

No. 44306-6

Court of Appeals  
DIVISION II  
STATE OF WASHINGTON

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LEVACK FAMILY TRUST, ELLEN LEVACK, Trustee, and ELLEN  
LEVACK, Individually,

APPELLANT,

v.

JOHN H. LEACH and MARILYN D. LEACH,

RESPONDENTS,

FILED  
COURT OF APPEALS  
DIVISION II  
2013 SEP - 6 PM 1:20  
STATE OF WASHINGTON  
BY  DEPUTY

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**APPELLANT ELLEN LEVACK'S REPLY BRIEF**

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### III. INTRODUCTION

Ellen Levack, individually, and as trustee of the Levack Family Trust (hereinafter, collectively, “Ms. Levack”) submits this reply brief.

The Respondent, John Leach, built retaining walls on Ellen Levack’s property without obtaining permits, without complying with code requirements, and without complying with setback requirements. Mason County has effectively ordered Leach to remove the walls.

The trial court abused its discretion by ignoring these facts and by awarding Leach title to Ms. Levack’s property beyond his boundary line up to those walls. The Court should reverse the portion of the trial court’s judgment that so orders. It should remand with instructions that the trial court require Leach to remove the walls.

### IV. ANALYSIS

A. Leach built retaining walls without permits, without complying with code requirements, and in violation of setbacks.

Acting with knowledge of the applicable setbacks, Leach built retaining walls without permits, without complying with code requirements, and in violation of setbacks.

Leach does not dispute that construction upon his property was, and is, subject to regulation by Mason County’s development regulations, Mason County’s shoreline regulations, and the Fawn Lake restrictive covenants. Mason County’s development and shoreline regulations each required Leach to obtain a permit before constructing any wall over 30 inches in height on his property. Mason County Code § 17.06.010; RP 299:1-5; RP 302:10-13. They required the walls to be constructed pursuant to standards set forth in the codes. RP 130:1-8; 133:16-18;

297:10-20. They required that the walls be set back a minimum of five feet from the property boundary. Mason County Code § 17.04.223(d); § 17.5.060 (table); RP 190:5-11. The Fawn Lake restrictive covenants imposed a 10-foot setback. Ex. 24, p.3; RP 242:4-6.

Leach built three walls in the vicinity of the border between his property and Ms. Levack's property: an eight foot tall concrete wall on top of which Leach parks his RV; a rock wall located on Ms. Levack's side of the concrete wall (built to hide the fact that the concrete wall was improperly constructed on grade), and a cottage block wall that runs from where the concrete wall ends towards Fawn Lake. Ex. 3; RP 82:19-83:20; 341:1-342:23; 344:7-10.

Leach was required to obtain a permit for each of these walls before he began construction of them. Ex. 16-17; RP 220:22-24.1. Leach did not obtain any of the required permits. RP 220:22-24; 344:11-24; 318:11-19; 328:14-23; 332:15-333:1.

The walls Leach constructed do not comply with code requirements. The walls were not designed by an engineer. RP 127:15-128:2 (“[N]othing was built per an engineer design.”). The eight foot tall concrete wall is only eight inches wide, instead of the 12 inches Mason County would have required. RP 125:15-16. Mason County inspectors found no evidence of required reinforcing steel or rebar at the concrete wall. RP 127:10. Leach did not embed the footing of the wall into native soils as required by code. RP 123:23–124:3. Instead, the footing was poured on grade, which Leach's engineer conceded to be an improper construction technique. RP 809:17-24. Because the footing was not

embedded into the grade, the wall is at risk of sliding. RP 738:8-22. Leach's own engineer conceded the wall did not meet code requirements. RP 807:21-810:16; 816:4-11. *See also*, Leach's Response Brief, p. 36 (“[T]he concrete wall has some cracks and is not up to code.”).

Because it was not constructed according to code, the wall is failing. RP 125:17-20. Ms. Levack cannot excavate and build anything on her property in the eight foot area next to the wall that would be definitely impacted by the wall's failure. RP 154:20-21.

Finally, Leach built these walls in violation of the setbacks required by Mason County's development regulations, Mason County shoreline regulation, and the Fawn Lake restrictive covenants. Mason County's development and shoreline regulations each impose a minimum five foot side yard setback requirement. Mason County Code § 17.04.223(d); § 17.05.034(d); and § 17.50.060(table). Fawn Lake's restrictive covenants impose a ten-foot side yard setback. Ex. 24, p. 3; RP 242:4-6.

