

ORIGINAL

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No. 36087-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NOEL PROCTOR,

Appellant,

v.

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

Respondents.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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BRIEF OF APPELLANT NOEL PROCTOR

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A. INTRODUCTION

Noel Proctor (Proctor) is record title owner of property in Skamania County, Washington. His property adjoins property owned by Robert "Ford" and Christina Huntington (collectively the Huntingtons). Proctor's property is to the west of the Huntingtons' property.

This case concerns a dispute over a 1-acre triangular strip of forest land (the disputed parcel) owned of record by Proctor, forming the northeastern portion of his property and bordering the Huntingtons' northwestern boundary line.¹ The Huntingtons built their house and certain other improvements on the disputed parcel because they believed their northwest boundary extended out to a specific surveyor's pin, which the parties refer to as "the 1/16th pin." The Huntingtons' improvements are located entirely on Proctor's property because the 1/16th pin does not mark their true boundary; instead, the pin was used to mark property to the north owned by parties not involved in this dispute. The Huntingtons misjudged the true boundary of their property by 400-500 feet.

Proctor brought this action to eject the Huntingtons from and to quiet title to the disputed parcel and to remove their encroachments. He also sought damages from the Huntingtons for their alleged timber trespass. The Huntingtons counter-claimed to quiet title in themselves

¹ A site survey depicting the parties' properties is included in the Appendix as an attachment to the final order and judgment.

through adverse possession or by estoppel in pais. They also sought an easement over Proctor's property for their private driveway.

During a four-day bench trial, the trial court dismissed Proctor's timber trespass claim based on the statute of limitations. At the conclusion of the trial, the court declined to find the Huntingtons were entitled to an easement over Proctor's driveway. The court also found the parties were operating under a mutual mistake of fact concerning the true boundaries of their properties but that the Huntingtons did not gain title to the disputed parcel through adverse possession or by estoppel. Despite this finding, the trial court concluded the equities favored quieting title to the disputed parcel in the Huntingtons and ordered Proctor to sell it to them for \$25,000.

The trial court erred by balancing the equities and forcing Proctor to sell his property. The trial court's choice of remedy was error.

B. ASSIGNMENTS OF ERROR²

(1) Assignments of Error

1. The trial court erred in making Finding of Fact Number 6.
2. The trial court erred in making Finding of Fact Number 9.
3. The trial court erred in making Finding of Fact Number 14.
4. The trial court erred in making Finding of Fact Number 16.

² The trial court's findings of fact, conclusions of law, and final judgment and order are included in the Appendix.

5. The trial court erred in entering Conclusion of Law Number 2.

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 7.

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

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

11. The trial court erred in admitting the testimony of the Huntingtons' real estate and construction experts.

12. The trial court erred in entering its final order and judgment on March 1, 2007.

(2) Issues Pertaining to the Assignments of Error

1. Did the trial court err by refusing to grant the landowner a mandatory injunction to remove his neighbors' encroachments from his property where the landowner has clear legal title to the disputed parcel, he has a well-grounded fear of immediate invasion of that right which will

continue in the absence of injunctive relief, and the neighbors failed to carry the burden necessary to defeat the injunction? (Assignments of Error Nos. 1-10, 12)

2. Did the trial court err by applying the “balancing the equities” doctrine and forcing the landowner to sell his property to his neighbors where the neighbors are not entitled to the benefit of that doctrine because their encroachments are substantial and they are not innocent defendants? (Assignments of Error Nos. 1-10, 12)

3. Was the trial court’s remedy inconsistent and excessive when it denied the landowner a mandatory injunction to remove his neighbor’s encroachments from his property after finding the neighbors had not gained title to that property, but then granted the neighbors affirmative relief, quieting title to the property in them? (Assignments of Error Nos. 7-8, 12)

4. Did the trial court abuse its discretion by admitting the testimony of the neighbors’ expert witnesses where the landowner’s neighbors were not entitled to balance the equities and legal title to the disputed parcel should have remained with the landowner, making such evidence inadmissible? (Assignments of Error Nos. 3-4, 11-12)

C. STATEMENT OF THE CASE

Noel Proctor has been a pilot with United Airlines for over 30-years. CP 105-06. In 1994, he was living in Colorado but was based in New York. RP 601. Given his family roots, he began looking to purchase real property in the Northwest. *Id.* He was particularly interested in property with acreage and a quiet, out-of-the-way setting where he could escape from his busy schedule. RP 602. Sometime during the winter of 1994-95, he flew to Portland, Oregon, rented a car, and drove to White Salmon, Washington to view properties recommended by his realtor. *Id.* One of the properties he visited was the 30-acre parcel he eventually purchased (Proctor property).³ RP 607.

When Proctor visited the property with his realtor and the developer, Dusty Moss (Moss), it was heavily timbered and there were no trails, roads, or other markings. CP 109; RP 604-06. Approximately 6-12 inches of snow covered the ground. CP 108; RP 603. Heavy brush, logging slash, and snow made it difficult to walk every inch of the property so the boundary lines were pointed out generally. CP 111, 149-50; RP 605. Proctor recalls seeing metal survey stakes with ribbons

³ Proctor's property was one of several parcels created after developer Dusty Moss (Moss) and his partner Carl Stewart (Stewart) subdivided a larger parcel of property sometime before 1993. CP 240. A pipeline runs parallel to the northern boundary of the Proctor and Huntington properties. CP 112, 208; RP 639. Proctor's property is identified as parcel 201 on the map at CP 208.

on them during his walk-through of the property, but does not recall seeing the 1/16th pin that the Huntingtons would later claim marked their northwest boundary. CP 111; RP 605, 608.

Proctor completed the purchase of his property in February 1995. RP 607. He did not have the property surveyed to verify the property lines prior to closing because it had already been surveyed. CP 116-17. He later bought a smaller parcel of property, which adjoins his original parcel to the south. CP 208 (additional Proctor property identified as parcel 223). Proctor now owns slightly more than 40 acres, approximately 29 of which are classified as forest land. CP 28-29; RP 719-21.

Proctor began constructing his home in the spring of 1995. RP 609. At the time, he was based in New York, was living in London, England, and had his residence in Colorado. RP 609-10. In addition to working as a pilot, he worked as a Senior Check Airman with the Department of Transportation Federal Aviation Administration and oversaw flight instructors training air crews to fly through the Middle East and Asia. RP 610-11. Because he was frequently absent during construction, he hired a friend to serve as his general contractor but later assumed those responsibilities himself. RP 319, 334, 612-13. Proctor hired Dan Webberly (Webberly) to work as a contractor and a builder. RP 714. He also hired Sam Oglesby (Oglesby) to build a road from the

main county road to his intended home site. CP 49, 125. Because of Proctor's flight schedule, he returned to his property only occasionally until approximately 2000 or 2001. RP 613, 615.

