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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

No. 37449-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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JOHN and ELIZABETH DEWEY, husband and wife,

Appellants,

vs.

RAUL GONZALES, a single man, and GLORIA GONZALES,

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
OF KITSAP COUNTY, WASHINGTON

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THE HONORABLE LEILA MILLS, JUDGE

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BRIEF OF RESPONDENTS

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 ORIGINAL

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## II. INTRODUCTION

This entire legal action is much ado about nothing. The appellants John and Elizabeth Dewey (collectively, “Dewey”), after prevailing at trial, but not satisfied with their legal remedy, continue to seek their pound of flesh against the respondents Raul Gonzales and Gloria Gonzales (collectively, “Gonzales”). Despite the plainly inequitable nature of the request, Dewey advocates for a mandatory injunction requiring Mr. Gonzales to move his residence off of a sliver of inconsequential raw land. As explained below, Dewey’s arguments, thick with conspiracy theories and thin on the evidence, are insufficient to overturn the trial court’s well-reasoned refusal to grant a mandatory injunction.

## III. STATEMENT OF THE CASE

Mr. Raul Gonzales acquired raw property in rural Port Orchard for in the late 1970’s, and subsequently Mr. subdivided the property into four lots: Lot A, Lot B, Lot C and Lot D.<sup>1</sup> In accordance with existing regulations,<sup>2</sup> Mr. Gonzales acquired a map of the resulting lots and obtained legal descriptions as part of the subdivision process. After developing Lot A, Mr. Gonzales then had the lot boundaries physically staked, which he then relied upon in determining the boundaries for the

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<sup>1</sup> RP at 12-14; Ex. 1.

<sup>2</sup> RP at 206-07.

individual lots.<sup>3</sup> This resulted, *inter alia*, in the placement of a line of survey tags along the eastern side of the property, which also marked the eastern boundaries for Lot B and Lot D.<sup>4</sup> These survey tags, which ran through a deep and heavily wooded ravine,<sup>5</sup> also marked the boundary line for the adjacent property to the east, which was later acquired by Dewey.<sup>6</sup>

When Mr. Gonzales began developing Lot D, he relied upon these survey tags and made sure that the edge of development was 30 to 40 feet away from the line created by these survey tags.<sup>7</sup>

Unbeknownst to Mr. Gonzales, these survey tags were mistakenly placed too far to the east. This was not revealed until Dewey purchased his two lots and immediately surveyed the properties in February of 2005.<sup>8</sup> However, prior to purchasing his property, Mr. Dewey suspected that Mr. Gonzales's residence was encumbering the property.<sup>9</sup> Apparently this did not affect his decision to purchase the property. The new survey lines carved out a small 1,500 square foot encroachment area that included part of Mr. Gonzales's residence.<sup>10</sup> Dewey's eastern lot ("Parcel A"),<sup>11</sup> being

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<sup>3</sup> RP at 24-25, 130-32.

<sup>4</sup> RP at 32-35; Ex. 1.

<sup>5</sup> See Ex. 7 and 8.

<sup>6</sup> Marked as "Parcel A" on Ex. 4. Dewey simultaneously purchased "Parcel B".

<sup>7</sup> RP at 38.

<sup>8</sup> Ex. 4.

<sup>9</sup> RP 249-50.

<sup>10</sup> Ex. 8; CP at 78.

<sup>11</sup> See Ex. 4.

five and a quarter acres in size,<sup>12</sup> was only reduced in size from 5.25 acres to 5.216 acres as a result of the encroachment. It is uncontested that Dewey's property is zoned for one residence per five acres.<sup>13</sup>

In any event, unlike Dewey's western lot ("Parcel B"), the eastern lot could not be developed in the encroachment area. Simply put, that whole side of Dewey's property did not have any suitable building sites.<sup>14</sup> This was for three reasons. First, there was an extremely steep ravine that cut off access to the encroached property.<sup>15</sup> Second, Dewey's property had a County identified creek running through the middle of it, also limiting development access.<sup>16</sup> Finally, there was an officially designated wetlands area right in the middle of Dewey's property.<sup>17</sup>

Mr. Dewey fought tooth and nail for this inconsequential sliver of undevelopable property in a two-day bench trial.<sup>18</sup> Thereafter the trial court issued a thoughtful and exhaustive oral decision rejecting Gonzales's adverse possession claim, but also rejecting Dewey's demand for a mandatory injunction directing the removal of Mr. Gonzales's residence. Instead the trial court awarded Dewey the value of the encumbered

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<sup>12</sup> RP at 186.