Leach not only built each of these walls in violation of the setback requirements; he built them so they each trespass onto Ms. Levack's property:

The concrete wall plus its footing goes over the Pipe to Pipe line by roughly six and one half inches; the cottage block wall is over the Pipe to Pipe line by 20.5 inches; and the rock retaining wall is over the Pipe to Pipe line by 3 feet 9.5 inches.

CP 100 - 101 (Transcript of trial Court's April 25, 2012 Oral Decision, page 9 - 10).

Leach has not seriously disputed any of the foregoing.

B. Leach proceeded with construction with knowledge of these requirements but without making the slightest effort to comply with them.

Leach proceeded with construction with knowledge of these requirements but without making the slightest effort to comply with them.

Leach knew that his narrow waterfront lot was subject to permit and setback requirements. The building permit which Mason County issued to Leach for his house states on its face: “The proposed structure or any portions thereof greater than 30 inches in height from grade line must maintain a minimum of five foot setback from all property lines, easements, and ten feet from all county and state road rights-of-ways.” Ex. 8 (Permit condition 4). Leach’s shoreline permit, which Leach obtained after litigating the issue of setbacks before the Shorelines Hearings Board, specifically provides that any structure Leach built on his property greater than 30 inches in height needed to comply with shoreline setback requirements. Ex. 13, p. 5 (“All other structures greater than 30 inches in height including deck floors shall comply with the setback requirements of the Mason County Shoreline Master Program residential chapter.”) RP 257:15-258:2. Finally, Leach knew of the ten foot side yard set back imposed by the Fawn Lake Restrictive Covenants. Ex. 15; RP 243:2-11; 243:22-244:5. Leach proceeded with construction with knowledge of all of these setback requirements.

Leach made no effort to comply, or to have his contractor comply, with any of these setback requirements. Ms. Levack asked Leach to have the boundary surveyed before construction began. RP 424:13-20; 426:11-13. Leach did not have the boundary surveyed. RP 350:8-10. Instead, Leach “located” the boundary by placing poles into the two pipes located

near the corners of his property. RP 349:11-15. Leach then ran a string ten feet in the air along the approximately 170 foot distance between the top of two poles from which his contractor estimated the property line. RP 719:1-20; 750:2-18; 890:17-25. Leach never installed any other kind of marking to show the property line. RP 369:12-16.

Leach ran a string five feet back from the property line on the far side of his property in order to mark a setback line on that side of his property:

- Q. Okay. So when you were doing this work on the concrete wall there were—there were no markers, or strings, or lines, or anything showing where the five foot setback was on that property line, correct?
- A. Not that I know of. I—
- Q. But there was a string that showed where the five foot setback was on the other side of Lot 9, correct?
- A. Yeah, they went and strung a line up later on down the road to get the—make certain they were back from that setback, from the house.

RP 742:24-743:8. **But Leach made no similar effort to mark any kind of setback line along the boundary he shared with Ms. Levack' property:**

- R. Okay. But you didn't stretch any lines, did you, or put any markers for any setbacks along the boundary between Lot 8 and Lot 9, is that correct?
- A. **No I did not.**

RP 349:21-24 (emphasis added).

When Leach saw the walls after they had been built, Leach knew that at least one of them had been built not only in violation of setback, but also well onto Ms. Levack's property. RP 352:2-12. Despite this knowledge, Leach did not investigate to determine exactly where the walls were in relation to the boundaries and setbacks. Leach also did not inform

Ms. Levack. Instead, Leach, feeling that it “didn’t concern him,” did nothing. *Id.*

In sum, Leach, knew perfectly well that he had to obtain permits to comply with code requirements, and he had to observe at least a five foot setback from the boundary of Ms. Levack’s property. But he made no effort to ensure that he or his contractor obtained permits, met code requirements, or observed those setbacks—either before, during, or after construction.

In his response brief, Leach puts forward several excuses for his failure to make any attempt to obtain permits, to meet code requirements, or to comply with setbacks. None of these excuses have the slightest merit.