Ford and Christine Huntington⁴ purchased their property as tenants-in-common with two other individuals and later short-platted it, thereby creating four separate parcels. CP 282; RP 867. The Huntingtons own two of the four parcels adjoining Proctor's parcel. CP 282. They began building their home in 1996 and received a certificate of occupancy in 1997. CP 27, 25. They did not survey their property before locating and building their home. RP 264. Their home and all of their improvements are located on Proctor's property. RP 627-28.

During construction of Proctor's road, Ford approached Oglesby to find out whether Proctor would give the Huntingtons permission to access their land from Proctor's road. CP 128; RP 436. Proctor first learned of Ford's request when Oglesby called him in Colorado to relay it. CP 131; RP 615-16. After Ford told Oglesby he had permission to connect to Proctor's road, Oglesby called Proctor to confirm he had permission to install the Huntingtons' road. RP 446. At that point, the outline of the Huntingtons' proposed road had been marked; however, there is a dispute over who marked it. RP 451, 742. Sometime after the markers for the

⁴ The Huntingtons will be referred to by their first names when necessary for clarity and ease of reading; no disrespect is intended.

proposed road had been set, Webberly asked Ford several times whether Ford had had the property surveyed. RP 323. Ford responded that if it was not right, then he would purchase the land from Proctor. RP 324. Oglesby eventually built the Huntingtons' road. RP 433, 443. He took Ford's word for it that Ford knew where his property lines were. RP 455.

Dennis Peoples (Peoples) has been a licensed surveyor since 1981. RP 569. He was hired by Moss to subdivide a portion of the 160-acres Moss and Stewart owned south of the pipeline. RP 419. They had him create two lots, the one bought by Proctor and the one bought by the Huntingtons. RP 423. Peoples later subdivided the Huntingtons' property. RP 502-03.

When Peoples sets corners during a survey, he usually describes what he is setting by referring to the size of the rod being used to mark the boundary and the date the rod is set. RP 519. He typically buries a fence post within 1 foot of the stake. RP 523. In addition to including that information on the survey map, he makes a corresponding entry in his field book. RP 520, 553; Ex. 92. Although Peoples attempted to set the corner boundary between the Proctor and Huntington properties in October 1994, he was unable to do so. RP 546-49, 598. He did not mark the corner boundary until May 22, 1995, the same day he set the 1/16th pin for Moss and Stewart. RP 500, 502, 549. The 1/16th pin is not identified

in the legal descriptions of the Proctor and Huntington properties, nor does it bear any relation to the true boundary line between their properties. RP 428, 517, 680. Peoples set the 1/16th pin to assist with logging activities that were being conducted on the property north of the pipeline, which was owned by Moss and Stewart. RP 429, 520. The pin was simply a midpoint along the northern line for the property to the north. RP 428, 524.

Ford later called Peoples and asked him to come out to the Huntington property. RP 501.⁵ Ford took him out to the 1/16th pin and asked if the Huntingtons' house was over "the line." RP 501, 507, 509, 583. Using a map provided by Ford and his compass, Peoples determined the house was not over the line. RP 501. He never told Ford what the property boundaries were, and any indication of the boundary line was general because he did not have his maps. RP 269. At the time, Peoples thought they were at the true northwest corner of the Huntington property. RP 510, 540. He did not perform a professional survey. RP 511.

Richard Bell (Bell) has been a licensed land surveyor for more than 40 years. RP 621, 657. He was hired by Proctor in May 2004 to survey Proctor's boundaries because Proctor was concerned about a

⁵ Ford claims he had a 15 minute chance meeting with Peoples in May 1995 and that Peoples confirmed the 1/16th pin was the Huntingtons' northwest boundary. RP 75-77, 212. Peoples denies such a chance meeting took place. RP 501.

possible encroachment along the southwestern edge of his property and wanted his entire property surveyed. RP 621, 623, 648, 924-25.

On June 1, 2004, Bell began his survey of Proctor's property using a hand compass but had difficulty locating the northeast corner. RP 623-24. At the time, he noticed that the Huntingtons' buildings appeared to be on the wrong side of the projected boundary line. RP 624. He returned to Proctor's property the following day with copies of the short plat maps for the properties in the area and began to survey the property. RP 625. Bell eventually located the T-post boundary marker in a fence running east-west and parallel to the pipeline, which was some 400 feet east of the 1/16th pin. RP 627, 644-46; Ex. 87 (handwritten notation of "fence" located between the 1/16th pin and the northeast boundary of Proctor's property). The true boundary was marked by an aluminum cap on a piece of 5/8th inch diameter rebar. RP 628. Bell determined that all of the Huntingtons' improvements were on Proctor's property. RP 627-28.

Bell knew Peoples as a fellow surveyor and was familiar with his work. RP 637. He knew that Peoples usually places a metal fence post within a foot of his monuments so that the marker will stand out in the brush. RP 624. He also knew that Peoples typically uses a 5/8th inch diameter rebar capped with aluminum and stamped "D2AB" on the cap. RP 637. The 1/16th pin is not the true corner of Proctor's property.

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

Proctor first discussed the boundary line problem with Ford in June 2004, after receiving Bell's survey. CP 135. He later met with Ford and Peoples at the 1/16th pin. RP 530, 740-41. Proctor thought the Huntingtons had hired Peoples. RP 774. Peoples had a map with him that he had prepared as a courtesy. RP 533, 775. They confirmed the true boundary of the properties and discussed possible resolutions. RP 364. Ford acknowledged in 2005 that he knew his house had been built over the property line a year and a half after it was built. RP 364.

After the encroachment was discovered, Proctor and the Huntingtons attempted to resolve the boundary dispute through on-going negotiations, but were unsuccessful. CP 50; RP 790; Exs. 94, 96, 98.

On February 16, 2005, Proctor brought an action to eject the Huntingtons from and to quiet title to the disputed parcel and to remove their encroachments. CP 1-4. He also sought damages from the Huntingtons for their alleged timber trespass. *Id.* The Huntingtons answered and counter-claimed to quiet title in themselves to approximately 6.17 acres of Proctor's property through adverse possession or by estoppel in pais. CP 7-12. They also sought an easement over Proctor's property for their private driveway. *Id.* Proctor answered the

Huntingtons' counter-claims, denying the Huntingtons' contentions. CP 14-16.

