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OF THE STATE OF WASHINGTON

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NOEL PROCTOR,

Appellant/Cross-Respondent,

v.

ROBERT "FORD" HUNTINGTON and CHRISTINA HUNTINGTON,  
husband and wife, and the marital community therein,

Respondents.

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COMBINED REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT  
NOEL PROCTOR

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A. INTRODUCTION

Appellant Noel Proctor (Proctor) and respondents Robert “Ford” and Christina Huntington (collectively the Huntingtons)<sup>1</sup> own adjoining tracts of land in Skamania County, Washington. The Huntingtons built a house and certain other improvements, including a well and a garage (collectively referred to as “the house”), on what they thought was their property. Their house is actually located on a 1-acre triangular strip of forest land (the disputed parcel) owned of record by Proctor, which forms the northeastern portion of Proctor’s property and borders the Huntingtons’ northwest boundary line. The Huntingtons did not survey their property before locating and building their home.

On February 16, 2005, Proctor filed an action to eject the Huntingtons from and to quiet title to the disputed parcel and to remove their encroachments. The Huntingtons counterclaimed to quiet title in approximately 6.17 acres of Proctor’s property through adverse possession or estoppel in pais (estoppel by conduct). They also sought a permanent easement over Proctor’s property for their private driveway.

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<sup>1</sup> The Huntingtons will be referred to by their first names when necessary for clarity and ease of reading; no disrespect is intended.

In a judgment filed on March 1, 2007, the trial court denied Proctor's request for a mandatory injunction. Despite rejecting the Huntingtons' defenses and counterclaims and finding the Huntingtons' house is located entirely on Proctor's property, the trial court declared the Huntingtons to be the legal owners of the disputed parcel and ordered the parties' boundary line adjusted. To accomplish the boundary line adjustment, the court ordered Proctor to convey the disputed parcel to the Huntingtons in exchange for their payment of \$25,000. The court also ordered the Huntingtons to cease using any portion of Proctor's property for their driveway.

Nothing in the Huntingtons' brief should dissuade this Court from reversing and remanding to the trial court with directions to modify the judgment by issuing an injunction ejecting the Huntingtons and their home from Proctor's property. The Court should affirm the judgment in all other respects by denying the Huntingtons' attempt to seize additional property from Proctor and by dismissing their efforts to create a permanent easement when only a revocable license was granted. Costs on appeal should be awarded to Proctor.

B.     RESTATEMENT OF THE ISSUES PERTAINING TO THE  
          HUNTINGTONS' ASSIGNMENTS OF ERROR ON  
          CROSS-REVIEW

Proctor acknowledges the Huntingtons' assignments of error on cross-review. He believes, however, the issues pertaining to those assignments of error are more appropriately formulated as follows:

(1) Did the trial court correctly reject the neighbors' attempts to seize a larger portion of the landowner's property through estoppel in pais where they failed to prove their claim by clear, cogent, and convincing evidence?

(2) Did the trial court correctly determine the landowner did not grant a permanent easement over his driveway to his neighbors where their use of his property was permissive, not necessary, and he consistently refused to sign a written agreement granting such an easement?

C. RESPONSE TO THE HUNTINGTONS' COUNTER STATEMENT OF THE CASE

As an initial matter, the Huntingtons cite several times to their proposed findings of fact and conclusions of law to support their factual assertions. Br. of Resp'ts at 7. *Proposed* findings do not support the Huntingtons' factual statements. More importantly, they misstate the trial court's *actual* findings when doing so. *Id.* The Court should disregard the Huntingtons' citations to proposed findings of fact.

Proctor and the Huntingtons agree on the most important fact of this case: the Huntingtons' home and other improvements are all located on Proctor's property. Br. of Appellant at 10; Br. of Resp'ts 13. But the Huntingtons then proceed to omit several key facts from their counter statement of the case.

For example, the Huntingtons overlook the fact that their statutory warranty deed does not reference the 1/16th pin, nor does it bear any relation to the true boundary line between the properties. RP 428, 517, 680; Ex. 63. They then attempt to down-play the significance of their failure to have their property professionally surveyed before they began constructing their home; they focus instead on the survey work Dennis Peoples (Peoples) did for the developer, Dusty Moss (Moss). Br. of Resp'ts at 7. In doing so, they ignore Peoples' testimony that the 1/16th pin was meant to be a point along the northern line of the properties. RP 428, 524. It was not set for subdivision purposes. RP 517-18. Although Peoples set the initial outline for Moss' subdivision, he did not map the individual subdivisions until the respective parcels were sold. RP 421-23. They also fail to mention that Dan Webberly (Webberly) specifically asked whether Ford had the property surveyed. RP 323.

As another example, Ford admits he purchased the property believing the 1/16th pin was the true boundary as shown to him by Moss;

however, the Huntingtons ignore the implications of that admission. Br. of Resp'ts at 7. By admitting Ford purchased the property believing the 1/16th pin was his boundary, the Huntingtons acknowledged they already believed the disputed parcel belonged to them by the time they met Proctor. Moreover, even if Proctor and Ford had met at the 1/16th pin as Ford contends they did, br. of resp'ts at 10, they had already cleared their proposed homesite of brush. Br. of Resp'ts at 11; RP 83-84; CP 226. That the Huntingtons had already begun constructing their home by the time Ford's alleged meeting with Proctor took place is evidence that they did not rely on Proctor's statements in locating their home on his property.