First, Leach points to the County. Leach claims that “County inspectors were onsite after he built these walls, but did not advise him they were a problem.” Response Brief, p. 24. Leach’s attempt to blame the County for his own failure to comply with code and setback requirements fails.

The building permit which Leach submitted to the County for his house shows on its face that Leach would observe a 10 foot side yard setback. Ex. 8. Relying on this, the County officials responsible for setback compliance approved the permit for his house. *Id.* This approval occurred in 1998--before Leach began construction of the walls. *Id.*

Leach began constructing these walls no earlier than April 25, 1999. Ex. 27; RP 385:14-25; 386:14-16. Because Leach did not apply for a permit for the walls, Leach did not provide the County a diagram

showing where they would be located in relation to the property line. Leach thus never put the County on notice of where these walls were located in relation to the property boundary, or put the County on notice that it needed to inspect the walls.

The Mason County inspectors who visited his house after April 1999, after Leach began constructing the walls, did so to inspect the house's plumbing, framing, electrical, and similar work. Ex. 8. They lacked the expertise to, and did not review, any aspect of the location or construction of the walls. *Id.* Leach had not had the boundary of the property surveyed or marked. RP 350:8-10. Leach had also not attempted to mark any kind of setback line. RP 349:21-24. Even if these officials had looked at the walls, there would have been no way for them to tell that Leach had constructed them in violation of setback and over his property boundary.

When the County finally learned that Leach had constructed these walls—in 2009, after Ms. Levack herself first learned where they were in relation to the property boundary—the County immediately ordered Leach to obtain a permit for them or to remove them. FoF 24; Ex. 16. But even today, Leach has still not applied for any permit. RP 353:15-354:7. Leach's attempt to shift the blame to the County fails.

Second, Leach claims he relied on the conduct of the Levacks, and/or that the Levacks “waived” their right to enforce setbacks. Response Brief, p. 6, 31. Again, Leach's attempt to blame others for his own failure to make any attempt to observe code or setbacks fails.

Leach squarely testified that he asked the Levacks if his contractor could install a wall on their property, and that the Levacks said “no:”

- Q. Okay. So you asked the Levacks if your contractor could install a rock retaining wall and backfill on their property?
- A. That I did.
- Q. Okay. And their answer to you was?
- A. No.

RP 343:15-19. Leach squarely admitted he never told the Levacks that he intended to locate his eight foot tall concrete wall right on the property line:

- Q. Okay and you told them that you intended to locate a concrete wall close-on your side of the property line. Correct?
- A. I don't recall telling them that.
- Q. You also never told them that in order to put the concrete wall where you intended, that you would also need to put a rock retaining wall to support the bottom of the concrete wall?
- A. No I did not.

RP 388:4-10.

In the face of this testimony, Leach makes the astonishing claim that Ms. Levack “agreed to waive” her right to enforce these setbacks. Leach Brief, p. 31. The trial court did not find that Ms. Levack had “agreed to waive” her right to enforce the relevant setback requirements. The trial court made no finding that Leach relied on anything the Levacks had said or done in building his walls. The absence of such findings is equivalent to a finding against Leach, the party who bore the burden of proof. *See, e.g., In re: the Welfare of A.B.*, 168 Wn.2d 908, 927 ¶ 40 and fn. 42, 232 P.3d 1104 (2010). Leach’s attempt to shift the blame to Ms. Levack fails.

Finally, Leach claims that he was ignorant of the fact that his contractor built these walls in violation of the applicable setback requirements. Response Brief, p. 24. This claim also fails. Leach, and

not his contractor, made the decision not to have his boundaries surveyed and staked. RP 350:8-10. Leach, and not his contractor, made the decision not to run or mark a setback line along his boundary with Ms. Levack. RP 349:21-24.

Leach in his testimony, squarely admitted that when he saw the walls after they have been built, he realized that at least one of the walls had been constructed well over onto Ms. Levack's property. RP 352:2-12. Yet Leach did not investigate. He did not inform the Levacks. *Id.* Leach, asserting that the location of these walls in relation to the boundary just "didn't concern him," did nothing. *Id.*

Leach knew that his contractor had built these walls in violation of applicable setback requirements.

C. The trial court erred by refusing to address Leach's utter failure to obtain permits for, to meet code requirements with respect to, and to comply with setbacks for his walls.

