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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NOEL PROCTOR,

Appellant,

vs.

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

Respondents.

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

Respondents,

vs.

NOEL PROCTOR,

Appellant.

RESPONDENTS' OPENING BRIEF

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A. INTRODUCTION.

Robert "Ford" and Christina Huntington ("Huntingtons") built their dream home on what everyone reasonably believed was their property. The developer (of both the Huntingtons' and the Proctor's properties) showed the Huntingtons the specific corner at issue (later referred to at trial as the "1/16th pin" and/or "16th pin") as their northwest corner. Before breaking ground on the construction of their home, the Huntingtons confirmed this corner with both the surveyor who had surveyed the properties and their neighbor, the Appellant Noel Proctor ("Proctor"). Everyone believed the 16th pin marked the common boundary and acted accordingly.

Eight years after the Huntingtons completed construction of, and moved into, their magnificent home, Proctor commissioned a survey to address a dispute with another neighbor. The new survey, conducted by another surveyor, revealed, to the shock of everyone, that the Huntingtons had built their home entirely upon about one acre of Proctor's approximately 36 acres of land.

When the Huntingtons refused to remove their house, Proctor sued in equity. He asked the court to order the Huntingtons to remove their home and to pay him damages. The Huntingtons countered that Proctor,

who acquiesced to the boundary line, was estopped (estoppel *in pais*) from claiming a boundary different than the 16th pin. The Huntingtons also argued that forcing them to move their home would be oppressive.

This case also involves the Huntingtons' driveway. Prior to selecting their homesite, the Huntingtons approached Proctor about building a "permanent driveway" across a portion of his property. Proctor agreed upon certain conditions. In reliance upon this promise, the Huntingtons spent approximately $12,600 to build their driveway, assisted for over eight years in maintaining the main road, and erected a gate. Eight years later, when they refused to remove their home, Proctor sued to force the Huntingtons to quit using their driveway. The Huntingtons countered that they were entitled to use the driveway under the theories of partial performance and equitable estoppel.

After a four-day trial, the court determined that Proctor was not "estopped" from claiming ownership of the disputed area, but ruled that forcing the Huntingtons to move their home would be oppressive. The trial court instead fashioned a remedy to require the Huntingtons to pay Proctor fair market value for the one acre of land occupied by the Huntingtons' improvements.

With regard to the driveway, the court found that Proctor could unilaterally revoke permission.

In his appeal, Proctor asks this Court to make new law by imposing a rule to prevent trial courts from considering the effect an injunction could impose on innocent parties. Proctor argues that trial courts should not consider the "oppressive" or inequitable nature of an injunction when an encroachment is more than "minimal." The Huntingtons counter that the law is well settled and the court properly consulted the *Arnold v. Melani* factors before fashioning the appropriate remedy.

On the other hand, the Huntingtons contend the trial court erred when it found that Proctor is not equitably estopped to claim beyond the 16th pin or that Proctor could unilaterally terminate the Huntingtons' right to use their driveway.

B. ASSIGNMENTS OF ERROR.

1. **Appellant's Appeal.**

A. <u>Appellant's Assignments of Error</u>.

(No response required).

B. **Issues Pertaining to Appellant's Assignments of Error.**

1. Did the trial court abuse its discretion when it declined to issue a mandatory injunction to force the Huntingtons to remove their house and other improvements?

2. Did the trial court abuse its discretion in finding that forcing the Huntingtons to remove their home would be inequitable, unjust, and unduly oppressive?

3. Did the trial court abuse its discretion when it fashioned a remedy that considered the equities of the particular circumstances in this case?

4. Did the trial court abuse its discretion in considering evidence related to the oppressive and inequitable nature a mandatory injunction could impose?

2. **Respondents' Appeal.**

A. **Assignments of Error.**

The Respondents, Ford and Christine Huntington, hereby assign error to the following:

1. The trial court erred in making Finding of Fact Number 5.

2. The trial court erred in making Finding of Fact Number 9.[1]

3. The trial court erred in making Finding of Fact Number 11.

4. The trial court erred in entering Conclusion of Law Number 1.

5. The trial court erred in entering Conclusion of Law Number 3.

6. The trial court erred in entering Conclusion of Law Number 5.

7. The trial court erred in entering Conclusion of Law Number 6.

8. The trial court erred in entering Conclusion of Law Number 9.

9. The trial court erred in entering Conclusion of Law Number 10.

10. The trial court erred in entering its Final Order and Judgment on March 1, 2007.[2]

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[1] This Finding of Fact contains a scrivener's error, stating that the Huntingtons' road was built in 2005. The road was actually built in the summer of 1995. *See* Finding of Fact Number 7; RP 193.

[2] The Findings of Fact and Conclusions of Law and Final Judgment and Order are included in the Appendix.

B. Issues Pertaining to Assignments of Error.

1. Did the trial court err by not applying the estoppel *in pais* doctrine to bar Proctor from seeking territory beyond the 16th pin? (Assignment of Error Nos. 1-3, 5-10).

2. Did the trial court err by permitting Proctor to revoke his promise to allow the Huntingtons to maintain their "permanent driveway" after they had partially completed their obligations of the agreement? (Assignment of Error Nos. 1-4, 10).

3. Did the trial court err by permitting Proctor to revoke his permission to allow the Hungtingtons to maintain a "permanent driveway" when the Huntingtons, in reliance upon his promise, spent substantial time and money to build and maintain their driveway? (Assignment of Error Nos. 1-4, 10).

C. RESPONDENT'S COUNTERSTATEMENT OF THE CASE.

Developer Dusty Moss ("Moss") short platted a large tract of land into the two parcels that eventually was bought by Proctor and the Huntingtons. RP 166.

In 1994, the Huntingtons purchased approximately 27 acres with two of their friends, eventually owning Parcel 2, totaling approximately

17 acres. RP 176-77.[3] Mr. Proctor purchased approximately 40 total acres of land in early 1995. RP 607, RP 719-21; CP 28-29. They both purchased directly from Moss. RP 166.

Prior to any sale, Moss hired Dennis Peoples of D2AB Surveying ("Peoples") to survey the property. RP 421. Mr. Peoples set pins to mark the parcels' boundaries. RP 419; RP 423. Mr. Peoples testified he set the 16th pin sometime before May 5, 1994. RP 564. Mr. Peoples also testified that he did not set the northwest corner pin for the Huntingtons' property until May 22, 1997, nearly three years after the Huntingons purchased the property.[4] RP 500. Mr. Peoples admitted that his field notes were incorrect and did not match the dates listed on maps he had prepared after learning of the boundary line dispute. RP 525.

Before purchasing Parcel 2, Mr. Huntington walked the properties with Moss in 1994. CP 388. Mr. Moss pointed to a metal t-post as marking the parcel's northwest corner. CP 388; RP 165-172, RP 172-73. The metal t-post actually marked the 16th pin that Peoples' had set. RP 188. Mr. Huntington relied upon the 16th pin as his northwest

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[3] At the time, Ford and Christina were not married. RP 175-76. They were married in 1994; the same year that Mr. Huntington purchased their property. *Id.*

[4] Although Mr. Peoples offered inconsistent testimony as to when the 16th pin was set, he finally reached the conclusion that it must have been before May 5, 1994 because, as shown on Ex. 88, his certificate was set to expire on that date. RP 563, 677.

boundary when he purchased Lot 227. RP 173.