The Huntingtons then ignore the manner in which Peoples customarily sets corners during a survey. Br. of Resp'ts at 7; *but see* Br. of Appellant at 8, 10. They also ignore testimony from Richard Bell (Bell) that the 1/16th pin was well-marked and identified as a 1/16th pin and not the boundary marker when he surveyed Proctor's property in 2004. RP 639, 649.

The statement of facts offered by Proctor is the more appropriate presentation of the facts and should be the statement relied upon by this Court.

#### D. ARGUMENT IN SUPPORT OF REPLY

##### (1) Standard of Review

The parties do not dispute the appropriate standard of review in this case. They agree this Court reviews the trial court's findings of fact to determine whether they are supported by substantial evidence and, if so, whether those findings support the trial court's conclusions. Br. of Appellant at 16-17; Br. of Resp'ts at 16-17. They also agree the granting or withholding of an injunction is addressed to the sound discretion of the trial court. Br. of Appellant at 17; Br. of Resp'ts at 17.

(2) The Trial Court Erred By Refusing to Issue a Mandatory Injunction and By Requiring Proctor to Sell a Portion of His Land to the Huntingtons to Accommodate Their Encroachments

The trial court denied Proctor's petition for a permanent injunction ejecting the Huntingtons from and barring their encroachments on his property, concluding the equities favored quieting title to the disputed parcel in the Huntingtons. CP 244-45. The court then ordered Proctor to sell the disputed parcel to the Huntingtons for \$25,000 to accommodate their encroachments. *Id.*

The Huntingtons admit they built their house on Proctor's property. Br. of Resp'ts at 20-21. They also concede that a mandatory injunction is the proper remedy for a landowner against an adjoining landowner to compel the removal of an encroachment. *Id.* at 19. In doing so, they tacitly agree that Proctor is entitled to an injunction requiring

them to remove their encroachments from his property. *Id.* at 19-21. However, they argue the equities dictate the outcome and require the trial court to deny the injunction. *Id.* at 21. Given the Huntingtons' admissions, the issue before this Court is whether the trial court should have applied the balancing doctrine at all and, if so, whether the trial court appropriately ordered a forced sale of Proctor's property against his wishes and his ownership right.

The Huntingtons argue the trial court correctly fashioned an equitable remedy in denying Proctor's request for an injunction and analogize this case to *Arnold v. Melani*, 75 Wn.2d 143, 449 P.2d 800 (1968). Br. of Resp'ts at 21-22. Their reliance on *Arnold* is misplaced because of a significant factual distinction they fail to address; namely, the remedy imposed by the trial court after balancing the equities and denying the mandatory injunction.

In *Arnold*, the Arnolds' fence and their home encroached onto the Melanis' lot. 75 Wn.2d at 145. The Arnolds brought a quiet title action against the Melanis, who cross-claimed for a mandatory injunction requiring the removal of the Arnolds' encroachments. The trial court denied the Melanis' request for an injunction after determining the value of the lots and finding the cost of removing the encroachments would far exceed the value of the Melanis' property. *Id.* at 146. The court further

found that requiring the Arnolds to remove the encroachments would be inequitable and unjust. *Id.* To remedy the situation, the trial court granted the Arnolds an easement over the Melanis' property to maintain the existing encroachments as long as they continued to exist. *Id.* at 146. On appeal, the Supreme Court modified the judgment by limiting the Arnolds' easement over the Melanis' property to the area covered by the encroachments and by requiring that any replacements be made within the true boundary line. *Id.* at 153. Importantly, neither the trial court nor the Supreme Court forced the Melanis to sell the property containing the Arnolds' improvements to the Arnolds. *Legal title to the disputed property remained with the true owners, the Melanis.*

In contrast, the trial court here entered an order forcing Proctor to convey a portion of his property to the Huntingtons to accommodate their encroachments on his property. Unlike the remedy in *Arnold*, the trial court here transferred legal title of the disputed parcel from Proctor to the Huntingtons. CP 235. In effect, the trial court's remedy rewarded the Huntingtons for failing to adequately ascertain the boundaries of their property before building their home by requiring Proctor to involuntarily convey a portion of his property to them. There is nothing equitable about such a remedy, as it is in derogation of Proctor's ownership right; it is inconsistent with *Arnold*.

The Huntingtons next claim Proctor is attempting resurrect arguments addressed and expressly rejected in *Arnold*. Br. of Resp'ts at 23, 26-27. What they fail to recognize is that the Supreme Court has never explicitly overruled the previous encroachment decisions analyzed in *Arnold*. 75 Wn.2d. at 149-50, 152. Accordingly, *Adamec v. McCray*, 63 Wn.2d 217, 220, 386 P.2d 427 (1963); *Tyree v. Gosa*, 11 Wn.2d 572, 119 P.2d 926 (1941); and *Wells v. Parks*, 148 Wash. 328, 333, 268 P. 889 (1928), *overruled on other grounds*, *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984), remain good law. Moreover, a close look at the cases in Washington and elsewhere reveals that the courts have looked to the equities only after determining the encroachments were so slight as to render damages easily compensable. Br. of Appellant at 25-26.