On September 12, 2006, the Huntingtons moved to amend their answer and counterclaims. CP 31-42, 43-47. The trial court denied the motion because it was untimely. CP 285. The Honorable E. Thompson Reynolds, Skamania County Superior Court, presided over a three-day bench trial that began on September 25, 2006. CP 239. The trial court conditionally denied the Huntingtons' renewed motion to amend their complaint on the first day of trial. RP 9-10.

During the trial, Proctor moved to exclude two of the Huntingtons' expert witnesses. RP 291-94. One expert was a real estate appraiser who would be called as a valuation expert and the other expert was a construction appraiser who would be called to testify about the costs of moving the Huntingtons' home. RP 292-93. The court denied the motion. RP 302-05. The real estate expert, Jim Lyon, testified that the fair market value for a 1-acre parcel of Proctor's property is \$25,000. RP 489-90. In doing so, he ignored comparables for higher valued lots within two miles of Proctor's property because the sales had not closed. RP 477; Ex. 89. The construction expert, Greg Mockford, testified it would cost the Huntingtons more than \$300,000 to move their house from Proctor's

property and onto their own. RP 405; Ex. 90. Proctor had a continuing objection to Mockford's testimony. RP 400.

At the conclusion of Proctor's case, the trial court dismissed Proctor's timber trespass claims because it concluded the claims were time-barred. CP 239; RP 855. At the close of the Huntingtons' case, Proctor moved the court for an order granting his request for a mandatory injunction, which the trial court denied. RP 906. The trial court dismissed the Huntingtons' adverse possession counterclaim. CP 239; RP 914-15. The court then granted the Huntingtons' motion to amend their complaint to conform to the evidence. CP 31-32; RP 916.

At the conclusion of the case, the trial court concluded the parties were under a mutual mistake of fact concerning their true boundary line. CP 243. The court rejected the Huntingtons' defenses and counterclaims based on estoppel in pais and concluded the Huntingtons' house and other improvements were on Proctor's property. CP 244. During its oral ruling, the court stated the Huntingtons were negligent in fully ascertaining where their boundaries were. RP 927. The court denied Proctor's request for a mandatory injunction ejecting the Huntingtons from his land and instead ordered the boundary line adjusted. CP 244; RP 928. To accomplish the boundary line adjustment, the court ordered Proctor to convey 1-acre of his land, which was to include the Huntingtons' house, garage, yard, and

well, to the Huntingtons in exchange for \$25,000. CP 244. The court ordered both sides to bear their own attorney fees. CP 245.

Proctor appealed and the Huntingtons have crossed-appealed. CP 232, 398.

D. SUMMARY OF ARGUMENT

The trial court found the Huntingtons built their improvements on the disputed parcel, which legally belonged to Proctor, but rejected their claim that they acquired title to it through adverse possession or estoppel in pais. Nevertheless, the trial court denied Proctor's petition for a permanent injunction, ejectment, and removal of the encroachments and instead ordered Proctor to sell the disputed parcel to the Huntingtons for \$25,000. This was an abuse of discretion.

A mandatory injunction is generally recognized as the appropriate remedy for a landowner seeking to remove an encroachment. It will not be granted where there is an adequate remedy at law. Proctor had no adequate remedy at law where damages in any amount are inadequate compensation for the loss of his property.

In certain rare cases, a court may deny an injunction based on equitable principles. A mandatory injunction will not issue if the encroacher can establish five factors, enunciated in *Arnold v. Melani*,

75 Wn.2d 143, 449 P.2d 800 (1968), by clear and convincing evidence.

The cases applying those factors are the exception rather than the norm.

Washington courts have approved a balancing of the equities where there has been no physical encroachment onto the plaintiff's land. Where there is a physical encroachment, however, Washington courts have balanced the equities only when the encroachments have been minimal. Numerous other jurisdictions have denied a mandatory injunction for the removal of a de minimis encroachment.

The trial court erred by failing to grant Proctor's request for a mandatory injunction because this case does not involve a de minimis encroachment. Accordingly, any balancing of the equities should not have occurred. Although the trial court argued *Arnold* controlled the outcome of this case, *Arnold* is distinguishable.

Even if *Arnold* applies, the Huntingtons bear the burden of proving all five factors apply to defeat Proctor's request for a mandatory injunction. Where they did not carry the burden of proving all five factors, the trial court erred in refusing to grant the mandatory injunction.

The trial court's choice of remedies was error. The defendant who loses possession of land in an ejectment action may recover amounts paid for real estate taxes and assessments and permanent improvements. To have such recovery, however, the defendant must have asked for it in his

answer. Had the Huntingtons raised this counterclaim, an offset for the cost of their improvements might have been an appropriate remedy; however, they failed to raise it.

The trial court not only denied Proctor his injunction but also granted the Huntingtons affirmative relief by quieting title in the disputed parcel in them. This was error because the trial court's relief was greater than what was reasonably necessary to protect the Huntingtons.

The trial court erred by admitting the testimony of the Huntingtons' real estate and construction experts. Where there was no basis to balance the equities, their testimony was immaterial and was tantamount to a finding before the conclusion of Proctor's case that it would be inequitable to eject the Huntingtons from the disputed parcel.

The Court should reverse and remand to the trial court with directions to modify the judgment by issuing an injunction ejecting the Huntingtons and their encroachments from the disputed parcel and quieting title in Proctor. The judgment should be affirmed in all other respects.

E. ARGUMENT

(1) Standard of Review

Following a bench trial, this Court reviews the trial court's findings of fact to determine whether they are supported by substantial

evidence and, if so, whether those findings support the trial court's conclusions of law.⁶ See, e.g., *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999) (citing *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986)). If that standard is satisfied, this 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, 879-80, 73 P.3d 369 (2003). The Court reviews questions of law and conclusions of law de novo. *Id.* at 880.

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 Env'tl. Council*, 96 Wn.2d 230, 233, 635 P.2d 108 (1981); *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 415-16, 63 P.2d 397 (1936). 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); *Lenhoff v.*

⁶ "Substantial evidence" is evidence that would persuade a reasonable fact finder of the truth of the declared premise. See, e.g., *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991), *cert. denied*, 503 U.S. 986, 112 S. Ct. 1672, 118 L.Ed.2d 391 (1992).

Birch Bay Real Estate, Inc., 22 Wn. App. 70, 74-75, 587 P.2d 1087 (1978).

