No. 46774-7-II

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

D. NORMAN FERGUSON and KAREN FERGUSON,

Appellants,

and

ALLEN McKENZIE and JANE McKENZIE,

Respondents.

BRIEF OF RESPONDENTS

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INTRODUCTION

Bruce and Jane McKenzie allowed their new neighbor Christopher Slye to use a small portion of their heavily vegetated, adjacent parcel while he constructed his residence in 1987. All three agreed that any affected area regrew when Slye completed construction. Slye never cleared or maintained what came to be known as the disputed strip. Rather, the McKenzies' parcel, including the disputed strip, was covered in native northwest vegetation – grasses, scrub brush, trees, blackberries and the like.

Jane first noticed a "clearing" in the disputed strip in 2006 or 2007, seven years after Slye sold his home to D. Norman Ferguson in 1994. The Fergusons asserted adverse possession from 1994 to 2004, claiming that Slye cleared and maintained the disputed strip. Slye and the McKenzies contradicted the Fergusons' claim. The Court specifically found Jane's and Slye's testimony credible and rejected the Fergusons' photographic evidence as inconclusive and unpersuasive.

The Fergusons' appeal only asks this Court to reject the trial court's credibility determinations and reweigh photographs the trial court rejected. Since this Court cannot do so, the appeal is frivolous. This Court should affirm and award the McKenzies fees.

STATEMENT OF THE CASE

Norman and Karen Fergusons' four-page introduction and statement of the case is replete with invitations to review credibility determinations and reweigh the evidence. BA 1-25. But as discussed fully below, this Court will not review the trial court's credibility determinations and does not reweigh competing testimony. ***Morse v. Antonellis***, 149 Wn.2d 572, 574-75, 70 P.3d 125 (2003) (citing ***State v. Camarillo,*** 115 Wn.2d 60, 71, 794 P.2d 850 (1990)); ***Bale v. Allison***, 173 Wn. App. 435, 458, 294 P.3d 789 (2013).

The statement of the case is also improperly argumentative. RAP 10.3(a)(5). Jane and Allen Bruce McKenzie endeavor, as much as possible to respond in their argument section, while also correcting the Fergusons' incomplete and inaccurate factual assertions.[1]

As discussed fully below, Christopher Slye, who built the Ferguson residence in 1987, is the only non-party who testified. RP 76, 1-376. His testimony is consistent with the McKenzies' testimony. *Infra*, Statement of the Case §§ A-D. According to all

[1] This brief uses first names when necessary to avoid confusion, including Bruce for Allen Bruce McKenzie.

three, Slye encroached on the McKenzie property with permission, for construction purposes only, thereafter allowing any disturbed area to re-vegetate. RP 84-85, 90, 92, 236-40, 320-21. The property remained vegetated until sometime in late 2006 or early 2007, when Jane McKenzie discovered a large clearing in a portion of what came to be known as the "disputed strip" – the western portion of the McKenzie property on the Ferguson's eastern boundary. RP 251-52, 254-55, 324. The McKenzies later constructed a fence along the property line, after which the Fergusons sued, claiming adverse possession from 1994 to 2004. CP 3-6.

Believing testimony from Slye and the McKenzies, the trial court denied the Fergusons' adverse possession claim. *Id.* The Ferguson's entire appeal hinges on this Court believing them and disbelieving Slye and the McKenzies. BA 5, 13, 14, 23-25. This Court should affirm.

A. Jane and Bruce McKenzie, who owned a home and an adjacent undeveloped parcel, allowed their new neighbor Christopher Slye to temporarily encroach onto their property while he constructed his home.

Jane and Bruce McKenzie have lived on Point White Drive on Bainbridge Island since 1979. RP 219. Their home is directly northeast of, and partially abuts, a large, undeveloped parcel they

purchased from Jane's parents in the 1970s. RP 219-20, 225. The McKenzies' undeveloped parcel is heavily wooded and vegetated with fir trees, alder trees, fruit trees, Madrona trees, holly, shrubs, and typical northwest plants like blackberry and Scotch broom. RP 32-33, 75, 85, 86, 105, 224-25, 228, 250, 315-16.