The Huntingtons began to live on the property during the summer of 1994. RP 181-82. They camped in tents and maintained a garden. RP 182. The Huntingtons openly camped in two places; the spot where the home is now located and a spot near an open field southwest of their homesite. RP 182-83. Both of these sites were east of the 16th pin. *Id.* In the Spring of 1995, the Huntingtons built, and lived on, a permanent platform for their tent, and developed a separate cooking area, south of their tent platform. Both of these spots were, as it turns out, west of their property line but east of the 16th pin. RP 182-83, 190; CP 223. The Huntingtons moved into their tent on the platform in early summer of 1995. *Id.* The Huntingtons also built a retention pond on what also turned out to be Proctor's property. RP 216; Ex. 14.

In early 1995, Proctor purchased and, later that year, began to develop Parcel 3. RP 607, 609. Prior to purchasing the property, Moss also showed Proctor the property corners. RP 834. Proctor recalls seeing a tent and other evidence of the Huntingtons' camping on the property. RP 818.. During the summer of 1995, Proctor visited the Huntingtons a few times at their campsite. *Id.*, RP 217. He did not believe they were on his property. RP 819.

Throughout 1995, the Huntingtons spent considerable time trying to choose their homesite. RP 183. They finally decided upon a flat area near the north boundary of their property. RP 213. The building site was east of the 16th pin, which the Huntingtons continued to believe was their northwest boundary. RP 269-71.

Before finalizing their choice of building sites, Mr. Huntington asked Peoples to confirm their northwest corner. RP 212. Mr. Peoples walked Mr. Huntington to the 16th pin and stated that it marked his northwestern boundary. RP 75; 212. The survey pin was still marked with the same metal t-post that was there when the Huntingtons purchased the property. RP 77. Mr. Peoples also verified that the Huntingtons' proposed building site was east of the property line (16th pin). RP 269-271.

After choosing their homesite, the Huntingtons next evaluated where to place their driveway. RP 193. Although there was no recorded easement, Moss had, before the sale, notified Mr. Huntington that he could use part of what is now Summit View Road to access his property. RP 195-96. Summit View Road lay entirely upon what turned out to be Proctor's property. CP 223.

The Huntingtons hired Sam Oglesby ("Oglesby"), a local contractor, to build their driveway. RP 196. Oglesby had also been contacted by Proctor to extend Summit View Road to his building site. RP 196-97. Mr. Oglesby determined that the Huntingtons' best option would be to tie their driveway into Summit View Road. RP 198-200. This would require them to build their driveway on a portion of Proctor's property. RP 202.

The Huntingtons therefore approached Proctor for permission to build their driveway. RP 202. Mr. Huntington met Proctor on his property. RP 205. After walking the proposed route, Proctor granted the Huntingtons permission to build their "permanent driveway" across his property to connect to Summit View Road. RP 205. However, Proctor said the Huntingtons would need to install a gate, which they were to keep locked, at the bottom of their driveway, and maintain the main road, the driveway, and the areas on each side of the driveway. RP 205-06.

Before actual construction of the driveway, Oglesby confirmed with Proctor that he had given the Huntingtons permission to use a portion of his property. RP 438. Proctor told Oglesby that the agreement between him and the Huntingtons was to his benefit because it would act as a fire break for his property and it would also mean that someone else would

share in the costs of maintaining the shared portion of the road. RP 439. Mr. Oglesby further testified that he did not "broker" the deal or act as a go-between for Proctor and Mr. Huntington. RP 446. The Huntingtons paid Oglesby (Pilot Knob Construction) approximately $12,600 for installing their driveway. RP 889-890.

The Huntingtons also hired Oglesby to clear the area for their future home. RP 454. At no time did anyone, including Oglesby or Proctor, have any concerns that they were clearing Proctor's property. RP 455.

While they were discussing the driveway and its location, Mr. Huntington showed Proctor the 16th pin and indicated his understanding that this pin marked their common corner. RP 222. Proctor agreed. RP 222. At the time of this meeting, the Huntingtons had cleared their proposed homesite of brush. RP 83-84. Proctor could see where the Huntingtons were planning to build their home. *Id.* Proctor testified he felt the end of the Huntingtons' driveway (the current homesite) was located entirely upon the Huntingtons' property. RP 788. Proctor also testified he had previously walked the Huntingtons' road and determined that it ended in a clearing upon "their property." RP 786.

Also critical to the meeting between Proctor and Mr. Huntington was their agreement that Proctor would keep all of the trees cut down west of the 1/16th pin while the Huntingtons would retain those trees that were harvested east of the boundary. RP 284, 781. Under this arrangement, Oglesby gave all of the trees harvested west of the 16th pin to Proctor. *Id.* Believing they belonged to the Huntingtons, Proctor did not lay claim to any trees cut east of the 16th pin. *Id.*

For years after their oral agreement, the Huntingtons asked Proctor to put their easement in writing. RP 210. Mr. Proctor repeatedly promised to prepare and sign the easement. RP 209-210.

In July of 1995, Mr. Huntington also contacted a well drilling company to drill a well at the building site. RP 233-34; Ex. 21. Mr. Proctor stopped by while they were drilling the well. RP 235. Mr. Proctor assumed the well was being dug on the Huntingtons' property.

In May and/or June of 1996, the Huntingtons began to construct their garage and home. RP 253. Proctor occasionally visited the Huntingtons' building site during the project. RP 818-19. Proctor never indicated to the Huntingtons that they were building on his property. RP 818-19.

In May of 2004, Proctor, concerned with another neighbor's possible encroachment, arranged to have Rich Bell ("Bell") survey and mark his boundaries. RP 647-48. On June 1, 2004, Bell was having trouble locating Proctor's northwest corner, so, when he saw Mrs. Huntington outside her home, asked if she knew where the corner was located. RP 651-52. Mrs. Huntington pointed Bell to the 16th pin. RP 652. Much to the surprise of everyone, Bell found that the 16th pin was not the actual corner and that the Huntingtons had built their home completely on the wrong side of the deeded line. RP 650-52.

Proctor sued on February 16, 2005, to "injoin" the Huntingtons from entering onto Proctor's land, damages, quiet title to the disputed property, and ejectment of the Huntingtons' home. CP 1-4. The Huntingtons answered and counter-claimed seeking quiet title to the disputed area, approximately 6.17 acres. CP 7-12. The Huntingtons also sought an easement over the permanent driveway.

After a four-day bench trial, Honorable E. Thompson Reynolds dismissed the Huntingtons' adverse possession counterclaim. RP 914-15.

Judge Reynolds entered Findings of Fact and Conclusions of Law. CP 401-08. Judge Reynolds found that both parties were under a mutual mistake of fact when they believed the 16th pin marked the northwest

corner of the Huntingtons' parcel. CP 405. The court further found that the Huntingtons had proven the elements of estoppel *in pais* by a preponderance of the evidence, but they did not meet the requisite burden of clear and convincing evidence. CP 405.

In deciding upon the appropriate remedy, the court ruled that requiring the Huntingtons to move their home and other improvements would be an oppressive, unduly costly, and inequitable remedy under the circumstances of this case. CP 406. The court specifically found that the Huntingtons did not act in bad faith, negligently,[5] or willfully when they chose to build their home on a location that was later discovered to be on Proctor's property. CP 406.

The court ordered that the Huntingtons could retain the approximately one acre that contains their home and other improvements provided they paid Proctor the property's fair market value ($25,000) and all closing costs. CP 244. Proctor appealed and the Huntingtons have cross-appealed. CP 232, 398.

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[5] Proctor notes that Judge Reynolds stated in his oral ruling that the Huntingtons were negligent in fully ascertaining their boundaries. App. Br. P. 13. This is an incorrect and misleading statement. Judge Reynolds stated that the Huntingtons "perhaps were negligent in fully ascertaining where their boundaries were." RP 927. Judge Reynolds later refused to include a finding regarding the Huntingtons alleged negligence in the Findings of Fact and Conclusions of Law. RP 956-57.