The Huntingtons then argue the cases Proctor cites at 21-24 are legally and factually distinguishable from this one. Br. of Resp'ts at 24-27. The Huntingtons miss the point of those cases and fail to consider the nature of the encroachments there at issue. Proctor refers to *Wimberly v. Caravello*, 136 Wn. App. 327, 149 P.3d 402 (2006) (granting mandatory injunction) and *Steele v. Queen City Broadcasting Co.*, 54 Wn.2d 402, 341 P.2d 499 (1959) (denying mandatory injunction) to highlight for the Court that Washington courts have historically approved a balancing of the equities to both grant and deny mandatory

injunctions where there has been no physical encroachment onto the landowner's property. Br. of Appellant at 21-23. Moreover, *Steele* is an example of a case where the Supreme Court affirmed the denial of a mandatory injunction because the landowners could be adequately compensated by money damages for a nuisance not physically encroaching on their properties.

The Huntingtons similarly miss the point of Proctor's references to *Adamec* and *Wells*. Br. of Resp'ts at 26-27. Proctor does not argue those cases were decided based on the size and/or scope of the encroachments. Br. of Appellant at 23-25. Rather, the size of the physical encroachments was relevant to the extent it determined whether the courts would apply the balancing doctrine. *Id.* For example, the *Wells* court affirmed an order granting a mandatory injunction without balancing the equities after concluding the doctrine had no application to that case because the establishment of an irregular side boundary for a city lot was a significant matter and not a "trifling" one. 148 Wash. at 332. Likewise, the *Adamec* court affirmed an order granting a mandatory injunction without balancing the equities after finding the facts necessary for the doctrine to apply were not present where the encroachment was more than "slight." 63 Wn.2d at 219-20 (citing Am.Jur., *Injunctions*, § 53). In contrast, the Court of Appeals balanced the negligible impact of a barn against the likely

prohibitive costs of moving it and rejected a mandatory injunction where the barn encroached only *one foot*. See *Hanson v. Estell*, 100 Wn. App. 281, 997 P.2d 426 (2000).

The Huntingtons attempt to distinguish the cases Proctor cites by claiming their encroachments on Proctor's property are minimal where the encroachments comprise, according to them, less than three percent of his total property. Br. of Resp'ts at 30. Yet they fail to consider that Proctor's ability to develop his property is tied to the number of undeveloped acres he must maintain to preserve the classification of his property as designated forest lands and to continue receiving the accompanying tax benefit of owning such land. CP 28-29; RP 718-21. A portion of Proctor's property was already reclassified when he constructed his own home on his property. Forcing Proctor to sell his property to the Huntingtons to accommodate their encroachments will affect Proctor's future development plans because he will be unable to develop as much of his property as he might otherwise have intended. See CP 161; RP 717. The trial court thus erred in finding no real limitation on Proctor's use of his property.

Even assuming the Huntingtons are entitled to invoke the benefit of the balancing of the equities doctrine, they cannot satisfy all five factors of the test enunciated in *Arnold* to defeat issuance of the mandatory

injunction. Br. of Appellant at 31. They cannot satisfy factors one, two, and five. *Id.*

The Huntingtons cannot satisfy the first *Arnold* factor because they took a calculated risk or acted negligently or indifferently when locating their home because they did not have the property surveyed before they began building. *See Warsaw v. Chicago Metallic Ceilings, Inc.*, 35 Cal.3d 564, 573, 676 P.2d 584, 199 (Cal. 1984) (holding a defendant does not act in good faith by gambling on the outcome of a legal action and losing, whether or not that gamble may have appeared reasonable at the time). *See also, Christensen v. Tucker*, 250 P.2d 660, 666 (Cal. App. 1952) (suggesting that where a defendant builds his encroachments on the plaintiff's land without making a survey of his own and simply relies on the statements of another, he will be barred from invoking the doctrine because his conduct is negligent).

Although Webberly asked several about the placement of their driveway, the Huntingtons failed to provide any survey upon which they relied in placing their encroaching structures. RP 323. More importantly, Ford seemed indifferent about any potential impact on Proctor's property if the home or driveway were not located in the correct location at the outset. *See* RP 324.

The Huntingtons attempt to excuse their negligence by claiming they confirmed the location of the boundary with both Peoples and Proctor before building their home. Br. of Resp'ts at 31. First, they misstate the trial court's findings because the trial court did not find that Proctor "confirmed the location of the boundary" with Ford. *Id.* Instead, Ford told Proctor that Peoples had told him that the 1/16th pin was his northwest corner. Proctor did not offer any protest to the accuracy of the pin. CP 226. Such a finding does not equate with a finding that Proctor confirmed the pin was the true boundary line between the properties.

