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No. 82326-0

SUPREME COURT
OF THE STATE OF WASHINGTON

NOEL PROCTOR,

Petitioner,

v.

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

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER NOEL PROCTOR

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A. INTRODUCTION

This case involves two adjacent parcels of land in rural Skamania County. Noel Proctor owns the western lot; Robert "Ford" and Christina Huntington (collectively "the Huntingtons") own the eastern lot.¹

The Huntingtons built their house and certain other improvements, including a garage and a well (collectively referred to as "the house"), on what they thought was their land based on their erroneous assumption that their northwest boundary extended out to a 1/16 inch diameter surveyor's pin ("1/16th pin"). They did not survey their land prior to construction. The Huntingtons misjudged their northwest boundary by approximately 400-500 feet because the 1/16th pin does not mark the true boundary. As a result, the Huntingtons' house is located entirely on Proctor's land.²

Proctor sued to quiet title to the land occupied by the Huntingtons and to eject them from it. The Huntingtons counterclaimed, seeking to quiet title in approximately 6.17 acres of Proctor's land and requesting a permanent easement over Proctor's property for their private driveway.

Although the trial court found the Huntingtons' house was on Proctor's land, the court denied Proctor's request for a mandatory

¹ A site survey depicting the parties' properties is attached to the final order and judgment, which is included along with the findings of fact in the Appendix.

² The Huntingtons' house occupies approximately 1-acre of Proctor's land (hereinafter "the disputed parcel").

injunction. Despite rejecting the Huntingtons' defenses and counterclaims, the court concluded the equities favored quieting title in the disputed parcel in the Huntingtons. Proctor was ordered to sell the disputed parcel to the Huntingtons for \$25,000.

The Court of Appeals affirmed in a published decision. *Proctor v. Huntington*, 146 Wn. App. 836, 192 P.3d 958 (2008).³ The Court of Appeals' opinion should be reversed because it serves as an open invitation to potential encroachers and encourages substantial encroachments. The Court of Appeals has significantly undercut a landowner's absolute right to own property while unfairly broadening the power of an encroacher to take possession of the owner's land. The Court of Appeals failed to recognize the balancing process only applies to deny a mandatory injunction when the physical encroachments are minor. This Court should reverse and remand to the trial court with instructions to craft an appropriate injunction ejecting the Huntingtons from Proctor's land.

B. ISSUES PRESENTED FOR REVIEW

1. Is a landowner entitled to a mandatory injunction removing his neighbors' physical encroachments from his land without balancing

³ A copy of the Court of Appeals' opinion is included in the Appendix.

the equities where the encroachments are substantial and the balancing process only applies to minor encroachments?

2. In an ejectment action, are encroachers prohibited from arguing a disparity in financial hardships precludes issuance of a mandatory injunction ejecting them from their neighbor's land when they fail to counterclaim for the value of their permanent improvements and the amount of taxes paid as permitted by RCW 7.28.160 and .170?

C. STATEMENT OF THE CASE⁴

The factual backdrop of this case has been recounted in the briefing and the Court of Appeals' opinion below. The material facts can be summarized as follows:

In January 1994, Ford Huntington⁵ and several friends purchased approximately 27 acres of land from developer Dusty Moss ("Moss"). RP 176-77; CP 282. Ford walked the property with Moss prior to the sale, at which time Moss showed him the property lines generally. CP 240. Ford and his friends eventually short platted the land and divided it into four lots; Ford and Christina own approximately 17 acres. CP 282.

⁴ The Huntingtons did not cross-petition for review or raise new issues in their answer; consequently, this Court will review only the questions raised in the petition for review. RAP 13.7(b). Proctor limits his statement of the case to the facts material to his claims on appeal and does not present detailed facts relating to the Huntingtons' unsuccessful counter-claims, which the Court was not asked to review.

⁵ The Huntingtons will be referred to by their first names when necessary for clarity and ease of reading; no disrespect is intended.

Proctor visited the land he would eventually purchase from Moss in the winter of 1994-95. CP 109; RP 602, 604-07. He purchased the land because it was in a quiet, out-of-the-way setting. RP 602. Like Ford, Proctor toured the land with Moss before deciding to purchase it. And like Ford, he was shown the general boundary lines by Moss because heavy brush, logging slash, and snow made it difficult to walk every inch of the property. CP 108-09, 111, 149-50; RP 603-05. Proctor did not have his land surveyed to verify the property lines prior to closing in January 1995 because it had already been surveyed. CP 116-17.

Proctor began constructing his home in the spring of 1995. RP 609. Because he was frequently absent during construction, he initially hired a general contractor but later assumed those responsibilities himself. RP 319, 612-13, 609-11. Until 2000 or 2001, he returned only occasionally to his property because of his flight schedule. CP 105-06; RP 610-11, 613, 615.

In 1996, the Huntingtons began constructing their house on what they thought was their land based on their assumption that the northwest corner of their land was marked by the 1/16th pin. CP 258-57.⁶ The

⁶ Ford claimed he had a 15 minute chance meeting with regional surveyor Dennis Peoples ("Peoples") in May 1995 and that Peoples confirmed the 1/16th pin marked the Huntingtons' northwest boundary. RP 75-77. Peoples denied that the meeting took place. RP 501.

1/16th pin does not mark the true corner of the Huntingtons' land; moreover, it is not identified in the legal description contained in their statutory warranty deed. Ex. 63. Instead, the 1/16th pin was set to assist with logging activities taking place on land to the north; it bears no relation to the true boundary line between the Proctor and Huntington properties. RP 428-29, 517-18, 520, 524, 627-28.⁷ Because the 1/16th pin is not the true corner of the Huntingtons' property, their house is located entirely on Proctor's property.⁸ RP 627-28.

After clearing the proposed homesite of brush, Ford called Peoples and asked him to come out to the Huntington property. RP 83-84, 501. Ford took him out to the 1/16th pin and asked if the Huntingtons' house was over "the line." RP 501, 507, 509, 583. Using a map provided by Ford and his compass, Peoples determined the house did not appear to be over "the line." RP 501-02. Peoples never told Ford what the property boundaries were, and any indication of the boundary line was general because he did not have his own maps. RP 269. At the time, Peoples thought he was at the true northwest corner of the Huntington property. RP 510, 540. He did not perform a professional survey. RP 511.

⁷ The pin was well-marked and identified as a 1/16th pin. RP 639, 649.

⁸ The Huntingtons did not survey their land prior to construction. RP 264.

In the spring of 2004, Proctor hired surveyor Richard Bell ("Bell") to locate the corners of his property because he was concerned about a possible encroachment by a different neighbor to the south. RP 621, 623, 648, 924-25. Bell began his work using a hand compass, but had difficulty locating the northeast corner of Proctor's property. RP 623-25. At the time, he noticed the Huntingtons' house appeared to be on the wrong side of the projected boundary line. RP 624. Bell eventually located the true boundary marker by walking in a straight line from the southeastern corner of Proctor's property to the northeastern corner and *following the other monuments previously set along the property line.* RP 623-27, 643-46, 655-56.⁹ He determined that all of the Huntingtons' improvements were on Proctor's property because they were located some 400 feet west of the true boundary marker. RP 627-28.

In February 2005, Proctor sued to quiet title to the disputed parcel and to eject the Huntingtons from it. CP 1-4. The Huntingtons counterclaimed to quiet title in approximately 6.17 acres of Proctor's land through adverse possession or estoppel in pais. CP 7-12. They did not

⁹ Bell located the T-post boundary marker in a fence running east-west and parallel to the pipeline located to the north of the Proctor/Huntington properties. RP 627, 644-46; Ex. 87 (handwritten notation of "fence"). The true boundary was marked by an aluminum cap on a piece of 5/8 inch diameter rebar and located some 400 feet east of the 1/16th pin. RP 628.

counterclaim for a set off under RCW 7.28.150 and .160 for the value of their improvements on Proctor's land. CP 31-32; RP 916.

The trial court concluded the parties were operating under a mutual mistake of fact concerning the boundaries of their properties but that the Huntingtons did not gain title to Proctor's land through adverse possession or by estoppel. CP 243-44. Instead, the court concluded the equities favored quieting title to the disputed parcel in the Huntingtons and ordered Proctor to sell it to them for \$25,000. CP 244-45.

The Court of Appeals affirmed the trial court's judgment in all respects in a published opinion issued on September 23, 2008.

D. ARGUMENT

(1) Proctor Was Entitled to a Mandatory Injunction and Should Not Be Forced to Sell Any Portion of His Land to Accommodate Admitted Encroachers

A mandatory injunction is generally recognized as the proper method to compel removal of an encroaching structure even though it is considered extraordinary relief. *See Arnold v. Melani*, 75 Wn.2d 143, 146, 449 P.2d 800 (1968); 28 A.L.R.2d 679, § 3. *But see, Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) (noting injunctive relief will not be granted where there is a complete and adequate remedy at law).

In rare cases, a court may deny an injunction based on equitable principles. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 699-700, 974 P.2d 836 (1999).¹⁰ In particular, a court may withhold a mandatory injunction as oppressive when (1) the encroacher did not simply take a calculated risk, or negligently or willfully locate the encroaching structure; (2) the damage to the landowner is slight and the benefit of removal is equally small; (3) there is no real limitation to the property's future use; (4) it is impractical to move the structure as built; and (5) there is an enormous disparity in resulting hardships.¹¹ *Arnold*, 75 Wn.2d at 152. But the cases applying these factors are the exception rather than the norm.

Washington courts have historically approved a balancing of the equities to both grant and deny mandatory injunctions in those rare cases where there has been no physical encroachment onto the landowner's property.¹² For example, in *Wimberly v. Caravello*, 136 Wn. App. 327,

¹⁰ Although a balancing test of sorts is applied in those exceptional cases, the party causing the encroachment, even if done so unintentionally, has trampled upon the property rights of another in violation of the fundamental maxim requiring that the rights of personal liberty and private property be held sacred. *Wilkinson v. Leland*, 27 U.S. 627, 657, 7 L.Ed. 542 (1829).

¹¹ The Huntingtons assert in their answer to the petition for review that Proctor does not challenge the trial court's application of the factors laid out in *Arnold*. Ans. at 1-2, 9. On the contrary, Proctor has consistently argued against the doctrine's applicability to this case but not against the doctrine itself. Br. of Appellant at 23-26, 29-36; Appellant's Combined Reply Br. at 7-8; Pet. for Review at 8-11. Moreover, he does not argue this Court must overturn *Arnold* for him to prevail.

¹² The Court of Appeals declined to consider the parties' citations to restrictive covenant cases "because [violations of restrictive covenants] do not involve actual

149 P.3d 402 (2006), the equities of the case favored granting the mandatory injunction. The Wimberlys sued to enjoin Caravello from constructing a substantially-completed three-story garage based on his violation of a restrictive covenant. The garage did not physically encroach on the Wimberlys' lot, but did interfere with neighboring views. The trial court granted a permanent injunction, ordering Caravello to bring his building into compliance. The Court of Appeals affirmed the trial court's balancing of the equities, and agreed that an injunction would not be oppressive and that none of the reasons to withhold an injunction were present. *Id.* at 340-41.