<sup>13</sup> Appellant's Brief at 18-19.

<sup>14</sup> Ex. 2; RP at 35-36.

<sup>15</sup> RP at 33-34; Ex. 7 and 8.

<sup>16</sup> RP at 198.

<sup>17</sup> RP at 198.

<sup>18</sup> RP at 1, 120.

property.<sup>19</sup> As stated by the trial court, “the resultant impact upon Mr. Gonzales through the removal of the encroachment, would be inordinately severe in light of the minimal advantage to Mr. Dewey.”<sup>20</sup> After a subsequent hearing on the value of the encumbered property,<sup>21</sup> the trial court issued a memorandum opinion<sup>22</sup> followed by a final judgment and decree.<sup>23</sup>

#### IV. ARGUMENT

##### A. THE TRIAL COURT DID NOT VIOLATE THE WASHINGTON CONSTITUTION BY DENYING DEWEY’S DEMAND FOR A MANDATORY INJUNCTION

Mr. Dewey argues that by denying his demand for a mandatory injunction, the trial court effectuated an unlawful taking in violation of the Washington Constitution.<sup>24</sup> Mr. Dewey’s basis is a 67-year-old case: Tyree v. Gosa, 11 Wn.2d 572, 119 P.2d 926 (1941). But newer case law emphatically repudiates Mr. Dewey’s constitutional argument. In Arnold v. Melani, 75 Wn.2d 143, 449 P.2d 800 (1968), the Supreme Court heaped heavy criticism on Tyree’s constitutional argument:

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, s 16 (amendment 9)

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<sup>19</sup> RP at 296-314.

<sup>20</sup> RP at 311.

<sup>21</sup> RP at 324-330.

<sup>22</sup> CP at 44-53.

<sup>23</sup> CP at 54-57.

<sup>24</sup> Appellant’s Brief at 10-13.

misconstrues its sole purpose. To suggest that such a provision somehow divests a court of equity of the power to refuse a mandatory injunction would necessarily by logical extension likewise prohibit the legislative body from establishing rules of limitation (adverse possession) and further, would bar the passing of title by other equitable doctrines based upon negative conduct, such as estoppel, waiver, or laches. We hold that the language contained in *Tyree v. Gosa*, supra, regarding Const. art. 1, s 16 (amendment 9) was not required for the opinion.

Id. at 805, 449 P.2d at 151-52. In this present case, Mr. Dewey errantly relies upon this very same disapproved dicta in order to construct his constitutional argument. But the fact of the matter is that the Supreme Court already rejected Mr. Dewey's argument 40 years ago. Mr. Dewey's constitutional argument should be summarily dismissed.

**B. THE TRIAL RECORD CONTAINS SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT'S FINDINGS THAT ALL FIVE ELEMENTS OF THE ARNOLD TEST HAVE BEEN SATISFIED**

Mr. Dewey next asserts that the trial court erred in not granting a mandatory injunction ordering Mr. Gonzales to move that portion of his residence that encumbered Mr. Dewey's property.<sup>25</sup> A mandatory injunction is an equitable remedy, Hanson v. Estell, 100 Wn. App. 281, 997 P.2d 426 (2000), and as such, the decision to grant or deny an injunction is left to the sound discretion of the trial court. "The standard for evaluating the exercise of judicial discretion is whether it is based on

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<sup>25</sup> Appellant's Brief at 13-20.

untenable grounds, or is manifestly unreasonable, or is arbitrary.”

Washington Federation of State Employees, Council 28, AFL-CIO v. State, 99 Wn.2d 878, 887, 665 P.2d 1337, 1343 (1983) (citations omitted).

In a trespass situation, a trial court may deny an equitable request for a mandatory injunction when faced with clear, cogent and convincing evidence that:

- 1) The encroacher did not simply take a calculated risk, act in bad faith, or negligently, wilfully [sic] or indifferently locate the encroaching structure;
- 2) The damage to the landowner was slight and the benefit of removal equally small;
- 3) There was ample remaining room for a structure suitable for the area and no real limitation on 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.