D. SUMMARY OF ARGUMENT.

Proctor claims in his appeal that the trial court abused its discretion when it refused to require the Huntingtons to remove their home. While he agrees that injunctions are extraordinary remedies not to be granted lightly, and that trial courts have broad discretion to fashion the appropriate remedy, Proctor argues that the judge should not have considered the equities or the harshness of the requested remedy. In other words, Proctor simply does not like the remedy chosen by the Judge. Proctor instead wants this Court to adopt a new statement of law that would require courts, in cases where an encroachment is more than "minimal," to "blindly" issue an injunction to force the removal of an encroachment, regardless of the circumstances.

The law in Washington is well established on this point. Whenever a court is asked to grant equitable relief, it must grant equity in a meaningful manner, not blindly. The rule is no different in the cases of encroachment. Indeed, the Washington Supreme Court has set forth a set of "factors" – not elements as suggested by the appellant – that a trial court is to consider before granting a mandatory injunction. Under the circumstances in this case, the trial court properly found that forcing the Huntingtons to remove their home would be oppressive and inequitable.

The Huntingtons have filed a cross-appeal because they believe the trial court erred in not granting to them quiet title to the disputed property. Estoppel *in pais* applies when the first party changes an earlier position they took, by admission, statement, or conduct, which the second party relied upon to change their position. In this case, the parties, although mutually mistaken, agreed that the 16th pin was their mutual corner. The Huntingtons relied upon Proctor's indication of his understanding that the 16th pin was their common corner when they locate their home. Proctor cannot, under the estoppel *in pais* doctrine, now change his position to the Huntingtons' detriment.

The Huntingtons also proved that they acquired an easement for their permanent driveway through the doctrines of equitable estoppel and/or part performance.

E. ARGUMENT – Huntington's Response To Proctor's Appeal

1. Standard of Review.

Appellate review of a trial court's findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. *Rogers Potato Serv., LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004). If that standard is satisfied, a reviewing

Court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-90, 73 P.3d 369 (2003). Conclusions of law and questions of law are reviewed *de novo*. *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 570 (1979); *see also Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (appellate court reviews findings for sufficiency of the evidence, and conclusions *de novo*, regardless of how they are designated).

Appellate court review of findings of fact to determine whether they are supported by substantial evidence is deferential to the trial court. *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 676, n.9, 929 P.2d 510 (1997). Accordingly, appellate courts must accept the trial court's "views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-72, 859 P.2d 610 (1993) (quoting *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992)).

The appellant has properly set forth the standard of review for injunctions. An injunction is an extraordinary remedy and should not be granted lightly. *See Kucera v. DOT*, 140 Wn.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."). The granting or withholding of an injunction is addressed to the sound discretion of the trial court to be exercised according to the circumstances of each case. *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wn.2d 230, 233, 635 P.2d 108 (1981). For purposes of granting or denying injunctive relief, the standard for evaluating the exercise of judicial discretion is whether it is based on untenable grounds, or is manifestly unreasonable, or is arbitrary. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Finally, the trial court has discretion in ruling on evidentiary matters and its decisions with respect to that evidence are ordinarily reviewed on an abuse of discretion standard. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997).

2. **The Trial Court Did Not Err by Denying a Mandatory Injunction.**

a. Mandatory Injunction is an Extraordinary Remedy and Not to be Granted as a Matter of Right.

Proctor has asked this Court to issue an injunction to require the Huntingtons to remove their home. The parties do not dispute that an injunction is an extraordinary remedy that should not be granted if there is

an adequate remedy at law. *See Kucera v. DOT*, 140 Wn.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."). The parties also agree that an injunction should not "be granted lightly." "An injunction is distinctly an equitable remedy and is frequently termed 'the strong arm of equity,' or a 'transcendent or extraordinary remedy,' and is a remedy which should not be lightly indulged in, but should be used sparingly and only in a clear and plain case." *Id.* at 209.

Before a court may order injunctive relief, the court should first consider the following: 1) the character of the interest to be protected; 2) the relative adequacy to the plaintiff of an injunction in comparison with other remedies; 3) the delay, if any, in bringing suit; 4) the misconduct of the plaintiff, if any; 5) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied; and, 6) the practicality of framing and enforcing the order or judgment. *Lenhoff v. Birch Bay Real Estate, Inc.*, 22 Wn. App. 70, 587 P.2d 1087 (1978).

Although a mandatory injunction is the proper remedy to compel removal of an encroacher's improvements, it is not to be issued as a matter of course. *Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800 (1968).

"[W]hen an equitable power of the court is invoked, to enforce a right, the court must grant equity in a meaningful manner, not blindly." *Id.* A court granting equitable relief is to look at the totality of the circumstances when fashioning a remedy, including denying a legal right when it is equitable to do so. *See Id.* at 152 ("There is no question but that equity has a right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable."). Accordingly, courts are vested with the authority to fashion a remedy that will be fair and equitable to the parties, which may include denial of a mandatory injunction. Indeed, the court stated in *Arnold* that "'[i]t is not safe to attempt to lay down any hard and fast rule for the guidance of courts of equity in determining when an injunction should issue.'" 75 Wn.2d at 146-47 *citing McCann v. Chasm Power Co.*, 211 N.Y. 301, 305, 105 N.E. 416 (1914).

3. **The Trial Court Properly Balanced the Harms.**

a. The Parties Made a Mutual and Reasonable Mistake Regarding Their Boundary.

There is no dispute that the 16th pin was not the correct boundary marker for the parties' property even though both parties reasonably believed that the pin marked their common boundary. There is also no dispute that the Huntingtons made permanent improvements to property

that belonged to Proctor. Under certain narrow circumstances, a mandatory injunction is the proper remedy for this type of encroachment. However, Washington courts have long recognized that equity dictates the outcome and courts are to grant equity in a meaningful manner, which may include denying the injunction.

Here, the trial court correctly fashioned an equitable remedy in denying Proctor's request for extraordinary relief, *i.e.*, a mandatory injunction. The court held that to require the Huntingtons to move their home would be oppressive, unduly costly, and inequitable under the circumstances of the case when both parties were mistaken as to the actual property line. CP 229. Specifically, the trial court noted its use and application of the "factors" suggested by the Supreme Court in *Arnold v. Melani*, 75 Wn.2d 143, 146, 449 P.2d 800 (1968): 1) the Huntingtons did not act in bad faith, negligently, or willfully when they chose to build their home on a location later discovered to be Proctor's property; 2) the Huntingtons acted reasonably and in good faith when they ascertained the boundaries of their property; 3) the damage to Proctor is slight and the benefit of removing the house is equally small; 4) there are no real limitations on Proctor's future use of his property in permitting the Huntingtons to retain their home in its current location; and, 5) there

would be an enormous disparity in resulting hardships if the Huntingtons were required to remove their home. CP 229.

In *Arnold v. Melani*, a case with facts similar to the present matter, the defendant built a house on the plaintiff's side of the boundary, due to a mistake by the defendant's surveyor. 75 Wn.2d at 144.

The Court, after considering the factors stated above, refused to authorize an injunction and left the plaintiffs to recover damages, stating, "There is no question but that equity has a right to step in and prevent the enforcement of a legal right whenever such enforcement would be inequitable." 75 Wn.2d at 152. Further, the Court held that a court's power to deny a mandatory injunction is the "judicial recognition of a circumstance in which one party uses a legal right to purchase of an equitable club to be used as a weapon of oppression rather than in defense of a right." *Id.* at 153.