In 1986, Christopher Slye purchased the lot adjacent to the McKenzie's undeveloped parcel. RP 74, 75-76. When Slye purchased, the area now known as the "disputed strip" running along Slye's eastern border and the McKenzie's western border, was covered in "scrub vegetation," Scotch broom, grass, alder trees, fir trees, and other native vegetation. RP 32-33, 75, 224-25; CP 541, FF 1. Some of the trees were mature, and others were smaller. RP 33. There was no noticeable difference between the vegetation on the Slye property, the disputed strip, and the remainder of the McKenzie property. RP 225.

Slye did not know the McKenzies, but may have introduced himself before purchasing his property. RP 83. He built his home in 1987, intending to live there. RP 76. He did not do all of the building, but acted as the general contractor. RP 76-77. During construction, Slye had "no doubt in [his] mind" about the location of the legal boundary. RP 76.

Slye asked the McKenzies for certain permissions related to construction, including: (1) to decommission a well on the McKenzie property necessary for Slye's drain field; (2) to run utilities across their property; (3) to use their road; and (4) to trim a tree in the disputed strip to improve his view. RP 84-85, 238-39.

Jane met with Slye on site to discuss his requests, and more generally to "see what was going on during the construction." RP 236. All in all, Jane viewed the construction site about 100 times. RP 226. She stopped by to chat with Slye and to "keep track of what was going on." RP 222. She saw the "entire process." *Id.*

Jane generally granted the permissions Slye requested. RP 84-85, 90, 236-40, 242, RP 320-21. Regarding the tree trimming, Jane conferred with Bruce, visited the site with Slye, and instructed Slye not to damage any of the mature trees in the disputed strip. RP 85, 90, 240.

The McKenzies did not formalize these conversations, require any money, or consult a lawyer. RP 240-41. Jane explained that Slye "was a nice young man," and that they "were happy to grant reasonable requests to facilitate the construction of his residence." RP 241; *see also* RP 321.

During construction, Slye disrupted a little bit of the vegetation on a portion of the disputed strip. RP 43. Slye testified that Jane gave him permission to intrude onto the McKenzies' property for construction purposes. RP 90. While Jane did not specifically recall Slye seeking her permission, she stated that they "may have" discussed vehicles or construction debris entering the disputed strip. RP 240; *see also* RP 317-18. It was "apparent that [this] was necessary for construction." *Id.* Jane was aware of this minor encroachment, but saw no need to complain about Slye's use of a small portion of the disputed strip. *Id.*

B. There was no "clearing" on the property after construction, and any vegetation disturbed during construction regrew.

After Slye completed construction, there was no "clearing" in the disputed strip. RP 251. The disputed strip remained "completely overgrown, lush vegetation, trees and shrubs," other than the small area where construction dirt had spilled. RP 250, 318. Slye did not maintain or trim the vegetation on the disputed strip. RP 92. He just "allowed the vegetation to grow." *Id.* Naturally, it grew. *Id.*

The vegetation on the remainder of the McKenzie property and the Slye property was no different than the vegetation on the disputed strip. RP 251. While visiting her property, Jane noticed that

the southern end of the Slye property abutting the disputed strip was well-landscaped and well maintained. *Id.* But the vegetation on the property's northern end abutting the disputed strip was, like the disputed strip and the remainder of the McKenzie property, "completely overgrown . . . with all sorts of shrubs and trees." RP 251.

C. Slye did not plant anything in the disputed strip or use it in any way before selling his home to Norman Ferguson in 1994.

Slye completed construction in 1987, and owned the home for seven years before selling it to Norman Ferguson in 1994. RP 41, 92, 119. Slye planted roses, flowers, pampas grass and plants on his property. RP 83, 91-92. He was aware of the property boundary and "made a point" not plant anything on the disputed strip. RP 82, 89-90, 92. Indeed, from the time Slye completed construction to the time he sold to Ferguson, Slye did not plant anything on the disputed strip or make any other changes to the disputed strip. RP 82, 89-90.

D. There was no indication that anyone was using the disputed strip until Jane McKenzie noticed substantial clearing in late 2006 or early 2007.