The trial court erred by refusing to address Leach's utter failure to obtain permits for, meet code requirements with respect to, and to comply with setbacks for his walls.

In her complaint, Ms. Levack asserted that the walls had been built in violation of county and private regulations, and asked the court to order Leach to remove the walls. CP 291-92. During the trial Ms. Levack offered substantial and undisputed evidence that Leach had not obtained permits for, met code requirements pertaining to, or conformed to setback requirements with respect to any of these walls.

Ms. Levack had standing to enforce the County setback requirements. *Radach v. Gunderson*, 39 Wn. App. 392, 400, 695 P.2d 128 (1985):

The improper setback creates a continuing condition which adversely affects the Radach's enjoyment of their property. A continuing injury is remedied properly by injunction. In our view, the equities must be very compelling indeed to avoid an injunction to correct a clear violation of a zoning ordinance.

*Id.*, at 400.

*Radach* squarely establishes that Ms. Levack had standing to enforce the County setback regulations in this case. Even Leach admits this. Response Brief at p. 13 ("*Radach* stands for the proposition that a landowner has standing to seek injunctive relief for a neighbor's zoning violations."). The trial court erred by ignoring Ms. Levack's request for enforcement of these setback requirements.

Ms. Levack was also entitled to enforce the setback contained in the Fawn Lake restrictive covenants. Fawn Lake had adopted restrictive covenants that forbade Leach from constructing these walls within ten feet of his property line. Ex. 24, p. 3; RP 242:4-6.

Leach's neighbor on the other side of the property line provided Leach with a letter, before Leach began construction, advising him that this setback existed, but agreeing to reduce it from ten feet to five feet. Ex. 15. *See also*, RP 242:4-9. However, Leach did not attempt to obtain a similar letter from the Levacks. RP 248:2-7. And he did not apply to or receive permission from the Fawn Lake Homeowner's Association for permission to reduce the setback applicable to construction on Ms. Levack's side of the property. RP 244:2-5.

Leach made some attempt to comply with these restrictive covenants on the far side of his property by observing the reduced setback he had agreed on with his other neighbor. Leach marked a line five feet from the boundary of that side of his property. RP 742:24-743:8. **But**

**Leach did not mark such a line, or make any effort to comply with the set back, on Ms. Levack's side of the property. RP 349:21-24.**

In sum, Ms. Levack had standing to enforce both the County's code regulations and the Fawn Lake restrictive covenants. Leach does not dispute that he violated all of these codes and covenants in constructing these walls. Yet the trial court did not address this issue. It simply ignored it.

Instead, the trial court focused exclusively on the issue of whether Leach made a reasonable effort to locate his walls *in relation to the boundary* between his and Ms. Levack's property:

[T]he concrete wall, Court cannot find that Mr. Leach acted negligently in placing that. It is six and a half inches. Actually, the wall itself is three inches over the pipe to pipe line, but the footing, I think is three and a half inches, is what Mr. Holman said. **And the fact that it is that close to the pipe to pipe line, the Court cannot find that Mr. Leach acted negligently and nor did the Court hear any testimony that would support that he acted negligently in, in his contractor placing the concrete wall there. Similarly, for the cottage block wall.**

CP at 101 - 02 (Transcript of Trial Court's April 25, 2012 oral decision at 10 - 11). (emphasis added).

The trial court's Findings and Conclusions also show that the trial court focused exclusively on whether Leach made the required effort to locate the walls within the boundary, and not whether Leach made any effort to comply with applicable setbacks:

37. The Leaches did not act negligently, recklessly, intentionally, or "wrongfully" as that term is defined in RCW 4.24.630(1), with respect to the location and construction of the poured concrete wall and cottage block wall, or **with respect to the fact that those walls (and the poured wall's footing) extend a few inches past the Pipe to Pipe line.** The Leaches were not aware of these encroachments past the Pipe to Pipe line until after this

lawsuit was filed.

CP 16 (emphasis added).

The trial court entered two Findings addressing Mason County's code enforcement action. These findings do not adequately explain or justify its failure to address and provide Ms. Levack a remedy for Leach's failure to comply with Mason County's development or shoreline code requirements.

First, the trial court found that:

27. Mason County has jurisdiction over code enforcement at Lot 8 and Lot 9. Prior to April 9, 2009, Mason County issued a Notice of Violation regarding the poured concrete wall, based upon deficiencies in permitting and/or alleged deficiencies in construction.

