IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Noel proctor, Petitioner, v. ROBERT "FORD" HUNTINGTON and CHRISTINA HUNTINGTON, husband and wife, and the marital community therein, Respondents.	NO. 82326-0 EN BANC Filed August 19, 2010

STEPHENS, J.—Robert and Christina Huntington unwittingly built their house, well, and garage entirely on a portion of land owned by their neighbor, Noel Proctor. Proctor did not realize that the Huntingtons were encroaching at the time, but, when he learned of the true boundary line between the properties, he sued to eject them. The trial court refused to issue an injunction forcing the Huntingtons to remove their home, instead requiring Proctor to deed them the acre underlying it and accept payment for the value of the land. Proctor asserts that this equitable remedy

was impermissible under the circumstances of this case. We disagree, and we affirm the court below.

Facts and Procedural History

Dusty Moss subdivided his property in Skamania County into a 30-acre parcel, which Noel Proctor later purchased, and a 27-acre parcel, which the Huntingtons later purchased. Moss showed each of the purchasers the general property lines of the two parcels. In the summer of 1994, the Huntingtons camped in an area that they believed was their property, but in reality was on Proctor's parcel (the Disputed Area). They returned to camp there the next spring, at which time Proctor, who had acquired his land in the intervening year, came to the Huntingtons' campsite to introduce himself. Proctor did not object to the location of the campsite and did not realize it was on his property.

The boundary confusion arose because Moss had a surveyor, Dennis Peoples, set a pin along the northern border of Proctor's property (the 16th pin). The 16th pin was set to regulate logging activities north of the parties' parcels and was not intended to mark the northwest corner of the Huntingtons' parcel. The actual boundary lay 400 feet east of the pin. When clearing their home site, however, the Huntingtons asked Peoples to confirm the northwest corner of their property. Peoples mistakenly referred to the 16th pin as the boundary marker, suggesting that the Huntingtons' parcel extended farther than it did.[1]

[1] Peoples denied having done this, but the trial court, as the finder of fact, believed the Huntingtons' account.

The Huntingtons relied on this representation, meeting with Proctor at the 16th pin in the summer of 1995. Ford Huntington told Proctor that Peoples had identified the pin as the northwest corner of the Huntington parcel. Proctor did not object to or question the accuracy of this information. Over that summer and the next, the Huntingtons built their house, garage, and well in the Disputed Area. Proctor also built his own house. The Huntingtons have resided full time in their house since its completion in 1996.

In 2004, Proctor hired a surveyor to locate the corners of his property because he was concerned that another neighbor (not the Huntingtons) was encroaching. The surveyor discovered that the Huntingtons' house, well, garage, and yard were located entirely on Proctor's property. Upon this surprising discovery, the parties tried to work out "some kind of trade, a swap, [or] boundary line adjustment," but negotiations failed. Report of Proceedings (RP) at 773; Clerk's Papers (CP) at 404. In February 2005, Proctor sued to quiet title and eject the Huntingtons from his land. The Huntingtons counterclaimed to quiet title in themselves, asserting adverse possession and estoppel in pais.

The trial court concluded that both parties reasonably, though mistakenly, believed the 16th pin marked the northwest boundary of the Huntingtons' property. It denied the Huntingtons' adverse possession and estoppel claim,[2] but refused to

[2] The trial court determined that Proctor's parcel is designated as forest land, which delayed the running of the adverse possession statute of limitations until the Huntingtons completed their improvements to the land. RP at 914-15 (citing RCW 7.28.085). Proctor sued before 10 years had elapsed since the house's construction. *Id.* The Huntingtons did not carry their burden on the estoppel claim because they proved it

issue a mandatory injunction ejecting them. It found that the acre of land on which the Huntingtons' home was built had a fair market value of $25,000, and moving the house elsewhere would cause considerable emotional hardship and cost at least $300,000. Citing *Arnold v. Melani*, 75 Wn.2d 143, 437 P.2d 908, 449 P.2d 800, 450 P.2d 815 (1968-69), the trial court concluded that the Huntingtons had acted in good faith and that requiring them to move their home and other improvements "would be oppressive . . . and inequitable." CP at 406. Instead, the trial court ordered Proctor to sell the Huntingtons the acre of his property on which they built their home, in exchange for which they would pay $25,000. Neither side, the court noted, was the prevailing party under this resolution.