By contrast, in *Steele v. Queen City Broadcasting Co.*, 54 Wn.2d 402, 341 P.2d 499 (1959), the equities of the case favored denying a mandatory injunction. There, the landowners brought an action against a television broadcasting company to enjoin the construction of a transmission tower on adjacent land. The tower did not, however, encroach upon the landowners' property. The trial court determined the equities dictated that no injunction issue because two other towers only blocks away had already blighted the neighborhood and an additional

encroachments of real property." *Proctor*, 146 Wn. App. at 847 n.6. The court's refusal to consider those cases is troubling because they state principles of general application and the notion of balancing the equities permeates nearly every consideration of granting or denying injunctive relief regardless of the nature of the underlying case.

tower added little to the damage already done. *Id.* at 404, 411-12. This Court affirmed the denial of the injunction because *the landowners could be adequately compensated by money damages. Id.* See also, *Holmes Harbor Water Co., Inc. v. Page*, 8 Wn. App. 600, 508 P.2d 628 (1973) (balancing the equities and denying mandatory injunction against breach of restrictive covenants where obstruction was located entirely upon neighboring lot and cost of removing the violation was exorbitant when compared to the slight violation). *But see, Hanson v. Hanly*, 62 Wn.2d 482, 383 P.2d 494 (1963) (affirming order requiring removal of enormous structure violating restrictive covenants without balancing the equities).

Where there is an actual, physical encroachment on land, however, Washington courts have treated the balancing process as though it were an independent doctrine and only applied it to minor encroachments.¹³ For example, in *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), this Court affirmed an order requiring removal of a portion of a concrete bulkhead encroaching less than 1 foot without balancing the

¹³ In most of the encroachment cases in Washington discussing the balancing process, the courts have ordered the physical encroachment removed. See, e.g., *Bach v. Sarich*, 74 Wn.2d 575, 582, 445 P.2d 648 (1968) (discussing the doctrine and declining to reverse order enjoining further construction of an apartment building and compelling removal of existing structure); *Mahon v. Haas*, 2 Wn. App. 560, 468 P.2d 713 (1970) (declining to apply the doctrine and requiring plaintiff to remove commercial greenhouse).

equities. Although the encroachment was minimal, the Court declined to apply the maxim of *de minimis lex non curat* (which means “the law does not concern itself with trifles”)¹⁴ because it determined that establishing an irregular side boundary line for a city lot by judicial decree was not a trifling matter. *Id.* at 332.

This Court also declined to apply the balancing process in *Adamec v. McCray*, 63 Wn.2d 217, 386 P.2d 427 (1963), recognizing the cases where that doctrine is applied deal with de minimis encroachments of only a few inches and noting the boat moorage at issue there encroached 7½ feet at its farthest end. *Id.* at 218, 220. Equally as important, the Court noted the landowners waited more than nine years after the boat moorage was built to bring their action. *Id.* at 218.

The Court of Appeals, Division III, rejected a mandatory injunction after balancing the negligible impact of a barn corner encroaching by 1 foot against the likely prohibitive costs of removing the entire barn. *Hanson v. Estell*, 100 Wn. App. 281, 283, 289, 997 P.2d 426 (2000). The court noted that the damages caused by the encroaching corner were minimal and did not prevent the landowners from rightful use of their property. *Id.* at 288. Furthermore, the landowners bought

¹⁴ BLACK’S LAW DICTIONARY AT 464 (8th ed. 2004).

knowing the barn encroached on their land but did not object at the time.
Id. at 284.

Other jurisdictions have made similar pronouncements.¹⁵ Karl B. Tegland, 15 WASH. PRAC., CIVIL PROCEDURE § 44.13 at 235 (2003) (citing C.J.S., Injunctions § 68; 28 A.L.R.2d 679). What is “truly minimal” is not subject to a litmus test, but examples include: *Alabama Power Co. v. Drummond*, 559 So.2d 158 (Ala. 1990) (balancing the equities and declining to order removal of the encroaching structure where the obstruction was “infinitesimal”); *Stuttgart Elec. Co. v. Riceland Seed Co.*, 802 S.W.2d 484 (Ark. App. 1991) (mandatory injunction not equitable where warehouse measuring 101 feet by 124.6 feet encroached only 2.3 feet onto neighboring property); *Golden Press, Inc. v. Rylands*, 235 P.2d 592 (Colo. 1951) (denying mandatory injunction where slight and unintentional encroachment did not affect plaintiff’s use and damaged plaintiff only slightly while cost of removal forced upon defendant would cause great hardship); *Feinzig v. Ficksman*, 674 N.E.2d 1329, *review denied*, 424 Mass. 1107 (Mass. App. Ct. 1997) (providing examples of minimal encroachments); *Goulding v. Cook*, 661 N.E.2d 1322, 1325 (Mass. 1996) (resetting the boundaries of

¹⁵ The RESTATEMENT (SECOND) OF TORTS § 941, cmt. c (1979), describes a “minimal encroachment” as 4 inches.

encroachments on land that will be tolerated for equitable reasons at those which are “truly minimal.”); *Zerr v. Heceta Lodge No. 111*, 523 P.2d 1018 (Or. 1974) (mandatory injunction requiring removal of home encroaching 2 feet onto neighboring lot would not be equitable, given the minimal nature of the encroachment and the costs involved in removing the wall).

That the balancing process historically has only applied to deny the removal of a minor encroachment is logical and reasonable. Where the encroachment is slight, the landowner’s title is not affected. The landowner is not irreparably injured and damages for the trespass are easily remunerable. Where the encroachment is substantial, however, it interferes with the landowner’s right to exclusive possession and no amount of money will make the landowner whole. *See Carpenter v. Folkerts*, 29 Wn. App. 73, 76, 627 P.2d 559 (1981) (noting all land is unique and damages in any amount are inadequate compensation for its loss). *See also, Crafts v. Pitts*, 161 Wn.2d 16, 26-27, 162 P.3d 382 (2007) (noting no amount of money will make landowners whole where there is no other piece of land identical to their 9.83 acres). The Court of Appeals failed to understand this distinction. Its contention that Proctor had an adequate remedy at law in the form of monetary damages is untenable.¹⁶

¹⁶ By permitting the Huntingtons to hide behind the value of their home while discounting the uniqueness of the land and its personal value to Proctor, the Court of

Here, the Court of Appeals ratified the trial court's ruling that the Huntingtons' encroachments are substantial. *Proctor*, 146 Wn. App. at 849. Nonetheless, the Court of Appeals approved the trial court's application of the balancing process to deny Proctor's request for a mandatory injunction. This was error because the balancing process articulated in *Arnold* only applies to minor physical encroachments and the Huntingtons' encroachments are not minor.

(2) *People's Savings Bank v. Bufford* Does Not Control the Outcome of this Case

Even after admitting the Huntingtons encroachments did not fit within the slight encroachments illustrated in *Arnold* and *Hanson*, the Court of Appeals affirmed the trial court's equitable remedy. In particular, the Court of Appeals claimed it found support for its decision in *People's Savings Bank v. Bufford*, 90 Wash. 204, 155 P. 1068 (1916). *Bufford* is distinguishable and should not control the outcome of this case.

In *Bufford*, a bank owned Lot 5 in Block 10 ("the bank's lot") of a sparsely settled subdivision located in Seattle and the Buffords owned Lot 5 in Block 7 of the same subdivision. Unfortunately, the Buffords had been shown the entirely wrong lot; instead of being shown their lot, they were actually shown the lot owned by the bank. *Id.* at 204-05. The

Appeals has significantly undercut a landowner's property rights while unfairly broadening the power of an encroacher to take possession of his neighbor's land.

Buffords later slashed off brush, installed a fence, and sowed turnips on the bank's lot. *Id.* In 1907, they built a home on the bank's lot and put a mortgage upon it. *Id.* at 205-06.

When the bank discovered the encroachment, it sued to eject the Buffords, who raised the defense of adverse possession. *Id.* at 205. This Court held the evidence was insufficient to show the Buffords adversely possessed the bank's lot, but refused to quiet title in the bank. In particular, the Court noted that no claim was made to both lots until after the 10-year statute of limitations had run on the first possession and that it would thus be inequitable to oust the Buffords. *Id.* at 209.

By contrast here, Proctor discovered the Huntingtons' encroachment in time to bring an ejectment action and before the statute of limitations ran on their adverse possession claim. And unlike *Bufford*, this case involves a partial encroachment on the highest point of Proctor's property with the best view. The Huntingtons did not mistakenly appropriate all of Proctor's property and completely abandon their own. Ford was not shown the wrong lot by Moss, and the Huntingtons have never claimed to own any lot other than the one Ford purchased from Moss.

Bufford should not control this case because it is factually distinguishable; the Court of Appeals' reliance on it is misplaced. *See*

Kent v. Holderman, 140 Wash. 353, 354, 248 P. 882 (1926) (declining to apply *Bufford*, stating: “[n]o two cases are alike in their facts, and with respect to the facts each case must stand upon its own bottom.”).

(3) The Huntingtons Created Any Financial Disparity by Failing to Pursue the Proper Statutory Remedy

The Court of Appeals failed to address an important issue of first impression in Washington: in an ejectment action, are encroachers prohibited from arguing a disparity in financial hardships precludes issuance of a mandatory injunction when they fail to counterclaim for the value of their permanent improvements and the amount of taxes paid pursuant to RCW 7.28.160 and .170?¹⁷

In 1903, the Legislature passed what is known as the betterment statute. *Johnson v. Ingram*, 63 Wash. 554, 561, 115 P. 1073 (1911). The statute is general, and was passed to meet the equities of cases such as this. *See id.* It permits a court, where hardship would follow even the application of equitable principles, to do justice between the parties. *Id.* at 562. Accordingly, a defendant who loses possession of land in an ejectment action may recover amounts paid for real estate taxes and assessments and permanent improvements. RCW 7.28.160 and .170.

¹⁷ RCW 7.28.160 and .170 are reproduced in the Appendix.

Here, the Huntingtons specifically chose not to seek an offset because they did not believe the trial court should order them to move their house. Although they did not request the offset, they argued their resulting financial hardship precluded issuance of the injunction. As Proctor pointed out below, *had they made the appropriate claim for an offset, there would have been no financial disparity because they would have been entitled to recover the value of their improvements.* But the Court of Appeals' decision is silent on this argument.

The Court of Appeals erred in failing to consider the effect of the betterment statute in this situation. The Huntingtons affirmatively chose not to seek an offset for the value of their improvements. Why then should this Court permit them to hide behind that unclaimed offset to excuse their conduct and avoid being ejected from Proctor's property?