CP 14.

The first finding is essentially accurate. Mason County had jurisdiction to enforce its codes. Mason County had issued a Notice of Violation. Ex. 17.<sup>1</sup> It was undisputed that Leach constructed his walls without obtaining permits, without complying with code, and without complying with setbacks.

Leach points out that Mason County's order only purports to require Leach to either obtain a permit for or to remove the walls. Response Brief, p. 33. Based on this, Leach asserts that he could obtain a permit to keep the walls in their existing location. *Id.*

The Court should reject this argument. In order for the County to issue a permit, the walls must comply with code. The concrete wall is not

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<sup>1</sup> Mason County had also, in response to Leach's request, suspended its enforcement action until the boundary between Leach's and Levack's property has been finally determined. RP 307; 12-17. By suspending its enforcement action, the County permitted Leach to ascertain exactly where the boundary was, and hence where the setback lines were, before Leach has to rebuild his walls.

built to code. RP 816:4-11. All the walls violate setback requirements. Therefore Leach cannot obtain a permit for the walls in their current locations.

Leach asserts that he might obtain a variance. Response Brief, p. 35. Leach cannot obtain a variance.

First, the relevant codes allow for setback reduction by variance down to a five feet minimum. Mason County Code § 17.04.223(d); § 17.05.034(d); § 17.50.060; § 17.50.090. Leach cannot obtain a variance to reduce the setback to zero. Leach must move the walls.

Second, Leach cannot satisfy the criteria necessary to obtain a variance:

**Variance Criteria.**

Variances from the bulk and dimension requirements of the resource ordinance or the development regulations (zoning regulations) may be allowed as follows: The County must document with written findings, compliance or non-compliance with the variance criteria. The burden is on the applicant to prove that each of the following criteria are met:

- (1) That the strict application of the bulk, dimensional or performance standards precludes or significantly interferes with a reasonable use of the property not otherwise prohibited by County regulations;
- (2) That the hardship which serves as a basis for the granting of the variance is specifically related to the property of the applicant, and is the result of unique conditions such as an irregular lot shape, size, or natural features and the application of the County regulations, and not, for example, from deed restrictions or the applicant's own actions;
- (3) That the design of the project will be compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or the environment;
- (4) That the variance authorized does not constitute a grant of special privilege not enjoyed by the other

- properties in the area, and will be the minimum necessary to afford relief;
- (5) That the public interest will suffer no substantial detrimental effect;
  - (6) No variance shall be granted unless the owner otherwise lacks a reasonable use of the land. Such variance shall be consistent with the Mason County Comprehensive Plan, development regulations, resource ordinance and other County ordinances, and with the Growth Management Act. Mere loss in value only shall not justify a variance.

Mason County Code, § 17.09.057. *See also*, Mason County Code § 17.50.090 (shoreline regulations adopt practically identical variance criteria).

Leach clearly cannot obtain a variance for his existing walls pursuant to these criteria: (1) Leach would not lack all reasonable use of his property; (2) Leach's need for a variance is the result of his own actions in building the walls in violation of setback, and not from any circumstance related to the shape, size or natural features of the property; (3) granting Leach a variance would cause adverse effects to adjacent properties; (4) granting Leach a variance would amount to the grant of a special privilege not enjoyed by other properties in the area; and (5) granting a variance would adversely impact the public interest. *Compare Radach v. Gunderson*, 39 Wn. App. 392, 400, 695 P.2d 128 (1985) (public has strong interest in enforcement of setbacks; property owner who built house in violation of setback properly denied variance).

In sum, while the trial court accurately found that Mason County had jurisdiction to enforce its own development regulations and shoreline regulations, and had acted to do so, that fact did not justify the trial court's refusal to address Ms. Levack's right to enforce these regulations in this

civil action.

The trial court's second finding related to Mason County's code enforcement action states:

28. Any code enforcement action that Mason County takes regarding the poured concrete wall, or any other structure, can be taken only against the titled owner of the land on which the structure exists, and not against the neighboring property.

CP 14.

This is not truly a factual finding at all. It is a conclusion of law. As such, it is subject to *de novo* review by this Court. *See, e.g., Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 P.3d 611 (2002).

