Bufford*, 90 Wash. 204, 155 P. 1068 (1916). There, the encroachers mistakenly built their home on a bank-owned lot instead of their own. In applying a liability rule, the court forced

the encroachers to deed their lot to the Bank in exchange for title to the lot they had built upon. *Id.*

Following some discrepancy in the law in the years that followed, the Supreme Court finally addressed the discrepancy and settled it for good in the matter *Arnold, supra*. There, the Arnolds' house and fence encroached over the Melanis' property. Arnold was the third owner of the property and the encroaching structures and fencing had been located (built) by the original owner after a mistake was made while surveying the property. The trial court held that it would be inequitable to require the Arnolds to remove their house, which was worth far more than the area encroached upon. *Arnold*, 75 Wn.2d at 145-46 (1968).

In demonstrating the proper application of the liability rule as applied by it in *Arnold*, while continuing to explore the history of this rule, in 2010 the Supreme Court issued a ruling in *Proctor v. Huntington*, 169 Wn.2d 491, 498, 238 P.3d 1117 (2010).

The Supreme Court took another look back at the history of the liability rule, reaching back to the 1897 Massachusetts case of *Harrington v. McCarthy*, 169 Mass. 492, 48 N.E. 278 (1897). In *Harrington*, the foundation beneath a newly built structure encroached slightly onto the neighboring property. The neighbor sued for ejectment, requesting the

court apply a strict property rule. Because it would have been nearly impossible to trim back the structure and foundation without causing extreme damage to the building, the Court applied a liability rule. *Proctor v. Huntington*, 169 Wn.2d at 498, citing *Harrington v. McCarthy*, 169 Mass. at 493-95.

D. Modern Application of Liability Rule

Studying *Proctor, supra*, the most recent application of the liability rule, we find that the Supreme Court issued a ruling on facts incredibly similar to those now before this Court. More importantly, the Court did so using the word “locate” in the same manner Defendant uses the word.

In *Proctor*, the Court was faced with the decision of whether it is equitable to force a homeowner to destroy their residence when the land disputed between the parties is of minimal benefit to the opposing party. In its majority opinion, the Court used the term “locate” in applying the *Arnold* 5-part test and in explaining its rationale.

The first of five tenants under the *Arnold* test asks the Court to determine whether the homeowner “negligently, willfully, or indifferently locate[d] the encroaching structure.” In speaking to this issue, the Court states, “The surveyor discovered that the Huntington’s house, well, garage, and yard were *located* entirely on Proctor’s property.” *Proctor*,

169 Wn.2d at 495 (2010) (emphasis added). This statement evidences the Court's intention in 2010 for the term "locate" to mean: built or constructed upon. Here, the Hunters' home is partially located, or constructed, upon Riley's lot.

Our Supreme Court has made it clear that, "*A court asked to eject an encroacher must instead reason through the Arnold elements as part of its duty to achieve fairness between the parties.*" *Proctor*, 169 Wn.2d at 502-503 (emphasis added). Citing to their 2008 decision in *Young v. Young*, the Supreme Court emphasized that a court has "tremendous discretion" to do justice when fashioning an equitable remedy. *See Young v. Young*, 164 Wn.2d 477, 488, 191 P.3d 1258 (2008) (discussing a court's "tremendous discretion" under these circumstances).

Applying the Supreme Court's rulings in *Arnold*, *Proctor* and *Young* to the facts of the present matter, it would be inequitable to force the Hunters to demolish a portion of their home, their attached two-car garage, their patio, their fireplace, and their driveway, all for the Plaintiff to re-acquire a nine-foot wide strip of property which is of little or no benefit to him. More importantly, where the Hunters and their predecessors were innocent in locating the structure upon the 9 foot strip

of land, Riley has admitted to constructing a portion of the retaining wall and other encroaching structures.

E. The cases relied upon by Riley are distinguishable.

Riley asserts a broad proposition that a party with prior knowledge of an encroachment cannot take advantage of the Liability Rule. Appellant's Brief at 13. All of the Washington cases relied on by Riley are distinguishable. In each, the party seeking relief built the encroaching structure despite knowledge of the potential encroachment or violation.

In *Bach v. Sarich*, 74 Wn.2d 575, 445 P.2d 648 (1968), (the defendants built apartments with full prior knowledge that doing so would interfere with the rights of other owners and accelerated the construction after the lawsuit was filed). The other cases relied on by Riley likewise involve situation where actual construction of a structure was commenced, or completed, after knowledge that an encroachment or violation would occur as a result. *See, e.g., Responsible Growth Forum Group v. City of Kent*, 123 Wn.2d 376, 868 P.2d 861 (1994) (construction preformed after a petition for review of a rezone); *Foster v. Nehls*, 15 Wn. App. 749, 753-754, 551 P.2d 768 (1976) (construction completed in violation of covenants after suit filed); *Hollis v. Garwall*, 137 Wn.2d 683, 699-700, 974 P.2d 836 (1999) (rock crushing in violation of covenants); *Mahon v.*

Haas, 2 Wn. App. 560, 565, 468 P.2d 713 (1970) (greenhouse built after receiving warning it would encroach); *Wilhelm v. Beyersdorf*, 100 Wn. App. 836, 846-847, 999 P.2d 54 (2000) (wellhead knowingly built on an easement).