After Slye completed construction, and after Norman Ferguson moved in and allegedly began adversely possessing the McKenzies' property, Jane saw no evidence that any vegetation was

being removed from the disputed strip.[2] RP 251-52. There were no trails or landscaping features. RP 252. There was no indication that someone – other than Bruce – was chopping wood. *Id.* There was not even evidence of weeding. *Id.*

Jane saw no indication that anyone was using the area as a "yard." RP 251-52. There was no dining furniture, or furniture of any kind. RP 252. There were no yard decorations, and again, no landscaping. *Id.* In short, there was no indication that anyone was using the property during the alleged adverse-possession period.

After Slye completed construction, Bruce cut some tree tops on the McKenzie property that had been trimmed by the power company, giving him a birds-eye view of a large part of the disputed strip. RP 324. The entire McKenzie property, including the disputed strip, was covered in vegetation including trees, underbrush, scrub, and thorny bushes. *Id.* There was no "clearing." *Id.* There was no indication that anyone else was using the property.

But in late 2006 or early 2007, Jane noticed a "substantial clearing" in the disputed strip. RP 254-55. The clearing was noticeable when Jane passed by on one of her usual walks along

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[2] Karen Ferguson moved in to the home about one year after Norman purchased it from Slye. CP 541, FF 7.

Point White Drive. RP 254. It was even more noticeable when Jane took the bus home from work, giving her a higher vantage point. *Id.*

E. The Fergusons sued to establish adverse possession, but the trial court ruled in the McKenzies' favor.

In February 2011, the McKenzies had a fence installed along the survey line, six-inches onto their property. RP 269, 325. The Fergusons filed a complaint on June 3, 2011, claiming that they adversely possessed the disputed strip from Norman Ferguson's purchase date in 1994 to 2004. CP 3, 541. They filed an amended complaint on April 6, 2012, adding Slye as a party. CP 37.

Slye moved for summary judgment on May 30, 2012. CP 767. The court granted Slye's motion on July 2, 2012, dismissing the claims against him. CP 777-78. The case was then set for trial.

The only witnesses were Norman and Karen Ferguson, Jane and Bruce McKenzie, and Christopher Slye. After a two-day trial, the court entered detailed findings of fact and conclusions of law, denying the Fergusons' adverse possession claim and quieting title in the McKenzies. CP 540-52. The Fergusons appealed on October 13, 2014. CP 554.

As mentioned above and below, the Fergusons ask this Court to adopt a set of facts dramatically different than those the trial court

believed. BA 2-5, 6-25. They do not, however, assign error to any particular finding, stating only that "the Trial Court committed error by making Findings which are not supported by substantial evidence." BA 5; RAP 10.3(a)(4). While this makes it particularly difficult to determine which findings the Fergusons challenge, the following findings are plainly relevant:

- This Court's task is to determine whether the Fergusons have proved, by a preponderance of the evidence, that they have adversely possessed the disputed strip as they claim. This decision is factual. The parties have asserted many contradictory facts, some of which are discussed in these findings. Given the contradictory factual assertions in this case, this Court has carefully considered the credibility of the witnesses. CP 542, FF 9.
- The Fergusons claim that during the 10-year period at issue [from 1994 to 2004], they stored firewood and furniture on the disputed strip, conducted landscaping on the disputed strip, and participated in other backyard activities there. The McKenzies state that they walked their property from time to time and that they observed none of these activities taking place in the disputed strip. CP 542, FF 10.
- The Fergusons maintain that when they purchased the property from Slye, it was cleared and covered in ornamental plants and grasses. Slye testified that when he owned the property it was covered in thick natural brush, typical of an undeveloped piece of property in the Pacific Northwest. CP 542, FF 11.
- D. Norman Ferguson relies heavily on photos taken during the construction of the residence. His theory is that Slye cleared the area of the disputed strip during construction and that the partial photographic shots of the construction site show that it was indeed clear. CP 544, FF 17.