Second, the Huntingtons ignore evidence that shows they began to build their home before establishing their property boundaries because they *admit they had already cleared their proposed homesite of brush* at the time Ford's alleged meetings with Proctor or Peoples even took place. Br. of Resp'ts at 11; RP 83-84, 501, 507; CP 226. They also ignore Peoples' testimony that he did not perform a profession survey during his impromptu meeting with Ford. RP 511. Rather than conduct a costly legal survey, the Huntingtons instead claim they attempted to ascertain the precise location of their boundary line by carrying on an informal, 15-minute conversation with Peoples. Even if the conversation occurred as the Huntingtons allege, a 15-minute conversation is hardly a true legal survey.

The Huntingtons' conduct demonstrates an intentional and willful intrusion upon Proctor's property. They failed to take proper precautions to ascertain their boundaries before beginning construction of their home. Yet the trial court declined to find that the Huntingtons' encroachments reached the level of negligence. This was error.

The Huntingtons also cannot satisfy the second *Arnold* factor because the damage to Proctor is not slight nor is the benefit of removal equally small. Contrary to the Huntingtons' assertions, br. of resp'ts at 34-35, awarding title to the disputed parcel to the Huntingtons will endanger Proctor's participation in the forest management program. CP 28-29; RP 717, 721. Losing the one acre will reduce the land Proctor has available for future development or subdivision because he must maintain a certain number of acres to maintain the forest land designation and to receive the resulting tax benefits. The forest designation is further jeopardized because he now has two residences on his property. CP 161. He also testified he will lose income from the trees grown on the property and processed through his saw mill. RP 716-17.

Similarly, there is substantial evidence Proctor will lose a great portion of his view and full enjoyment of his property in the absence of injunctive relief. RP 518-19. Proctor's home and view are unique commodities that cannot be replaced with money. He is entitled to ask the

courts to restore what he had before the Huntingtons encroached on his property. *See Foster v. Nehls*, 15 Wn. App. 749, 551 P.2d 768 (1976), *review denied*, 88 Wn.2d 1001 (1977) (land is considered a unique commodity which cannot be adequately replaced by money; equity should intervene to restore land to the full enjoyment of the rightful owner). The trial court therefore erred in finding money damages an adequate remedy in this case.

Finally, the Huntingtons cannot satisfy the fifth *Arnold* factor because there is no disparity in the resulting hardships. It is ironic that the Huntingtons' claim they will suffer a significant emotional hardship if they are forced to say "goodbye to an area that they worked so hard for the last ten years to call home" yet discount Proctor's efforts to outline his own emotional hardships if he is forced to sell his property to them. Br. of Resp'ts at 34, 36; Br. of Appellant at 33-34; RP 602.

Any disparity in the resulting hardships would have been removed had the Huntingtons counterclaimed for an offset for the value of their house and the taxes paid as permitted by RCW 7.28.160 and .170. Yet the Huntingtons argue they specifically chose not seek an offset because they did not believe the trial court should order them to move their home. Br. of Resp'ts at 37 n.9. Their argument begs the question and is further proof of their indifference. Although they did not request the offset, they

argued their resulting financial hardships precluded issuance of the injunction. Had they made the appropriate claim for an offset, there would be no financial disparity because they would have been entitled to recover the value of their improvements and the amount of such taxes or assessments paid. They should not now be allowed to hide behind the value of their home or the costs to move it to excuse their conduct and to avoid corrective action where they affirmatively chose not to seek the offset.

The Huntingtons' encroachments are substantial, permanent and continuing, in gross violation of Proctor's right to the free and unencumbered use of his property. Even if a balancing of the equities was appropriate, the Huntingtons' encroachments are more than *de minimis* where Proctor's use of his property is restricted, the amount of land involved is 1-acre covering encroachments of 400-500 square feet, and the result of the encroachments is the economic enrichment of the Huntingtons at Proctor's expense. *See Renaissance Dev. Corp. v. Univ. Props. Group, Inc.*, 821 A.2d 233 (R.I. 2003) (reversing order denying mandatory injunction where defendant's encroachment was 250 square feet and restricted plaintiff's access to the back portion of his lot). Consequently, the trial court erred in failing to issue the mandatory injunction.

E. ARGUMENT IN RESPONSE TO THE HUNTINGTONS' CROSS-APPEAL

Despite rejecting the Huntingtons' defenses and counterclaims and finding the Huntingtons' house is entirely on Proctor's property, the trial court declared the Huntingtons to be the legal owners of the disputed parcel and ordered the parties' boundary line adjusted accordingly. CP 245. The court also ordered the Huntingtons to cease using any portion of Proctor's property for their private driveway.

Not satisfied with legal title to only the 1-acre granted to them by the trial court, the Huntingtons cross-appeal in an attempt to seize additional land from Proctor. This Court should reject the Huntingtons' attempt to snatch additional land from Proctor where they failed to prove their claim to the additional 5.17 acres by clear and convincing evidence. Additionally, the Court should refuse to reverse the trial court's judgment to the extent it requires the Huntingtons to cease using a portion of Proctor's property for their driveway because Proctor did not grant them a permanent easement over his driveway. Their use of his property for their driveway was not necessary, it was permissive, and Proctor consistently refused to sign a written agreement granting them such an easement.