Here, the encroachments were constructed in part by Neff and in part by Riley. It was Riley's construction that eliminated any visual clues of the encroachment when he eliminated the steps onto the bare lot, rebuilt portions of the wall in line with the remainder of the wall, and constructed a concrete planter on the house side of the wall. Riley also intentionally withheld knowledge of the encroachment from his lender when he obtained a loan.

Riley further attempts to rely on a Virginia case from 1954 in support to his position. In the case of *Benoit v. Baxter*, 196 Va. 360, 83 S.E.2d 442 (1954), it does not appear that the Virginia court even considered application of Liability Rule as we see in Washington under more modern decisions such as *Proctor*. Furthermore, although the court in *Benoit* determined that the contract to remove the encroaching house was personal between the Michaels and the Baxters, in fashioning its equitable remedy, the court clearly relied on the fact that Baxter agreed to

remove the structure and knew that Benoit was entitled to the full use and enjoyment of their property. *Benoit* at 367.

The present case is distinguishable. In addition, under Riley's reasoning, if Riley simply waited long enough, and the fact of an encroachment became commonly known, any subsequent owners to take title, such as heirs of an estate, or a foreclosing lender, years after the construction by Riley, would be forced to remove the encroaching structure, regardless of the equities.

F. The Trial Court made sufficient finding of fact.

Riley alleges that the Trial Court did not make a sufficient finding of fact as to the second, fourth and fifth elements of the Liability Rule. (note that the heading for section V of Appellant's Brief states "third" element of the test but the text makes it clear they intended to argue the "second" element.) Those elements are: (2) the damage to the landowner was slight and the benefit of removal equally small; (4) it is impractical to move the structure as built; and (5) there is an enormous disparity in resulting hardships. *Arnold v. Melani*, 75 Wn.2d 153, 450 P.2d 815 (1969).

There was ample testimony to support the Trial Court's findings. Riley admitted that he had no damage as a result of the encroachment and

no opinion as to the value of the disputed strip. RP at 49. Riley submitted a development application to the City of Vancouver for the West Lot, and in that application excluded the disputed strip. RP at 46, Exs. 22-23. The City of Vancouver approved Riley's application to develop the West Lot into two lots, each 45 feet in width from east-to-west. RP at 49, Ex. 22.

At trial, Hunter testified about the location of the encroachment, the nature of the construction of the home, and the difficulty and extensive expense involved in removing home's attached two-car garage, patio, fireplace, driveway, retaining wall, and the ground which these improvements were built upon. RP at 17-18. The garage is part of the house itself and not a freestanding structure. Due to its age, the roof structure is stick framed, not premanufactured trusses, and thus as observed by the Trial Court, removal could undermine the structure. *Id.*

Furthermore, the Trial Court issued a written decision outlining the basis for its ruling. In the written decision the Judge made a finding that: "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. Hunters' testimony establishes that the removal of the garage would come at a tremendous

cost and would likely undermine the structural integrity of the home. There is enormous disparity in the hardships to the two parties.” CP 233.

A finding of fact erroneously described as a conclusion of law is reviewed as a finding of fact. Under these circumstances, the court reviews the conclusion of law as a finding of fact and looks for evidence in the record to support the finding. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 7230 P.2d 45 (1986), citing *Golberg v. Sanglier*, 96 Wn.2d 874, 639 P.2d 1347, 647 P.2d 489 (1982). Here, there was sufficient evidence to support the Trial Court’s ruling, which were incorporated into its written decision outlining its findings. Ex. 23. Accordingly, conclusion of law 5 can be considered a finding of fact.

G. Neither Valaer nor Hunter simply took a calculated risk, acted in bad faith, or negligently, willfully, or indifferently located the encroaching structure.

In purchasing the house at foreclosure, Valaer worked with a realtor, viewed the property, and obtained a title report. Riley testified that even if a potential purchaser had come to the house, he would not have let him in. It is important to note there were no visible clues of the encroachment because, at the time of the foreclosure, Riley had removed the pool and steps, rebuilt part of the wall in line with the removal, and

built a concrete planter on the East Lot inside the disputed strip. Neither Valaer nor Riley obtained surveys, something which would be unusual in purchasing residential real estate.

As for Hunter, by the time he leased the home with an option to purchase, the stage was set. The encroachment existed and Valaer had already purchased the property. Nothing further could be done. Under Riley's theory, once the encroachment became known, Riley automatically prevailed

Here, the Hunters exercised their option under very stressful personal circumstances. Hypothetically under Riley's view, if Valaer died and the house went to an heir, or if Valaer lost the property in a foreclosure, the subsequent owners would have no defense to Riley's quiet title.

Neither Valaer nor Hunter constructed any portion of any encroachment and in fact, it was Riley who removed any evidence or clues that there was an encroachment and withheld this information from his lender, and thus, is the party responsible.

V. Conclusion

For the reasons stated above, this Court should affirm the Superior Court's.

Respectfully submitted this 1st day of March, 2019.

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DECLARATION OF SERVICE

I hereby declare under the penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the **BRIEF OF RESPONDENTS BLAINE AND MELISSA HUNTER** to be served upon the following by the method(s) indicated below, addressed as follows:

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