Similarly, 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 Erred By Depriving Proctor of His Real Property

a. The trial court erred by balancing the equities

The trial court here found that the Huntingtons were operating under a mistake of fact concerning the true northwest boundary of their property when they built their house, garage, and well upon the disputed parcel, which is legally owned by Proctor. The court ruled Proctor was not estopped from seeking to remove the Huntingtons from his property and rejected the Huntingtons' claim that they acquired title to the disputed parcel through adverse possession or by estoppel in pais. CP 329, 243; RP 914-15.

Nevertheless, the trial court denied Proctor's petition for a permanent injunction, ejectment, and removal of the encroachments, concluding the equities favored quieting title to the disputed parcel in the Huntingtons. CP 244-45. The court ordered Proctor to sell the

Huntingtons the parcel for \$25,000. *Id.* The trial court erred by balancing the equities where the Huntingtons' encroachments on Proctor's property are substantial and the Huntingtons came to the court with unclean hands. The trial court should have ejected the Huntingtons from the disputed parcel, removed their encroaching improvements, and quieted title in Proctor.

A mandatory injunction is generally recognized as a proper remedy for a landowner to invoke against an adjoining owner to compel the removal of an encroachment. *See Arnold*, 75 Wn.2d at 146; 28 A.L.R.2d 679, § 3. An injunction is an extraordinary remedy, however, and should not be granted lightly. *See Kucera v. State, Dep't of Transp.*, 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 party seeking an injunction must show:

(1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him. Since injunctions are addressed to the equitable powers of the court, the listed criteria must be examined in light of equity including balancing the relative interests of the parties and, if appropriate, the interests of the public.

Id. at 209-10 (quoting *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982)).

In the instant case, it is clear that Proctor has clear legal title to the disputed parcel. It is also clear that he established more than a fear of immediate invasion: the Huntingtons' house and other improvements *actually* encroach upon Proctor's property. There is no dispute these encroachments will continue to interfere with Proctor's use and enjoyment of his property in the absence of injunctive relief. More importantly, he has no adequate remedy at law. Since all land is unique, damages in any amount are inadequate compensation for its loss. *Carpenter v. Folkerts*, 29 Wn. App. 73, 76, 627 P.2d 559 (1981). There is no other piece of land identical to the disputed parcel and no amount of money will make Proctor whole. *See Crafts v. Pitts*, ___ Wn.2d ___, 162 P.3d 382 (2007) (noting no amount of money will make respondents whole where there is no other piece of land identical to their 9.83 acres). Accordingly, the trial court erred by failing to issue an injunction granting Proctor the immediate possession of his land and removing the Huntingtons' and their encroaching structures from his property.

In rare cases, a court may deny an injunction based on equitable principles. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 699-700, 974 P.2d 836 (1999).⁷ Thus, a mandatory injunction requiring the removal of an

⁷ Although a balancing test of sorts is applied in those exceptional cases, it must be remembered that the party causing the encroachment, even if done so unintentionally, has trampled upon the property rights of another in violation of the fundamental maxim

encroaching structure will not issue if the encroacher can establish by clear and convincing evidence five factors rendering an injunction unreasonable or inequitable. The factors, as stated in *Arnold*, are:

(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 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.

75 Wn.2d at 152. The cases applying these factors remain the exception, however, rather than the norm.

Washington courts have approved a balancing of the equities to both grant and deny mandatory injunctions in those rare cases where there has been no physical encroachment onto the plaintiff's land. For example, in *Wimberly v. Caravello*, 136 Wn. App. 327, 149 P.3d 402 (2006), the equities of the case favored granting the mandatory injunction. There, the Wimberlys and Caravello were neighbors. The Wimberlys brought an action against Caravello to enjoin his construction of a substantially-completed three-story garage based on his violation of a restrictive covenant. The garage did not physically encroach on the Wimberlys' lot but did interfere with neighboring views. The trial court granted a

requiring that the rights of personal liberty and private property be held sacred. *Wilkinson v. Leland*, 27 U.S. 627, 657, 7 L.Ed. 542 (1829).

permanent injunction ordering Caravello to bring his building into compliance with the covenants, meaning that only a 1½-story, traditional garage would be permitted. The Court of Appeals affirmed the trial court's balancing of the equities, and agreed that an injunction would not be oppressive and that none of the reasons to withhold an injunction were present. *Id.* at 340-41. *But see Green v. Normandy Park*, 137 Wn. App. 665, 151 P.3d 1038 (2007) (refusing to balance the equities and granting an injunction requiring complete demolition of non-encroaching house and garage built in violation of restrictive covenants where property owners were not innocent parties).

By contrast, in *Steele v. Queen City Broadcasting Co.*, 54 Wn.2d 402, 341 P.2d 499 (1959), the equities of the case favored denying a mandatory injunction. There, landowners brought an action against a television broadcasting company to enjoin construction of a transmission tower on land adjacent to theirs on the grounds that the land upon which the tower was being constructed was smaller than that required by law and that the tower was a nuisance. The tower did not, however, encroach upon the landowners' property. The trial court determined the tower was constructed without a valid permit and constituted a nuisance, but found that the equities of the case dictated that no injunction should issue because two other towers only blocks away had already blighted the

neighborhood and an additional tower added little to the damage already done. *Id.* at 404, 411-12. The court determined removal of the tower would not restore the value of any of the surrounding properties other than those immediately adjacent to it. *Id.* The Supreme Court affirmed, holding the denial of the mandatory injunction was justified where the television company's hardship would be much greater if it were required to remove the tower than would be the landowners' hardship if injunctive relief were denied. *Id.* Moreover, the Court agreed the landowners could be adequately compensated by money damages. *Id.* See also, *Holmes Harbor Water Co., Inc. v. Page*, 8 Wn. App. 600, 508 P.2d 628 (1973) (balancing the equities and denying mandatory injunction against breach of restrictive covenants where obstruction was located entirely upon neighboring lot and cost of removing the violation was exorbitant when compared to the slight violation). *But see, Hanson v. Hanly*, 62 Wn.2d 482, 383 P.2d 494 (1963) (affirming order requiring removal of enormous structure violating restrictive covenants without balancing the equities).

Where there is an actual, physical encroachment on land, however, Washington courts have treated the balancing process as though it were an independent doctrine and only applied it to minor encroachments.⁸ For example, in *Wells v. Parks*, 148 Wash. 328, 333, 268 P. 889 (1928),

⁸ The RESTATEMENT (SECOND) OF TORTS § 941, cmt. c (1979), describes a "minimal encroachment" as 4 inches.

overruled on other grounds, *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984), the Supreme Court affirmed an order requiring the Parks to remove a portion of a concrete bulkhead encroaching less than 1 foot onto the Wells' property without balancing the equities. The Court concluded that even though enforcement would likely result in considerable inconvenience to the Parks, such fact did not constitute a reason for denying the Wells their legal rights. Although the encroachment was minimal, the Court declined to apply the maxim of *de minimis lex non curat* (which means "the law does not concern itself with trifles")⁹ because it determined that establishing an irregular side boundary line for a city lot by judicial decree was not a trifling matter. *Id.* at 332.