Arnold at 805-06, 449 P.2d at 152. In this case, the trial court entered findings of fact that all five prongs of the Arnold test were satisfied.<sup>26</sup> It therefore denied Mr. Dewey's demand for a mandatory injunction and instead granted Mr. Dewey its remedy at law.

Mr. Dewey challenges the trial court's findings of fact that all five elements of the Arnold test have been satisfied. For purposes of appeal, the trial court's findings of fact will be upheld unless not supported by substantial evidence. Nordstrom Credit, Inc. v. Department of Revenue 120 Wn.2d 935, 940-41 845 P.2d 1331, 1334 (1993). As demonstrate

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<sup>26</sup> CP at 44-53; RP at 310-312.

below, the trial record contains substantial evidence supporting the trial court's findings.

1. The Trial Record Contains Substantial Evidence that Mr. Gonzales was Entirely Innocent of the Encroachments

The trial court was practically bombarded with evidence that Mr. Gonzales was entirely innocent and had no idea that his residence was encroaching on Mr. Dewey's property. First, the evidence was conclusive that Mr. Gonzales innocently relied upon misplaced survey markers when he began to develop his property. Mr. Gonzales testified that he first acquired his property in the late 1970's, and thereafter he subdivided this property into four lots (lots A, B, C and D).<sup>27</sup> In the process of the subdivision, he acquired a map of the property from a surveyor.<sup>28</sup> Later, when Mr. Gonzales finished his development of the first lot (Lot A) and was ready to start developing Lot B, Mr. Gonzales had the property physically staked by the surveyor. Mr. Gonzales then relied upon the resulting survey markers as he developed the rest of the lots.<sup>29</sup> In particular, as a result of the staking, there was a series of survey tags identifying the eastern boundary for Lot B and Lot D. These survey tags ran through a heavily wooded ravine.<sup>30</sup> When Mr. Gonzales started to

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<sup>27</sup> RP at 12-13.

<sup>28</sup> Exhibit 1; RP at 13.

<sup>29</sup> RP at 24-25, 130-32.

<sup>30</sup> RP at 32-35. Also, compare Ex. 1, Ex. 4 and Ex. 7.

develop the last of the four lots (Lot D), he was mindful to set up his perimeter fence line 30 to 40 feet away from the line created by the survey markers.<sup>31</sup>

The trial court also heard from two other witnesses who testified about these survey tags and believed these tags marked the boundary line. Ms. Denise Mandeville, owner of neighboring lot C since 1996,<sup>32</sup> testified to observing pink or orange survey tags in the ravine on Mr. Dewey's property.<sup>33</sup> She also testified that she walked through the woods with Mr. Gonzales while Mr. Gonzales explained how these survey tags marked the boundary line.<sup>34</sup>

In addition, Mr. Tracy McIntosh, who lived on Lot B since 1988,<sup>35</sup> testified that he observed these same survey tags in the ravine and believed they marked his boundary line and Lot D's boundary line.<sup>36</sup> In particular, Mr. McIntosh testified in colorful detail about his first contact with Dewey's new surveyors in 2005, and his consternation when he learned the location of the true boundary line.<sup>37</sup>

Hence, there was substantial evidence supporting the trial court's

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<sup>31</sup> RP at 38.

<sup>32</sup> RP at 88, 103.

<sup>33</sup> RP at 103-106.

<sup>34</sup> RP at 106.

<sup>35</sup> RP at 150-51.

<sup>36</sup> RP at 150-54.

<sup>37</sup> RP at 154-55.

finding that Mr. Gonzales was entirely innocent in relying on existing survey tags in developing his property.

Mr. Dewey excitedly cites to the testimony of Mr. William Sleeth to advance his conspiracy theory that Mr. Gonzales never hired a surveyor to physically stake his property and was pulling the wool over the trial court's eyes. Mr. Sleeth was the owner of Westsound Surveying (which is the company that Mr. Gonzales testified he hired).<sup>38</sup> Mr. Sleeth testified that he never performed a survey of Mr. Gonzales's property.<sup>39</sup> However, on cross-examination, Mr. Sleeth admitted he could not rule out the possibility that someone else had physically staked Mr. Gonzales's property.<sup>40</sup> Hence there remained a distinct possibility that Mr. Gonzales either used another survey company to handle the staking of his property, or that another employee at Westsound Surveying besides Mr. Sleeth performed the staking. In fact, Mr. Sleeth corroborated Mr. Gonzales's testimony by stating that at the time Mr. Gonzales subdivided his property, it was not necessary to stake property in order to complete a subdivision—one was only required to hire a surveyor to create a map of the subdivided parcels and draft corresponding legal descriptions.<sup>41</sup> As indicated above, this is exactly what Mr. Gonzales did: it was only when Mr. Gonzales

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<sup>38</sup> RP at 24, 205.

