

**FILED**

JUL 21 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 295494**

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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RONALD J. COGDELL and CATHERINE L. COGDELL, husband and  
wife,

Appellant

v.

1999 O'RAVEZ FAMILY, L.L.C., a Washington limited liability  
company,

Respondent

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION AND CASE SUMMARY

Respondent, the 1999 O’Ravez Family, LLC (“O’Ravez Family”), by and through its attorney, Michael DeLeo of Peterson Russell Kelly, PLLC, submits this response to Appellant Cogdells’ Brief.

As noted by this Court in the first appeal, “[m]ost facts are unchallenged and, therefore, are verities on appeal.”<sup>1</sup> The unchallenged facts include the Cogdells building their entire home on the O’Ravez Family’s land.<sup>2</sup> The O’Ravez Family obtained title to the land via statutory warranty deed when it purchased the property from the Cogdells.<sup>3</sup> Thus, although the Cogdells received payment from the O’Ravez Family for the land, the Cogdells constructed their entire home on the land they sold.

In February of 2002, the Cogdells filed a Chapter 7 bankruptcy and received their discharge in June of 2002.<sup>4</sup>

After rejecting various offers made by the O’Ravez Family to resolve the encroachment problem that the Cogdells created, on February 9, 2005, the Cogdells sued the O’Ravez Family for quiet title and

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<sup>1</sup> *Cogdell v. 1999 O’Ravez Family, LLC*, 153 Wn. App. 384, 387, 220 P.3d 1259, 2009.

<sup>2</sup> *Id.* at 387.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 387.

equitable relief.<sup>5</sup> The O’Ravez Family countersued for quiet title, ejectment, trespass, and breach of their statutory warranty deed.<sup>6</sup> Following the bench trial in 2007, the court rejected the Cogdells’ various theories seeking to avoid responsibility for the encroachment.<sup>7</sup> The Cogdells did not cross-appeal.<sup>8</sup>

This Court’s rulings in the prior appeal included the following:

- “[W]e vacate the easement and remand for the trial court to provide meaningful relief [to the O’Ravez Family] for the [Cogdells’] encroachment.”<sup>9</sup>
- “[C]onsidering the bankruptcy court lifted its automatic stay to allow a final judgment and now both parties criticize the trial court’s easement grant, we decide the trial court erred in not considering damages and ejectment or a forced sale of the disputed property.”<sup>10</sup>

On November 18, 2010, *almost a year* after this Court’s prior ruling on appeal, the trial court—having reasoned through the *Arnold* factors<sup>11</sup>—entered an Order ejecting the Cogdells from the O’Ravez

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<sup>5</sup> See *Id.* at 388-389.

<sup>6</sup> *Id.* at 389.

<sup>7</sup> *Id.* at 391.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 393.

<sup>10</sup> *Id.* at 387.

<sup>11</sup> *Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800 (1968).

Family's land.<sup>12</sup> The trial court also entered judgment against the Cogdells and in favor of the O'Ravez Family in the total amount of \$64,509.59.<sup>13</sup> The Cogdells appeal the trial court's rulings.

## II. ISSUES

The Cogdells built on previously undeveloped, rural land, without a survey and without any regard for the true boundary line. Under Washington law, unless the encroaching party can establish all of the *Arnold* factors, which includes showing that they did not take a calculated risk, or indifferently select the location of the encroachment, ejectment is the ordinary remedy. Should the trial court's decision ordering ejectment be sustained on appeal?

Following trial in 2007, the court determined that the O'Ravez Family should be awarded damages in the amount of \$40,500.00, but failed to enter a money judgment due to the Cogdells' bankruptcy. The Cogdells did not appeal the damages determined following the 2007 trial and Court of Appeals ruled that it was in error not to consider awarding damages. Should the trial court's money judgment be sustained on appeal?

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<sup>12</sup> CP 66-70.