The Supreme Court also declined to apply the balancing process in *Adamec v. McCray*, 63 Wn.2d 217, 220, 386 P.2d 427 (1963), recognizing that cases where the doctrine is applied deal with de minimis encroachments of only a few inches and noting that the objectionable structure at issue there encroached 7½ feet at its farthest end. *Id.* By comparison, the Court of Appeals, Division III, rejected a mandatory injunction after balancing the negligible impact of a barn encroaching by 1 foot against the likely prohibitive costs of moving it. *Hanson v. Estell*, 100 Wn. App. 281, 289, 997 P.2d 426 (2000).

⁹ BLACK'S LAW DICTIONARY (8th ed. 2004) 464.

As in Washington, the balancing process has in many jurisdictions led to the denial of a mandatory injunction for the removal of a de minimis encroachment. Tegland, Karl B., 15 Wash. Prac., Civil Procedure § 44.13 at 235 (2003) (citing C.J.S., Injunctions § 68; 28 A.L.R.2d 679). *See also*, *Alabama Power Co. v. Drummond*, 559 So.2d 158 (Ala. 1990) (balancing the equities and declining to order removal of the encroaching structure where the obstruction was “infinitesimal”); *Stüttgärt Elec. Co. v. Riceland Seed Co.*, 802 S.W.2d 484 (Ark. App. 1991) (mandatory injunction not equitable where warehouse measuring 101 feet by 124.6 feet encroached only 2.3 feet onto neighboring property); *Golden Press, Inc. v. Rylands*, 235 P.2d 592 (Colo. 1951) (denying mandatory injunction where slight and unintentional encroachment did not affect plaintiff’s use and damaged plaintiff only slightly while cost of removal forced upon defendant would cause great hardship); *Goulding v. Cook*, 661 N.E.2d 1322, 1325 (Mass. 1996) (resetting the boundaries of encroachments on land that will be tolerated for equitable reasons at those which are “truly minimal.”); *Zerr v. Heceta Lodge No. 111*, 523 P.2d 1018 (Or. 1974) (mandatory injunction requiring removal of home encroaching 2 feet onto neighboring lot would not be equitable, given the minimal nature of the encroachment and the costs involved in removing the wall).

A close look at the cases in Washington and elsewhere reveals that the courts have looked to the equities only after determining the encroachments were so slight as to render damages so easily remunerable that title to the property would not be affected by it; nonetheless, in most of the encroachment cases in Washington discussing the balancing process, the courts have ordered the physical encroachment removed. *See, e.g., Bach v. Sarich*, 74 Wn.2d 575, 582, 445 P.2d 648 (1968) (discussing the doctrine and declining to reverse order enjoining further construction of an apartment building and compelling removal of existing structure); *Mahon v. Haas*, 2 Wn. App. 560, 468 P.2d 713 (1970) (declining to apply the doctrine and requiring plaintiff to remove commercial greenhouse). *See also, Adamec*, 63 Wn.2d at 429. *But see Arnold*, 75 Wn.2d at 148 (balancing the equities and denying a mandatory injunction even though the encroachments involved “something more than a trifle” and where the encroachers did not act in bad faith, negligently, willfully, or indifferently in locating their encroachments).

One of the cases in Washington particularly dispositive of this issue and based on a similar factual pattern is *Tyree v. Gosa*, 11 Wn.2d 572, 119 P.2d 926 (1941). There, Tyree purchased 40 acres of land in 1936 and subsequently established his home upon it. In 1940, he brought an action against Gosa and several other defendants (collectively Gosa) to

establish the boundary line between their respective properties and to require removal of their encroachments. *Id.* at 574. Gosa pleaded as affirmative defenses that Tyree acquiesced in the construction of the objectionable buildings at their actual locations and that the buildings could not be removed without a monetary loss out of all proportion to the value of Tyree's land. *Id.* A commission, appointed by the trial court, confirmed the objectionable buildings were on Tyree's land. *Id.* at 575. The actual amount of land encroached upon was about 791 feet in length north and south, 75 feet wide at the north end and 59 feet at the south end, containing 1.162 acres. *Id.* After considering evidence as to values and access, the trial court entered a decree requiring Tyree to quitclaim the disputed property to Gosa for \$250. *Id.* at 576.

On appeal, the Supreme Court held Tyree had legal title to his property. *Id.* at 579. The Court determined Gosa fixed the locations of the buildings upon their vendor's mistaken representations, but not Tyree's. *Id.* The Court then reversed the order requiring Tyree to quitclaim the disputed property to Gosa, concluding the order could not be justified by applying the "balancing equities doctrine." Although the Court determined the loss to Gosa if he was required to remove the buildings from Tyree's land would be six times the loss to Tyree if he were forced to surrender his land, it declined to balance the equities

because the effect of such a decision would be to condemn Tyree's land for Gosa's private use in violation of the constitution. *Id.* at 579-80.

Here, the trial court erred by failing to grant Proctor's request for a mandatory injunction ejecting the Huntingtons because this is not a case involving de minimis encroachments. There is no dispute that the Huntingtons' improvements encroach upon Proctor's property. Unless those encroachments are truly minimal, however, the trial court did not have the authority to deny Proctor an injunction even if the burden imposed on the Huntingtons from such an injunction far exceeds the benefits of the injunction to Proctor. Where the intrusion is permanent and significant, a court cannot exercise "a general power of equitable adjustment and enforced good neighborliness." *Goulding*, 661 N.E.2d at 1325.

The photographs and maps in evidence demonstrate that this is not a case where the objectionable structures encroach just a few feet onto the plaintiff's property. Instead, the Huntingtons' house, well, garage, and yard are all physically located on Proctor's property, approximately 400-500 feet farther west of the true boundary than they should be. The house is three floors, has a 1650 sq. ft. footprint, and measures 3800 sq. ft. of finished space. RP 394-95; Ex. 89 (page 5 of the summary). The entire house sits on Proctor's property, not just one small corner or an eave or

two. The Huntingtons' invasion of Proctor's property is therefore not de minimis. The trial court thus erred by denying Proctor's request for a mandatory injunction after balancing the equities because that doctrine simply does not apply when the encroachments are substantial. *See, e.g., Adamec*, 63 Wn.2d at 220.