The "finding" is plainly incorrect. There is simply nothing in Mason County's regulations that purport to limit the County's authority to act only against the title owner of property. To the contrary, the Mason County Code makes it a misdemeanor for "any person" to violate any of its provisions. Mason County Code § 1.04.010. Therefore, Mason County is entitled to enforce its zoning and shoreline codes against "any person" who violates them. The claim that the County is not entitled to enforce its code requirements against Leach because he built these walls in part on Ms. Levack's property is pure nonsense.

This finding, though erroneous, suggests that the trial court quieted title to the section of Ms. Levack's property lying between the "Pipe to Pipe line" and the walls as Leach constructed them *in order to ensure* that Mason County had the authority to take code enforcement action against Leach with respect to his construction of these walls. To the extent the trial court acted on this basis, it erred. The trial court did not need to award Leach property beyond the boundary it set by adverse possession in

order to allow the County to take code enforcement action against Leach.

In sum, Ms. Levack had standing to enforce Mason County's zoning and shoreline regulations against Leach. She established that Leach violated these regulations, as well as the Fawn Lake restrictive covenants. The trial court erred, and acted in abuse of its discretion, in refusing to address the issue. The trial court's two Findings relating to the fact that Mason County had also taken code enforcement action against Leach do not justify or excuse the trial court's failure to address Leach's manifold code and setback violations.

D. The trial court erred in its application of *Arnold v. Melani*.

Finally, the trial court erred in its application of the doctrine set forth in *Arnold v. Melani*, 75 Wn.2d 143, 437 P.2d 908, 449 P.2d 800, 450 P.2d 815 (1968). The trial court asked the wrong question. It applied the wrong legal standard. And it came up with the wrong answer.

Under Washington law, a plaintiff who establishes a violation of his property rights is normally entitled to the remedy of an injunction. *Arnold v. Melani*, 75 Wn.2d 143, 152, 437 P.2d 908 (1968). However, in *Arnold*, the Washington Supreme Court held that a trial court had the discretion to refuse to grant the plaintiff an injunction if the defendant who acted in violation of the plaintiff's property rights could establish each of the following five elements:

[A] mandatory injunction can be withheld as oppressive when, as here, it appears . . . that: (1) the encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the land owner 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*, 75 Wn.2d at 152. The defendant has the burden of proving each of these five elements by clear and convincing evidence. *Id.*

The trial court misapplied this test. First, the trial court asked the wrong question. The trial court asked whether Leach had made the required effort to locate these walls *on his side of the property line*. CP at 101-02; FoF 37 at CP 16.

Here, Leach built these walls without obtaining the permits required by the Mason County zoning code and shoreline regulations, without meeting those codes' substantive requirements for the construction of retaining walls, and without complying with those codes', and the Fawn Lake restrictive covenants' setback requirements. Therefore, the trial court should have asked whether Leach had made the showings required by *Arnold* with respect to his failure to comply with **these** requirements. And it should have evaluated that request in light of this Court's admonition that the equities "must be very compelling indeed" to refuse an injunction to correct a clear violation of a zoning ordinance. *Radach*, 39 Wn. App. at 400.

Second, the trial court plainly applied the wrong legal standard. In order to refuse to order removal of these walls, *Arnold* required the trial court to explicitly find that Leach did not simply take a calculated risk. It required the trial court to explicitly find that Leach had not acted in bad faith. And it required the trial court to explicitly find that Leach had not negligently, willfully **or indifferently** located the encroaching structure. 75 Wn.2d at 152.

Negligence and indifference are substantially different standards.

Negligence involves a failure to exercise ordinary care, that is, the care a reasonably careful person would exercise under the same or similar circumstances. WPI 10.01, 10.02. Indifference means the quality or state of being indifferent. A person is indifferent to something if he “look[s] upon [it] as not mattering one way or another,” or “regard[s] [it] as being of no significant importance or value.” *State v. Madarash*, 66 P.3d 682 (2003) quoting *Webster’s Third New International Dictionary* 807 (1969).

Here, the trial court did not enter any findings as to: (1) whether Leach had taken a calculated risk in building these walls without obtaining permits complying with code requirements, and flouting applicable setbacks; (2) whether Leach had acted in good or bad faith; and (3) whether Leach had acted with indifference.