<sup>13</sup> *Id.*

### III. PREAMBLE TO RESPONDENT'S STATEMENT OF THE CASE

The counter statement of facts presented here are particularly significant for two reasons. First, the statement of facts in the Appellant's Brief is not a "fair" statement of the facts and procedure.<sup>14</sup> Rather, the facts are a one-sided presentation of testimony that occurred years ago and for which findings of fact were made, including certain findings of fact that are contrary to the facts present in Appellant's Brief. For illustrative purposes, following is an example of a fact offered by the Cogdells that is inconsistent with a finding in the case and that was not appealed.

- o On page 7 of Appellant's brief it states-- "nor did the Respondent O'Ravez question the white survey states [sic] then present or the boundary lines at the time. 11/07/07 RP 59-60)."
- o Conversely, the trial court determined – after reviewing maps, surveys, title reports and hearing testimony from the parties and third-party survey and realtor witnesses— that: "[t]here was nothing on the ground at the time during these discussions that could be considered a physical demarcation."<sup>15</sup>

Second, because the trial court issued findings of fact and conclusions of law plus a final judgment after a trial and because only

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<sup>14</sup> RAP 10.3(a)(5) contemplates the presentation of "[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument."

<sup>15</sup> See CP368: Finding of Fact XIII.

some of those findings were appealed, the doctrines of res judicata and law of the case preclude re-trying the case in this appeal. Thus, in presenting the statement of the case below we strove to honor those legal doctrines.

#### IV. STATEMENT OF THE CASE

This case has been pending since 2005 and was previously decided on appeal.<sup>16</sup> In the prior appeal, this Court remanded the case with instruction to “the trial court to provide meaningful relief [to the O’Ravez Family] for [Cogdells’] encroachment.”<sup>17</sup> This Court also held that “the trial court erred in not considering damages and ejection or a forced sale of the disputed property.”<sup>18</sup>

The rulings in the first appeal included the Court’s recognition that “[m]ost facts are unchallenged and, therefore, are verities on appeal.”<sup>19</sup> Thus, the Court of Appeal’s decision articulating the facts is of paramount importance when considering the current appeal challenging the relief recently granted. Additionally, the doctrines of res judicata and the law of the case prevent re-litigation of the case on this second appeal. Consequently, rather than repeat the decision in its entirety, we will

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<sup>16</sup> *Cogdell v. 1999 O’Ravez Family, LLC*, 153 Wn. App. 384, 220 P.3d 1259, 2009.

<sup>17</sup> *Id.* at 393.

<sup>18</sup> *Id.* at 387 (emphasis added).

<sup>19</sup> *Id.* at 387.

summarize the facts—as set forth in the Court of Appeals’ decision—that are most relevant to the present appeal.

In 1994, the Appellant, Cogdells, purchased 80 acres in Stevens County, which they divided into four 20-acre parcels.<sup>20</sup> The Respondent, O’Ravez Family, purchased two of the Cogdells’ parcels; the one at issue was acquired on January 4, 1997, by statutory warranty deed.<sup>21</sup> The Cogdells retained one 20-acre parcel adjacent to the contested O’Ravez Family’s parcel.<sup>22</sup> About the same time, the Cogdells began improving property near the boundary between the adjacent properties and completed construction of their well, septic system, pool, and residence by fall 1997.<sup>23</sup> The Cogdells did not obtain a survey before constructing their residence.<sup>24</sup> The O’Ravez Family asked the Cogdells to join in a survey to locate the boundary lines, but the Cogdells refused.<sup>25</sup>

In January 2004, the O’Ravez Family obtained a survey showing the Cogdells’ improvements were all constructed exclusively on the O’Ravez Family’s property.<sup>26</sup> The O’Ravez Family unsuccessfully offered to purchase the Cogdells’ improvements for \$375,000, less their attorney

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<sup>20</sup> See, *Id.* at 387.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

fees.<sup>27</sup> The O'Ravez Family unsuccessfully offered in the alternative to convey title to the land upon which the encroachments were placed in exchange for an equal piece of the Cogdells' property so each party would retain a 20-acre parcel.<sup>28</sup>