- The photos show only partial areas of the disputed strip. For example, the Fergusons rely on Exhibit 19 for the proposition that the disputed strip was cleared. Exhibit 19 depicts only a very limited area of the disputed strip where the construction was occurring. It is impossible to conclude that the whole disputed strip was cleared and planted. The McKenzies do not dispute that during Slye's construction, they permitted him to enter onto their property for construction purposes, causing certain areas within the disputed strip to be trampled on and effectively cleared, or at least in part, to allow for construction machinery and construction work to be performed. The Fergusons tend to rely on this construction work and the effects of this construction work on the surrounding areas as proof that the disputed strip was permanently cleared, remained cleared, and was occupied by Slye as his own, thus presenting the disputed strip as his own when D. Norman Ferguson sought to purchase the property. The fact that there was construction does not prove that Slye had cleared and cultivated the disputed strip as the Fergusons claim. This is not supported by the evidence. The photos of the construction site do not illustrate what the land looked like as it existed in 1994. Even if this Court accepts that the area was cleared during construction, that was six to seven years before D. Norman Ferguson bought the property. CP 544-45, FF 17.

- This Court accepts as credible Jane McKenzie's testimony that she visited her own property, which became the disputed strip, during Slye's construction and observed and witnessed Slye's construction site many times. It defies reason to accept the Fergusons' claim that Slye cleared an area that encroached on the McKenzie property while Jane McKenzie passively looked on, allowing it to be cleared and effectively occupied by Slye from 1987 to the Fergusons' purchase in 1994. The Court would have to accept that Jane McKenzie not only observed Slye clearing the McKenzies' property, but allowed the clearing and use of the property to exist thereafter. Jane McKenzie's rendition is more feasible in that she allowed the area to be trampled and effectively cleared as needed for construction purposes. The Court also accepts that Slye obtained permission from Jane McKenzie to encroach on the McKenzie property in the construction phase. This Court accepts that the encroachment was for a limited time and

purpose, and that after the construction, the affected area regrew and returned to its natural state by 1994. The Court is not persuaded that when Slye obtained permission to encroach, he cleared the property and continued to occupy the disputed strip for several years until the sale in 1994. CP 545, FF 18.

- There is little photographic evidence that can be relied upon to definitively persuade this Court that the area cleared in the construction phase remained cleared and thereafter possessed in an open, notorious, and hostile fashion from 1994 to 2004. The Fergusons argue that some photos of purportedly cleared and cultivated areas show areas located within the disputed strip. These photos are ambiguous as to the angle and depth and of limited value in drawing definitive and reliable conclusions. . . . Although the photos are open to interpretation, they are not dispositive. The Fergusons have failed to carry their burden of proof with the photographic evidence. CP 545-46, FF 20.

- The Fergusons assert that a magazine cover from 1990, when Slye owned the property, demonstrates and supports the proposition that the vegetation seen through the kitchen window confirms that the property was cleared through the disputed strip. One could argue that the area is cleared through to the trees, as trees can be seen. But one could equally argue that because it is impossible to tell from the picture, specifically as it relates to angle and depth, how much shrubbery has been cleared below the window sill, the area purported to be cleared and cultivated between the house and vegetation is difficult to tell from this exhibit. CP 546, FF 22.

- As with all trials, the finder of fact may consider the evidence and lack of evidence. Once more, the Fergusons have the burden of proof. While there was considerable criticism espoused about the unreliability of the only non-party witness in this case Chris Slye, it became evident that while the Fergusons criticized Slye's testimony, they did not produce any testimony from a non-party and non-interested witness. It appears that the Fergusons are professional people who are engaged, and seem to work and be involved in the world around them. However, there is a marked absence of evidence, in that there is an absence of any testimony from

> family, friends, acquaintances, or neighbors who might have been able to testify regarding the use of the disputed strip from 1994 to 2004. Again, it is the Fergusons' burden. And the distinct lack of evidence for the weakened the Fergusons' claim of adverse possession, which is a claim that relies, in this instance, heavily upon factual support. CP 550-51, FF 34.

F. Responses to the Fergusons' Statement of the Case.

At trial and on appeal, the Fergusons argue that Slye cleared the disputed strip during construction, thereafter maintaining the cleared area to preserve his view. BA 7. To support their theory, the Fergusons' Statement of the Case sets forth two factual inquiries: (1) what was the "natural state" of the disputed strip before Slye's construction; and (2) what was the condition of the disputed strip following construction. BA 6. As discussed above, the answer to both questions is the same – before and after construction, the disputed strip – like the remainder or the McKenzie property and the abutting portion of the Ferguson property – was covered in trees, shrubs, Scotch broom, blackberry, and other native northwest plants. *Supra*, Statement of the Case § C.