<sup>39</sup> RP at 206.

<sup>40</sup> RP at 208.

<sup>41</sup> RP at 206-07.

started the development of Lot B that he decided to have the property physically staked.<sup>42</sup>

Mr. Dewey next seems to argue that the fact that Mr. Gonzales's did not install his septic system drain field in the exact same location as indicated on his septic system permit map, somehow demonstrates that he knew he was encroaching on Mr. Dewey's property.<sup>43</sup> This argument is as far-fetched as it is difficult to understand.

In conclusion, the trial court was faced with overwhelming and substantial evidence that Mr. Gonzales innocently relied upon a series of survey tages setting forth the common boundary line. The paltry sum of contrary evidence is insufficient to overturn the trial court's finding that Mr. Gonzales was entirely innocent of the encroachment.

2. The Damage of the Encroachments to Mr. Dewey was Slight and the Benefit of its Removal was Small

The trial record is replete with substantial evidence that the damage of the encroachments to Mr. Dewey were slight, and the benefit of their removal to Mr. Dewey was equally small. This is because Mr. Dewey's property was not developable. In fact, as explained below, the only evidence of development potential was Mr. Dewey's own pie-in-the-sky development plan testimony.

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<sup>42</sup> RP at 24-25, 130-32.

<sup>43</sup> Appellant's Brief at 7, 17.

First and most importantly, the trial court considered the written testimony of Mr. Daniel Joehnk, project manager from a local engineering firm, WestSound Engineering. Mr. Joehnk expressed the opinion that, in light of the topography of Mr. Dewey's property and its critical areas, Mr. Dewey's property was "very limited in suitable building sites", and the west side (where the encroachment is located) "does not appear to have any suitable building sites".<sup>44</sup>

To state that Mr. Dewey's property was unfavorable for development is a gross understatement. First, there was a 75-foot deep ravine running through the middle of the property, which Mr. Gonzales colorfully described as "steeper than hell".<sup>45</sup> Second, there was an officially designated wetlands area in the middle of Mr. Dewey's property.<sup>46</sup> Finally, the County identified a creek running through middle of the property.<sup>47</sup> The combination of the ravine, the wetlands area and the designated creek effectively cut off the encroached area from any road access, leaving the encroachment area completely landlocked. It is perhaps for this reason that the Kitsap County wetlands specialist could not find any suitable building sites.<sup>48</sup>

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<sup>44</sup> Ex. 2; RP at 35-36.

<sup>45</sup> RP at 33-34; Ex. 7 and 8.

<sup>46</sup> RP at 198.

<sup>47</sup> RP at 202; Ex. 3.

<sup>48</sup> RP at 61; *accord*, RP at 64.

In contrast, Mr. Dewey, who was a Wyoming residence with no significant development experience in Washington,<sup>49</sup> offered nothing more than his own self-serving and uncorroborated testimony about how he would go about developing the encroached area. Drawing on his experience operating bulldozers in open pit copper mines in Arizona and New Mexico, Mr. Dewey waxed eloquent on how he would bulldoze an access road around the wetlands areas and, by means of extreme cutbacks, wind a road up the ravine to the encroached area in order to establish a building site.<sup>50</sup> Alternatively, if that proved too difficult, Mr. Dewey opined on how he would obtain a Sikorski military helicopter (the kind that can “pick up an Abrams tank”), and drop a modular home on the encroaching area.<sup>51</sup> Mr. Dewey offered no explanation as to how he would connect utilities to this alleged building site. Mr. Dewey submitted no testimony from an engineer, surveyor, wetlands specialist or any other type of development expert confirming any of these plans. In reality, Mr. Dewey’s development plans were nothing less than a pipe dream.

Not surprisingly, Mr. Dewey had not made any progress in executing any of these fanciful plans. Of course, he did not have a building permit. The well he owned on his adjacent lot was not approved

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<sup>49</sup> RP at 248-249.