In 2005, the Cogdells sued the O'Ravez Family for quiet title and equitable relief.<sup>29</sup> The O'Ravez Family counterclaimed for quiet title, ejectment, trespass, and breach of their statutory warranty deed.<sup>30</sup>

When the trial court was issuing its original ruling in this case, it clearly felt constrained by the Cogdells' prior bankruptcy filing<sup>31</sup> and, thus, granted them an easement over the O'Ravez Family's land. The decision was reversed on appeal. Specifically, this Court concluded that "the trial court lacked tenable grounds or tenable reasons in ordering an easement."<sup>32</sup> The Court, accordingly, vacated the easement and remanded for the matter to the trial court "to provide meaningful relief for the encroachment."<sup>33</sup> The Court also included the following in its ruling: "considering the bankruptcy court lifted its automatic stay to allow a final

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<sup>27</sup> *Id.* Interestingly, this Court also included the following: "The trial court found the Cogdells' 'residence was listed [in the bankruptcy] at a value of \$275,000.00 and the equity was claimed exempt.'" *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn. App. at 389.

<sup>28</sup> *Id.* at 387-8.

<sup>29</sup> *Id.* at 388.

<sup>30</sup> *Id.*

<sup>31</sup> See *Id.* at 388.

<sup>32</sup> *Id.* at 393.

<sup>33</sup> *Id.*

judgment and now both parties criticize the trial court's easement grant, we decide the trial court erred in not considering damages and ejectment or a forced sale of the disputed property.”<sup>34</sup>

The trial court’s November 16, 2010 money judgment and order of ejectment was the decision following the Court of Appeals’ mandate.

## V. SUMMARY OF ARGUMENT

The issue facing this Court is whether the remedy issued by the trial court in this encroachment case should be affirmed. Because the application of the remedy here was largely equitable, the trial court’s decision is reviewed for an abuse of discretion.<sup>35</sup> Consequently, this Court reviews “the trial court's grant of equitable relief to determine whether the remedy is based upon tenable grounds or tenable reasons.”<sup>36</sup> Here, the trial court’s ruling is based on tenable grounds and should be affirmed.

On remand, the trial court had instructions from this Court to consider damages and ejectment or a forced sale of the disputed property.<sup>37</sup> Washington law provides that ordinarily “an injunction will issue to compel the removal of an encroaching structure.”<sup>38</sup> But an

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<sup>34</sup> *Id.* at 387.

<sup>35</sup> *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn. App. at 390; citing *Willener v. Sweeting*, 107 Wn.2d 388, 397, 730 P.2d 45 (1986).

<sup>36</sup> *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

<sup>37</sup> See *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn. App. at 387.

<sup>38</sup> *Proctor v. Huntington*, 169 Wn.2d 491, 502, 238 P.3d 1117 (2010), cert. denied, 131 S. Ct. 1700 (2011).

injunction is not issued as a matter of course; rather, the trial court must “reason through the *Arnold* elements as part of its duty to achieve fairness between the parties.”<sup>39</sup> In the instant case, the trial court reasoned through the *Arnold* elements and determined that they were not met. Consequently, following binding Washington precedent, the trial court correctly ordered ejectment.

The trial court also correctly awarded a judgment for damages incurred by the O’Ravez Family at the trial court level for the lawsuit commenced—and made difficult—by the Cogdells. The Cogdells’ only defense to the money judgment is their 2002 bankruptcy. Yet, this Court rejected that argument in the prior appeal.<sup>40</sup> Consequently, the Cogdells’ argument cannot be sustained due to the application of the law of case doctrine. Plus, where a debtor returns to the fray of litigation post-bankruptcy, as the Cogdells did here by initiating litigation, they can and should be liable to the defending party for the damage they caused.<sup>41</sup> This logical and well-established legal principle is based on the ground that “[b]ankruptcy was intended to protect the debtor from the continuing costs

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<sup>39</sup> *Id.* at 502-3.

<sup>40</sup> *Cogdell v. 1999 O’Ravez Family, LLC*, 153 Wn. App. at 387 (“[C]onsidering the bankruptcy court lifted its automatic stay to allow a final judgment and now both parties criticize the trial court’s easement grant, we decide the trial court erred in not considering damages and ejectment or a forced sale of the disputed property.”)