Both parties appealed. One of the areas of contention was whether the trial court had the authority to deny Proctor an injunction under *Arnold*.[3] *See* Br. of Appellant at 30-36. Proctor argued that *Arnold* did not apply because the Huntingtons' encroachment onto his property was not "slight." *Proctor v. Huntington*, 146 Wn. App. 836, 848, 192 P.3d 958 (2008). The Court of Appeals agreed that the encroachment was not slight but nevertheless affirmed the trial court's chosen remedy, concluding it was authorized by an older case. *See id.* at 849-50, 854 (discussing *Peoples Sav. Bank v. Bufford*, 90 Wash. 204, 155 P. 1068

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by a preponderance, but not by clear and convincing evidence. CP at 405-06. The adverse possession and estoppel claims are not before us on review.

[3] Another issue was whether the Huntingtons could establish a disparity of hardships if they failed to counterclaim for their home's value under the "betterment statute," RCW 7.28.160-.170. Br. of Appellant at 35-37. The Court of Appeals did not address this argument. *Proctor v. Huntington*, 146 Wn. App. 836, 850-51, 192 P.3d 958 (2008).

(1916)). We granted review at 165 Wn.2d 1041 (2009).

ANALYSIS

Encroachment occurs when one builds a structure on another's land; it is a form of trespass. Black's Law Dictionary 607 (9th ed. 2009). Traditionally, a property owner had an absolute right to eject trespassers—and to require them to remove encroaching structures—even if the trespassers believed in good faith that the land was theirs. *See 7* Stuart M. Speiser, Charles F. Krause & Alfred W. Gans, The American Law of Torts §§ 23:9, :12, at 641, 646-47 (1990). This form of relief is a type of "property rule." *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972). Property rules are characterized by all-or-nothing relief afforded to the party who is deemed to have the legal right. *See id.* at 1105-06 (contrasting injunctive relief with an award of damages).

During the 19th and early 20th centuries, courts increasingly grappled with frustrating applications of common law property rules. Because of their absolute nature, the results sometimes seemed grossly inefficient or unfair. For example, a property rule might require a factory owner to tear down its factory because one wall of it encroached a few inches on another's lot. *See*, *e.g.*, *Pile v. Pedrick*, 167 Pa. 296, 31 A. 646 (1895).

To mitigate harsh or unjust results, a new form of relief gradually crept into property law: the "liability rule." A liability rule is characterized by the exchange of

damages for a transfer of a legal right. *See* Calabresi & Melamed, *supra*, at 1092, 1105-06. An early case that illustrates the difference between the two types of rules is *Harrington v. McCarthy*, 169 Mass. 492, 48 N.E. 278 (1897). The cornice of McCarthy's wooden building projected 18 inches into the space above Harrington's land. *Id.* at 493. The foundation of the building also encroached slightly, but only underground. *Id.* at 494. As to the cornice, the court required McCarthy to trim back any portion of the building encroaching on Harrington's lot—a remedy reflecting a property rule. *Id.* Because the foundation would be difficult or impossible to trim back and caused no appreciable harm, however, the court refused to require McCarthy to remove the foundation and instead left Harrington to his remedy at law (i.e., damages)—a liability rule. *Id.* at 494-95. Following *Harrington*, courts occasionally began to substitute liability rules for trespass's traditional property rule in order to align case results with contemporary notions of justice. *See*, *e.g., Geragosian v. Union Realty Co.*, 289 Mass. 104, 108-110, 193 N.E. 726 (1935) (summarizing the scenarios in which a liability rule might apply, but applying a traditional property rule).

This evolution of property law remedies can be seen in Washington precedent. Originally, a landowner could sue to eject a trespasser even if the trespasser had considerably improved on (or purchased improvements on) the land.[4]

[4] See, for example, *Suksdorf v. Humphrey*, 36 Wash. 1, 3-6, 77 P. 1071 (1904), *overruled on other grounds by Chaplin v. Sanders*, 100 Wn.2d 853, 861 n.2, 676 P.2d 431 (1984), in which an encroacher's adverse possession claim failed for lack of "hostility," and the court reversed a judgment in her successors' favor. This reversal allowed the landowner to eject the encroachers despite their having built a house and

Gradually, liability rules began to surface in equity cases. In *Hart v. City of Seattle*, 45 Wash. 300, 301, 88 P. 205 (1907), the defendants obtained an injunction requiring the city to restore a street to its original, higher grade. The trial court gave the city the option of leaving the street at the lower grade, however, if it paid damages. *Id.* at 302-03. The city challenged this remedy, arguing that no damages could be awarded in equity cases. *Id.* at 301. Citing a large number of cases from Washington and other jurisdictions, this court approved of a liability rule as a possible remedy in equity and affirmed the trial court. *See id.* at 303.