- (1) The Huntingtons Cannot Complain about the Adequacy of the Trial Court's Findings

The Huntingtons begin their cross-appeal by criticizing the trial court's findings of fact, or lack thereof, regarding their counterclaim of estoppel in pais. Br. of Resp'ts at 38, 42. Their complaints about the adequacy or lack of such findings are disingenuous and must fail.

First, counsel cannot set up an error at trial and then complain of it on appeal under the doctrine of invited error. *See, e.g., State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). This doctrine has been applied even in cases where the error resulted from neither negligence nor bad faith. *See, e.g., State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999). Moreover, the Court will deem an error waived if the party asserting such error materially contributed to it. *See Pam*, 101 Wn.2d at 511.

In this case, *the Huntingtons' counsel* drafted, signed, and presented the proposed findings of fact and conclusions of law which were ultimately entered by the trial court. CP 387-94; RP 937. That the findings fail to include the trial court's reasoning for its decision on the question of estoppel in pais is their own error, when the trial court addressed this issue in its oral ruling. RP 924-26. Moreover, their counsel had the opportunity to raise any issues about the adequacy of the trial

court's findings during the presentation hearing but declined to do so. RP 937-65. The Huntingtons invited any error and cannot now complain the failure was error. *See In re Breedlove*, 138 Wn.2d 298, 312-13, 979 P.2d 417 (1999).

Second, the lack of a finding on an issue is the equivalent of a negative finding against the person with the burden of proof. *Taplett v. Khela*, 60 Wn. App. 751, 760, 807 P.2d 885 (1991). Here, the Huntingtons had the burden of proving by clear, cogent, and convincing evidence that they were entitled to the disputed property through estoppel in pais. *See Thomas v. Harlan*, 27 Wn.2d 512, 518, 178 P.2d 965 (1947); *Tyree v. Gosa*, 11 Wn.2d 572, 578, 119 P.2d 926 (1941). Since the Huntingtons had the burden of proof on this issue, this Court must presume from the absence of findings in that regard that they failed to sustain their burden of proof.

Finally, although the Huntingtons contend the trial court needed to make findings regarding estoppel in pais, they did not advance this claim below. The Court should therefore refuse to review their claim of error under RAP 2.5(a).

- (2) The Trial Court Correctly Rejected the Huntingtons' Attempt to Quiet Title to an Additional 5.17 Acres of Proctor's Property

At trial, the Huntingtons requested an injunction quieting title to all of Proctor's property located "easterly of a line drawn from the 1/16th pin south to the southerly corner between the Proctor property and the Huntington property." CP 10. In essence, they requested the trial court quiet title to a total of 6.17 acres of Proctor's property through adverse possession or estoppel in pais (estoppel by conduct). The trial court dismissed their adverse possession claims. The trial court then declined to find Proctor acquiesced in the 1/16th pin as the parties' true boundary line and similarly declined to apply estoppel in pais to the Huntingtons' claim for an additional 5.17 acres of Proctor's property beyond the 1-acre parcel being conveyed to them.<sup>2</sup> CP 228-29; RP 925, 953. These factual findings are amply supported by the record.

Equitable estoppel is a rule of law which precludes a person from denying his own expressed or implied admission, which has in good faith, and in pursuance of its purpose, been accepted and acted upon by another. *See Thomas* at 518. It is a condition in which "justice forbids that one speak the truth in his own behalf." *Id.* Equitable estoppel is not favored and therefore requires a showing of clear, cogent, and convincing evidence by the asserting party. *Colonial Imports v. Carlton N.W., Inc.*, 121 Wn.2d 726, 734, 853 P.2d 913 (1993) (quoting *Robinson v. City of Seattle*, 119

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<sup>2</sup> The Huntingtons have abandoned their claim to title by adverse possession.

Wn.2d 34, 82, 830 P.2d 318, *cert. denied*, 506 U.S. 1028, 113 S. Ct. 676, 121 L.Ed.2d 598 (1992)). The Huntingtons have not met their burden.

The Huntingtons argue Proctor should be estopped to retain the additional 5.17 acres of his property they seek to acquire because his past statements, admissions or conduct are inconsistent with his current position and they relied upon and were damaged by those statements or conduct. Br. of Resp'ts at 39, 41. The evidence the Huntingtons rely upon to support their claim does not qualify as clear, cogent and convincing evidence of an admission or statement required for estoppel to apply.

Here, the Huntingtons claim Proctor saw them building their home and should have objected sooner to their actions. *Id.* They claim to have acted upon Proctor's silence. *Id.* at 41.<sup>3</sup> However, the facts at trial indicate otherwise. First, Ford admits he purchased the Huntingtons' property believing the 1/16th pin was the true boundary, as shown to him by Moss. RP 173; CP 225. Thus, by the time the Huntingtons met Proctor, they already believed the disputed parcel belonged to them. As the trial court correctly found, the Huntingtons relied upon Moss's general

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<sup>3</sup> The Huntingtons seem to suggest Proctor acquiesced in the 1/16th pin as the true boundary line. Br. of Resp'ts at 41. But the boundary could not have been fixed by acquiescence because the 10-year statute of limitations had not yet run when Proctor filed his lawsuit. RP 952. *See also, Thomas*, 27 Wn.2d at 518 (noting most courts have laid

indication of the property lines and Peoples' confirmation of the 1/16th pin as their northwest corner when they built their home. CP 225, 241.