<sup>41</sup> *Siegal v. Federal Home Loan Mortgage Corp.*, 143 F.3d 525, 533 (9th Cir. 1998).

of pre-bankruptcy acts but not to insulate the debtor from the costs of post-bankruptcy acts.”<sup>42</sup>

In sum, and as set forth in more detail below, the trial court’s decision ordering ejectment and awarding a money judgment should be affirmed.

## VI. ARGUMENT

### A. Standards of Review.

The Cogdells appealed the trial court’s ruling ejecting the Cogdell’s from the O’Ravez Family’s property and awarding a judgment in favor of the O’Ravez Family for the damages incurred at the trial court. Both the equitable order of ejectment and the attorney fee award are reviewed for abuse of discretion.

#### 1. Ejectment on Review.

Equity applications, like the decision to apply the remedy of ejectment here, are reviewed for an abuse of discretion.<sup>43</sup> Moreover, to trigger the *Arnold* exception, the encroacher must prove the *Arnold* elements by clear and convincing evidence.<sup>44</sup> “The trial court, not a reviewing court, determines whether evidence meets the clear, cogent and

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<sup>42</sup> *Shure v. Vermont (In re Sure-Snap)*, 983 F.2d 1015, 1018 (11th Cir. 1993).

<sup>43</sup> *Cogdell v. 1999 O’Ravez Family, LLC*, 153 Wn. App. 384, 390, 220 P.3d 1259 (2009).

<sup>44</sup> See *Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800 (1968); see also *Proctor v. Huntington*, 146 Wn. App. 836, 846, 192 P.3d 958 (2008), *affd*, 169 Wn.2d 491, 238 P.3d 1117 (2010), *cert. denied*, 131 S. Ct. 1700 (2011)).

convincing standard of persuasion.”<sup>45</sup> A trial court’s decision constitutes an abuse of discretion only if it is “manifestly unfair, unreasonable, or untenable.”<sup>46</sup>

2. Money Judgment Award on Review.

The money judgment award is comprised of surveying costs, land appraisal expense, and attorney fees. All but \$10,001.00 of the award, excluding interest, was determined by the trial court in 2007 and was *not* appealed. Therefore, the doctrine of res judicata bars review of that portion of the award. The remaining \$10,001.00 recently added to the damages incurred is comprised of attorneys’ fees which are reviewed for an abuse of discretion. A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons.<sup>47</sup> A trial court’s decision constitutes an abuse of discretion only if it is “manifestly unfair, unreasonable, or untenable.”<sup>48</sup>

Here the trial court’s ruling is not unreasonable or unfair and should be affirmed.

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<sup>45</sup>Proctor, 146 Wn. App. at 846.

<sup>46</sup>*Myers v. Boeing Co.*, 115 Wn.2d 123, 128, 794 P.2d 1272 (1990).

<sup>47</sup>*Noble v. Safe Harbor Family Pres. Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009).

<sup>48</sup>*Myers v. Boeing Co.*, 115 Wn.2d 123, 128, 794 P.2d 1272 (1990).

**B. Cogdells' Attempt to Re-Argue Mutual Mistake is Barred by the Doctrines of Res Judicata and the Law of the Case**

In their brief, the Cogdells attempt to re-litigate the mutual mistake claim which was previously decided against them and which they failed to appeal.<sup>49</sup> The Cogdells make no attempt to hide their goal of re-trying the mutual mistake issue in this appeal. For example, at page 13 of Appellant's Brief they begin their legal analysis by stating that this is "not an encroachment case but rather one caused by a mistaken property line." Yet, the Cogdells litigated and lost their mutual mistake claim and they did not appeal. Consequently, the Cogdells' argument on appeal is barred by the doctrines of res judicata and the law of the case.