The doctrine that protects innocent home builders from an understandable mistake has been around for nearly 100 years. In *People's Savings Bank v. Bufford*, a case with some very strong similarities to the case at hand, both parties owned property in the same subdivision. 90 Wash. 204, 155 P. 1068 (1916). When the property was sold to one of the parties the seller mistakenly showed the other party's property. The

buyer (defendant) began work on the property by making improvements and eventually building a house on the lot. Each side paid the taxes on the property they thought they owned. Just like in this case, the Court found that there was no intention by the defendant to enter upon the land of the other and take that property. All actions were done in good faith and were the result of a mistake. Realizing that ejecting the defendant from their house and the lot they called home for the past five years would be unjust, the Court gave the plaintiff the option of trading lots with the defendant or else be reimbursed for taxes and assessments paid out by the plaintiff until the present time of the lawsuit. *Id.* at 209. This remains the law today. A court will not force a person to lose their house under circumstances that show that the encroachment was done in good faith and was the result of a mistake.

b. The Court Properly Considered the Circumstances Before Choosing the Appropriate Equitable Remedy.

Proctor argues that courts will only consider the equities where there are no physical encroachments or where the encroachments are only "minimal." He tries to resurrect all of the arguments and cases that the Supreme Court of Washington addressed and expressly rejected in *Arnold.* Indeed, *Arnold* remains the law in Washington and, as the trial court held,

controls the outcome of this case. Proctor's analysis and distinction of *Arnold* is misplaced and constitutes a gross misstatement of the law. Proctor essentially wants this Court to either ignore or effectively overturn the Supreme Court's decision in *Arnold.*

No Washington court has held that a physical encroachment or an encroachment that is more than "minimal," a term not defined by any Washington court, requires a different or altered test than the one laid out in *Arnold* and relied upon for nearly 40 years. Indeed, as set forth above by the Supreme Court in *Buford*, the Court allowed a party to keep their home even though it had been built entirely upon the wrong parcel because the Court found that the defendant acted in good faith.

The Washington cases cited by Proctor are legally and factually distinguishable from the present case. In *Wimberly v. Caravello*, the Court of Appeals affirmed the trial court's grant of a mandatory injunction, finding that Caravello failed to satisfy the first element of the *Arnold* test by proceeding with his construction knowing that it violated the restrictive covenants, *i.e.*, Caravello took a calculated risk that once he reached a critical stage of the building process no one would complain or make him remove the three-story garage. 136 Wn. App. 327, 341, 149 P.3d 402 (2006). *Accord Green v. Normandy Park*, 137 Wn. App. 665, 151 P.3d

1038 (2007) (court affirmed grant of mandatory injunction when first part of *Arnold* not satisfied because garage built in violation of restrictive covenants and property owners were not innocent parties).

In *Steele v. Queen City Broadcasting Co.*, the Supreme Court found that a tower was illegally built too close to other homes. 54 Wn.2d 402, 341 P.2d 499 (1959). In particular, the Court found that the tower "substantially damaged" the neighboring properties, thereby preventing them from obtaining mortgages in a reasonable amount, sizeable chunks of ice fall from other similar towers onto adjacent properties, making it likely that the same would happen with the tower at issue, and the tower created "disagreeable wind noise." *Id.* at 407. The Court further noted that there were grave doubts regarding the defendant's good faith in erecting the tower; however, the plaintiff allowed the defendant to nearly complete construction on the tower before bringing a declaratory judgment action for an injunction. *Id.* at 410. Under these circumstances, the Court held that it would be inequitable to force the defendant to remove the tower since damages could adequately compensate the plaintiff. *Id.* Finally, the Court noted that reversal of the trial court's holding would amount to a usurpation of the trial court's function. *Id.* at 411.

The cases cited by Proctor for the proposition that physical encroachments to land are handled differently than those cases that do not involve encroachments were not decided on the issue of the size and/or scope of the encroachment. Indeed, the *Arnold* case that laid out the five factors a court may consider in determining whether to deny a mandatory injunction involved a physical encroachment that was more than the trifle example of 4" advocated for by Proctor. Br. of App. 23; *Arnold*, 75 Wn.2d at 145 (encroachment was between 8.4 and 9.7 feet).

In *Wells v. Park*, the Court affirmed the award of a mandatory injunction because the defendants relied on adverse possession for their claim to the property, yet the defendants failed to follow the same fence line in placing their encroachment, thus making it difficult for the court to understand how the defendants acted in good faith in building the encroaching wall. 148 Wash. 328, 333, 268 P. 889 (1928), *overruled on other grounds, Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). The Court in *Arnold* expressly stated that *Wells* is inapposite to the balancing doctrine and that the Court in *Wells* "did not discuss the comparison of the cost of removal in relation to the value of the benefit." *Arnold v. Melani*, 75 Wn.2d 143, 149, 449 P.2d 800 (1968).

In *Tyree v. Gosa*, a case cited by Proctor as "particularly dispositive of this issue and based on a similar fact pattern" Br. of App. 26, the encroacher, who was warned of a dispute as to the property line and took steps to correct his own survey by some 20 feet, took a chance by constructing two houses on the questioned area. 11 Wn.2d 572, 119 P.2d 926 (1941). The *Arnold* court stated that the trial court in *Tyree* was clearly in error in protecting the encroacher because of the absence of "entire good faith" as required in *Bufford*, 75 Wn.2d at 150. Here, the trial court made findings of fact, sufficiently supported by the evidence, and conclusions of law in finding that the Huntingtons acted in good faith and did not take a calculated risk. If *Tyree* is dispositive of this case, it is dispositive for one reason only: Proctor's request for a mandatory injunction must be denied because the Huntingtons acted in good faith in building their home.

In *Adamec v. McCray*, a case decided before *Arnold*, the court refused to "balance the equities" when affirming the grant of a mandatory injunction because at that time no Washington case had been decided that required denial of the injunction, and the facts did not support a denial (case involved boat pilings placed on plaintiff's side of surveyed line). 63 Wn.2d 217, 220, 386 P.2d 427 (1963).

The encroaching structure in *Adamec* extended just 7½ feet over the boundary line, which was a smaller encroachment than the encroachment in *Arnold*, where the court denied the request for a mandatory injunction. 63 Wn.2d at 218. Clearly, application of the doctrine is less concerned about a bright line test for the size and/or scope of the encroachment and more concerned about weighing the factors listed in *Arnold.*

Further, the *de minimis* standard advocated for by Proctor as a bright line test on when a mandatory injunction may be denied was expressly denounced in *Arnold*, 75 Wn.2d at 148 (the "*de minimis* rule" is not the subject of the case because the encroachment was "more than a trifle"). Indeed, as Proctor notes, the court in *Arnold* failed to define or discuss the size of the encroachment versus the size of the lot the house and fence were encroaching upon. The reason is simple: There is no bright line test based upon the size of the encroachment. Accordingly, in determining whether to deny a mandatory injunction, courts address the size of the encroachment as part of the five factor test rather than as a separate sixth factor. *Accord Peoples Sav. Bank v. Bufford*, 90 Wash. 204, 155 P. 1068 (1916) (entire home built on neighbor's small adjacent lot).

Finally, a more recent case to apply the balancing test from *Arnold* also involved a physical encroachment. In *Hanson v. Estell*, the Hansons rebuilt a barn in 1992 that had burned to ground the year before. 100 Wn. App. 281, 283, 997 P.2d 426 (2000). A county building inspector examined the apparent property line and approved construction of the building, believing it satisfied the requisite setback requirements. *Id.* at 283.[6] The Estells' predecessor surveyed the property and found that the barn encroached about one foot over the property line. *Id.* After a few years were spent dealing with various claims and procedural issues, the matter was finally tried based on the Estells' request for an injunction for removal of the barn. *Id.* at 285. At issue during the trial was the scope of the easement granted to the Hansons and whether the barn interfered with the easement. *Id.*

At trial, the judge refused to award an injunction to the Estells, believing that there was an adequate remedy at law (*i.e.*, damages) and that the facts of the case did not warrant granting extraordinary relief to the Estells in the form of an injunction. *Id.* at 285.[7] The holding from

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[6] Since the Huntingtons also received a building permit and final occupancy permit for their home, they would also have had to have a building inspection approving the home and the setbacks. CP 27, 25.