Second, Proctor could not have misled them about their property boundary because he denied even seeing the 1/16th pin when he walked his property with Moss shortly before purchasing it. RP 605, 608; CP 111. He also steadfastly denied ever meeting with Ford at the 1/16th pin before the Huntingtons began constructing their home. Even if Proctor and Ford had met at the 1/16th pin as Ford contends they did, *the Huntingtons admit they had already cleared their proposed homesite of brush*. Br. of Resp'ts at 11; RP 83-84; CP 226. That the Huntingtons had already begun constructing their home by the time Ford's alleged meeting with Proctor took place is evidence that they did not rely on Proctor's statements in locating their home on his property.

Third, there is simply no evidence that a definite agreement to accept the 1/16th pin as the true boundary existed between Proctor and the Huntingtons when they began constructing their home on his property. *See Arnold, 75 Wn.2d at 147* (holding the elements of equitable estoppel had not been established where there was no evidence of an affirmative statement or act prior to the construction of the encroachment). *Contra*

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down the rule that the time required to elapse before a line is established by acquiescence is the time necessary to secure property by adverse possession).

*Burkey v. Baker*, 6 Wn. App. 243, 492 P.2d 563 (1971) (holding the defendant was equitably estopped to deny that common boundary line was a line of trees where plaintiff purchased, developed, and improved his property in reliance upon numerous affirmative statements by defendant that the boundary was along the line of trees, which conversations were overheard by third parties). That Proctor may have seen where the Huntingtons intended to build their home and stood by and said nothing is not enough. He took no affirmative action that could have led the Huntingtons to believe the 1/16th pin marked their common boundary. “[I]t would be a dubious proposition to say that one neighbor is estopped simply by saying or doing nothing[.]” 17 William B. Stoebuck and John W. Weaver, *Washington Practice Series*, Real Estate: Property Law § 8.23 (2nd ed. 2004). *See also, Thomas*, 27 Wn.2d at 519 (noting mere acquiescence in a boundary line’s existence is not sufficient to establish a claim of title to a disputed strip of land). Importantly, the Huntingtons had a copy of their recorded deed, which delineated their true property boundaries. The 1/16th pin is not identified in the legal description of their property nor does it bear any relation to the true boundary line of their property. RP 428, 517, 680. Proctor is not estopped to contest the Huntingtons’ claim to an additional 5.17 acres of his property when the Huntingtons had constructive notice of their true boundary line. *See*

*De Boe v. Prentice Packing & Storage Co.*, 172 Wash. 514, 520, 20 P.2d 1107 (1933) (recognizing the general rule that usually mere silence or acquiescence will not operate to work an estoppel where the other party has constructive notice of public records which disclose the true facts).

Finally, Proctor did not learn that the Huntingtons' house was on his property until he had his property surveyed in 2004. CP 135. Once he discovered the Huntingtons' house was on his property, he took prompt action. Where the Huntingtons could not have relied on any statement or conduct attributed to Proctor that the 1/16th pin was the boundary marker, Proctor was not estopped to insist upon the true boundary line.

The facts of this case demonstrate no evidence of an affirmative statement or act by Proctor on which the Huntingtons' detrimentally relied prior to their construction of their home on Proctor's property; thus, the elements of equitable estoppel have not been established. The trial court correctly declined to grant judgment in favor of the Huntingtons on the issue of estoppel in pais and this Court should therefore affirm.

(3) The Trial Court Correctly Determined Proctor Did Not Grant the Huntingtons a Permanent Easement Over His Property

In addition to trying to pilfer additional property beyond the disputed parcel conveyed by the trial court, the Huntingtons also tried to gain a permanent easement over Proctor's property for their private

driveway. The trial court declined to grant the easement, concluding the Huntingtons had a revocable license to use a portion of Proctor's property for their driveway and they had no right to continue to use his property for their driveway when Proctor withdrew such permission. CP 243. Contrary to the Huntingtons' assertions, br. of resp'ts at 42-47, they did not acquire an easement for their driveway through the doctrines of part performance or equitable estoppel.

1. License verses easement

Licenses and easements are distinct in principle. 25 Am.Jur.2d, *Easements and Licenses*, § 2 (2007). A license authorizes the doing of some act or series of acts on the land of another without passing an estate in the land and justifies the doing of an act or acts which would otherwise be a trespass." *Conaway v. Time Oil Co.*, 34 Wn.2d 884, 893, 210 P.2d 1012 (1949). Unlike an easement, a license is permissible and therefore revocable and nonassignable, and does not exclude possession by the owner of the servient estate. See *Bakke v. Columbia Valley Lumber Co.*, 49 Wn.2d 165, 170, 298 P.2d 849 (1956). A license is created by the consent of the licensor, whether that consent is in writing, is by parole, or is implied by acquiescence. *Conaway*, 34 Wn.2d at 894.