1. **The Doctrine of Res Judicata Bars Cogdells' Attempt to Re-Argue Mutual Mistake.**

Resurrecting the same claim in a subsequent action is barred by res judicata. Under the doctrine of res judicata, or claim preclusion, "a prior judgment will bar litigation of a subsequent claim if the prior judgment has 'a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of

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<sup>49</sup> *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn. App. at 391 ("The trial court rejected the Cogdells' various theories seeking to avoid responsibility for the encroachment. The Cogdells did not cross-appeal.")

the persons for or against whom the claim is made.”<sup>50</sup> Here, the Cogdells are attempting to resurrect their claim to reform the deed due to a mutual mistake. But all the elements of res judicata are present. The subject matter, cause of action, parties, and the quality of the claim are precisely the same today as they were back in 2007 when the case was tried. The Cogdells litigated that issue and lost. They did not appeal the ruling. They cannot and should not be allowed to re-litigate that issue here. Instead, the doctrine of res judicata bars it.

2. The Law of the Case Bars the Cogdells From Re-Litigating The Mutual Mistake Claim

In Appellant’s Brief, the Cogdells correctly set forth the law of the case doctrine, which “stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.”<sup>51</sup> Here, the law of the case includes this Court’s ruling that “[t]he trial court rejected the Cogdells’ various theories seeking to avoid responsibility for the encroachment. The Cogdells did not cross-appeal.”<sup>52</sup> Because in “all of its various formulations the doctrine seeks to promote finality and efficiency in the judicial process” the law of the case should be applied here to

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<sup>50</sup> *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 737-738, 222 P.3d 791, 798 (2009); *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 791-792, 193 P.3d 1077, 1089 (2008).

<sup>51</sup> *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005).

<sup>52</sup> *Cogdell v. 1999 O’Ravez Family, LLC*, 153 Wn. App. 391.

prevent the Cogdells from seeking to avoid responsibility for the encroachment.

**C. The Trial Court’s Decision Ordering Ejectment Should be Affirmed**

“Ordinarily, even though it is extraordinary relief, a mandatory injunction will issue to compel the removal of an encroaching structure.”<sup>53</sup>

Yet, an injunction is not issued as a matter of course, rather the trial court must “reason through the *Arnold* elements as part of its duty to achieve fairness between the parties.”<sup>54</sup> Consequently, an encroaching party can avoid ejectment if it proves the following:

- it did not simply take a calculated risk, act in bad faith, or negligently, willfully, or indifferently select the location of the encroaching improvements;
- both the damage to the landowner and the benefit of removal are slight;
- ample room remains on the property, and the encroaching improvements do not limit the property’s future use;
- it is impractical to move the structure as built; and

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<sup>53</sup> *Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800 (1968), aff’d, 169 Wn.2d 491, 238 P.3d 1117 (2010), cert. denied, 131 S. Ct. 1700 (2011).

<sup>54</sup> *Proctor v. Huntington*, 169 Wn.2d 491, 502-3, 238 P.3d 1117 (2010), cert. denied, 131 S. Ct. 1700 (2011).

- there is an “enormous disparity” in hardship between the parties (collectively “the *Arnold* factors”).<sup>55</sup>

The encroaching party must prove all of these elements and must do so with clear and convincing evidence.<sup>56</sup>

Indisputably, the Cogdells failed to satisfy each of the *Arnold* elements with clear and convincing evidence. The original trial court’s findings of fact and conclusions of law do not support the factors necessary to escape the ordinary remedy of ejection. Plus, despite nearly a year passing between this Court’s original ruling on appeal and the final judgment by the trial court in this case, the Cogdells offered nothing further to support triggering the *Arnold* factors. Consequently, after reasoning through the *Arnold* factors the trial court correctly determined that they had not been met. The trial court is in the best position to apply these factors having heard and ruled upon various motions in this case, including a motion for summary judgment, presided over the trial, heard the post-trial motion on the easement remedy brought by the Cogdells, and presiding over multiple post-appeal hearings. Moreover, “the trial court,

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<sup>55</sup>*Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800 (1968).

<sup>56</sup>*Id.*

not a reviewing court, determines whether evidence meets the clear, cogent and convincing standard of persuasion.”<sup>57</sup>

Briefly reviewing the *Arnold* factors here reveals that the trial court’s ruling was not untenable and should be affirmed.