[7] The appellate court in *Hanson* also held that CONST. art. I, § 16, the eminent domain provision, does not divest a court of equity of the power to refuse a mandatory

Hanson, affirmed by the appellate court, is particularly relevant to the instant case. In *Hanson*, the court stated that the trial court correctly balanced the equities and that equity supported denying the mandatory injunction, leaving the Estells to their remedy at law. *Id.* at 289.

Applying these principles it is obvious that an encroachment taking up an acre of land could be considered a minimal encroachment if the landowner owned one thousand acres. In the present case, the encroachment onto one acre of Proctor's land constitutes less than three percent of his total property. Certainly this is a minimal or trifle encroachment under the standard Proctor is asking this Court to adopt.

Under *Arnold,* the trial court must consider the following factors when considering whether to issue a remedy that is less than a full blown injunction.

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injunction when balancing the equities. *Id.* at 288. Proctor makes a similar argument; however, this argument lacks merit based on the longstanding holdings from *Arnold* and *Hanson*. "To suggest that property rights of an individual (other than protection against the sovereign in regard to eminent domain) are created and protected by Const. art. 1, § 16 (amendment 9) misconstrues its sole purpose." *Arnold v. Melani*, 75 Wn.2d 143, 151 (1968).

i. The Huntingtons did not take a calculated risk, act in bad faith, or negligently, willfully, or indifferently locate their encroaching structure.

The trial court found that the Huntingtons talked with the developer about the boundary line, confirmed the location of the boundary with the surveyor responsible for originally surveying the plots, and also confirmed the location of the boundary with Proctor before building their home. CP 226-27. These findings of fact are all supported by substantial evidence. Proctor argues that the Huntingtons should have had their property re-surveyed before they built their home. Why would they have done this when the surveyor who had performed the actual survey just months before they purchased the property physically verified both the boundary line and the fact that the Huntingtons' building site was well on their side of the boundary line? The Huntingtons could also verify what they were being told by simply looking at the survey pin that they were shown. Indeed, as Peoples admitted, the actual survey pin was not placed until 1997, well after the Huntingtons had begun construction of their home.

Add to this the fact that the developer and Proctor also confirmed the line. At trial, even the surveyor testified that this was a reasonable

mistake; a mistake that he even admits he made when asked if the 16th pin was the actual boundary. RP 592. As Proctor concedes in a footnote, the trial court refused to enter written findings stating that the Huntingtons were negligent in failing to ascertain their boundaries before building. RP 956-57.

The best that Proctor can do is point to disputed evidence to support his claim that the Huntingtons were negligent. Proctor's assignment of error to the trial court not finding Proctor, Peoples, or Webberly credible is not an issue that this Court can review. Appellate courts "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). The trial court was in the best position to observe the witnesses and make determinations regarding their credibility. By finding that Mr. Huntington met with both Proctor and Peoples at the 16th pin before building his home, the trial court did make a finding as to the credibility of Proctor and Peoples. CP 225-26.

Even if this Court were to substitute its judgment for that of the trial court in determining the issue of the conflicting testimony, this Court would find that Mr. Webberly did not question the Huntingtons about the

location of their home as suggested by Proctor. Mr. Webberly questioned Mr. Huntington about his driveway being built on Proctor's land, which both parties acknowledge that Proctor was aware of because he gave the Huntingtons the right to use his property. Indeed, it was most likely this conversation with Mr. Webberly that prompted Mr. Huntington to meet with Proctor at the 16th pin to show Proctor how much of his property was being used for the road.

As for the surveyor, Peoples made clear his concern about being sued for his surveying work. RP 588. Peoples offered conflicting testimony as to when the pins were set. RP 546, 549, 555, 562. Peoples finally admitted that the 16th pin was set well before he set the actual boundary pin for the Huntingtons' parcel. RP 563. The other surveyor, Bell, testified that based upon Ex. 80, the 16th pin must have been set sometime before 1994. RP 676. There was ample reason for the trial court to find Peoples' and Mr. Huntington's testimony more credible than Proctor's or his paid employee, Mr. Webberly.

ii. The damage to Proctor is slight and the benefit of removal is equally small.

The evidence at trial showed that the damage to Proctor is small because Proctor still has full development rights. Lyon testified that the

loss of one acre had no developmental effect to Proctor because the zoning for Proctor's property is five-acre parcels, thus the loss of one acre has no impact on his development potential. RP 490. In addition, there was no evidence that Proctor's enrollment in the forest tax program would be affected. CP 393. Mr. Lyon's calculation of the fair market value for the one acre of land took into account that the property had a view. RP 480-81.[8]

Further, the benefit of removing the house from Proctor's 36 acres is relatively small. Proctor gains little by retaining this one-acre of land. Proctor has not claimed nor asserted any damage to his property due to the home being located on what he alleges to be his property other than that "he can hear their [Huntingtons'] dogs barking and their children screaming." RP 750. This "damage" does not justify forcing the Huntingtons to move their home. Perhaps the trial court would have fashioned a different remedy if there were more than a negligible impact to Proctor that could not have been remedied by the payment of money to Proctor; however, that is not the case here. Moreover, the Huntingtons

[8] Proctor misunderstands the definition of fair market value and attempts to argue that Mr. Lyon erred by ignoring comparable lots within property. App. Br. 34; RP 476-477. This error was Proctor's to raise at trial, either by objecting to the value or by introducing evidence of fair market value. Proctor did neither.

were ordered to pay any taxes on the parcel of land to which they will acquire title so as to prevent Proctor from incurring any expense from the removal of that certain property from the lower tax classification. CP 230.

iii. There is ample remaining room for a structure suitable for the area to be built on Proctor's property.

As described in (b) above, there is ample remaining room for Proctor's future development rights, and awarding title to the Huntingtons does not threaten Proctor's status in the forest management program because there would not be two homes located on Proctor's property after he conveys title to the one acre parcel to the Huntingtons. CP 393.

iv. It is impractical to move the structure as built.

Greg Mockford, an expert in construction, testified at trial that the costs to move the house was prohibitive, exceeding $300,000. CP 227-28. The trial court found that the cost of moving the home ($300,000) far outweighs the value of the land that it sits on ($25,000). CP 390. The trial court further found that it would be impractical to move the house. CP 228. The house has three floors, has a 1650 sq. ft. footprint, and measures 3800 sq. ft. of finished space. RP 394-95; Ex. 89.

Again, Proctor failed to introduce any evidence as to the costs to move the home or whether it would be practical to move the home. Proctor has waived any argument to the contrary.

v. There is an enormous disparity in the resulting hardships if the Huntingtons had to move their home.

There is very little hardship, if any, to Proctor in allowing the Huntingtons' home to stay where it is. On the other hand, the Huntingtons will face an enormous hardship if forced to uproot their home and move it. This will not only result in financial tolls, but will also place a heavy burden on the family themselves as they will be left to deal with saying goodbye to an area that they worked so hard for the last ten years to call home. There really is no possible way to determine the disparity in the resulting hardships because they are not even on the same scale.