We next applied the liability rule concept in ejectment cases. In *Bufford*, 90 Wash. at 205, the encroachers were mistakenly shown a bank-owned lot instead of their own, and so constructed their home entirely on the bank's lot. Both the bank and the encroachers paid taxes on their titles of record until the mistake was discovered and the bank sued for ejectment. *Id*. This court held that, although the encroachers' possession did not give rise to a claim for adverse possession, the bank was not entitled to eject them. *Id.* at 206-09. Under the maxim that a party requesting equity must do equity, the encroachers could remain on the land, but had to deed their identical parcel to the bank in exchange for this privilege, or, if the bank preferred, reimburse the bank for any taxes it paid on the lot the encroachers had been occupying. *Id.* at 208-09. Thus, as in *Hart*, we applied a liability rule requiring one party to yield its absolute right to the other party in exchange for a

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planted fruit trees on the disputed tract. *Id.*

penalty.

As with any change in bedrock property law, the introduction of liability rules was controversial. In *Tyree v. Gosa*, 11 Wn.2d 572, 573-77, 119 P.2d 926 (1941), some encroachers relied on a surveying mistake when building their homes even though the plaintiff warned them that they were trespassing on his land. The trial court refused to eject the encroachers, but required them to pay the plaintiff in exchange for the land. We found this remedy unauthorized. *Id.* at 580. Ignoring *Bufford*, we stated that the parties had cited no Washington case that allowed such "balancing the equities," implying that none existed in our jurisprudence. *See id.* We further noted that the trial court's remedy, even if authorized, amounted to an unconstitutional taking of property for private use. *Id.* at 580-82. Similarly, in *Adamec v. McCray*, 63 Wn.2d 217, 219-20, 386 P.2d 427 (1963), we repeated *Tyree*'s statement that no Washington cases supported the application of a liability rule to an encroachment. In both *Adamec* and *Tyree*, we opined that other jurisdictions had applied liability rules only to encroachments of a few inches, and so the remedy did not apply to greater encroachments. *See id.*; *Tyree,* 11 Wn.2d at 580.

Adamec and *Tyree* called into question the propriety of substituting a liability rule for the traditional property rule in encroachment cases. Reading them without reference to *Hart* and *Bufford*, which they did not address, gave the impression that liability rules might be impermissible, or permissible only in very limited

circumstances.

We ultimately recognized the discrepancy in our case law and settled the point in *Arnold*. In that case, the Arnolds' house and fence encroached over the Melanis' property line because of a surveying mistake. *Arnold*, 75 Wn.2d at 145-46. The trial court held that it would be inequitable to require the Arnolds to remove their house, which was worth far more than the area encroached. It granted them the right to remain in their house on condition that they pay the Melanis for the value of the encroached land. *Id.* Surveying *Adamec*, *Hart, Bufford*, and *Tyree*, we upheld the trial court's equitable remedy. *Id.* at 149-53. We explained that *Adamec* did not need to address the legitimacy of recognizing a liability rule remedy because of the facts of that case. *Id.* at 149-50. We distinguished *Hart*, but noted its use of a liability rule. *Id*. at 150. We approved of *Bufford*'s equitable use of a liability rule in cases of good-faith mistake. *Id.* *Tyree* we explained in light of its unique facts—the encroachers had notice that they might be building on another's land and took that risk when building—and dismissed its purported constitutional holding as dictum.[5] *Id.* at 150-52. Finally, we distilled our cases into a test for when a court may substitute a liability rule for the traditional property rule in encroachment cases:

> [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 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

[5] We also refuted *Tyree*'s private takings rationale. *Arnold*, 75 Wn.2d at 150-52.

> enormous disparity in resulting hardships.

Id. at 152.