E. CONCLUSION

No one should be permitted to take land of another indirectly, by trespassing with the hope that an injunction will be denied and he will be permitted to remain on the land.¹⁸ Yet that is exactly what the trial court's order has allowed to happen.

¹⁸ Although *White Bros. & Crum Co. v. Watson*, 64 Wash. 666, 671, 117 P. 497 (1911), is factually distinct from this case, the late Judge Ellis very clearly and persuasively set out the dangers inherent in the reasoning advanced by the Huntingtons:

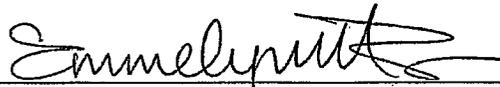
If it is something in which he has the actual right of property there is no rule of law nor principle of equity which would warrant a

The Court of Appeals' decision authorizes the right to encroach on another's property by encouraging a maximum invasion of that property and by failing to recognize the balancing process only applies to preclude a mandatory injunction when the physical encroachments are minor. This Court should not permit such an insidiously dangerous decision to stand.

This Court should reverse the decision of the Court of Appeals, reverse the trial court's denial of equitable relief to Proctor, and remand to the trial court with directions to craft and issue an appropriate injunction ejecting the Huntingtons and their encroachments from Proctor's property. The judgment should be affirmed in all other respects. Costs on appeal should be awarded to Proctor.

DATED this 30th day of June, 2009.

Respectfully submitted,



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court in taking it from him against his will for the benefit of another. No amount of hardship in a given case would justify the establishment of such a precedent . . . If a man may be required to surrender what is his own, because he does not need it and cannot use it, and because another does need it and can use it, then there is no reason why he may not be required to surrender what he needs but little because another needs it much. A doctrine so insidiously dangerous should never find lodgment in the body of the law through judicial declaration.

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APPENDIX

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SKAMANIA COUNTY
FILED
MAR - 1 2007
SHARON K. VANCE, CLERK
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF SKAMANIA

NOEL PROCTOR,

Plaintiff,

vs.

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

Defendants.

No. 05 2 00032 7

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
~~(PROPOSED)~~

This cause came on for trial before the Honorable E. Thompson Reynolds on September 25, 26, 27, 2006 and November 15, 2006. The Court issued its opinion in this matter on November 17, 2006. Plaintiff appeared personally and through his attorneys Robert Stanton and Ross Rakow. Defendants Ford and Christine Huntington appeared personally and through their attorney Bradley Andersen of Schwabe, Williamson & Wyatt.

At trial, the Defendants moved, and the court allowed, the Defendants to amend their Complaint. The court dismissed the Plaintiff's timber trespass claims because it arose outside the applicable statute of limitations and dismissed the Defendants' adverse possession counterclaim. NOW, THEREFORE, the Court makes the following Findings of Fact and Conclusions of Law.¹

¹ Any Finding of Fact that should be considered a Conclusion of Law or any Conclusion of Law that should be considered a Finding of Fact are so deemed.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW (PROPOSED) - 1

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1
2 FINDINGS OF FACT

3 1. Prior to 1993, Dusty Moss subdivided a large parcel of property in Skamania
4 County. Mr. Moss hired Dennis Peoples to survey the property for the subdivision. In
5 December of 1993, the Plaintiff, Ford Huntington, visited the property with an interest in
6 purchasing one of the lots in Mr. Moss's subdivision. Mr. Huntington walked the property
7 with Mr. Moss. Mr. Moss showed Mr. Huntington a 30-acre parcel, which was later
8 purchased by Mr. Proctor (the "Proctor Parcel"), and a 27-acre parcel. Mr. Moss generally
9 showed Mr. Huntington the property lines, including a metal fence on the north boundary of
10 the 27-acre parcel. Mr. Moss also showed Mr. Huntington a fence post which marked the
11 northwest corner of the 27-acre parcel. The Huntingtons purchased the 27-acre parcel (the
12 "Huntington Parcel") from Mr. Moss on January 7, 1994.

13 2. In June of 1994, the Huntingtons set up a camp site and lived the rest of that
14 summer on a portion of the Proctor Parcel ^{6.7 acre ETR} (the "Disputed Area"). At that time, they believed
15 this was part of their property. In September of 1994, the Huntingtons moved to Utah for the
16 winter but returned to live on the Disputed Area the following spring (1995).

17 3. During the winter of 1994-1995, Noel Proctor visited the 30-acre parcel with
18 Dusty Moss. He also walked the north boundary line with Mr. Moss. Mr. Proctor observed
19 a pin at the northeast corner of the 30-acre parcel. On February 7th, 1995, Mr. Proctor bought
20 the 30-acre parcel from Mr. Moss.

21 4. Mr. Proctor first met the Huntingtons in April of 1995, when Mr. Proctor
22 came onto where the Huntingtons were camped and introduced himself. Mr. Proctor was
23 aware of the camp site and did not object to their use or claim that they were on his property.
24 Mr. Proctor did not realize that the Huntingtons were on his property.

25 5. ^{On May 23, 1975 ETR} Dennis Peoples, a surveyor, set a pin for Dusty Moss at what is considered the
26 "16th corner" along the northern boundary line of the Proctor property. This pin was some

FINDINGS OF FACT AND CONCLUSIONS
OF LAW (PROPOSED) - 2

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1 400 feet west of the actual corner boundary between the Proctor and Huntington properties
2 (the northwest corner of the Huntington Property).

3 6. In the spring of 1995, the Huntingtons started to clear their homesite. While
4 doing so, Mr. Huntington encountered Dennis Peoples, the surveyor, in the area. Mr.
5 Huntington asked Mr. Peoples to confirm the northwest corner of his property. Mr. Peoples
6 mistakenly pointed out the 16th pin and told Mr. Huntington that that was his northwest
7 corner. This was in the same location as the corner fence post that Mr. Moss had identified
8 to Mr. Huntington as the northwest corner of the property in 1993. ^{ETR} The Huntingtons relied
9 upon the surveyor's confirmation of the 1/6th pin as their northwest corner, an error of some
10 400 feet, when they proceeded to build their home.

11 7. In the summer of 1995, Mr. Huntington approached Mr. Proctor for
12 permission to construct a driveway across a portion of Mr. Proctor's property to permit the
13 Huntingtons access to their home site. This road could have been built over the Huntington's
14 property. However, the Huntingtons and their road construction contractor determined that a
15 driveway across Proctor's property would provide a better driveway, and would cost less
16 money because of the slope of the land. Mr. Proctor agreed to allow the Huntingtons to
17 construct the road across his property on the condition that the Huntington would construct a
18 gate across the road and also share in the cost of maintenance for that portion of the main
19 road that the Huntingtons and the Proctors would share. The Huntingtons built their
20 driveway across the Proctor property to their homesite in 1995 and have maintained that road
21 ever since.

22 8. In June of 1995, Mr. Huntington drilled a well on the Disputed Area.

23 9. While the road was being constructed in the summer of 2005, Mr. Proctor and
24 Mr. Huntington met at the 16th pin. Mr. Huntington told Mr. Proctor that Mr. Peoples had
25 told him that the 16th pin was his northwest corner. Mr. Proctor ^{ETR} acknowledged the pin and
26 did not offer any protest to the accuracy of the pin. In the spring and summer of 1996, and in

FINDINGS OF FACT AND CONCLUSIONS
OF LAW (PROPOSED) - 3

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1 reliance upon what both parties believed was their property, the Huntingtons built their house
2 and garage on the Disputed Area. *Designated as Forest Resource Land ETR.*

3 10. Between 1995 and 1997, Mr. Proctor constructed a house on his property.

4 11. The Huntingtons have resided full time in their home on the Disputed Area
5 since 1996. They have also used the driveway that crosses Mr. Proctor's property as the
6 primary access to their home. The Huntingtons repeatedly asked Mr. Proctor for a written
7 easement for the driveway, but Mr. Proctor refused.

8 12. In the spring of 2004, Mr. Proctor was concerned about a possible
9 encroachment by a neighbor to the southwest of his property. Mr. Proctor hired Richard
10 Bell, a surveyor, to locate the corners of his property to ascertain if his neighbor to the
11 southwest was encroaching. Mr. Bell walked the property in June of 2004 and discovered
12 that the Huntingtons' house, well, garage, and yard were located entirely on Mr. Proctor's
13 property. While locating Mr. Proctor's northeast corner, Mr. Bell saw Mrs. Huntington at
14 her home. Mr. Bell asked her to identify her northwest corner. She took him to the 16th pin.
15 Mr. Bell informed her that the true corner was 400 feet to the east of the 16th pin.
16 Mrs. Huntington was surprised.

17 13. After the encroachment was discovered, the parties attempted to settle, but
18 were not successful. Mr. Proctor brought this action on February 16, 2005, for timber
19 trespass, ejectment, and quiet title. The Huntingtons counterclaimed for quiet title to the
20 Disputed Area and for an easement for their private driveway.

21 14. The court finds the expert appraiser Jim Lyons to be credible and finds that
22 the fair market value for a one (1) acre parcel of the Plaintiff's property, if conveyed by
23 virtue of a boundary line adjustment to the Defendants, is \$25,000.00.

24 15. The Huntingtons cut down some trees on the Disputed Area for their
25 homesite. This occurred more than seven (7) years before this lawsuit was filed.

26 16. In addition to the substantial emotional hardship, it would cost the

FINDINGS OF FACT AND CONCLUSIONS
OF LAW (PROPOSED) - 4

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1 Huntingtons more than \$300,000.00 to move their house to another location. The Court
2 further finds that it would be impractical to move the house.

3 Based on these Findings of Fact, the Court hereby makes the following

4 CONCLUSIONS OF LAW

5 A. Driveway.

6 1. Mr. Proctor gave the Huntingtons an oral license to build and use the
7 driveway across his property. This was not an easement. Indeed, Mr. Proctor refused to sign
8 a written easement that was provided to him by Mr. Huntington. The Huntingtons' use was
9 therefore permissive and Mr. Proctor had a right, at anytime, to withdraw his permission.
10 The Huntingtons have an alternate access. There is no necessity that they cross Mr. Proctor's
11 property. The Huntingtons shall cease using the driveway on Mr. Proctor's land on or before
12 June 1, 2007. This should provide the Huntingtons sufficient time to construct a new
13 driveway across their property.

14 B. Disputed Area / Quiet Title.

15 2. Both parties were under a mutual mistake of fact. They both believed the
16 16th pin marked the northwest corner of the Huntington Parcel when in fact the actual corner
17 pin was approximately 400 feet west of the 16th pin. The Huntingtons relied upon Mr. Moss,
18 the surveyor and the boundary markers to conclude that the 16th pin was their northwest
19 corner when they chose to build on property that turned out to be owned by Mr. Proctor.
20 Because Mr. Proctor also believed that this property belonged to the Huntingtons, he did
21 nothing to stop them from developing the Disputed Area. Each side's belief about the
22 location of the property line was a reasonable mistake.