Because the trial court found that the Huntingtons satisfied all of the factors from *Arnold* by clear and convincing evidence, the trial court did abuse its discretion in denying Proctor's request for a mandatory injunction. Because its decision was not arbitrary, manifestly unreasonable, or based on untenable grounds, reversal of the trial court's holding would amount to a usurpation of the trial court's function. *See Steele v. Queen City Broadcasting Co.*, 54 Wn.2d 402, 411, 341 P.2d 499

(1959).

It was Proctor's burden to assert at trial that the Huntingtons were only entitled to an easement and not title in fee and to present evidence to the trial court as to the value of an easement for a one-acre parcel of property. Proctor did neither. Since there was no testimony and/or evidence presented to the trial court as to the value of an easement, the trial court did not err in quieting title in the Huntingtons as it was the trial court's only available remedy under the circumstances.[9]

4. **The Trial Court Did Not Err in Introducing Testimony From Real Estate Appraiser or Construction Expert.**

ER 702 provides a trial court with broad authority to admit expert testimony. Accordingly, the trial court properly admitted the testimony of Mr. Mockford and Mr. Lyon. *Wilson v. Overlake Hosp. Medical Center*, 77 Wn. App. 909, 912, 895 P.2d 16 (1995). (A trial court has discretion to permit the interruption of a party's case when necessary for the convenience of litigants or court.) There is no evidence the trial court abused its discretion in permitting Mr. Lyon and Mr. Mockford to testify out of order.

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[9] Proctor also argues that the Huntingtons waived their right to "off-set" because they did not seek such relief. The Huntingtons specifically chose not to seek "off-set" because they did not believe the court should require them to remove their house.

ARGUMENT - Huntingtons' Cross Appeal

5. The Trial Court Erred by Denying the Huntingtons' Claim of Estoppel *in Pais* to the Disputed Area.

Without explanation, the trial court concluded that the Huntingtons proved the elements of estoppel *in pais* by a preponderance of the evidence, but not by clear and convincing evidence. CP 228. Because the court does not explain its reasoning, the Huntingtons are unable to assign error to the trial court's findings of fact. The Huntingtons do, however, assign error to the trial court's conclusion of law.

Estoppel "prevents one alleging or denying a fact in consequence of his own previous act, allegation, or denial, of a contrary tenor. Equitable estoppel, or estoppel in pais, is that condition in which justice forbids that one speak the truth in his own behalf." *Thomas v. Harlan*, 27 Wn.2d 512, 518, 178 P.2d 965 (1947). "It stands simply as the rule of law which forecloses one from denying his own expressed or implied admission, which has in good faith, and in pursuance of its purpose, been accepted and acted upon by another." *Id.* The doctrine of estoppel *in pais* subscribes to the principle that "a man shall not be permitted to deny what he has once solemnly acknowledged." *Arnold v. Melani*, 75 Wn.2d 143, 147 (1968).

In *Thomas v. Harlan*, 27 Wn.2d 512, 518 (1947), the court stated the policy and the elements of the doctrine as follows:

> "It stands simply as the rule of law which forecloses on from denying his own expressed or implied admission, which has in good faith, and in pursuance of its purpose, been accepted and acted upon by another. To constitute estoppel in *pais*, three things must occur: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act."

The Huntingtons have satisfied all three elements.

a. An Admission, Statement, or Act Inconsistent With the Claim Afterwards Asserted.

Mr. Huntington and Proctor met at the 16th pin and agreed that it represented their common corner. CP 226. Proctor, knowing where the Huntingtons planned to build their home, failed to offer any protest to the accuracy of the pin. CP 226; CP 228.

Proctor's past statements, admissions, or conduct are inconsistent with his current position and claims. He now takes the position that he is entitled to own territory beyond the boundary that both parties believed was the actual boundary for over nine years.

In *Burkey v. Baker*, two neighbors that shared a common east/west boundary had the property lines surveyed. 6 Wn. App. 243, 244, 492 P.2d 563 (1971). One neighbor (Baker) insisted that the survey accurately marked the boundary line, while the adjoining neighbor (Burkey) asserted that a row of trees planted by Baker's son-in-law marked the boundary and that Baker was estopped to deny the tree line as the true boundary. *Id.* at 244. In *Burkey*, the appellate court set out the material facts found by the trial court regarding the improvements made to the disputed area by Burkey. Most notably, the trial court found that Burkey had planted the row of trees and had maintained up to the trees, but did not maintain the area between the trees and the actual survey line. In other words, Burkey did not maintain all of the land that he actually owned. *Id.* at 245. While visiting the property to determine whether to purchase the lot next to Burkey, Baker noticed that Burkey did not improve the area on the other side of the trees. *Id.* Burkey also told Baker that the boundary line was within a foot or two of the tree line. *Id.*

As it turns out, Burkey was mistaken about the location of the boundary line. The court applied the doctrine of estoppel in *pais* and found that even though Burkey may not have had superior knowledge regarding the boundary line, nor intended to misrepresent the facts, he was

estopped from denying the line that he once admitted. *Id.* at 248-49.

In the present case, the trial court found that Mr. Huntington and Proctor met at the 16th pin before the Huntingtons built their home for the purpose of confirming the 16th pin as their boundary. CP 226. Proctor did not dispute that the 16th pin marked the parties' boundary line. CP 227. In reliance on Proctor's actions, the Huntingtons built their home on what turned out to be Proctor's land. CP 227; RP 781, 788, 818-19.

Proctor stood by and said nothing while the Huntingtons made improvements to their property. Any one of Proctor's actions or statements alone may not add up to clear and convincing evidence of estoppel; however, viewing all of the actions as a whole, clearly evidences that Proctor made a "statement" (letting the Huntingtons have the trees east of the 16th pin), and engaged in conduct (not protesting when Mr. Huntington stated that the 16th pin marked the boundary and watching the Huntingtons build their home) that is inconsistent with his current claim.

b. Action by the Other Party on the Faith of Such Admission, Statement, or Act.

This elements asks whether the other party actually and reasonably relied upon the other's statement, admission, or conduct.

In reliance on the parties' understanding of the true boundary line, the Huntingtons spent substantial sums of money to construct their house, garage, retaining wall, yard, and driveway in reliance on where the parties believed the common line was located.

c. Injury to Such Other Party Resulting From Allowing the First Party to Contradict or Repudiate Such Admission, Statement, or Action.

The injury to the Huntingtons in this case is obvious. They spent money on the construction of their driveway and house, garage, retaining wall, and other landscaping features. The trial court found that it would cost the Huntingtons more than $300,000 to move their house to another location. CP 228.

The Huntingtons have proven the three elements of estoppel *in pais* by clear and convincing evidence.

6. **The Trial Court Erred By Finding That The Huntingtons Did Not Have An Easement Over Summit View Road.**

The trial court refused to find that the Huntingtons were entitled to continue to use their "permanent" driveway. With little discussion, the court simply found that Proctor never granted an easement and therefore could revoke the license at any time.

The court did find, however, that Proctor agreed to allow the Huntingtons to construct their driveway across his property on the condition that the Huntingtons would construct a gate across the road and also share in the cost of maintenance for that portion of the main road that the Huntingtons and Proctor would share. CP 226. The court also found that the Huntingtons built their driveway across the Proctor property to their homesite in 1995 and have maintained that road ever since. CP 226.

a. Huntingtons Proved Part Performance of the Parties' Agreement, Requiring Enforcement of Their Agreement.

In Washington, under the doctrine of part performance, "an agreement to convey an estate in real property which is not in writing in compliance with the requisites of RCW 64.04.010 and .020 [Statute of Frauds requirements] may be proved without a writing, and specifically enforced, if there is sufficient part performance of the agreement." *Berg v. Ting*, 125 Wn.2d 544, 556, 886 P.2d 544 (1995) *citing Miller v. McCamish*, 78 Wn.2d 821, 479 P.2d 919 (1971). The part performance doctrine is designed to prevent a plaintiff from later denying the existence of an agreement that is not in writing.