By contrast, an easement is a right, distinct from ownership, to use in some way the land of another, without compensation. See *City of*

*Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986) (quoting *Kutschinski v. Thompson*, 101 N.J. Eq. 649, 656, 138 A. 569 (1927)). It is subject to the provisions of RCW 64.04.010, which requires that conveyances be accomplished by deed. *See Ormiston v. Boast*, 68 Wn.2d 548, 550, 413 P.2d 969 (1966).<sup>4</sup>

Here, there is no recorded deed that complies with the requirements of RCW 64.04.010 conveying an easement to the Huntingtons; accordingly, no easement was created. Moreover, there was no easement where permission was granted by license. There is evidence that Proctor gave the Huntingtons an oral license to use a portion of his property to access their building site. The Huntingtons approached him for permission to use his property, which he granted; however, there is no evidence he intended to exclude himself from possession of his property. Moreover, the Huntingtons did not have to rely on Proctor's license to gain access to their property because they could use another road, not on Proctor's property, to access their house. CP 228. Nonetheless, the Huntingtons claim the doctrine of part performance operates to grant them an easement over Proctor's property. They are mistaken.

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<sup>4</sup> Under RCW 64.04.010, "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed . . ." Every deed "shall be in writing, signed by the party bound thereby, and acknowledged . . ." RCW 64.04.020.

2. The doctrine of part performance does not grant the Huntingtons an easement over Proctor's property

Under the doctrine of part performance, a conveyance can be taken out of the statute of frauds and specifically enforced if there is sufficient part performance. *See Miller v. McCamish*, 78 Wn.2d 821, 829, 479 P.2d 919 (1971). The first requirement of the doctrine of part performance is that the contract be proven by evidence that is *clear and unequivocal* and which leaves no doubt as to the terms, character, and existence of the contract. *See Granquist v. McKean*, 29 Wn.2d 440, 445, 187 P.2d 623 (1947) (citing cases). A mere preponderance of the evidence is not sufficient. *See id.*

There are three factors that are examined to determine if there has been part performance of the agreement so as to take it out of the statute of frauds:

- (1) delivery and assumption of actual and exclusive possession;
- (2) payment or tender of consideration; and
- (3) the making of permanent, substantial and valuable improvements, referable to the contract.

*Powers v. Hastings*, 93 Wn.2d 709, 717, 612 P.2d 371 (1980).<sup>5</sup> The crucial inquiry is whether the creation of the easement was in fact

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<sup>5</sup> The Huntingtons' reliance on *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 544 (1995), is misplaced. Br. of Resp'ts at 43. The *Berg* court did not reach the part performance issue and thus did not assess whether there was sufficient evidence of a contract under the clear and unequivocal evidence standard for specific performance of the contract. 125 Wn.2d at 571 n.2.

intended. *See Kirk v. Tomulty*, 66 Wn. App. 231, 237, 831 P.2d 792, review denied by 120 Wn.2d 1009 (1992).

Here, the evidence was not only sharply conflicting, but any evidence that was favorable to the Huntingtons was lacking in specific details as to duration and other terms of the contract. The conduct of the parties was consistent with the findings of the trial court that the arrangement for the Huntingtons' driveway was nothing more than a permissive use at the sufferance of each party involved, and that such situation never changed from its inception. *See Ormiston*, 68 Wn.2d at 550-51. As the Huntingtons later concede, their use of Proctor's property was permissive. Br. of Resp'ts at 47. Importantly, Proctor refused to sign a written easement provided to him by Ford.

The trial court did not err in determining that the Huntingtons' use of a portion of Proctor's property for their driveway was permissive; and certainly there is no basis for any finding that would take the claimed agreement out of the operation of the statute of frauds. The trial court correctly concluded there was no basis for the claim of an enforceable oral contract.

3. The Huntingtons did not acquire an easement by estoppel over Proctor's property

With little analysis, the Huntingtons next argue the trial court erred in finding they did not acquire an easement by estoppel. Br. of Resp'ts at 46-47. Like their claim for an easement through part performance, the Huntingtons' claim to an easement by estoppel also fails.

As an initial matter, no Washington case allows the creation of an easement by estoppel.<sup>6</sup> Although the Huntingtons cite to *Canterbury Shores Associates v. Lakeshore Props., Inc.*, 18 Wn. App. 825, 827, 572 P.2d 742 (1977), br. of resp'ts at 46 n.11, to support their request for an easement by estoppel, that case is inapplicable here. In that case, the dispute involved the encroachment of the plaintiffs' garage driveway over a relatively small portion of the defendant's land. *Canterbury*, 18 Wn. App. at 826. The plaintiffs asked the trial court to quiet title in them in the land utilized by the driveway. *Id.* at 827. The trial court rejected their claim for title but decreed a permanent easement, stating "the facts of this case cry out for some form of relief. And the law, . . . , has developed an easement by estoppel." The Court of Appeals affirmed on a different ground, holding the plaintiffs were entitled to specific performance of the

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<sup>6</sup> Washington recognizes three distinct judicial doctrines by which easements may arise by implication. 17 William B. Stoebeck and John W. Weaver, *Washington Practice Series*, Real Estate: Property Law § 2.4 (easements implied from prior use), § 2.4 (easements implied from necessity), § 2.6 (easements implied from plat) (2nd ed. 2004). However, the Huntingtons do not argue for their application.

defendant's agreement to grant to the plaintiffs an easement over the driveway. *Id.* at 830.