23 3. The Washington Supreme Court has laid out the elements for estoppel *in pais*
24 in *Thomas v. Harlan*, 27 Wn.2d 512, 518 (1947). The Huntingtons have proven the elements
25 for estoppel *in pais* by a preponderance of the evidence. However, they have not met the
26 requisite burden of clear and convincing evidence. Therefore, the Court finds that the

FINDINGS OF FACT AND CONCLUSIONS
OF LAW (PROPOSED) - 5

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1 Huntingtons' house and other improvements are located on Mr. Proctors' property and reject
2 the Huntingtons' defenses and counterclaims based on estoppel *in pais*.

3 4. Plaintiff's claim for timber trespass under RCW 64.12.030 is barred by the
4 statute of limitations.

5 5. The Court must now address the appropriate remedy to impose in this case.
6 The Court, in considering the factors listed in *Arnold v. Melani*, 75 Wn.2d 143, 146 (1968),
7 finds that requiring the Huntingtons to move their home and other improvements to another
8 location would be oppressive, unduly costly and inequitable under the circumstances of this
9 case. In reaching this conclusion, the Court notes the following: 1) The Huntingtons did not
10 act in bad faith, negligently or willfully, when they chose to build their home on a location
11 that was later discovered to be on Mr. Proctor's property; 2) the Huntingtons acted
12 reasonably and in good faith when they ascertained the boundaries of their property; 3) the
13 damage to Mr. Proctor is slight and the benefit of removing the house is equally small;
14 4) there are no real limitations on Mr. Proctor's future use of his property in permitting the
15 Huntingtons to retain their home in its current location; 5) it would be impractical and unduly
16 expensive to remove the structure; and 6) there would be an enormous disparity in resulting
17 hardships if the Huntingtons were required to move their home. Therefore, the Plaintiff's
18 petition for a permanent injunction and ejection is denied, along with any claims for
19 trespass damages.

20 6. The boundary between the Plaintiff's and the Defendants' property is hereby
21 adjusted so that the Defendants will acquire one (1) acre of Plaintiff's land where the
22 Defendants' house, garage, yard, and Defendants' well are located. The Defendants shall, in
23 consideration for the conveyance of the one (1) acre parcel, pay the Plaintiff the sum of
24 \$25,000.00, which represents the property's fair market value. The one (1) acre parcel also,
25 if possible, should be configured to include a new driveway approach for the Defendants'
26 homesite.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW (PROPOSED) - 6

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1 7. The new boundary line between Plaintiff's and Defendants' property is legally
2 described as set out in the attached Exhibit "A" and depicted in the attached Exhibit "B" and
3 may hereafter be recorded and relied upon as the legal boundary between the two parcels.

4 8. The Plaintiff's request for rent is denied because the Court awarded a transfer
5 of land and the Plaintiff did not introduce any evidence as to the rental value of the property.

6 9. Except as expressly provided for herein, the Plaintiff's and the Defendants'
7 claims are denied.

8 10. Neither party shall be deemed the prevailing party.

9 Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY
10 ORDERED AND DECREED that:

11 1. Except as provided below, each of the parties' claims are dismissed with
12 prejudice.

13 2. The Defendants are hereby declared to be the legal owners of the real property
14 described in Exhibit "A" and depicted on Exhibit "B".

15 3. The Plaintiff shall convey to the Defendants by virtue of a statutory warranty
16 deed the one-acre parcel as described in Exhibit A" and depicted on Exhibit "B".

17 4. Defendants upon the delivery of the Deed into escrow, shall pay the Plaintiff
18 the sum of \$25,000.00. Defendants shall further be responsible for the costs (surveying and
19 closing fees) associated with closing of the one-acre parcel.

20 5. The Defendants shall, on or before June 1, 2007, cease using any portion of
21 the Plaintiff's property for their driveway.

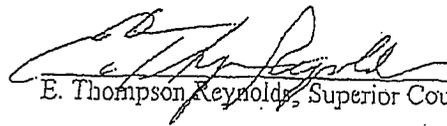
22 6. Each party shall bear their own court costs, legal fees and attorney fees in this
23 proceeding. Each party shall cooperate with the other to effectuate the Court's judgment,
24 including but not limited to executing any deeds or other instruments necessary to convey the
25 one-acre parcel.

26 Dated this 1st day of March, 2007.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW (PROPOSED) - 7

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E. Thompson Reynolds, Superior Court Judge

Presented by:
SCHWABE, WILLIAMSON & WYATT, P.C.

By: 
Bradley W. Andersen, WSBA #20640
Phillip J. Haberthur, WSBA #38038
Attorneys for Defendants
Robert "Ford" Huntington and Christina Huntington

FINDINGS OF FACT AND CONCLUSIONS
OF LAW (PROPOSED) - 8

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SKAMANIA COUNTY
FILED
MAR - 1 2007
SHARON K. VANCE, CLERK
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF SKAMANIA

NOEL PROCTOR,
Plaintiff,
vs.
ROBERT "FORD" HUNTINGTON and
CHRISTINA HUNTINGTON, husband and
wife and the marital community therein,
Defendants.

No. 05 2 00032 7
FINAL ORDER AND JUDGMENT
[Clerk's Action Required]

JUDGMENT SUMMARY

Judgment Creditor:	n/a
Judgment Debtor:	n/a
Attorney for Judgment Creditor:	n/a
Principle Judgment Amount:	\$0
Interest on Judgment	0%
Attorneys' Fees	0
Costs:	0

PRINCIPAL JUDGMENT SHALL BEAR INTEREST AT THE RATE OF
12% PER ANNUM UNTIL PAID IN FULL

///

FINAL ORDER AND JUDGMENT - 1

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FINAL ORDER/JUDGMENT

The Court HEREBY ENTERS JUDGMENT AS FOLLOWS:

1. Except as provided herein, each of the parties' claims and counterclaims are dismissed with prejudice

2. The Defendants are hereby declared to be the owners of the approximately 1-acre real property upon which their home, garage, well and other miscellaneous improvements or utilities are located. The Defendants are therefore declared to own the real property described in Exhibit "A" and depicted in Exhibit "B."

3. Plaintiff shall, within 30 days, execute and deliver to the Defendants or a mutually agreeable Title Company, a mutually acceptable statutory warranty deed conveying to the Defendants the real property described above. The Defendants are responsible to pay the survey and closing costs associated with describing the real property to be conveyed and to record the Deed.

4. The Defendants shall, when the Plaintiff delivers the deed, pay the Plaintiff the sum of \$25,000 as the fair market purchase price of the property;

5. The Defendants shall, on or before June 1, 2007, cease using any portion of the Plaintiff's property for their driveway.

6. Any and all legal relationship between the Plaintiff and Defendants is hereby dissolved; and

5. Since neither party is deemed to have prevailed, each party shall bear their own costs and attorneys fees.

Co. Plaintiff's motion for reconsideration filed 2/24/07 is denied ETR
Dated this 17th day of Mar., 2007.



E. Thompson Reynolds
SUPERIOR COURT JUDGE

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PRESENTED BY:



Bradley W. Anderson, WSBA #20640
Attorneys for Defendants
Robert "Ford" and Christina Huntington

FINAL ORDER AND JUDGMENT - 1

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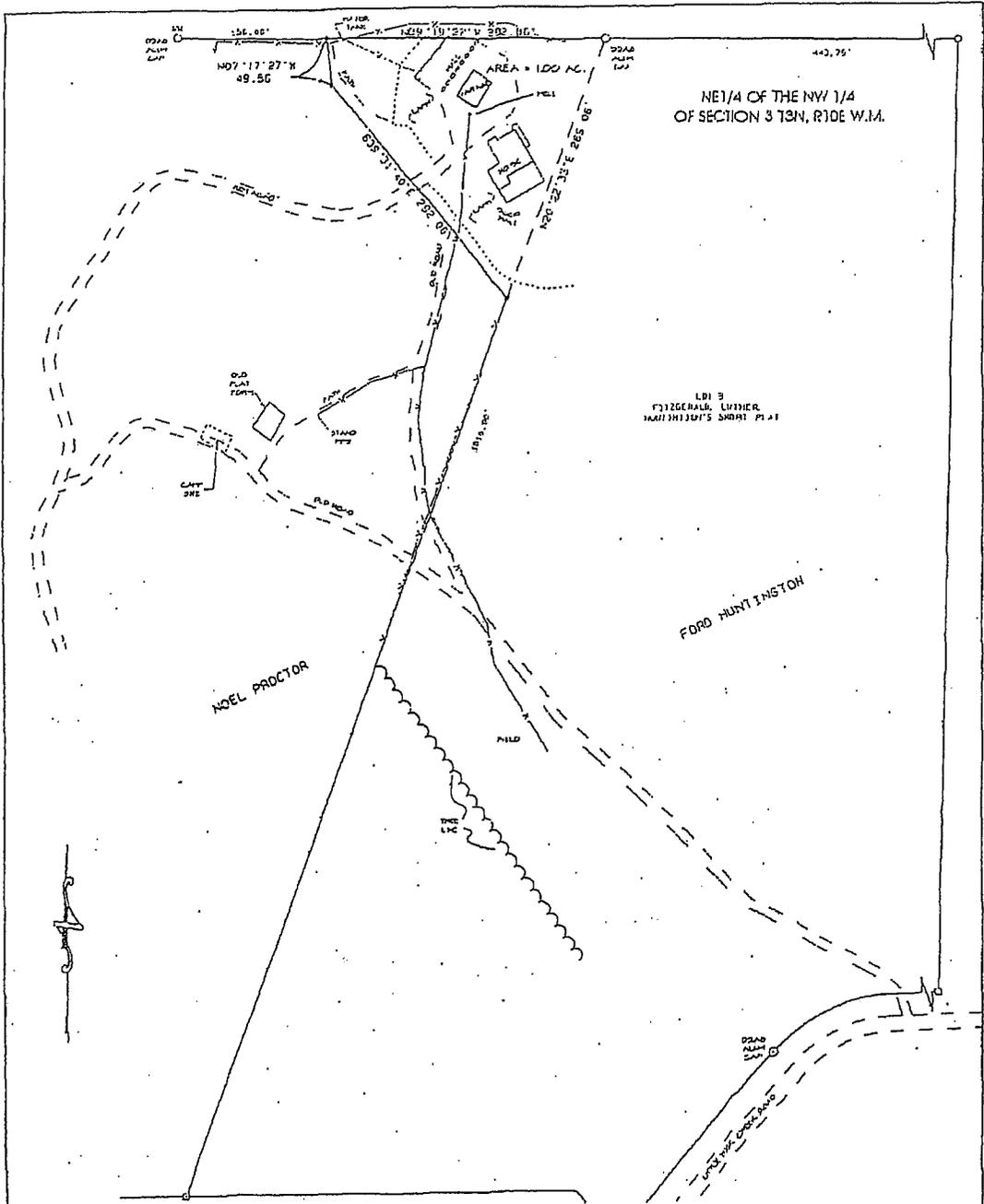
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1.0 Acre Legal Description

Beginning at a point North $89^{\circ}19'22''$ East, a distance of 156.00 feet from the West 1/16 Corner on the North line of Section 3, Township 3 North, Range 10 East, Willamette Meridian, Skamania County, Washington;

thence South $07^{\circ}17'27''$ East, a distance of 49.56 feet;
thence South $39^{\circ}31'40''$ East, a distance of 292.08 feet;
thence North $20^{\circ}22'33''$ East, a distance of 289.08 feet to a D2AB Aluminum Cap;
thence North $89^{\circ}19'22''$ West, a distance of 292.86 feet to the Point of Beginning.
Containing 1.00 ACRES, more or less.