Leach had the burden of proving each of these things by clear and convincing evidence. *Arnold*, 75 Wn.2d at 152. The trial court’s failure to enter findings on these issues is equivalent to a finding against Leach, who had the burden of proof. See, e.g., *In re: the Welfare of A.B.*, 168 Wn.2d 908, 927 ¶ 40 and fn. 42, 232 P.3d 1104 (2010). The trial court’s findings thus on their face do not support its legal conclusion that Leach was entitled to avoid the entry of an injunction walls under *Arnold*.

Finally, having asked the wrong question, and having adopted the wrong legal standard, the trial court not surprisingly reached the wrong answer. Leach made no effort to obtain the permits he was required to obtain before constructing these walls. Leach built his eight-foot-tall concrete retaining wall in violation of code requirements. And Leach made no effort to establish a setback line for his contractor to observe

when working on Ms. Levack's side of his property. RP 349:21-24.

Leach himself testified to his indifference. He admitted that when he actually realized that one of the walls had been built on Ms. Levack's property, he thought it "didn't concern him," and did nothing. RP 352:2-12.

Had the trial court asked the proper questions, it could only have reached only one conclusion: Leach had constructed these walls in violation of applicable permit, construction, and setback requirements. Leach had not shown, by clear and convincing evidence, the state of mind required to permit the trial court to withhold the injunction to which Ms. Levack, who had standing to enforce these requirements, was entitled. Therefore, this Court should reverse the trial court, and remand with instructions that it require Leach to promptly remove all of these walls.

The trial court similarly erred with respect to its analysis of the other *Arnold v. Melani* factors. The second *Arnold* criteria required Leach to show clearly and convincingly that "the damage to the land owner was slight and the benefit of removal equally small." On this issue, the trial court concluded, without entering any specific findings, that:

36. The encroachments of the poured concrete wall face and footing and the cottage block wall face past the Pipe to Pipe Line do not have any material impact on the value or use of Lot 8; the impacts are *de minimis* at best.

CP 16-17.

No reasonable fact finder could conclude on this record that the encroaching walls caused only a *de minimus* impact to Ms. Levack's ability to use and enjoy her property. The trial court's decision to award Leach title up to the face of the wall leaves Ms. Levack with a lot that is

less than the 50 foot width which the Mason County Development Code requires to construct a single family residence. Mason County Code § 17.04.223(b). The trial court's judgment also leaves Levack with an eight-foot-tall, unpermitted, illegally constructed, non-code compliant, cracking, failing, wall right at the border of her property (on top of which Leach parks his recreational vehicle), which Ms. Levack with no private right to require Leach to repair. Even if Ms. Levack were somehow still able to persuade the County to allow her to build a residence on her property, the presence of the wall will substantially restrict the area available for building on that lot. RP 154:17-21 (Ms. Levack cannot excavate on her property for a distance equal to the height of the wall).

Ms. Levack's certified real estate appraiser testified that Leach's encroachments and wall had reduced the value of Ms. Levack's lot by \$35,500 - \$42,000. RP 945:14-18. His opinion was based in part upon his testimony that waterfront property like this has a value of \$2,200 per lineal waterfront foot. RP 937:2. Leach concedes that the trial court accepted this latter opinion. Leach Brief at p.29.

Leach argues the trial court used the \$2,200 per lineal waterfront foot opinion to calculate the impact caused by the loss of an additional 20 inches of Ms. Levack's property. *Id.* But this completely ignores the impact to the value of the remainder of Ms. Levack's property caused by Leach's encroachments. The trial court's conclusion that these encroachments did not impact on the value of Ms. Levack's property fails.

The third *Arnold* factor required Leach to clearly and convincingly prove:

- (3) there was ample remaining room for a structure

suitable for the area and no real limitation on the property's future use.

The trial court's decision leaves Ms. Levack with a lot less than the 50 feet minimum width required for her to obtain a permit to build a residence on it. Mason County Code § 17.04.223(b). And, the presence of an eight-foot-tall concrete retaining wall right on the border of her property further reduces the very limited building space presently available on this narrow waterfront lot. RP 154:17-21. The trial court did not enter a finding that there was ample remaining room on Ms. Levack's lot for her to build a single family residence. Because the trial court made no finding that Ms. Levack is left with ample room (because the evidence did not permit it to do so), the Findings do not establish this third criteria.