<sup>50</sup> RP at 238-41.

<sup>51</sup> RP at 242.

for serving an additional residence on his property.<sup>52</sup> He sought approval for installing a septic system for a residence on his property, and that application was denied.<sup>53</sup> Mr. Dewey also acknowledged the need to seek a zoning variance as a result of an optional logging agreement he had signed. He had not yet sought such a variance, and offered no testimony on his chances of obtaining such a variance.<sup>54</sup>

In summary, the trial record is replete with compelling evidence that the encroached land had no appreciable value because it could not be developed. Naturally, allowing the encroachments to remain would not hamper the little developable potential of the entire Dewey property. Because of this, the damage caused to Mr. Dewey by the encroachment was slight, and further ordering the removal of the encroachments would hardly benefit Mr. Dewey. Therefore, there was substantial evidence supporting the trial court's finding that the second prong of the Arnold test had been satisfied.

3. There was Ample Remaining Room for a Structure Suitable for the Area and No Real Limitation on the Property's Future Use

The substantial evidence clearly supported the finding that Mr. Gonzales's small encroachments would not hinder development potential

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<sup>52</sup> RP at 193.

<sup>53</sup> RP at 196.

<sup>54</sup> RP at 250-55; Ex. 34.

of Mr. Dewey's property. With regard to the size of the encroached area, Mr. Dewey contends that encroached property, which Mr. Dewey asserts is 1,500 square yards, rendered the property undevelopable because it would reduce the size of Mr. Dewey's property below the zoning minimum of 5-acres per structure.<sup>55</sup> But Mr. Dewey errantly states that the encroaching area was 1,500 square yards. In fact the evidence is undisputed that the area was 1,500 square *feet*.<sup>56</sup> The size of Mr. Dewey's property, including the encroached area is five and a quarter acres.<sup>57</sup> Since 1,500 square feet only comprises 3.4% of an acre,<sup>58</sup> Mr. Dewey's property was only reduced from 5.25 acres to 5.216 acres. Simple math demonstrates that the encroachments only reduced the entire size of Mr. Dewey's property by 0.00655. Dewey exaggerates the size of the encroached area, and the zoning argument is specious.

On the other hand, if there is any development potential of Dewey's property, the evidence was clear that such potential only lies on the relatively flat and accessible southwest corner of the property.<sup>59</sup> Mr. Gonzales's encroachments, lying on the exact opposite side of Mr. Dewey's property, and separated by a steep ravine, wetlands area and

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<sup>55</sup> Appellant's Brief at 18-19.

<sup>56</sup> Ex. 12.

<sup>57</sup> RP at 186.

<sup>58</sup> There are 43,560 square feet in an acre.

<sup>59</sup> Ex. 7 and 8.

designated creek, could not plausibly affect any development potential of this portion of Mr. Dewey's property. In fact, the evidence was clear that the actual hindrance to development of Mr. Dewey's property was not Mr. Gonzales's encroachments, but rather Mr. Dewey himself. Mr. Dewey decided to install his septic system drain field for his neighboring western lot right in the middle of the only developable portion of Mr. Dewey's property: the southwestern corner.<sup>60</sup>

The trial court therefore had substantial evidence to find that the third prong of the Arnold test was satisfied. The evidence was clear that Mr. Gonzales's encroachments would not hinder any development potential of Mr. Dewey's property, such as it was, and such encroachments presented no real limitations on the property's future use.

4. The Trial Record Contains Substantial Evidence that it is Impractical to Move Mr. Gonzales's Residence

There was substantial evidence that it would be impractical to move Mr. Gonzales's encroachments. These encroachments primarily consisted of a significant portion of Mr. Gonzales's residence.<sup>61</sup> Mr. Gonzales testified about this residence and submitted pictures of the encroachments.<sup>62</sup> In contrast, Mr. Dewey submitted no evidence even suggesting that it would be practical to move Mr. Gonzales's residence and the rest of the

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<sup>60</sup> RP at 60-62; Ex. 9.

<sup>61</sup> Ex. 8 depicts the boundary line running through the middle of the residence.

<sup>62</sup> RP at 54-60; Ex. 10 and 11.

encroachments. Based on the available evidence, the trial court was justified in finding that it would have been impractical to move Mr. Gonzales's residence.