EX. A
PAGE 1 of 1



1.0 ACRE BOUNDARY LINE ADJUSTMENT

SCALE 1"=100'

<p>BELL DESIGN COMPANY 1240 1/2 AVENUE SEASIDE, WASHINGTON</p>	<table border="1"> <tr> <th>DATE</th> <th>DESCRIPTION</th> <th>BY</th> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> </table>	DATE	DESCRIPTION	BY							<p>SITE SURVEY FOR FORD HUNTINGTON SKAMANIA COUNTY, WASHINGTON</p>	<p>SHEET: 1 OF 1</p> <p>PROJECT: 060221</p> <p>DATE: Dec 2008</p>
	DATE	DESCRIPTION	BY									
<p>This is not a legal survey.</p>	<p>022006b12106b121#3.pro</p>											

Westlaw

192 P.3d 958
 146 Wash.App. 836, 192 P.3d 958
 (Cite as: 146 Wash.App. 836, 192 P.3d 958)

Page 1

▷

Court of Appeals of Washington,
 Division 2.
 Noel PROCTOR, Appellant/Cross Respondent,

v.
 Robert "Ford" HUNTINGTON and Christina
 Huntington, husband and wife and the marital
 community therein, Respondents/Cross Appellants.
 No. 36087-0-II.

Sept. 23, 2008.

Background: Landowner sued to eject adjacent landowners from his property and remove their home and other improvements that were on plaintiff's land. Defendants counterclaimed to quiet title by adverse possession or estoppel in pais, and for an easement to driveway over plaintiff's land. The Superior Court, Skamania County, E. Thompson Reynolds, J., denied the adverse possession and estoppel in pais claims, denied plaintiff an injunction, and ruled that the driveway was a revocable license and ordered them to stop using it. Parties appealed.

Holdings: The Court of Appeals, Armstrong, J., held that:

- (1) ruling that adjacent landowners failed to prove estoppel in pais by clear and convincing evidence was not an abuse of discretion;
- (2) substantial evidence supported finding that adjacent landowners did not act negligently;
- (3) landowner failed to show little disparity in hardships;
- (4) boundary adjustment and forced sale was appropriate remedy;
- (5) admission of expert testimony was not an abuse of discretion;
- (6) substantial evidence supported finding that landowner never intended to convey driveway easement; and
- (7) appeal by adjacent landowners was not frivolous.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ↪1010.1(6)

30 Appeal and Error
 30XVI Review
 30XVI(I) Questions of Fact, Verdicts, and Findings
 30XVI(I)3 Findings of Court
 30k1010 Sufficiency of Evidence in Support

30k1010.1 In General
 30k1010.1(6) k. Substantial Evidence. Most Cited Cases
 A trial court's findings of fact are reviewed for substantial supporting evidence in the record.

[2] Appeal and Error 30 ↪846(6)

30 Appeal and Error
 30XVI Review
 30XVI(A) Scope, Standards, and Extent, in General
 30k844 Review Dependent on Mode of Trial in Lower Court

30k846 Trial by Court in General
 30k846(6) k. Consideration and Effect of Findings or Failure to Make Findings. Most Cited Cases
 If the evidence supports the trial court's findings on appellate review, the reviewing court considers whether the findings support the court's conclusions of law.

[3] Evidence 157 ↪597

157 Evidence
 157XIV Weight and Sufficiency
 157k597 k. Sufficiency to Support Verdict or Finding. Most Cited Cases
 "Substantial evidence" is a quantum of evidence sufficient to persuade a rational fair-minded person

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that the premise is true.

[4] Appeal and Error 30 ↪1008.1(3)

30 Appeal and Error
 30XVI Review
 30XVI(I) Questions of Fact, Verdicts, and Findings
 30XVI(I)3 Findings of Court
 30k1008 Conclusiveness in General
 30k1008.1 In General
 30k1008.1(3) k. Substituting Reviewing Court's Judgment. Most Cited Cases
 If the evidence supports the trial court's findings, and the findings support the conclusions of law, the reviewing court will not substitute its judgment for that of the trial court.

[5] Appeal and Error 30 ↪893(1)

30 Appeal and Error
 30XVI Review
 30XVI(F) Trial De Novo
 30k892 Trial De Novo
 30k893 Cases Triable in Appellate Court
 30k893(1) k. In General. Most Cited Cases
 A trial court's legal conclusions are reviewed de novo.

[6] Estoppel 156 ↪52.15

156 Estoppel
 156III Equitable Estoppel
 156III(A) Nature and Essentials in General
 156k52.15 k. Essential Elements. Most Cited Cases
 Estoppel in pais requires the claimant to prove that (1) the owner made an admission, statement, or act inconsistent with a claim afterwards asserted, (2) the other party acted on the faith of such admission, and (3) allowing the owner to contradict or repudiate his admission, statement, or act would result in injury to the other party.

[7] Estoppel 156 ↪118

156 Estoppel
 156III Equitable Estoppel
 156III(F) Evidence
 156k118 k. Weight and Sufficiency of Evidence. Most Cited Cases
 Because the estoppel in pais doctrine estops an owner from asserting legal title to real property, proof by very clear and cogent evidence is required.

[8] Boundaries 59 ↪37(5)

59 Boundaries
 59II Evidence, Ascertainment, and Establishment
 59k37 Weight and Sufficiency of Evidence
 59k37(5) k. Agreement or Recognition as to Location of Boundary. Most Cited Cases
 Trial court's ruling that encroaching landowners failed to prove estoppel in pais as to adjoining landowner's acquiescence to boundary line by clear, cogent and convincing evidence was not an abuse of discretion; there was conflicting evidence as to the substance of a meeting between the landowners in which the boundary line between their properties was discussed.

[9] Evidence 157 ↪596(1)

157 Evidence
 157XIV Weight and Sufficiency
 157k596 Degree of Proof in General
 157k596(1) k. In General. Most Cited
 The trial court, not a reviewing court, determines whether evidence meets the "clear, cogent and convincing" standard of persuasion, which is met if the evidence makes the fact in issue highly probable.

[10] Appeal and Error 30 ↪1008.1(4)

30 Appeal and Error
 30XVI Review
 30XVI(I) Questions of Fact, Verdicts, and Findings
 30XVI(I)3 Findings of Court
 30k1008 Conclusiveness in General

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 146 Wash.App. 836, 192 P.3d 958
 (Cite as: 146 Wash.App. 836, 192 P.3d 958)

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30k1008.1 In General

30k1008.1(4) k. Credibility of
 Witnesses; Trial Court's Superior Opportunity.
 Most Cited Cases

Evidence 157 ⚡596(1)

157 Evidence

157XIV Weight and Sufficiency

157k596 Degree of Proof in General

157k596(1) k. In General. Most Cited

Whether evidence meets the "clear, cogent and convincing" standard of persuasion necessarily requires a process of weighing, comparing, testing, and evaluating, which is a function best performed by the trier of the fact, who usually has the advantage of actually hearing and seeing the parties and the witnesses, and whose right and duty it is to observe their attitude and demeanor.

[11] Injunction 212 ⚡50

212 Injunction

212II Subjects of Protection and Relief

212II(B) Matters Relating to Property

212k45 Trespass or Other Injury to Real

Property

212k50 k. Encroachments by Buildings

or Other Structures. Most Cited Cases

Courts will generally order by mandatory injunction that an encroacher remove encroaching structures even though it is extraordinary relief.

[12] Injunction 212 ⚡50

212 Injunction

212II Subjects of Protection and Relief

212II(B) Matters Relating to Property

212k45 Trespass or Other Injury to Real

Property

212k50 k. Encroachments by Buildings

or Other Structures. Most Cited Cases

An exception to the general rule that courts issue mandatory injunctions to remove encroachments applies where such an injunction would be oppress-

ive.

[13] Injunction 212 ⚡50

212 Injunction

212II Subjects of Protection and Relief

212II(B) Matters Relating to Property

212k45 Trespass or Other Injury to Real

Property

212k50 k. Encroachments by Buildings

or Other Structures. Most Cited Cases

A mandatory injunction to remove encroaching structures is oppressive if the encroacher can prove by clear and convincing evidence that (1) he did not simply take a calculated risk or act in bad faith, or act negligently, willfully, or indifferently in locating the encroaching structure, (2) the damage to the landowner is slight and the benefit of removal equally small, (3) there is ample remaining room for a structure suitable for the area and there is no real limitation on the property's future use, (4) it is impractical to move the encroaching structure as built, and (5) there is an enormous disparity in the resulting hardship.

[14] Injunction 212 ⚡128(4)

212 Injunction

212III Actions for Injunctions

212k124 Evidence

212k128 Weight and Sufficiency

212k128(3) Property, Conveyances,
 and Incumbrances

212k128(4) k. Trespass or Other In-

jury to Real Property. Most Cited Cases

Substantial evidence supported trial court's finding that encroaching landowner did not act negligently or indifferently or take a calculated risk in locating his house on adjoining property, as required element to avoid mandatory injunction to remove the house; the court's findings resolved all critical disputes in the evidence, and trial court's oral finding of "negligence" was hesitant at best and an off-handed comment that was not reduced to writing.

[15] Injunction 212 ⚡50

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212 Injunction
 212II Subjects of Protection and Relief
 212II(B) Matters Relating to Property
 212k45 Trespass or Other Injury to Real Property

212k50 k. Encroachments by Buildings or Other Structures. Most Cited Cases
 To satisfy the "slight" harm to the owner of the encroached upon property requirement to avoid a mandatory injunction to remove the encroaching structure, the encroachment need not be so small as to be de minimus.

[16] Injunction 212 ↪50

212 Injunction
 212II Subjects of Protection and Relief
 212II(B) Matters Relating to Property
 212k45 Trespass or Other Injury to Real Property

212k50 k. Encroachments by Buildings or Other Structures. Most Cited Cases
 Even though encroacher's house was entirely on title owner's property, and took up nearly an acre of the title owner's land, the damage to title owner was "slight," as required to avoid order requiring the house to be removed from the property.