There are three factors that a court should examine to determine "if there has been part performance of the agreement so as to take it out of the

statute of frauds: (1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements, referable to the contract." *Berg*, 125 Wn.2d at 556. The Court in *Berg* noted that all three of the factors are not required to be present for a Court to find part performance.[10] *Id.* at 557-59.

In *Kirk v. Tomulty*, 66 Wn. App. 231, 831 P.2d 792 (1992), *rev. den.* 120 Wn.2d 1009, 841 P.2d 47 (1992), the Court of Appeals applied the part performance doctrine to excuse the lack of compliance with the Statute of Frauds. *Id.* at 238-39. The holders of the easement in *Kirk*, relying upon an oral agreement, subdivided their land, built a road across the servient land, and sold subdivision lots. *Id.* at 233-36.

The initial inquiry is to determine whether the parties intended to create an easement. "If there is any ambiguity as to the existence of an easement, we determine the intention of the parties by examining such factors as the construction of the pertinent language, the circumstances surrounding the transaction, the situation of the parties, the subject matter,

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[10] In addition, "the party relying on the part performance doctrine must prove by clear and unequivocal evidence the existence and all the terms of the contract. However, that proof is in addition to establishing that there has been part performance." *Berg*, 125 Wn.2d at 561.

and the subsequent acts of the parties involved." *Kirk*, 66 Wn. App. at 237-238 (internal citations omitted). Moreover, the modern tendency is "to minimize the consequences of defects in the formalities of a transaction and thus to increase the frequency of easements and correspondingly to decrease the frequency of licenses so created." *Moe v. Cagle*, 62 Wn.2d 935, 938, 385 P.2d 56 (1963) (emphasis added).

Proctor granted to the Huntingtons the right to build their "permanent driveway" across his property to access Summit View Road. RP 205-06. In consideration of being allowed to build their driveway across his property, Proctor required the Huntingtons to put up a gate, maintain the road, help maintain the common road, and to clear the brush in and around their driveway. *Id.* Proctor knew construction of the road would be expensive.

In reliance upon Proctor's promise, the Huntingtons spent in excess of $12,600 to install their driveway. RP 889-90. They also spent a considerable amount of time and money since then to maintain the road. RP 905; 139-40.

Proctor only sought to revoke permission to use the driveway after the Huntingtons refused to remove their house. "[E]quity should intervene to deny one party what would clearly be an unjust enrichment as long as

the character, terms and existence of the contract can be clearly and unequivocally established to the satisfaction of the court." *Kirk*, 66 Wn. App. at 237.

In sum, the Huntingtons satisfied all of the elements of part performance and are entitled to an easement even though the parties failed to actually record a written easement.

b. The Trial Court Erred in Finding That The Huntingtons Did Not Acquire an Easement by Estoppel Across Summit View Road.

The same facts that support the granting of an easement through part performance also support the grant of an easement through an estoppel.[11]

The following are requirements for equitable estoppel: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party from allowing the first party to contradict or repudiate such admission, statement, or act. *Finch v. Matthews*, 74 Wn.2d 161, 172, 443 P.2d 883 (1968).

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[11] In *Canterbury Shores Associates v. Lakeshore Properties, Inc.*, the Court of Appeals agreed with the trial court's assessment that in certain situations a court may find an easement by estoppel when "the circumstances...were such that, if no legal theory would support [the] claim, equity should intervene to deny [the defendant] what would clearly be an unjust enrichment." 18 Wn. App. 825, 827 (1977).

The trial court found that Proctor gave permission to the Huntingtons to build a permanent driveway. CP 226. Further, Proctor knew the Huntingtons were going to spent a lot of money to build a permanent driveway to connect to Summit View Road. CP 226, RP 205, 786. These acts and admissions are entirely inconsistent with Proctor's current claims that the use of Summit View Road and the driveway was "permissive only" and was not intended to be permanent. CP 14-16, 228. The Huntingtons proved the elements for estoppel and should have been granted quiet title to use their driveway.

F. CONCLUSION

The trial court properly exercised its discretion when it fashioned a remedy that did not require the Huntingtons to remove their home. The issuance of an injunction under these circumstances would have resulted in a very harsh, oppressive, and unnecessary result.

On the other hand, the court should have found that Proctor was estopped from denying that the 16th pin was the actual corner marker between the properties. Moreover, Mr. Proctor should not have been allowed to terminate the Huntingtons' right to use their driveway.

The Huntingtons therefore request that the Court:

1. Reverse the Trial Court's decision and find that the Huntingtons are entitled to quiet title to the entire disputed area;

2. Reverse the Trial Court's decision and find that the Huntingtons are entitled to quiet title to an easement across the existing driveway; and/or

3. As an alternative to number 1 above, affirm the Trial Court's decision holding that an injunction forcing the Huntingtons to remove their home would be unduly oppressive, costly, and inequitable.

Dated this 29th day of October 2007.

SCHWABE, WILLIAMSON & WYATT, P.C.

By:

Phillip J. Haberthur, WSBA #38038
Bradley W. Andersen, WSBA #20640
Attorneys for Respondents

APPENDIX

Findings of Fact and Conclusions of Law APP-1

Final Judgment and Order APP-9

Exhibit 88 ..... APP-14

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.

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FINDINGS OF FACT

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

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

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

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

5. On May 23, 1995 Dennis Peoples, a surveyor, set a pin for Dusty Moss at what is considered the "16th corner" along the northern boundary line of the Proctor property. This pin was some

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

A. Driveway.

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

B. Disputed Area / Quiet Title.

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

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

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

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

5. The Court must now address the appropriate remedy to impose in this case. The Court, in considering the factors listed in *Arnold v. Melani*, 75 Wn.2d 143, 146 (1968), finds that requiring the Huntingtons to move their home and other improvements to another location would be oppressive, unduly costly and inequitable under the circumstances of this case. In reaching this conclusion, the Court notes the following: 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; 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 6) there would be an enormous disparity in resulting hardships if the Huntingtons were required to move their home. Therefore, the Plaintiff's petition for a permanent injunction and ejectment is denied, along with any claims for trespass damages.

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

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

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

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

10. Neither party shall be deemed the prevailing party.

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

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

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

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

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

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

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

Dated this 12th day of ~~February~~ March, 2007.

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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

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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

///

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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.

6. Plaintiffs motion for reconsideration filed 2/26/07 is denied ETR

Dated this 1st day of March, 2007.