First, the trial court’s 2007 findings of fact and its more recent findings establish that the Cogdells took a calculated risk when deciding where to construct their improvements.<sup>58</sup> They plainly could have conducted a survey prior to commencing construction but they did not. They could have built well within their 20-acres to eliminate the risk of being wrong by cavalierly building close to the purported boundary. Instead, the Cogdells built without regard to the property line and, thereby assumed the risk that their improvements might be located on O’Ravez Family’s property.

Moreover, the appraiser testified at the trial that the “prime building site on the whole 20 [acre parcel] is exactly where this particular house is built.”<sup>59</sup> Thus, it can be fairly argued that when locating the

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<sup>57</sup> *Proctor v. Huntington*, 146 Wn. App. 836, 846, 192 P.3d 958 (2008), aff’d, 169 Wn.2d 491, 238 P.3d 1117 (2010), cert. denied, 131 S. Ct. 1700 (2011)).

<sup>58</sup> See CP 363-378: Finding of Fact XXV (“Cogdells did not obtain a survey at the time of the construction of the residence. . . Cogdells assumed that they were building the improvements on property that they owned. O’Ravez did not know where the property lines were located. He asked Cogdells to join in a survey to locate the boundary lines. Cogdells refused to do so.”); see also CP 66-70 Judgment Awarding Damages and Ejectment.

<sup>59</sup> RP date November 8, 2007, P. 39.

improvement the Cogdells were more interested in the “prime” building site and cavalier or indifferent in their consideration of the boundary line. Regardless, the Cogdells have failed to satisfy this *Arnold* factor. Their failure to satisfy this factor alone renders the *Arnold* exception entirely inapplicable in this case as the Cogdells have **not** satisfied all of the *Arnold* factors with clear and convincing evidence.

Second, the damage to O’Ravez Family certainly is not slight and the benefit of removal is not small. The Cogdells constructed their entire residence on the Property, effectively preventing the O’Ravez Family from any significant use of the property. As mentioned above, the encroachment also deprived the O’Ravez Family of the “prime” building site on the property. The encroachment made building on the remaining portion of the O’Ravez Property difficult or impossible.<sup>60</sup>

The Cogdells have the burden of proof on this issue and offered nothing but argument regarding the O’Ravez Family’s limited use. Yet it is the very encroachment at issue that limits the O’Ravez Family’s use—due to zoning and the limited-view or non-existent-view sites remaining—and creates the animosity in this dispute. Removal of the encroachment would, therefore, be of great value. Remember also Mr. O’Ravez testified that while he was not so interested in boundaries, he was seeking a “nice

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<sup>60</sup>See RP date November 8, 2007, P. 28 at l. 25 – P.31, l. 8.

building site, a view site.”<sup>61</sup> Thus, it is not difficult to understand that the O’Ravez Family’s use of the land is negatively impacted by the Cogdells building on the land that they sold to them.

Third, the Cogdells failed to show that there was ample remaining room for a structure suitable for the area and, thus, no real limitation on the property’s future use. Again, the trial court’s original findings do not support the Cogdells and the Cogdells failed to offer anything new. While offering no additional evidence was suitable in the *Proctor v Huntington* case, it worked for the Huntingtons because Mr. Proctor already built his home elsewhere on his property. That same approach cannot work here because the Cogdells’ encroachment severely and negatively impacts the use of the remaining O’Ravez Family land.

Furthermore, the facts beyond the findings do not weigh in Cogdells’ favor. The encroachment made building on the remaining portion of the O’Ravez Property difficult or impossible.<sup>62</sup> Plus, the Cogdells’ used what the appraiser stated was the prime building site.

To trigger the *Arnold* forced sale exception, the Cogdells should have attempted to show that the O’Ravez Family retained an equally desirable building site as the one the Cogdells are attempting to take. The

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<sup>61</sup> Excerpt RP dated November 8, 13, 30, 2007, Volume 2, P. 205 l. 25 – p. 206 l. 2.