[17] Injunction 212 ↪50

212 Injunction
 212II Subjects of Protection and Relief
 212II(B) Matters Relating to Property
 212k45 Trespass or Other Injury to Real Property

212k50 k. Encroachments by Buildings or Other Structures. Most Cited Cases
 Landowner failed to show that there was little disparity in the hardship to him in allowing adjoining landowners house to remain on his property to the hardship of requiring the encroaching landowner to remove the house, as required element for mandatory injunction to remove the house, even though he claimed the additional house on his property would affect the tax designation on his property and limit how he could use his property; claims were mere

speculation as tax designation had not changed and landowner had no firm plans for the property.

[18] Adjoining Landowners 15 ↪9(2)

15 Adjoining Landowners
 15k9 Encroachments
 15k9(2) k. Remedies and Procedure in General. Most Cited Cases
 Boundary adjustment and forced sale was an appropriate remedy to resolve dispute regarding a house encroaching on landowner's property; encroaching house was entirely on landowner's property and took up nearly an acre, which made granting an easement unworkable.

[19] Evidence 157 ↪524

157 Evidence
 157XII Opinion Evidence
 157XII(B) Subjects of Expert Testimony
 157k521 Value
 157k524 k. Real Property. Most Cited Cases
 Admission of expert testimony regarding the value of the property encroached upon by the adjoining landowner's house and the costs of moving the house was not an abuse of discretion; encroaching landowner's were entitled to ask for equitable relief as alternative to removing the house and were entitled to present evidence to support it.

[20] Appeal and Error 30 ↪970(2)

30 Appeal and Error
 30XVI Review
 30XVI(H) Discretion of Lower Court
 30k970 Reception of Evidence
 30k970(2) k. Rulings on Admissibility of Evidence in General. Most Cited Cases
 A trial court's evidentiary rulings are reviewed for an abuse of discretion.

[21] Appeal and Error 30 ↪946

30 Appeal and Error
 30XVI Review

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30XVI(H) Discretion of Lower Court

30k944 Power to Review

30k946 k. Abuse of Discretion. Most

Cited Cases

A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, that is, if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.

[22] Easements 141 ↪1

141 Easements

141I Creation, Existence, and Termination

141k1 k. Nature and Elements of Right. Most

Cited Cases

An easement is a property right, albeit distinct from ownership, to use another's land.

[23] Licenses 238 ↪44(3)

238 Licenses

238II In Respect of Real Property

238k44 Licenses Distinguished from Other Rights in Land

238k44(3) k. Easement. Most Cited Cases

Unlike an easement, a license is revocable, nonassignable, and created by the licensor's oral, written, or implied consent.

[24] Frauds, Statute Of 185 ↪60(1)

185 Frauds, Statute Of

185VI Real Property and Estates and Interests Therein

185k60 Creation of Easements

185k60(1) k. In General. Most Cited Cases

Because easements are encumbrances upon real estate, any contract creating or evidencing an easement must be in writing and comply with the statute of frauds. West's RCWA 64.04.010.

[25] Easements 141 ↪36(3)

141 Easements

141I Creation, Existence, and Termination

141k36 Evidence

141k36(3) k. Weight and Sufficiency.

Most Cited Cases

Substantial evidence supported trial court's finding that landowner never intended to convey a driveway easement to adjoining landowners, but merely a license to use a driveway across landowner's property during construction of adjoining landowner's house; landowner repeatedly refused to execute a written easement, and no written easement existed.

[26] Easements 141 ↪12(1)

141 Easements

141I Creation, Existence, and Termination

141k12 Express Grant

141k12(1) k. In General. Most Cited Cases

A grantor must intend to convey an easement in order to require specific performance of an agreement to convey an easement.

[27] Costs 102 ↪260(5)

102 Costs

102X On Appeal or Error

102k259 Damages and Penalties for Frivolous Appeal and Delay

102k260 Right and Grounds

102k260(5) k. Nature and Form of Judgment, Action, or Proceedings for Review. Most Cited Cases

Appeal by encroaching landowners of trial court's denial of easement by estoppel was not frivolous, for purpose of award of attorney fees; encroaching landowners cited case law in which easements by estoppel were discussed favorably. RAP 18.9.

[28] Costs 102 ↪260(4)

102 Costs

102X On Appeal or Error

102k259 Damages and Penalties for Frivolous

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ous Appeal and Delay

102k260 Right and Grounds

102k260(4) k. What Constitutes

Frivolous Appeal or Delay. Most Cited Cases

An appeal is frivolous if there are no debatable issues on which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal.

**961 Philip Albert Talmadge, Talmadge Fitzpatrick, Emmelyn Hart-Biberfeld, Talmadge Law Group PLLC, Tukwila, WA, Ross Roland Rakow, Attorney at Law, Goldendale, WA, for Appellant/Cross Respondent.

Bradley W. Andersen, Attorney at Law, Phillip Justin Haberthur, Schwabe Williamson & Wyatt, Vancouver, WA, for Respondents/Cross Appellants.

ARMSTRONG, J.

*840 ¶ 1 In 1994 and 1995, Robert and Christina Huntington and Noel Proctor bought adjacent multi-acre parcels of undeveloped land on which they constructed homes. In 2004, they discovered that the Huntingtons' home and other improvements, which take up nearly an acre, are entirely on Proctor's property because of a misunderstanding regarding the boundary marker on the north side of their properties. Proctor sued to eject the Huntingtons and to require them to remove the improvements. He also revoked permission he had given the Huntingtons to *841 construct and use a driveway over his property. The Huntingtons counterclaimed (1) to quiet title in themselves under adverse possession and estoppel *in pais* theories and (2) for an easement to the driveway. Although the trial court ruled that the Huntingtons had not proved adverse possession or estoppel *in pais*, it denied Proctor an injunction to remove them. Instead, it ordered the Huntingtons to pay Proctor \$25,000 in exchange for a boundary adjustment giving them title to the acre on which their improvements stood. The trial court also concluded that the Huntingtons had held a revocable license, not an easement, to the driveway,

and ordered them to cease using it.

¶ 2 Proctor appeals the trial court's forced sale remedy and its admission of certain expert testimony. The Huntingtons cross appeal the trial court's denial of their claims for estoppel *in pais* and for the easement to the driveway. We affirm.

FACTS

¶ 3 This case concerns a disputed boundary line between two large properties in Skamania County. Both lots were originally owned by Dusty Moss, who sold the eastern lot to Robert and Christina Huntington and the western lot to Noel Proctor. At the time, both lots were undeveloped.

¶ 4 Before Robert ^{FN1} bought his property in January 1994, Moss walked him through it **962 and showed him the property lines generally. The northern boundary was marked by a metal fence, and Moss showed Robert a fence post on that fence that marked the northwest corner of his parcel. Six months after purchasing the property, Robert set up a campsite on what he thought was his property but was actually part of the 30-acre parcel that Proctor later purchased. The Huntingtons lived in that campsite during the summer of 1994, but they were absent from September *842 1994 to April 1995. Meanwhile, Proctor purchased the 30-acre parcel in February 1995, after having been shown the same general boundaries by Moss. After the Huntingtons moved back to their campsite in April 1995, Proctor introduced himself to them, not realizing that they were on his property.

FN1. When referring to Robert Huntington, we use his first name.

¶ 5 The Huntingtons chose a site on which to build a home that summer, and they needed an access road over Proctor's property. Robert testified that he asked Proctor for permission to build a permanent driveway across Proctor's land as an offshoot from the access road. Proctor gave his permission to build the road on the condition that Robert con-

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struct a gate and share the costs of maintaining the shared part of the road. But he testified that he thought the road was to be temporary while the Huntingtons built their home; the property already had another driveway that he thought they would use as their permanent driveway. The Huntingtons believed that the agreement was for a permanent road or easement but they did not ask for a written easement at the time. In later years, they repeatedly asked Proctor for a written easement, but Proctor refused.

¶ 6 Robert testified that before he started building the road, he wanted to verify how much of it would be on Proctor's property and how much would be on his. He testified that by chance, he encountered Dennis Peoples, the surveyor for the region, along the northern boundary of the property. Robert asked Peoples to confirm the northwest corner of his property, and Peoples mistakenly pointed out a marker, now referred to as the "16th pin," that is about 400 feet west of the true boundary.^{FN2} Report of Proceedings (RP) at 212. Robert also testified that he showed Proctor the 16th pin and told him that Peoples had confirmed it as the boundary marker between their properties.^{FN3} Reassured that their desired homesite was on their property, the *843 Huntingtons built the driveway as well as a house, well, garage, and garden.

FN2. Peoples had placed this marker for the benefit of the logging operation conducted on the property on the other side of the fence.

FN3. Proctor denied at trial that this meeting ever took place.

¶ 7 In spring 2004, Proctor hired a different surveyor, Richard Bell, to locate the corners of his property because he was concerned about a possible encroachment by a different neighbor. After completing the survey, Bell discovered that the Huntingtons' house, well, garage, yard, and driveway were located entirely on Proctor's property. Proctor sent the Huntingtons a letter withdrawing his permission

for them to use their driveway, then brought this action for timber trespass, quiet title, ejectment, and a restraining order against trespass by the Huntingtons. The Huntingtons counterclaimed to quiet title to the disputed area and for an easement for their driveway.

¶ 8 During trial, Proctor moved to exclude the testimony of the Huntingtons' two expert witnesses regarding the costs and difficulty of removing the Huntingtons' improvements from the land and returning the land to its previous condition. The trial court denied the motion, ruling that the testimony might help it fashion an equitable remedy.

¶ 9 The trial court ruled that Proctor gave the Huntingtons an oral license, not an easement, to build and use the driveway across his property. As such, Proctor had a right, at anytime, to withdraw his permission. It ordered the Huntingtons to cease using the driveway before June 1, 2007, a deadline that would give them sufficient time to construct a new driveway across their own property.

¶ 10 The trial court also rejected the Huntingtons' estoppel *in pais* claim, ruling that they had failed to prove the elements by clear and convincing evidence. As such, their improvements were on Proctor's property.^{**963} ^{FN4}] But the trial court denied Proctor's requests for a mandatory injunction, ejectment, and damages for trespass. It concluded that requiring the Huntingtons to move their home and other *844 improvements to another location would be oppressive, unduly costly and inequitable because:

FN4. The court had previously dismissed the Huntingtons' adverse possession claim, finding that they had failed to meet all of the elements under RCW 7.28.085.

- 1) The Huntingtons did not act in bad faith, negligently or willfully, when they chose to build their home on a location that was later discovered to be on Mr. Proctor's property;

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- 2) the Huntingtons acted reasonably and in good faith when they ascertained the boundaries of their property;
- 3) the damage to Mr. Proctor is slight and the benefit of removing the house is equally small;
- 4) there are no real limitations on Mr. Proctor's future use of his property in permitting the Huntingtons to retain their home in its current location;
- 5) it would be impractical and unduly expensive to remove the structure; and
- 5) there would be an enormous disparity in resulting hardships if the Huntingtons were required to move their home.

Clerk's Papers (CP) at 229.