Our opinion in *Arnold* grounds this test in the general power of the court to afford equitable relief. "'[E]quity has a right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable.'" *Id.* (quoting *Thisius v. Sealander*, 26 Wn.2d 810, 818, 175 P.2d 619 (1946)); *accord Casa del Rey v. Hart,* 110 Wn.2d 65, 71, 750 P.2d 261 (1988); *In re Estates of Palmer*, 146 Wn. App. 132, 137 n.7, 189 P.3d 230 (2008). Importantly, we explained *Arnold*'s test as something more than merely balancing the equities. 75 Wn.2d at 152-53. Rather, it is concerned with the reasoned use of injunctive relief only when an absolute property rule is appropriate. *See id.* at 153 ("It is a contradiction of terms to adhere to a rule which requires a court of equity to act oppressively or inequitably and by rote rather than through reason."). The dissenters complained that a court should always enforce landowners' legal rights even if doing so is inequitable, and would have stopped short of allowing a court to alter property rules through its equity power. *See id.* at 154-55 (Hill, J., dissenting). But, the majority relied on *Bufford* and *Hart*, which fashioned liability rules instead of property rules, and disapproved of dicta in *Adamec* and *Tyree*, which purported to limit or eliminate a court's ability to do so. Thus, the majority's holding confirmed that a court's equity power transcends the mechanical application of property rules. *See id.* at 152.

Proctor acknowledges *Arnold*'s holding that a court may refuse to enjoin an

encroachment under certain circumstances but argues that appropriate circumstances are not present in this case. Specifically, he contends that *Arnold* does not permit a court to deny an injunction unless the damage to the landowner is "slight."[6] *See Arnold*, 75 Wn.2d at 152 (part 2 of the test). The Huntingtons put their house, garage, and well on Proctor's land, occupying a full acre. Proctor argues that encroachment of an entire acre of land, worth $25,000, cannot be "slight" in any sense of the word. He points to cases addressing much smaller encroachments in an attempt to show that the remedy in *Arnold* is not available here. *See id.* at 145 (2 x 3.28-foot encroachment); *Hanson v. Estell*, 100 Wn. App. 281, 283, 997 P.2d 426 (2000) (1-foot encroachment); *Mahon v. Haas*, 2 Wn. App. 560, 563, 468 P.2d 713 (1970) (15-foot strip); *see also Adamec*, 63 Wn.2d at 219-20 (doctrine applies only to encroachments of "a few inches"); *Tyree*, 11 Wn.2d at 580 (same). *But see Bach v. Sarich*, 74 Wn.2d 575, 578, 582, 445 P.2d 648 (1968) (considering but rejecting a "balancing the equities" argument for a 130 x 77-foot encroachment).

It may be true that encroachments of only a few feet are more likely to meet the *Arnold* test than greater encroachments. However, *Arnold* relied on and derived its rule from *Bufford*, in which the encroachers occupied the landowner's entire parcel. *Arnold*, 75 Wn.2d at 150. In absolute terms, this encroachment was sizeable, and in comparative terms, this encroachment was much greater than the

[6] The dispute over the term "slight" in *Arnold* is distinct from the question of whether an encroachment is so trifling that a court may refuse to remedy it altogether. The latter is dealt with under another doctrine: *de minimis non curat lex* (i.e., the law does not redress trifles). *See Arnold*, 75 Wn.2d at 148 (rejecting a *de minimis* claim separately from discussing the equitable limits on traditional property rules).

one in this case. The acre on which the Huntingtons built makes up only about 3.3 percent of Proctor's parcel. Since *Bufford* was a case on which *Arnold* based its test, encroachments on par with the one in *Bufford* may be said to fall within the meaning of "slight" in appropriate circumstances.

Proctor tries to distinguish *Bufford* on the ground that the landowner in that case made no claim to its lot until after the 10-year adverse possession period had run, and so it would have been inequitable to eject the encroachers. Suppl. Br. of Pet'r at 15. Here, in contrast, Proctor sued for ejectment before the adverse possession period had run. *Id.* This distinction misses the point. *Bufford* held that the encroachers could not acquire title by adverse possession because the first few years of their possession had not been open and notorious. 90 Wash. at 206-08. It then proceeded on equitable grounds to deny the landowner's request to eject the encroachers. *Id.* at 208-09. Likewise, the Huntingtons' claim for adverse possession failed. Thus, as in *Bufford* and *Arnold*, the trial court appropriately turned to equitable considerations to determine whether an injunction should issue.[7]