5. There Is an Enormous Disparity in Resulting Hardships Between Mr. Gonzales and Mr. Dewey

The same substantial evidence described above supported the trial court's finding that there was an enormous disparity between the hardship on Mr. Gonzales in moving his residence and the hardship on Mr. Dewey in allowing the encroachments to remain. Because the evidence powerfully demonstrated that the encumbered property could not be developed, and that the encumbered property was located in an isolated and practically inaccessible location, there was in fact no hardship on Mr. Dewey in allowing it to remain.

C. THE TRIAL COURT PROPERLY AWARDED A JUDGMENT FOR THE VALUE OF THE ENCUMBERED PROPERTY

Mr. Dewey next argues that the trial court erred in awarding a money judgment for the fair market value of the encroached land instead of a judgment for the "loss of use and occupancy" of the property. Mr. Dewey further argues that the amount of damages awarded was inappropriate.<sup>63</sup> However, the trial record reveals that the trial court's

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<sup>63</sup> Appellant's Brief at 21.

award was well within the range of the substantial evidence. A trial court has broad authority in awarding damages:

A trier of fact has discretion to award damages which are within the range of relevant evidence. An appellate court will not disturb an award of damages made by the fact finder unless it is outside the range of substantial evidence in the record, or shocks the conscience, or appears to have been arrived at as the result of passion or prejudice.

Mason v. Mortgage America, Inc., 114 Wn.2d 842, 850, 792 P.2d 142, 146 (1990). Despite Mr. Dewey's claims to the contrary, the trial court appropriately refused to issue a judgment for "loss of use and occupancy" (or "mesne profits") for the simple reason that there was no credible evidence that the contested property could be used or occupied. As explained in detail above, Mr. Gonzales submitted compelling evidence that the contested property could not be used for any development purpose whatsoever.<sup>64</sup> In contrast, Mr. Dewey's single bit of contrary evidence was his self-serving testimony that he was charging his granddaughter \$1,200 in rent per month to live on a modular home on Dewey's western property.<sup>65</sup> Dewey stretches his argument beyond the point of plausibility in contending that he should be awarded that same amount per month for the last nine years. This, of course, would require evidence that, "but for" the encroachments, Dewey would have built a residence on the

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<sup>64</sup> See, e.g., Trial Exhibit 2.

<sup>65</sup> RP at 236-37.

encroached property, and would have been receiving rent for the last nine years. But the evidence, as well documented above, demonstrates that Mr. Dewey could not develop the encroached property. Hence Mr. Dewey has suffered no damages for lost use and occupancy. This left the only other remedy at law: the value of the encroached property.

This case is most analogous to Hanson v. Estell, 100 Wn. App. 281, 997 P.2d 426 (2000), as follows:

The trial court ratified the earlier ruling that the Hanson barn encroaches on Estell property and that such encroachment constitutes trespass. The court further found, however, that damages caused by the encroachment are minimal, do not prevent the Estells from rightful use of their property within the easement, and that the first judge contemplated the barn in its present position when he granted the easement by prescription. Testimony at trial indicated the Spokane County building inspector mistakenly approved construction of the barn based on his own interpretation of the corner posts and the property line. He was surprised to discover later that a survey showed the barn encroached on the easement and he testified that the county did not plan to force removal of the barn for noncompliance. Nothing in the testimony indicates that at the time the barn was rebuilt the Hansons knew or should have known it encroached. Noting that even the Estells admit the actual damages are minimal, the judge based the \$100 award on testimony from an appraiser who assessed the land's value as between \$18 and \$100.

Id. at 288, 997 P.2d at 431. Hence, just as in this case, the Hanson trial court found that a mandatory injunction should not be issued pursuant to Arnold. Under these circumstances, the appeals court sanctioned an alternative award in the form of a money judgment for the value of the

contested land:

Balancing the negligible impact of the barn encroaching on the easement by one foot with the likely prohibitive costs of moving the barn, the equities support rejection of mandatory injunction, leaving the Estells to their remedy at law. *As in Arnold, the trial court properly awarded the Estells the value of the encroached land.*

Id. at 288-89, 997 P.2d at 437 (citations omitted) (italics added). Just like Hanson, in this case the record supports the trial court's decision to award damages in the form of the value of the encroached property.