E. Thompson Reynolds
SUPERIOR COURT JUDGE

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PRESENTED BY:

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Robert "Ford" and Christina Huntington

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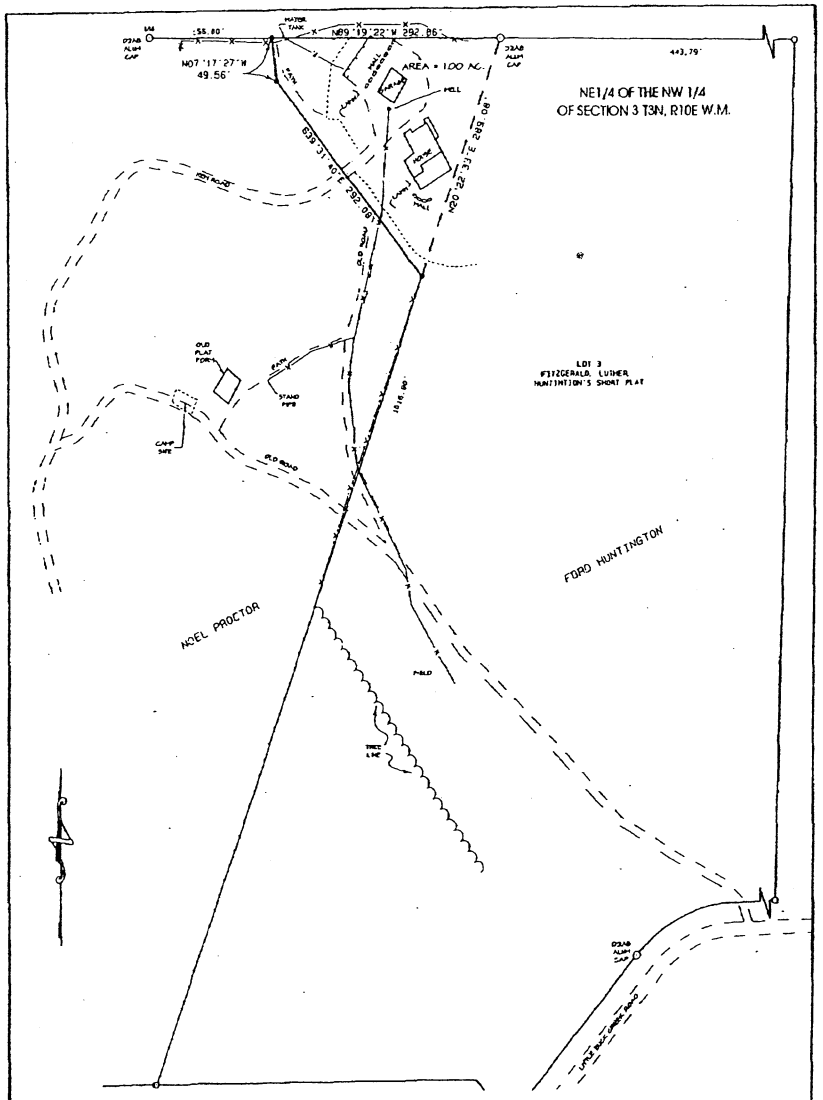
1.0 Acre Legal Description

Beginning at a point North 89°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°17'27" East, a distance of 49.56 feet;
thence South 39°31'40" East, a distance of 292.08 feet;
thence North 20°22'33" East, a distance of 289.08 feet to a D2AB Aluminum Cap;
thence North 89°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'

BELL DESIGN COMPANY

SITE SURVEY
FOR FORD HUNTINGTON
SKAMANIA COUNTY, WASHINGTON

SHEET: 1 OF 1
PROJECT: 06b121
DATE: Dec 2006

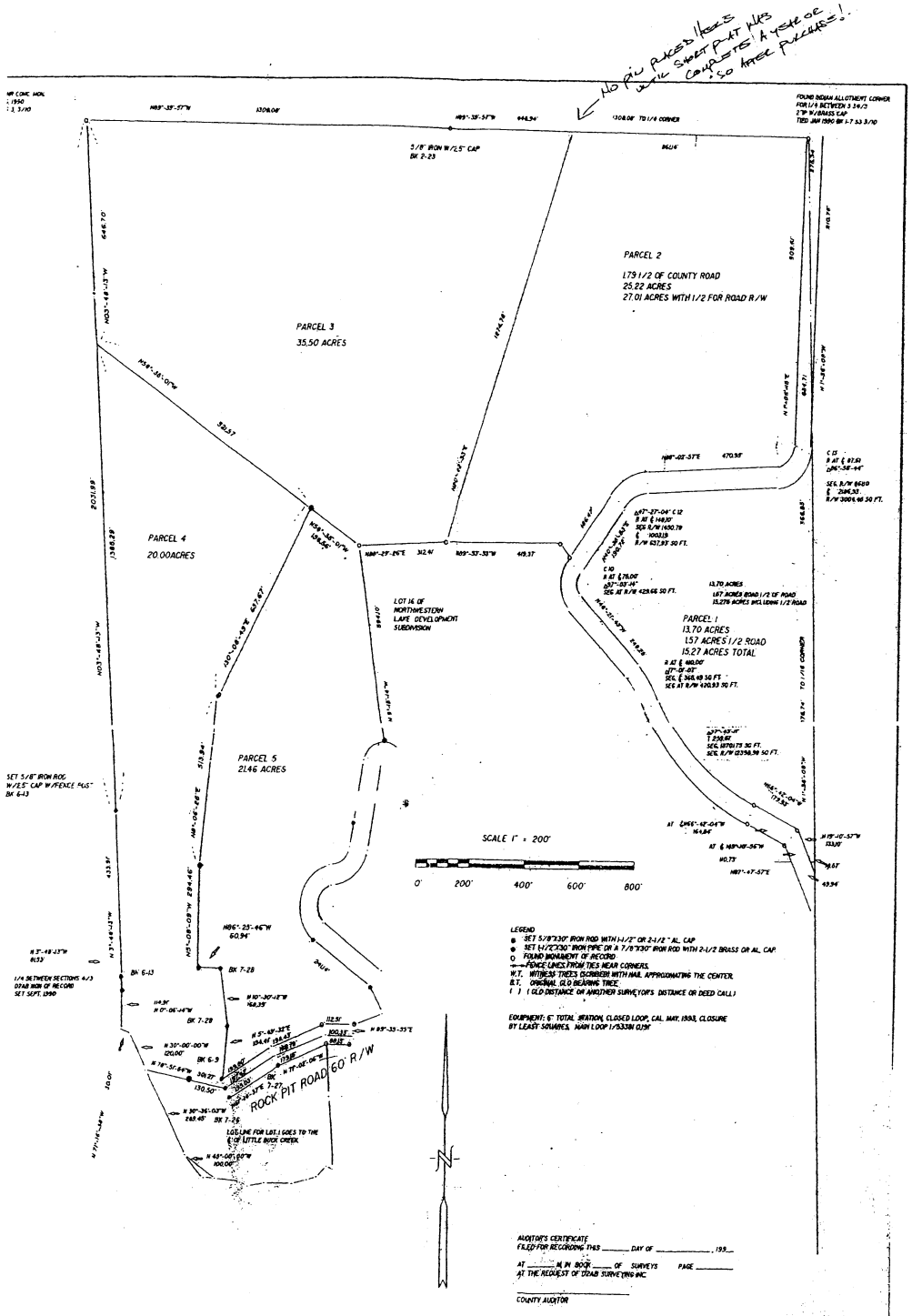
This is not a legal survey.

0:\2006\b121\06b121#3.pro

EX. 12

APP-13

PAGE 1 of 1



APP-14

HUNTINGTON 122

D2AB SURVEYING INC
22 COTTONTAIL RIDGE ROAD
WHITE SALMON, WA. 98672
PHONE NO. 509-493 3376

SECTION 3 T3N R10E

80

CERTIFICATE OF FILING

I hereby certify that on the 29 day of October 2007, I caused to be filed the original and one copy of the foregoing RESPONDENTS' OPENING BRIEF with the State Court Administrator at this address:

David Ponzoha, Clerk/Administrator
Court of Appeals, Division II
950 Broadway
Suite 300 MS TB-06
Tacoma, WA 98402-4454

by First Class Mail.

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

COURT OF APPEALS
DIVISION II
07 OCT 31 PM 1:32
STATE OF WASHINGTON
BY
DEPUTY

CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of October 2007, I served one correct copy of the foregoing RESPONDENTS' OPENING BRIEF by First Class Mail to:

Philip A. Talmadge
Emmelyn Hart-Biberfeld
Talmadge Law Group, PLLC
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