¶ 11 The trial court ordered the Huntingtons to pay Proctor \$25,000 ^{FN5} for an adjustment of the boundary line, giving the Huntingtons the acre on which their house, garage, yard, and well were located. It also ordered that the parcel be configured, if possible, to include a new driveway approach for the Huntingtons' homesite. Both parties appeal.

FN5. An expert appraiser, Jim Lyons, testified that this was the fair market value for a one-acre parcel of Proctor's property if conveyed by a boundary line adjustment to the Huntingtons. The trial court explicitly found Lyons to be credible.

¶ 12 The principal issues on appeal are whether the trial court erred in finding that the Huntingtons failed to prove estoppel *in pais* by clear and convincing evidence and in fashioning a remedy that forced Proctor to sell the disputed land to the Huntingtons.

ANALYSIS

[1][2][3][4][5] ¶ 13 We review a trial court's findings of fact for substantial supporting evidence in

the record. If the evidence*845 supports the findings, we then consider whether the findings support the court's conclusions of law. *See Landmark Dev., Inc. v. City of Roy*, 138 Wash.2d 561, 573, 980 P.2d 1234 (1999). Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 879-80, 73 P.3d 369 (2003). If this standard is met, we will not substitute our judgment for that of the trial court. *Sunnyside Valley Irrigation Dist.*, 149 Wash.2d at 879-80, 73 P.3d 369. We review the trial court's legal conclusions de novo. *Sunnyside Valley Irrigation Dist.*, 149 Wash.2d at 880, 73 P.3d 369.

¶ 14 We first consider the Huntingtons' cross appeal of the trial court's conclusion that they failed to prove estoppel *in pais* by clear and convincing evidence.

I. ESTOPPEL *IN PAIS*

[6][7] ¶ 15 Estoppel *in pais* requires the claimant to prove that (1) the owner made an admission, statement, or act inconsistent with a claim afterwards asserted, (2) the other party acted on the faith of such admission, and (3) allowing the owner to contradict or repudiate his admission, statement, or act would result in injury to the other party. *Thomas v. Harlan*, 27 Wash.2d 512, 518, 178 P.2d 965 (1947). Because this doctrine estops an owner from asserting legal title to real property, we require proof by "very clear and cogent evidence." *Sorenson v. Pyeatt*, 158 Wash.2d 523, 539, 146 P.3d 1172 (2006) (quoting *Tyree v. Gosa*, 11 Wash.2d 572, 578, 119 P.2d 926 (1941)).

¶ 16 The Huntingtons base their claim on the meeting that they asserted occurred between Robert and Proctor at the 16th pin in 1995. The trial court found that at that **964 meeting, Robert told Proctor that Peoples had told him the pin was his northwest corner, and Proctor "did not offer any protest." CP at 226. The trial court found, however, that the

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Huntingtons proved Proctor's acquiescence to the boundary by only a preponderance of the evidence, not by clear and convincing evidence.

[8][9][10] *846 ¶ 17 The trial court, not a reviewing court, determines whether evidence meets the "clear, cogent and convincing" standard of persuasion, which is met if the evidence makes the fact in issue "highly probable." *Endicott v. Saul*, 142 Wash.App. 899, 910, 176 P.3d 560 (2008) (quoting *Colonial Imps., Inc. v. Carlton Nw., Inc.*, 121 Wash.2d 726, 735, 853 P.2d 913 (1993)). This determination "necessarily requires a process of weighing, comparing, testing, and evaluating—a function best performed by the trier of the fact, who usually has the advantage of actually hearing and seeing the parties and the witnesses, and whose right and duty it is to observe their attitude and demeanor." *Endicott*, 142 Wash.App. at 910, 176 P.3d 560 (quoting *Bland v. Mentor*, 63 Wash.2d 150, 154, 385 P.2d 727 (1963)). Here, Robert testified that the meeting occurred; Proctor testified that it did not. Although the trial court accepted Robert's version of the incident, it acted well within its discretion in concluding that because of the dispute, the Huntingtons had not proved the incident by clear and convincing evidence. See *Hovila v. Bartek*, 48 Wash.2d 238, 241, 292 P.2d 877 (1956) (where the evidence is closely conflicting or equally balanced, trial court's findings will not be disturbed).

II. REMEDY

¶ 18 Proctor argues that the trial court abused its discretion by refusing to order the Huntingtons to remove their encroachments and by instead granting them title to the property.

A. Denying Mandatory Injunction

[11][12][13] ¶ 19 Generally, courts will order an encroacher to remove encroaching structures even though it is extraordinary relief.^{FN6} *847 *Arnold v. Melani*, 75 Wash.2d 143, 152, 449 P.2d 800 (1968);

Hanson v. Estell, 100 Wash.App. 281, 287-88, 997 P.2d 426 (2000). But we have recognized an exception where such an order would be oppressive. See *Arnold*, 75 Wash.2d at 152, 449 P.2d 800. To trigger the exception, the encroacher must prove by clear and convincing evidence that (1) he did not simply take a calculated risk or act in bad faith, or act negligently, willfully, or indifferently in locating the encroaching structure; (2) the damage to the landowner is slight and the benefit of removal equally small; (3) there is ample remaining room for a structure suitable for the area and there is no real limitation on the property's future use; (4) it is impractical to move the encroaching structure as built; and (5) there is an enormous disparity in the resulting hardships. *Arnold*, 75 Wash.2d at 152, 449 P.2d 800; *Hanson*, 100 Wash.App. at 288, 997 P.2d 426. The *Arnold* court emphasized that this exception is specifically intended for the "circumstance in which one party uses a legal right ... as a weapon of oppression rather than in defense of a right." *Arnold*, 75 Wash.2d at 153, 449 P.2d 800.

FN6. A mandatory injunction is also often an appropriate remedy for violation of a restrictive covenant, but because such violations do not involve actual encroachments of real property, we disregard the parties' extensive citations to restrictive covenant cases.

¶ 20 In this case, the trial court concluded that all five of these elements were met. Proctor challenges the first, second, and fifth elements.

1. First-Element Negligent Encroachment

[14] ¶ 21 Proctor argues that the Huntingtons failed to satisfy the first element of the *Arnold* test because they took a calculated risk or acted negligently or indifferently when locating their encroachments. He maintains that in its oral ruling, the trial court "specifically found [that] the Huntingtons were negligent" even though it later declined to enter a written finding to that effect. He

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also contends that the court ignored "considerable testimony" that (1) neither Peoples nor Proctor met with Robert at the 16th pin, and (2) Peoples did not even set **965 the 16th pin until after the meeting allegedly took place. Br. of Appellant at 31-32.

¶ 22 Proctor's first argument fails for two reasons. First, the evidence supports the trial court's written findings and they adequately resolve all critical disputes, we do not look beyond them. *848 *In re Det. of Smith*, 117 Wash.App. 611, 615, 72 P.3d 186 (2003). Second, the court's "finding" of negligence was hesitant at best: it stated, "[The Huntingtons] perhaps were negligent in fully ascertaining where their boundaries were. However, I do believe that they did in good faith rely on the 16th pin thinking that that was their boundary." RP at 926-27. When Proctor explicitly requested the court to enter a written finding that the Huntingtons were negligent, it declined to do so. The trial court's off-handed comment does not undermine its' ultimate conclusion that the Huntingtons acted reasonably in locating their property.

¶ 23 Nor are we persuaded by Proctor's argument that the court "ignored testimony" by Proctor and Peoples that the meetings at the 16th pin never occurred. Br. of Appellant at 32. Robert testified that they did occur, and we defer to the trier of fact on issues of conflicting testimony and the credibility of witnesses. *State v. Thomas*, 150 Wash.2d 821, 874-75, 83 P.3d 970 (2004). Substantial evidence supported the trial court's finding.

2. Second Element-Slight Damage to Landowner

¶ 24 Proctor argues that the Huntingtons failed to establish the second element of the *Arnold* test for an exception to enjoining an encroacher: that the damage to the landowner is "slight."

[15] ¶ 25 To satisfy the "slight" harm requirement, the encroachment need not be so small as to be *de minimis*. See *Arnold*, 75 Wash.2d at 148, 449 P.2d 800. For instance, in *Arnold*, the defendant's house

encroached onto the plaintiff's land by about three feet and his fence encroached by about nine feet along the boundary; the court held that this invasion was "something more than a trifle" but still of only slight harm to the plaintiff. *Arnold*, 75 Wash.2d at 148, 152, 449 P.2d 800. In *Hanson v. Estell*, the only other published case applying the *Arnold* exception, the encroachment onto the plaintiff's land was one *849 foot, which the court held to have a "negligible impact" on the plaintiff. *Hanson*, 100 Wash.App. at 288-89, 997 P.2d 426.^{FN7}

FN7. Proctor also cites several cases from other jurisdictions to argue that *Arnold* applies only slight encroachments. See *Stuttgart Elec. Co., Inc. v. Riceland Seed Co.*, 33 Ark.App. 108, 115, 802 S.W.2d 484 (1991) (warehouse encroached 2.3 feet onto neighboring property); *Golden Press, Inc. v. Rylands*, 124 Colo. 122, 128-29, 235 P.2d 592 (Colo.1951) (footings seven feet below surface of ground encroached by about three inches); *Zerr v. Heceta Lodge No. 111, Indep. Order of Odd Fellows*, 269 Or. 174, 185, 523 P.2d 1018 (Or.1974) (encroachment of nine inches, no mandatory injunction where no substantial damages); cf. *Goulding v. Cook*, 422 Mass. 276, 279-80, 661 N.E.2d 1322 (Mass.1996) (while Massachusetts courts will not enjoin "truly minimal encroachments," injunction to remove septic system taking up a "spatially significant portion of the plaintiffs' lot" was upheld).

[16] ¶ 26 Here, the Huntingtons' improvements do not extend slightly beyond the boundary line with Proctor's land; they are entirely on Proctor's land. Moreover, the improvements take up nearly an acre of that land; the house alone has a 1,650 square-foot footprint. But although the Huntingtons' encroachment does not fit within the slight encroachment illustrated by *Arnold* and *Hanson*, the *Arnold* court specifically cited *People's Savings Bank v. Bufford*, 90 Wash. 204, 155 P. 1068 (1916), as sup-

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port for its premise that the court is not required to issue an oppressive injunction, and as support for its five-part rule setting the parameters of the exception. *Arnold*, 75 Wash.2d at 152, 449 P.2d 800. In *Bufford*, as here, the encroacher built his home on the wrong lot in a subdivision. *Bufford*, 90 Wash. at 204-05, 155 P. 1068. When the true owner discovered the situation, it sued to eject the encroacher, who raised the defense of adverse possession. *Bufford*, 90 Wash. at 205, 155 P. 1068. The Supreme Court held that the evidence was insufficient to show the encroacher's open hostile possession for the required 10 years, but it nonetheless refused to quiet title in the true owner because "it *966 would be inequitable to permit [the title owner] to oust [the encroacher]." *Bufford*, 90 Wash. at 209, 155 P. 1068. The court then fashioned an equitable remedy allowing the title owner to take either the encroacher's lot in the same addition or a refund of the taxes the title owner had paid on the disputed lot. *Bufford*, 90 Wash. at 209, 155 P. 1068.