Beginning at page 7, the Fergusons rely on a series of photographs of Slye's construction to contradict testimony from Slye and the McKenzies that Slye's minor encroachment on the disputed trip was permissive and for construction purposes only. The trial

court specifically found that the construction photos "show only partial areas of the disputed strip." CP 544, FF 17. Thus, it is "impossible to conclude [from these photos] that the whole disputed strip was cleared and planted." *Id.*

The court went on to find that the construction photos "do not illustrate what the land looked like as it existed in 1994" – when the Fergusons supposedly began adversely possessing the disputed strip. CP 5445, FF 17. Rather 6-to-7 years had gone by since construction. *Id.* The court accepted that in that timeframe, any area damaged by constructed "regrew and returned to its natural state by 1994." CP 545, FF 18.

The Fergusons next argue – in their facts – that the trial court could have found the photographs unpersuasive only by ignoring half of them. BA 13-14. What follows is a lengthy discussion about pampas grass – allegedly on the disputed strip – concluding with an accusation that Slye was "demonstrably untruthful" when he stated that he did not plant pampas grass on the disputed strip. BA 13-16. In other words, the Fergusons ask this Court to disbelieve Slye's testimony. *Id.*

Norman Ferguson testified about photos purporting to show pampas grass in the disputed strip. RP 129-30, 136, 138-42, 144.[3] Slye unequivocally testified that while he planted some pampas grass in his yard, he knew where the boundary line was located, and was careful not to plant anything in the disputed strip. RP 82-83. The trial court did not enter any findings specifically addressing pampas grass, and the Fergusons did not propose any findings. CP 540-53. The court did, however, find that photos purporting to show clearing and cultivation in the disputed strip were "ambiguous as to angle and depth and of limited value in drawing definitive and reliable conclusions." CP 546, FF 20. Thus, the court found that the Fergusons failed to carry their burden of proof regarding photographic evidence. *Id.*

The Fergusons next argue that exhibits 19 and 42 demonstrate that there was no vegetation east of the Ferguson residence across the disputed trip. BA 17. Exhibit 19, taken during construction, appears to show some grading around Slye's residence. RP 52-54. Slye could not tell whether the grading

[3] The Fergusons claims that exhibits 5, 6, 51, 53, and 54 show "exactly" where the pampas grass is located. BA 15. At trial, the only testimony about exhibits 5, 6, and 51 had nothing to do with pampas grass. RP 134-35, 331-32, 337-38, 342-43.

extended into the disputed strip. RP 53. Again, the trial court found that "Exhibit 19 depicts only a very limited area of the disputed strip where the construction was occurring," making it "impossible to conclude that the whole disputed strip was cleared and planted." CP 544, FF 17.

Exhibit 42 is a picture taken of Slye's kitchen depicted in Kitchen and Bath magazine in 1990. RP 131-32; CP 546, FF 22. The Fergusons argue that the photo confirms the property was cleared through the disputed strip. BA 17; CP 546, FF 22. The court found, however, that while one "could argue" that the area shown in the photo was cleared through to trees, one could "equally argue" that it is "impossible to tell . . . how much shrubbery has been cleared below the windowsill." CP 546, FF 22.

The Fergusons next argue that Jane McKenzie "undoubtedly" admitted that the area depicted in exhibit 19 was cleared by Slye, contradicting her testimony that it was not cleared until 2006. BA 17-18. To support this claim, the Fergusons rely on the following exchange, in which Jane is asked about her testimony that before Slye's construction, the disputed strip was covered with lush vegetation:

Q. Do you see any of that vegetation in Exhibit No. 19[ ]?

A. No.

Q. Okay. So does it not follow,[4] Ms. McKenzie, that the vegetation you testified was there before Mr. Slye began construction was removed by Mr. Slye during construction and not in 2006 as you've testified by the Fergusons?

A. I believe Mr. Slye actually testified that after he occupied the house, the vegetation returned, went back to its natural state.

BA 18 (quoting RP 311-12) (citations omitted). From this, the Fergusons argue that Jane's reference to "re-vegetation" is an admission that Slye cleared the area. BA 18.