<sup>62</sup> See RP date November 8, 2007, P. 28 at l. 25 – P.31, l. 8.

Cogdells should have also shown that applicable zoning laws would allow suitable improvements on the O’Ravez Family’s remaining land. Yet, they did not do this. The Cogdells, therefore, have not carried their burden and have not established the third *Arnold* factor.

The fourth *Arnold* factor addresses the practicality of moving the structure as built. Again, the Cogdells have the burden and trial court’s original findings do not support a ruling in their favor. And although they had a year from the original Court of Appeal ruling, they offer nothing further on this issue other than to ask this Court to take judicial notice that the cost to move the house would be substantial. Judicial notice is allowed where the fact is “not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the ... court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”<sup>63</sup> The cost of relocating the house a short distance is subjective and not properly a topic for judicial notice. Moreover, because the Cogdells have failed to present evidence, the relative cost within this case is unknown.

Finally, to the extent that there is any disparity of hardships between the parties, it is the O’Ravez Family who has and will continue to suffer the greatest hardship. As an initial matter, it is the Cogdells who

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<sup>63</sup> ER 201(b).

have both the benefit of the O’Ravez Family’s money from the sale transaction and are occupying the land without any consideration in return to the O’Ravez Family. The Cogdells are reaping a windfall.

Additionally, the O’Ravez Family has continuously offered to do equity and has exhausted every conceivable option. The Cogdells have steadfastly refused all of the O’Ravez Family’s attempts to do equity and have left the O’Ravez Family with no choice but to incur attorneys’ fees in connection with the trial, a successful appeal, post appeal hearing, and now a second appeal—all after being denied full use and enjoyment of their property for more than six years. As the trial court and this Court of Appeals have noted, the O’Ravez Family has consistently and repeatedly sought to do equity by asking the Cogdells to join in a survey to locate the boundary lines, offering to purchase the Cogdells’ improvements,<sup>64</sup> and offering to convey title to the portion of the property on which the improvements are located in exchange for a portion of the Cogdells’ property.<sup>65</sup>

The Cogdells’ argument that the O’Ravez Family’s generous offers to resolve this matter should not be considered when weighing the application of the *Arnold* factors is mean-spirited, disingenuous, and

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<sup>64</sup> CP376, Finding of Fact XXXIII.

<sup>65</sup> *Id.*; see also *Cogdell*, 153 Wn. App. at 387-88.

cannot be sustained because of the doctrines of res judicata and the law of the case. As reflected in Appellant's Brief at p. 32, both parties—the O'Ravez Family and the Cogdells—were allowed to present their settlement offers. But after hearing days of testimony, prior motions, and weighing all the evidence, the trial court determined that it was the O'Ravez Family who was being fair and seeking to do equity with the solutions they proposed.

Moreover, the doctrine of res judicata bars the re-litigation of the same issue between the same parties once it has been decided. The O'Ravez Family's offers are included in the trial court's original findings. The Cogdells did not appeal.

Likewise, the O'Ravez Family's offers are included in this Court's prior ruling and are the law of the case.

Any hardship to the Cogdells could have been easily prevented or remedied if not for the Cogdells' refusal to undertake due diligence before constructing their improvements and their continued unwillingness to do equity.

The trial court correctly concluded that the Cogdells have not satisfied the *Arnold* factors. There is ample evidence to support the trial court's decision. Moreover, the Court should decline to consider any ejectment alternatives at this juncture due to the Cogdells' unwillingness

to do equity. Consequently, ejectment remains the only remaining “meaningful relief for the encroachment.”<sup>66</sup>

**D. The Trial Court’s Money Judgment Should Be Affirmed.**

Following the bench trial in this case, the trial court correctly found that the Cogdells breached the following statutory warranties against defects in title: of seisin, of good right to convey, against encumbrances, for quiet enjoyment, and to defend.<sup>67</sup> As a proximate result of such breaches, the O’Ravez Family suffered the following damages: RFK land surveying: \$3,500.00; land appraisal: \$2,000.00; and attorney’s fees: \$35,000.00.<sup>68</sup> These Findings were not appealed. Hence, the doctrine of res judicata applies. Only the \$10,001.00 awarded recently can be subject to review now. And while reviewable, the trial court’s decision should be affirmed.