The Huntingtons argued below, and the trial court agreed, that *Arnold* controlled the outcome of this case. *Arnold* is distinguishable. In that case, the Arnolds' fence encroached between 8.4 and 9.7 feet onto the Melanis' lot and their home extended 3.28 feet over their property line. 75 Wn.2d at 145. The Arnolds brought an action to quiet title against the Melanis, who cross-claimed for a mandatory injunction requiring the removal of the Arnolds' improvements. The trial court found the Arnolds had not acquired title through adverse possession; however, it denied the Melanis' request for a mandatory injunction after determining the value of the lots and finding the cost of removing the encroachments would far exceed the total value of the Melanis' property and that requiring them to remove the encroachments would be inequitable and unjust. *Id.* at 146. The Arnolds were granted an easement to maintain the improvements in their present location as long as they continued to exist; the Melanis were granted a judgment against the Arnolds for \$125. *Id.*

The Supreme Court affirmed the judgment as modified, noting the Arnolds' encroachments were "something more than a trifle." *Id.* at 148. Yet it did not define the term "trifle," which is certainly not a legal term. Moreover, just because the Court deemed the 3-foot encroachment "something more than a trifle" does not mean it was substantial. Whether the Arnolds' encroachment was substantial when compared to other reported encroachments is impossible to determine because the Court failed to specify the size of the Arnold or Melani lots. A 3-foot encroachment might be substantial, but only if the lots are small.

The Supreme Court then discussed its previous encroachment decisions; however, it never overruled them. *Id.* at 149-150, 152. Had it wished to do so, it would have specifically done so. Accordingly, *Wells*,¹⁰ *Tyree*, and *Adamec* remain good law. Finally, the Court modified the judgment by limiting the Arnolds' easement over the Melanis' property to the area covered by the encroachments and stated that while the encroachments could be repaired, any replacements would have to be made within the true boundary line. *Id.* at 153.

The benefit of the doctrine of balancing the equities, or relative hardship, is reserved for the innocent defendant who proceeds without knowledge or warning that his structure encroaches upon another's

¹⁰ *Wells* was overruled on other grounds in *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984).

property. *Bach v. Sarich*, 74 Wn.2d 575, 582, 445 P.2d 648 (1968) (citations omitted). Under the circumstances of this case, the Huntingtons are not entitled to invoke the benefit of this doctrine. Even if they are, they must satisfy all five factors of the test enunciated in *Arnold* to defeat issuance of the mandatory injunction. *Arnold*, 75 Wn.2d at 152.

Even if this Court assumes the Huntingtons produced clear and convincing evidence of factors three (ample remaining room for a structure suitable for the area and no real limitation on the property's future use) and four (impracticality of removing the structure as built), they have not satisfied factors one, two, and five. They have not carried the burden necessary to defeat Proctor's entitlement to a mandatory injunction, and the trial court erred by refusing to issue it.

The Huntingtons cannot satisfy the first *Arnold* factor because they took a calculated risk or acted negligently or indifferently when locating their encroachments. During its oral ruling, the trial court specifically found the Huntingtons were negligent in fully ascertaining where their boundaries were before they began constructing their home. RP 927.¹¹ The trial court's conclusion that they acted in good faith disregards

¹¹ Although the trial court specifically found the Huntingtons negligently ascertained their property boundaries before they began construction, it declined to enter written findings to that effect and denied Proctor's motion for reconsideration of that finding. RP 956-57; CP 213, 244.

considerable testimony to the contrary. For example, the court ignored testimony from both Proctor and Peoples that neither one met with Ford to confirm the Huntingtons' northwest boundary was the 1/16th pin. The conclusion also ignores Peoples' testimony that he did not set the 1/16th pin until May 23, 1995, long after Ford claims Moss pointed it out as his northwest boundary. CP 214. Contrary to Ford's assertions, Peoples never told Ford what his property boundaries were. Instead, Peoples simply confirmed the home was situated within the parameters Huntington was describing when they met. RP 269. He made no instrumental survey of the property, but merely a visual siting without any actual measurements and without determining exact course and location. The court also overlooks Webberly's testimony that he asked Ford several times while the Huntingtons' road was being constructed if Ford had had the property surveyed. RP 323.¹² Ford's response was that if he was encroaching on Proctor's property, then he would just purchase the land from Proctor. RP 324.

Christensen v. Tucker, 250 P.2d 660 (Cal. App. 1952), is particularly relevant because it stands for the proposition that "for a

¹² The trial court never specifically questioned the credibility of Proctor, Peoples, or Webberly, and did not enter written findings concerning their credibility. The court's lack of written findings concerning their testimony or their credibility is significant, especially where the testimony undermines the court's written findings that the Huntingtons acted in good faith.

defendant to be entitled to the benefits of the relative hardship doctrine, the trespass must not have been willful” 250 P.2d at 666. The *Christensen* case, however, also suggests that where a defendant builds his encroachments on the plaintiff’s land without making a survey of his own and simply relies on the statements of another, he will be barred from invoking the doctrine of balancing of equities because his conduct is negligent. *Id.* Here, the Huntingtons claimed that their construction of their home on the disputed parcel was innocent, but the evidence suggests otherwise. They began to construct their house after being questioned about their boundaries, but failed to have it surveyed before they began construction. They took a calculated risk or acted with indifference to the consequences when they located their future home. They should not be rewarded for taking such a risk. *See J. L. Cooper & Co. v. Anchor Securities Co.*, 113 P.2d 845 (1941) (equities will not give complainant relief against his own vice and folly).

The Huntingtons cannot satisfy the second *Arnold* factor because the damage to Proctor is not slight nor is the benefit of removal equally small. There is no other piece of land identical to the disputed parcel and no amount of money will make Proctor whole. Moreover, the Huntingtons’ home was built on a high promontory with the best view. Placement of their home on Proctor’s property has removed a portion of

his view property, thereby decreasing the overall value of his property. Testimony indicates that the Huntingtons gained view property but did not have a similar parcel to convey to Proctor. Moreover, Proctor testified that the Huntingtons' home is so close to his that he can hear their dogs barking and their children screaming. RP 750. This is an obvious detriment for a man who wanted to purchase a serene, quiet property to escape from the stress of his job. Finally, the court's finding that the value of the disputed parcel was only \$25,000 removes Proctor's ability to realize the best price for his property, if he chooses to sell it rather than being forced to sell it. It also fails to consider that comparable lots within two miles of Proctor's property were selling for ten times that amount.