Proctor argues for a hard and fast rule that unless an encroachment is "slight" in an absolute sense, a court must always grant an injunction to eject the encroacher. But, our case law affords a trial court greater flexibility. The entire purpose of our pronouncement in *Arnold* was to show that injunctions should not mechanically

[7] Proctor also cites *Kent v. Holderman*, 140 Wash. 353, 354, 248 P. 882 (1926) because it distinguishes *Bufford*, stating that "with respect to the facts, each case must stand upon its own bottom." But, *Kent* distinguished *Bufford* on an unrelated issue. *See id.* (holding that, unlike in *Bufford*, the encroachers had established adverse possession).

follow from any encroachment. *See Arnold*, 75 Wn.2d at 152 ("Ordinarily, . . . a mandatory injunction will issue to compel the removal of an encroaching structure. However, *it is not to be issued as a matter of course*. . . . [T]he court must grant equity in a meaningful manner, *not blindly*." (emphasis added)). A court asked to eject an encroacher must instead reason through the *Arnold* elements as part of its duty to achieve fairness between the parties. *See Young v. Young*, 164 Wn.2d 477, 488, 191 P.3d 1258 (2008) (discussing a court's "tremendous discretion" to do justice when fashioning an equitable remedy). This is the essence of the court's equity power, which is inherently flexible and fact-specific. *See id.* at 495 ("[F]lexibility is crucial in fashioning remedies that do equity to the parties.").[8]

Here, although encroachment on an acre of Proctor's land (worth $25,000) was not "slight" in an absolute sense, that was not the key question before the trial court. The question was whether, in equity, it would be fair and just to require the Huntingtons to remove their entire house, garage, and well—at an estimated cost of over $300,000—because of both parties' good-faith surveying mistake. The benefit of removal to Proctor would be to gain an acre. (As for the house, Proctor admitted

[8] The same reasoning forecloses Proctor's other argument, that an encroacher cannot establish a disparity of hardships if he or she does not counterclaim under the betterment statute, RCW 7.28.160-.170. The betterment statute predates *Bufford* and *Arnold*, so the equitable rule announced in those cases presumably accounts for its existence. *See* RCW 7.28.160-.170 (enacted in 1903). *Arnold* disapproves of the rote issuance of a mandatory injunction, whether due to a failure to counterclaim for the value of improvements or upon the mere showing of encroachment. A court sitting in equity may consider one party's failure to pursue all possible legal remedies, but the point is to reason through the *Arnold* factors in light of *all* the facts, as part of the equitable consideration of whether an injunction is appropriate.

he did not know what he would do with it, seeing as he had built his own house shortly after the Huntingtons' house was constructed. RP at 810; CP at 404.) The acre of land would not appreciably increase the value or size of Proctor's parcel, which totals 30 acres.[9] On these particular facts, the trial court could fairly characterize the benefit to Proctor as minimal. In contrast, ejectment would impose a great hardship on the Huntingtons because they would have to remove and reconstruct their house and garage and drill a new well. (The loss of one acre of land itself would not impose hardship on the Huntingtons, as they also owned much more than one acre.) The trial court's equitable approach in this case fits comfortably within the good-faith-mistake line of cases, including *Arnold* and *Bufford*, in which equity allows a court to apply a liability rule in lieu of rote application of a property rule. Because the trial court's chosen remedy was proper under *Bufford* and *Arnold*, the Court of Appeals was right to affirm it.

CONCLUSION

In upholding the equitable remedy imposed by the trial court, we recognize the evolution of property law in Washington away from rigid adherence to an injunction rule and toward a more reasoned, flexible approach. Nothing in our holding today undermines fundamental property rights: it remains true that a landowner may generally obtain an injunction to eject trespassers. Proctor does not forfeit the right to his land, nor do the Huntingtons get something for nothing.

[9] Considering the size of Proctor's parcel is appropriate. The *Arnold* test requires courts to consider the loss to the landowner in light of the "remaining room for a structure suitable for the area" and the "limitation on the property's future use." 75 Wn.2d at 152.

Consistent with our case law, the trial court's remedy requires the Huntingtons to pay Proctor fair market value for the land upon which they unwittingly encroached. This is exactly the sort of analysis that our precedent prescribes. We affirm the Court of Appeals.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:

Justice Susan Owens

Justice Charles W. Johnson

Justice Mary E. Fairhurst

Justice Tom Chambers