In 2007, the trial court determined that although the O’Ravez Family suffered damages due to the Cogdells’ breaches, they could not be awarded “[b]ecause of Plaintiff’s bankruptcy, Defendant is not entitled to a money judgment.”<sup>69</sup> The Court of Appeals reversed the trial court on

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<sup>66</sup> *Cogdell*, 153 Wn. App. at 393.

<sup>67</sup> Finding of Fact XXX, XXXII ( The O’Ravez Family also suffered damages in the form of reduced land value, but in light of the ejectment order—those damages were not included by the trial court in the damages awarded nor requested by the O’Ravez Family.)

<sup>68</sup> CP375, Finding of Fact XXXII.

<sup>69</sup> CP376-7, Conclusion of Law 4.

this issue and held that “[c]onsidering the bankruptcy court lifted its automatic stay to allow a final judgment and now both parties criticize the trial court's easement grant, **we decide the trial court erred in not considering damages** and ejectment or a forced sale of the disputed property.”<sup>70</sup> Consequently, the law of the case doctrine defeats the Cogdells’ argument that damages should not be awarded.<sup>71</sup>

In addition, where a debtor returns to the fray of litigation post-bankruptcy, as the Cogdells did by *initiating* the lawsuit in an attempt to take land from the O’Ravez Family, they are liable for that post-bankruptcy act.<sup>72</sup> This logical and well-established legal principle is based on the ground that “[b]ankruptcy was intended to protect the debtor from the continuing costs of pre-bankruptcy acts **but not to insulate the debtor from the costs of post-bankruptcy acts.**”<sup>73</sup>

Here, all the damages awarded to the O’Ravez Family arose from the Cogdells’ post-bankruptcy decision to initiate litigation seeking to take property from O’Ravez Family post-bankruptcy. The O’Ravez Family had no choice but to defend the litigation. Consequently, well established

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<sup>70</sup> *Cogdell v. 1999 O’Ravez Family, LLC*, 153 Wn. App. at 393 (emphasis added).

<sup>71</sup> *Roberson v. Perez*, 156 Wn.2d at 39 (“[O]nce there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.”)

<sup>72</sup> *Siegal v. Federal Home Loan Mortgage Corp.*, 143 F.3d 525, 533 (9th Cir. 1998).

<sup>73</sup> *Shure v. Vermont (In re Sure-Snap)*, 983 F.2d 1015, 1018 (11th Cir. 1993) (emphasis added).

bankruptcy principles, in addition to the doctrines of res judicata and the law case, require affirmation of the trial court's money judgment.

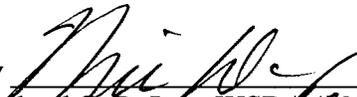
## VII. CONCLUSION

The unchallenged facts in this case include the Cogdells building their entire home on the O'Ravez Family's land. The O'Ravez Family obtained title to the land via statutory warranty deed when it purchased the property from the Cogdells. Thus, although the Cogdells received payment from the O'Ravez Family for the land, the Cogdells constructed their entire home on the land they sold. In constructing their home on this large rural land, the Cogdells took no steps whatsoever to ensure that they were building on the correct property. Consequently, the Cogdells have not and cannot trigger the *Arnold* factors, and the remedy of ejectment is appropriate and should be sustained.

Likewise, the money judgment awarding the O'Ravez Family damages in the form of attorney fees and costs incurred as a result of the litigation commenced by the Cogdells should also be sustained. Because of the application of the doctrine of res judicata only \$10,001.00 is subject to review on appeal. Those damages in the form of fees were incurred solely due to the Cogdells post-bankruptcy decision to initiate this litigation. Thus, the award, was proper, reasonable, made on tenable grounds, and should be affirmed.

Respectfully submitted this 20<sup>th</sup> day of July, 2011.

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