The trial record also contains substantial evidence supporting the trial court's finding that the value of the encroached property was \$795. As indicated above, the encroached property was only 1,500 square feet. The property surrounding this strip of property was heavily wooded<sup>66</sup> and, as already demonstrated above, was cut off from access due to an extreme ravine, wetlands area and designated creek. Mr. Gonzales submitted the written expert testimony of independent certified appraiser Mr. Jo Schaefer who, taking into consideration these factors, and having personally investigated the property, used the generally accepted comparison method to arrive at a value of \$795.<sup>67</sup> Mr. Gonzales also submitted evidence demonstrating that the tax appraised value of the encroached property was only \$284, and that the tax appraised value of his

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<sup>66</sup> RP at 37.

<sup>67</sup> Ex. 12 and 13.

property would only increase by \$150 if he acquired the encroached property.<sup>68</sup>

In contrast, the only evidence Mr. Dewey submitted was the following conclusory and self-serving statement: “In my opinion the portion of the property with Mr. Gonzales’ house is worth \$60,000.”<sup>69</sup> The trial court’s decision to accept the valuation of the independent appraiser was entirely within the range of the substantial evidence.

Mr. Dewey’s argument that he is entitled to treble damages pursuant to RCW 4.24.630(1) is even more tenuous.<sup>70</sup> Simply stated, Mr. Dewey lacks standing to argue application of this statute because the statute states that an offending party is only liable to “the injured party”.<sup>71</sup> In this case the only plausible injured party is the prior owner of Mr. Dewey’s property. Mr. Gonzales cleared and developed the encumbered property *before* Mr. Dewey purchased the property. In fact, Mr. Dewey suspected that Mr. Gonzales’s residence was encroaching on the property even before Mr. Dewey decided to purchase the property.<sup>72</sup> After Mr. Dewey purchased the property, Mr. Gonzales only removed one tree,<sup>73</sup> and it is uncontested that was done with Mr. Dewey’s express

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<sup>68</sup> Ex. 14.

<sup>69</sup> Ex. 7 at p. 1, lines 16-17.

<sup>70</sup> Appellant’s Brief at 22-23.

<sup>71</sup> The full text of this statute is found in Appellant’s Brief at 22.

<sup>72</sup> RP 249-50.

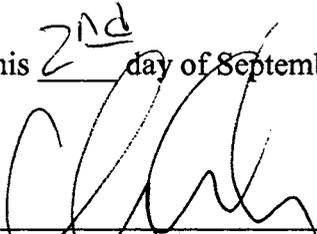
<sup>73</sup> RP at 179-80.

permission.<sup>74</sup> Hence, Mr. Dewey has no standing to argue the application of RCW 4.24.630.<sup>75</sup> Even if Mr. Dewey has standing, the statute requires a finding that the offending party intentionally caused the damage, which of course is not supported by the substantial evidence.

## V. CONCLUSION

For the reasons explained above, Gonzales respectfully requests that this Court uphold the trial court's decision refusing to issue a mandatory injunction and leaving Dewey with their sole remedy at law.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of September, 2008.

  
\_\_\_\_\_  
ISAAC A. ANDERSON, WSBA #28186  
Of Law Office of Isaac A. Anderson, PS  
Attorney for Respondents

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<sup>74</sup> RP at 213, 250.

<sup>75</sup> RP 264-65.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY



DIVISION II

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JOHN and ELIZABETH DEWEY, husband and wife,

Appellants,

vs.

RAUL GONZALES, a single man, and GLORIA GONZALES,

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
OF KITSAP COUNTY, WASHINGTON

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THE HONORABLE LEILA MILLS, JUDGE

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DECLARATION OF SERVICE OF RESPONDENT'S BRIEF

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ISAAC A. ANDERSON, WSBA #28186  
of Law Office of Isaac A. Anderson, PS  
Attorney for Respondents

Kimberly Wasser declares and states as follows:

1. On the 2<sup>nd</sup> day of September, 2008, I caused to be served and filed true and correct copies of the respondent's brief to the following recipients by personal service of the same to the following recipients:

Emily R. Hansen, WSBA 8440, Attorney for Appellants  
Law Offices of Emily R. Hansen  
600 University Street, Suite 2701  
Seattle, WA 98101

Clerk of the Court  
Washington State Court of Appeals  
Division Two  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

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

SIGNED this 2nd day of September, 2008 in Poulsbo,  
Washington.

  
Kimberly Wasser