Nearly as important, the Court recognized that the trial court's remedy was based on the theory of unjust enrichment rather than easement by estoppel. *See Canterbury*, 18 Wn. App. at 827 (agreeing with the trial court that equity should intervene to deny defendant landowner what would clearly be an unjust enrichment). The Huntingtons' reliance on *Canterbury* for the proposition that an easement by estoppel was created is therefore misplaced. Even if this Court determines the doctrine exists, which Proctor denies, the Huntingtons have not satisfied all of the elements necessary to establish an easement by estoppel.

As mentioned above, equitable estoppel precludes a person from denying his own expressed or implied admission, which has in good faith, and in pursuance of its purpose, been accepted and acted upon by another. *Supra* at 22. Proctor is not equitably estopped to prevent the Huntingtons from using a portion of his property for their permanent driveway because the record contains no evidence of any admissions, statements, or acts by him that are inconsistent with his present claim; accordingly, the Court should affirm.

The Huntingtons want to claim an express easement despite Proctor's explicit statements to the contrary, just because they spent a lot

of money on a road they do not need to use. Br. of Resp'ts at 47; CP 228. These are not "acts and omissions . . . entirely inconsistent with Proctor's current claims[.]" Br. of Resp'ts at 47. Proctor has consistently asserted he granted the Huntingtons a permissive license to use a portion of his property to access their property during construction. He expressly declined to grant the Huntingtons a permanent easement when they approached him for one. His current position is that he did not grant the Huntingtons a permanent easement, nor would he, where the Huntingtons have an alternative route available to access their house. Accordingly, he is not maintaining inconsistent positions and equitable estoppel does not apply. The Huntingtons implied inconsistency cannot prevail over Proctor's expressed consistency. Finally, the cost of the driveway is irrelevant and speculative; Proctor had no way to know what the Huntingtons' driveway would cost them.

Where the Huntingtons cannot satisfy all the elements of equitable estoppel, the trial court correctly concluded their use was permissive and that Proctor subsequently withdrew his permission. This Court should affirm.

(4) Proctor Is Entitled to His Attorney Fees on Appeal

Proctor is entitled to his fees on appeal under RAP 18.1 and RAP 18.9.<sup>7</sup> The Huntingtons' cross-appeal, at least as to their claim for an easement by estoppel, is frivolous because there are no debatable issues, and no reasonable possibility of reversal exists. *See Pub. Employees Mut. Ins. Co. v. Rash*, 48 Wn. App. 701, 706-07, 740 P.2d 370 (1987). In the instance of a frivolous appeal, attorney fees are appropriate. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 692, 732 P.2d 510 (1987). An appeal is therefore frivolous where the appellant cannot cite any authority in support of its position.

Here, the Huntingtons bring this cross-appeal despite the fact that Washington does not recognize an easement by estoppel and there is no clear case law supporting their arguments. They waste this Court's time and the parties' time with meritless arguments. This Court has the authority to sanction them by awarding Proctor his attorney fees. Proctor respectfully requests this appropriate sanction.

F. CONCLUSION

There is no dispute the Huntingtons house is physically located on Proctor's property, approximately 400-500 feet farther west of the true

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<sup>7</sup> RAP 18.1(a) and (b) require a party to devote a separate section in his brief to his request for an award of fees on appeal. RAP 18.9 permits this Court to award attorney fees as a sanction against a party who files a frivolous appeal.

boundary line than it should be. The trial court therefore erred by failing to grant Proctor's request for a mandatory injunction ejecting the Huntingtons from his property because this is not a case involving de minimis encroachments. The doctrine of balancing the equities simply does not apply when the encroachments are substantial.

The trial court correctly rejected the Huntingtons' attempt to acquire an additional 5.17 acres of Proctor's property. There is no evidence of an affirmative statement or act by Proctor on which the Huntingtons' detrimentally relied prior to their construction of their home on Proctor's property. The Huntingtons therefore failed to prove the elements of estoppel in pais by clear and convincing evidence.

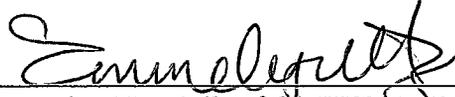
The Huntingtons also did not acquire an easement over a portion of Proctor's property through part performance or equitable estoppel. Their use of his property for their driveway was not necessary and was permissive. Moreover Proctor consistently refused to sign a written agreement granting such an easement.

The Court should reverse and remand to the trial court with directions to modify the judgment by issuing an injunction ejecting the Huntingtons and their encroachments from the disputed parcel and quieting title in Proctor. The Court should dismiss the Huntingtons' cross-

claims and affirm the judgment in all other respects. Cost on appeal, including attorney fees, should be awarded to Proctor.

DATED this 9<sup>th</sup> day of January, 2008.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I sent by U.S. Mail a true and correct copy of the following document: Appellant/Cross-Respondent Noel Proctor's Combined Reply Brief in Court of Appeals Cause No. 36087-0-II to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 9, 2008, at Tukwila, Washington.

  
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