¶ 27 The Supreme Court has never overruled *Bufford*. In fact, it has cited the case a number of times for its *850 discussion of what evidence is sufficient to show a hostile possession. And in *Skoog v. Seymour*, 29 Wash.2d 355, 363-64, 187 P.2d 304 (1947), overruled on other grounds by *Chaplin v. Sanders*, 100 Wash.2d 853, 676 P.2d 431 (1984), the court acknowledged *Bufford's* equitable remedy and noted that the case was "a most unusual one on its facts." The same unusual facts exist here. The Huntingtons, acting in good faith and without negligence, constructed their home entirely on Proctor's property. Although we cannot reconcile this with the slight encroachments of *Arnold* and *Hanson*, neither can we reconcile *Bufford* with those encroachments. And, because the Supreme Court cited *Bufford* as support for its five-part test in *Arnold*, we cannot conclude that *Bufford* is no longer good law. In short, *Bufford* supports the trial court's equitable remedy even though the Huntingtons did more than slightly encroach on Proctor's property.

3. Fifth Element-Disparity in Resulting Hardships

¶ 28 Proctor argues that the trial court erred in concluding that there was an "enormous disparity" between his hardship in keeping the Huntingtons' improvements on his land and the Huntingtons' hardship in removing them. He asserts that his land is designated as forest land for tax purposes, which requires that a certain number of his total acres be devoted to forestry activities. Thus, according to Proctor, the acre of land taken up by residential improvements subtracts from his available non-forestry acreage allowance and limits what he can do with the rest of the land. In addition, having two residences on the property instead of one endangers the forestry designation altogether.

[17] ¶ 29 Proctor's arguments are speculative. At trial, he acknowledged that he still maintains his forestry tax designation, and he presented no evidence of any specific plans for the rest of his property that were thwarted by the Huntingtons' improvements on the property. Furthermore, even if Proctor's tax designation was eliminated, his hardship would be monetary in nature and therefore subject to *851 legal remedies without the need for a mandatory injunction. See *Kucera v. Dep't of Transp.*, 140 Wash.2d 200, 209, 995 P.2d 63 (2000) ("[I]njunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law"). In contrast, the Huntingtons' hardship from the mandatory injunction would be considerable because it would require them to destroy their sizeable family home and build elsewhere. In sum, the trial court properly considered Proctor's arguments and properly found an enormous disparity between the parties' hardships.

B. Alternate Remedy/Granting Title

¶ 30 Proctor argues that even if the *Arnold* doctrine applies to this case, the trial court erred in imposing the remedy of a forced sale of the disputed property.

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[18] ¶ 31 In *Arnold*, the court granted the defendant an easement for the area covered by his encroachments as long as he paid the plaintiff the value of the land as damages. *Arnold*, 75 Wash.2d at 153, 449 P.2d 800. Unlike this case, title did not change hands. In fact, the court specifically ordered that while the defendant could repair his existing encroachments, any replacement of those improvements must be within his own lot. *Arnold*, 75 Wash.2d at 153, 449 P.2d 800. But our facts are unlike those in *Arnold* where the encroachment was minor. Rather, as we have discussed, the facts here are most like *Bufford*—a home and other improvements built entirely on another's property. Under these circumstances, an easement is not workable, and the trial court's boundary adjustment was an appropriate remedy.

**967 III. EXPERT TESTIMONY

¶ 32 Proctor argues that the trial court abused its discretion by admitting expert testimony regarding the value of the disputed property and the costs of moving the Huntingtons' improvements. He argues that the only possible relevance of this testimony was to the "balancing the equities" inquiry; therefore, the court's decision to admit *852 the evidence "was tantamount to a finding before the conclusion of Proctor's case that it would be inequitable to eject the Huntingtons from the disputed parcel." Br. of Appellant at 38.

[19][20][21] ¶ 33 We review a trial court's evidentiary rulings for an abuse of discretion. *In re Pers. Restraint of Davis*, 152 Wash.2d 647, 691, 101 P.3d 1 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Lord*, 161 Wash.2d 276, 283-84, 165 P.3d 1251 (2007). The trial court did not abuse its discretion here. Even if the court had denied the Huntingtons equitable relief, they

were entitled to ask for the relief and to present evidence to support it.

IV. DRIVEWAY EASEMENT

¶ 34 The Huntingtons contend that the trial court erred by finding that they had merely a license and not an easement for their driveway across Proctor's land.

[22][23][24] ¶ 35 Licenses and easements are distinct in principle. 25 AM.JUR.2Easements & Licenses § 2 (2007). The basic difference is that an easement is a right and a license is a privilege. 17 WILLIAM B. STOEBUCK AND JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE § 2.1, at 82 (2d ed.2004). Unlike an easement, a license is revocable, nonassignable, and created by the licensor's oral, written, or implied consent. *Conaway v. Time Oil Co.*, 34 Wash.2d 884, 894, 210 P.2d 1012 (1949); *Showalter v. City of Cheney*, 118 Wash.App. 543, 548, 76 P.3d 782 (2003). An easement is a property right, albeit distinct from ownership, to use another's land. *Dickson v. Kates*, 132 Wash.App. 724, 731, 133 P.3d 498 (2006). And because easements are "encumbrance[s] upon real estate," any contract creating or evidencing an easement must be in writing and comply with *853 the statute of frauds set forth in RCW 64.04.010. *Berg v. Ting*, 125 Wash.2d 544, 551, 886 P.2d 564 (1995).

¶ 36 Here, because no deed establishes an easement, the Huntingtons assert that the doctrines of part performance and estoppel entitle them to specific performance of an agreement to create such an easement.^{FN8} But these doctrines apply only if Proctor agreed to convey an easement as opposed to a license. See *Adler*, 153 Wash.2d at 362-63, 103 P.3d 773; *Kirk v. Tomulty*, 66 Wash.App. 231, 237, 831 P.2d 792 (1992). If Proctor agreed to grant only a revocable license, the Huntingtons would not be entitled to an easement even if they fulfilled all their duties under the contract. *Kirk*, 66 Wash.App. at 237, 831 P.2d 792.

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FN8. Under the doctrine of part performance, a court may specifically enforce an oral agreement to convey an estate in real property if there is sufficient part performance of the agreement. *Berg*, 125 Wash.2d at 556, 886 P.2d 564 (citing *Miller v. McCamish*, 78 Wash.2d 821, 826, 479 P.2d 919 (1971)). Equitable estoppel applies where there has been an admission, statement, or act that has been justifiably relied on to another party's detriment. *Adler v. Fred Lind Manor*, 153 Wash.2d 331, 362-63, 103 P.3d 773 (2004). Some commentators have noted that the estoppel doctrine is often confused with the part performance doctrine because they arise out of essentially the same fact pattern and usually may be used interchangeably. 17 STOEBUCK AND WEAVER, *supra* § 2.8, at 108. We need not consider the distinctions between the two doctrines because the Huntingtons fail to meet their burden on either.

[25][26] ¶ 37 A grantor must intend to convey an easement. *M.K.K.I., Inc. v. Krueger*, 135 Wash.App. 647, 654, 145 P.3d 411 (2006), *review denied*, 161 Wash.2d 1012, 166 P.3d 1217 (2007). Here, the trial court impliedly found that Proctor did *not* intend to create an easement when it (1) concluded that no easement existed and (2) noted that Proctor had repeatedly refused to execute a written easement. Substantial evidence supports these findings. Proctor testified that the word "permanent" never came up in his **968 discussions with the Huntingtons; in fact, he assumed at the time that the Huntingtons would be using the driveway only temporarily during the construction of their home because they already had a permanent driveway on their own property. Furthermore, after the Huntingtons' construction was finished, *854 Proctor repeatedly refused their requests for a written easement to the driveway. This evidence is sufficient to persuade a rational fair-minded person that Proctor did not intend to grant the Huntingtons

an easement for the driveway. *See Sunnyside Valley Irrigation Dist.*, 149 Wash.2d at 879, 73 P.3d 369. As a result, the most the Huntingtons were ever entitled to was a revocable license from Proctor. The trial court did not err when it ordered the Huntingtons to cease using the driveway on Proctor's property.

V. ATTORNEY FEES

[27] ¶ 38 Proctor argues that he is entitled to attorney fees under RAP 18.9 because the Huntingtons' cross-appeal is frivolous. Specifically, he contends that we should sanction the Huntingtons because "Washington does not recognize an easement by estoppel and there is no clear case law supporting their arguments." Reply Br. of Appellant at 32.

[28] ¶ 39 An appeal is frivolous if there are no debatable issues on which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Malted Mousse, Inc. v. Steinmetz*, 150 Wash.2d 518, 535, 79 P.3d 1154 (2003) (quoting *Fay v. Nw. Airlines, Inc.*, 115 Wash.2d 194, 200-01, 796 P.2d 412 (1990)). The Huntingtons cite several Washington cases in which easements by estoppel are discussed favorably. *See Ormiston v. Boast*, 68 Wash.2d 548, 552, 413 P.2d 969 (1966); *Canterbury Shores Assocs. v. Lakeshore Props., Inc.*, 18 Wash.App. 825, 827, 572 P.2d 742 (1977). We cannot find that the Huntingtons' cross-appeal was frivolous. We deny Proctor's request for sanctions.

¶ 40 Affirmed.

We concur: HUNT, J., and PENOYAR, A.C.J.
 Wash.App. Div. 2, 2008.
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END OF DOCUMENT

RCW 7.28.160 provides:

In an action for the recovery of real property upon which permanent improvements have been made or general or special taxes or local assessments have been paid by a defendant, or those under whom he claims, holding in good faith under color or claim of title adversely to the claim of plaintiff, the value of such improvements and the amount of such taxes or assessments with interest thereon from date of payment must be allowed as a counterclaim to the defendant.

RCW 7.28.170 provides:

The counterclaim shall set forth the value of the land apart from the improvements, and the nature and value of the improvements apart from the land and the amount of said taxes and assessments so paid, and the date of payment. Issues shall be joined and tried as in other actions, and the value of the land and the amount of said taxes and assessments apart from the improvements, and the value of the improvements apart from the land must be specifically found by the verdict of the jury, report of the referee, or findings of the court as the case may be.

DECLARATION OF SERVICE

On said day below I deposited in the U.S. Mail a true and correct copy of the following document: Supplemental Brief of Petitioner Noel Proctor in Supreme Court Cause No. 82326-0 to the following:

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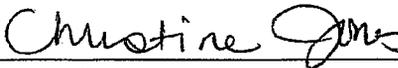
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 30, 2009, at Tukwila, Washington.



Christine Jones
Talmadge/Fitzpatrick

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DECLARATION