The Huntingtons cannot satisfy the fifth *Arnold* factor because there is no disparity in the resulting hardships. Proctor is facing significant damages if he is forced to sell the disputed parcel. The County has indicated his forest designation is in jeopardy now that there are two residences located on his land. CP 161. What he can do with his remaining land is therefore much more limited because he cannot lose much more acreage before he will lose the forest designation completely. *See id.*; RP 717. Proctor will lose future tax savings if he loses the forest designation. CP 28-29; RP 717, 721. He will lose income from the trees grown on his property and processed through his saw mill. RP 716-17.

More importantly, he will lose the ability to market his property as a view property since the Huntingtons' home sits on the highest point of his land and there is nowhere else on his property with a view. CP 216; RP 490, 468. Finally, the Huntingtons failed to counter-claim for an offset for the value of their improvements and the taxes paid pursuant to RCW 7.28.160 and .170.¹³ This would have removed any disparity in the resulting hardships.

Finally, although not a factor considered in *Arnold*, this Court should consider public policy. Allowing the trial court's decision to stand would be tantamount to endorsing the right to encroach on another's

¹³ RCW 7.28.160 provides:

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

RCW 7.28.170 provides:

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

property, even though the encroacher did not gain legal title through adverse possession, so long as the costs of moving the encroaching structure are substantial or the construction has reached such a critical stage beyond which there can be no return. The Court should not permit the Huntingtons to hide behind the value of their home or the costs to move it to excuse their negligent encroachments and to avoid corrective action.

Where the Huntingtons have failed to satisfy all of the *Arnold* factors, they have not carried the burden necessary to defeat the mandatory injunction and the trial court erred by refusing to issue it. The trial court's decision must be reversed as it has granted the Huntingtons virtual power of condemnation over Proctor's property. CP 68.

b. The trial court's choice of remedy was error

In certain circumstances, the defendant who loses possession of the land in an ejectment action may recover amounts paid for real estate taxes and assessments and permanent improvements. The defendant may recover the cost of such improvements only if he: (1) held adversely to the plaintiff; (2) under color of title; and (3) in good faith. RCW 7.28.150 (setoff); RCW 7.28.160 (counterclaim). To have such recovery, however, the defendant must have asked for it in his answer. *Harper v. Holston*, 128 Wash. 403, 222 P. 889 (1924) (holding the defendant must ask for the

recovery of improvements in his answer). Thus, the appropriate remedy if the trial court had issued the injunction to eject the Huntingtons would have been to permit them a setoff for their improvements.

The Huntingtons would no doubt be entitled under those statutes to set forth the value of their improvements in their answer and have a recovery for the relief the statutes afford. But this is a partial defense to the ejectment statute, and the defense, to avail, must "by the express terms of the statute, be set forth in the answer and tried out as a part of the issues in the trial of the main section." *Harper*, 128 Wash. at 404. By failing to raise this counterclaim, the Huntingtons have waived it.

Moreover, it should be noted that the trial court here not only denied Proctor his injunction, but also granted the Huntingtons affirmative relief by quieting title in the disputed parcel in them. This was error as the court's affirmative relief should not have been greater than was reasonably necessary to protect the Huntingtons. *See Christensen*, 250 P.2d at 565. (citation omitted). Since an easement would have sufficed to protect the Huntingtons' use of the disputed parcel, the trial court's judgment went too far by quieting title instead. *Id.* The trial court's remedy was error.

(3) The Trial Court Abused its Discretion By Admitting The Testimony Of the Huntingtons' Real Estate And Construction Experts

On the second day of trial, Proctor moved to exclude the testimony of the Huntingtons' real estate and construction experts. RP 291-94. Lyon was the real estate appraiser called to testify as a valuation expert. RP 291. Mockford was the construction appraiser called to testify about the costs of moving the Huntingtons' home. RP 292-93. The court denied the motion. RP 302-05. The trial court should not have admitted the testimony and abused its discretion by doing so.

As noted above, the Huntingtons were not entitled to a balancing of the equities because their encroachments were substantial and they took a calculated risk when locating their encroachments. Where there was no basis for balancing the equities, the trial court abused its discretion by admitting the expert testimony of Lyon and Mockford as to the value of the disputed parcel or the costs of moving the Huntingtons' home. The court's decision to admit the testimony was tantamount to a finding before the conclusion of Proctor's case that it would be inequitable to eject the Huntingtons from the disputed parcel.

Moreover, the Huntingtons failed to counterclaim for an offset of their improvements, which would have been an appropriate remedy if they had been ejected. Admitting the testimony of Lyon and Mockford allowed the Huntingtons to get into evidence that which they chose not to plead in

a counterclaim. Accordingly, evidence of the value of their improvements was inadmissible.

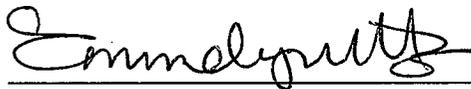
Where the Huntingtons were not entitled to balance the equities, the trial court abused its discretion by admitting expert testimony concerning the impracticality and costs of removing the encroachments and the fair market value of the disputed parcel where title should have remained with Proctor.

F. CONCLUSION

Where it is clear that the mandatory injunction must issue, there is no need to burden the trial court with unnecessary further proceedings. This is an appropriate case for the application of RAP 12.2. The Court should reverse and remand to the trial court with directions to modify the judgment by issuing an injunction ejecting the Huntingtons and their encroachments from the disputed parcel and quieting title in Proctor. The judgment should be affirmed in all other respects.

DATED this 28th day of August, 2007.

Respectfully submitted,



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APPENDIX

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

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

NOEL PROCTOR,

Plaintiff,

vs.

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

Defendants.

No. 05 2 00032 7

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

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

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

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

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

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1
2 FINDINGS OF FACT

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

13 2. In June of 1994, the Huntingtons set up a camp site and lived the rest of that
14 summer on a portion of the Proctor Parcel ^{6.77 acre ETR} (the "Disputed Area"). At that time, they believed
15 this was part of their property. In September of 1994, the Huntingtons moved to Utah for the
16 winter but returned to live on the Disputed Area the following spring (1995).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 CONCLUSIONS OF LAW

5 A. Driveway.

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

14 B. Disputed Area / Quiet Title.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

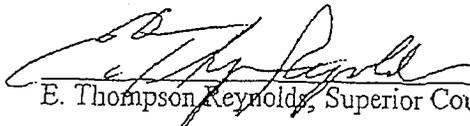
22 6. Each party shall bear their own court costs, legal fees and attorney fees in this
23 proceeding. Each party shall cooperate with the other to effectuate the Court's judgment,
24 including but not limited to executing any deeds or other instruments necessary to convey the
25 one-acre parcel.