The fourth *Arnold* criteria required Leach to prove, clearly and convincingly, that it is "impractical to move the structure as built." In Finding No. 35, the trial court offers the conclusory statement that "moving the poured concrete wall would be impractical."

The trial court did not make a similar finding with respect to the cottage block wall which extends from the end of the eight-foot-tall concrete wall towards the shoreline (and which is built not only in violation of the side yard setback, but also extends into the shoreline setback). RP 86:5-18; 318:20-22; 332:22-333:1. Leach thus failed to establish this fourth criteria, and Ms. Levack is entitled to an injunction requiring him to remove the illegally-constructed cottage block wall.

The trial court did find that removal of the concrete wall would "risk damage to the Leach residence and its foundation." FoF 35. The only evidence Leach identifies to support this finding is the testimony of

Leach's engineer at RP 774-75. Leach's Response Brief at p. 38. In fact, the engineer merely testified that "care" would need to be taken to remove the wall. *Id.* The engineer did not suggest that there would be a risk of damage to the Leach house or residence as long as such care were exercised. *Id.* This portion of Finding 35 is without substantial evidence in the record.

And, as to the poured concrete wall, Leach has been effectively ordered by the County to move it. Ex. 16. And, Leach's own expert testified that it would cost Leach about the same either to remove the wall or to maintain it in place. *Compare* FoF 35 (cost to move wall \$40,000) with RP 778:11-20 (Leach's engineer testifies cost to repair wall in place would cost between \$41,000 - \$47,000). There is no support in the record for the trial court's conclusion unsupported by any specific facts that it would be impractical to move the concrete wall.

The fifth and final *Arnold* factor required Leach to prove, by clear and convincing evidence, that: "there is an enormous disparity in resulting hardships."

The trial court's judgment imposes an enormous hardship upon Ms. Levack. She is left with a lot less than the 50 feet minimum required under Mason County code to construct a single family residence. Mason County Code § 17.04.223(b). She is left with a lot that has an eight-foot-tall, failing concrete wall looming over it. Under the trial court's present judgment, Ms. Levack is harmed enormously in any event. Leach will incur about the same cost to remove and rebuild this wall further back on his property as to repair it.

Requiring Leach to remove his walls would impose some hardship on Leach. But Mason County has effectively ordered Leach to remove his walls. To the extent Leach is impacted by a reduction in the usable space on his lot that is an impact Leach accepted when bought a narrow lot which he knew to be subject to setback requirements. The balance of the equities clearly favored Ms. Levack, and the trial court erred finding otherwise.

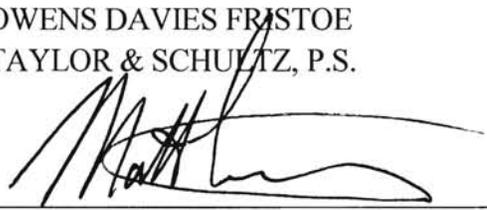
## V. CONCLUSION

If the trial court had asked the proper questions, if it had applied the correct legal standard, it could and should have reached only one result: Ms. Levack was entitled to the entry of an injunction requiring Leach to remove the walls that he had constructed without permits, in violation of code requirements, and in violation of setback restrictions. Leach had not established his right to relief from the entry of an injunction under *Arnold v. Melani*.

The Court of Appeals should reverse the trial court's judgment. It should remand with the directions that the trial court enter an injunction requiring Leach to remove these walls, and for further proceedings consistent with that order.

DATED this 4th day of September 2013.

OWENS DAVIES FRISTOE  
TAYLOR & SCHULTZ, P.S.



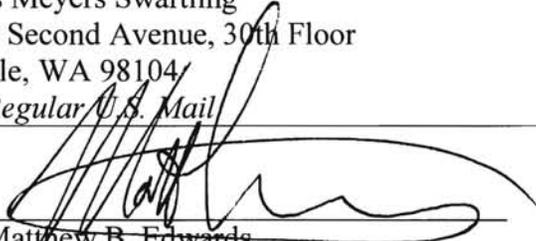
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CERTIFICATE OF SERVICE

I certify that on the 4th day of September 2013, I caused a true and correct copy of this corrected Appellate Ellen Levack's Reply Brief to be served on the following in the manner indicated below:

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