26 Dated this 1st day of March, 2007.

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

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E. Thompson Reynolds, Superior Court Judge

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

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

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

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

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

NOEL PROCTOR,

Plaintiff,

vs.

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

Defendants.

No. 05 2 00032 7

FINAL ORDER AND JUDGMENT
[Clerk's Action Required]

JUDGMENT SUMMARY

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

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

///
FINAL ORDER AND JUDGMENT - 1

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Attorneys at Law
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Vancouver, WA 98660
360-694-7551

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FINAL ORDER/JUDGMENT

The Court HEREBY ENTERS JUDGMENT AS FOLLOWS:

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

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

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

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

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

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

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

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


E. Thompson Reynolds
SUPERIOR COURT JUDGE

1 PRESENTED BY:

2

3


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

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FINAL ORDER AND JUDGMENT - 1

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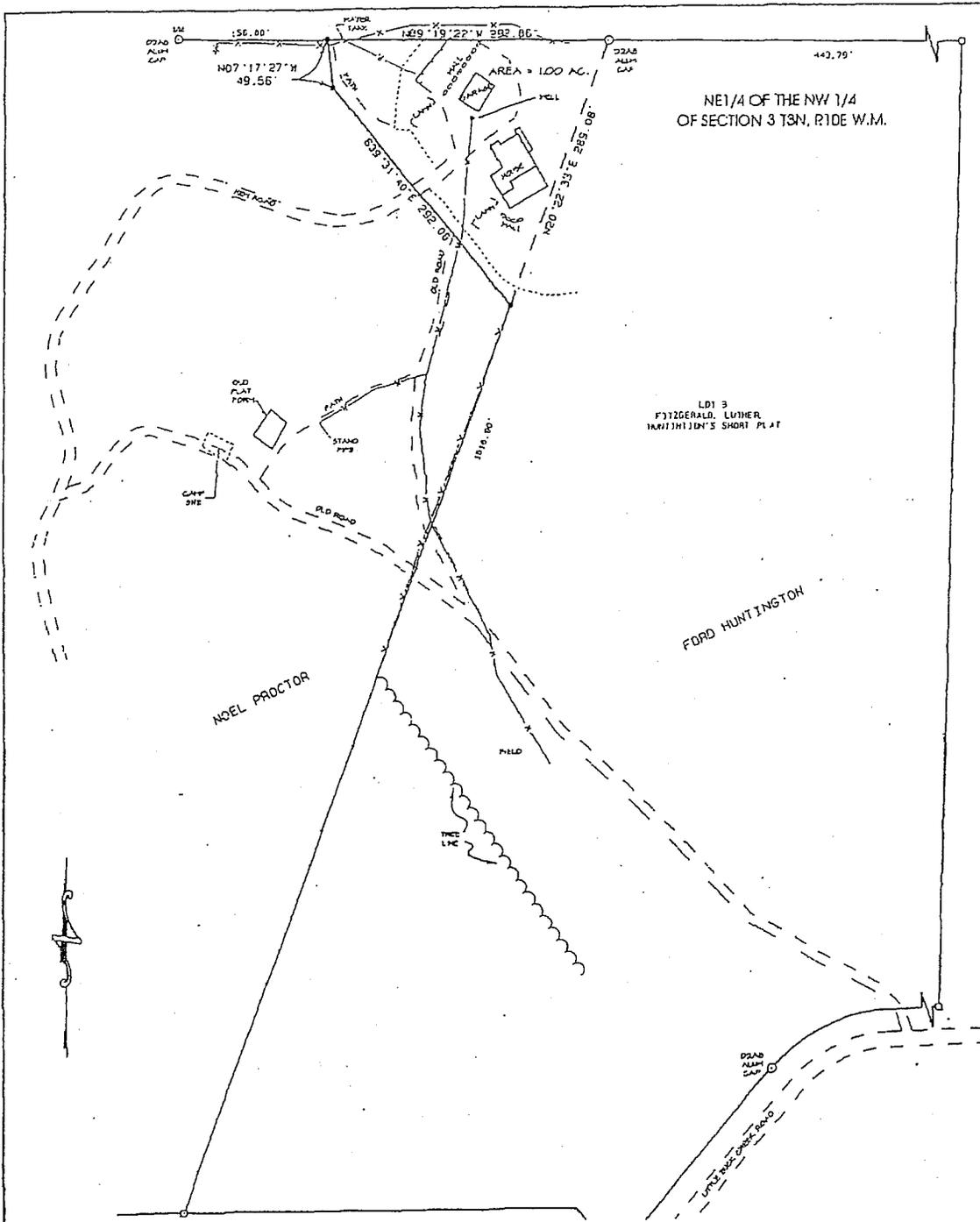
SCHWABE, WILLIAMSON & WYATT, P.C.
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Vancouver Center
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Vancouver, WA 98660
360-694-7551

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



NE1/4 OF THE NW 1/4
OF SECTION 3 T3N, R12E W.M.

LD1 3
FITZGERALD, LUTHER
HARRINGTON'S SHORT PLAT

FORD HUNTINGTON

NOEL PROCTOR

1.0 ACRE BOUNDARY LINE ADJUSTMENT

SCALE 1"=100'



DATE	DESCRIPTION	BY
11/11/06	SETUP	JDG
11/11/06	FIELD	JM

SITE SURVEY
FOR FORD HUNTINGTON
SKAMANIA COUNTY, WASHINGTON

SHEET: 3 OF 3
PROJECT: 06b12j
DATE: DEC 2006

This is not a legal survey.

042006b12j06b121#3.pro

DECLARATION OF SERVICE

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

Robert Stanton
PO Box 1939
White Salmon, WA 98672

Ross Rakow
117 E. Main
Goldendale, WA 97620

Bradley W. Andersen
Phillip J. Haberthur
Schwabe, Williamson & Wyatt, P.C.
700 Washington Street, Suite 701
Vancouver, WA 98660
(ROPs sent via Fed Ex)

Original filed with:
Court of Appeals, Division II
Clerk's Office

FILED
COURT OF APPEALS
DIVISION II
07 AUG 29 PM 1:35
STATE OF WASHINGTON
BY _____
DEPUTY

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

DATED: August 29, 2007, at Tukwila, Washington.

Christine Jones
Christine Jones, Legal Assistant
Talmadge Law Group PLLC