The Ferugsons take this testimony out of context, omitting that Jane had just explained: (1) that exhibit 19 shows very little of the disputed strip; (2) that exhibit 19 shows dirt that had fallen onto the disputed strip during construction, covering the vegetation so that it could not be seen in the picture; and (3) that, therefore, she would not expect to see vegetation in exhibit 19. RP 310-12. Again, the trial court agreed: (1) that exhibit 19 shows only "a very limited area of the disputed strip where construction was occurring"; (2) that the McKenzies did not dispute that they allowed Slye to intrude onto the disputed strip for construction purposes "causing certain areas within the disputed strip to be trampled on and effectively cleared, at least

[4] This actually reads "doesn't it not follow." RP 311-12.

in part"; (3) but that this "does not prove that Slye had cleared and cultivated the disputed strip as the Fergusons claim." CP 544, FF 17.

The Fergusons next challenge the following credibility determination:

> The Court accepts as credible Jane McKenzie's testimony that she visited her own property, which became the disputed strip, during Slye's construction, and observed and witnessed Slye's construction site many times. It defies reason to accept the Fergusons' claim that Slye cleared an area that encroached on the McKenzie property while Jane McKenzie passively looked on, allowing it to be cleared and effectively occupied by Slye from 1987 to the Fergusons' purchase in 1994.

CP 545, FF 18; BA 19. The Fergusons argue that this "is exactly what [the McKenzies] asked the Court to believe," *i.e.* that the McKenzies passively looked on while the Fergusons cleared the property in 2006. BA 19-20. That is untrue.

Jane explained that she did not visit the property often from 2006 to 2009, where she was working full time, traveling for the birth of her grandchildren, and traveling to help her mother who was ill, and later to attend to her mother's estate after she passed away. RP 224. Jane first noticed a substantial clearing in late 2006 or early 2007. RP 254. That she was not present to stop the Fergusons from

clearing her property or to immediately respond, does not remotely suggest that she passively looked on. BA 19-20.

The Fergusons next challenge the finding that Slye was more credible than Norman Ferguson regarding their conversations about the property boundaries. BA 20-21. Specifically, the Fergusons argue that the trial court erroneously found that Slye testified that he gave Ferguson the entire septic system permit application, containing plat maps accurately depicting the legal boundary line. BA 20; CP 631-53. They continue that there was "no evidence that [Norman Ferguson] received the entirety of the Exhibit," referring to the septic permit application. BA 21.

As discussed fully in the argument section below, the Fergusons' first assertion is at best, technically accurate but woefully incomplete. *Infra*, Argument B.1. Their second assertion is simply false. In brief here, it is accurate that Slye did not testify that he gave Norman Ferguson the entire septic permit application. *Id.* This is, however, irrelevant because Norman admitted that Slye gave him the septic permit application. *Id.* Norman's own testimony is "evidence" that he received the permit application and attached plat maps depicting the legal boundary. *Compare id. with* BA 21.

The Fergusons' fact section culminates with their factual theory that the trial court rejected. BA 23-25. They argue that during construction, Slye cleared and graded the disputed strip to preserve his view while the McKenzies passively looked on unaware that Slye was encroaching on their property. BA 23. They argue that if the McKenzies had really visited their property between 1987 and 2004, then they necessarily would have seen pampas grass in the disputed strip. BA 23-24. They conclude by asking this Court to reject the finding that Jane McKenzie's testimony is credible, and to adopt the Fergusons' version of events. BA 24. As addressed below, this Court does not reweigh the evidence or review credibility determinations. *Infra*, Argument § A.

Finally, the Fergusons conclude their fact section by accusing Slye and the McKenzies of "collusive fabrication." BA 25. They argue that in his affidavit Slye "denies doing anything in the Disputed Strip," contrary to testimony from Slye and the McKenzies that Slye "cleared, graded, filled and installed improvements with permission." BA 23, 25. Both assertions are false.

Slye's affidavit does not deny "doing anything in the Disputed Strip," but plainly states that he trimmed trees and filled a well with the McKenzies' permission. CP 19. Slye also explained that any

construction debris inadvertently placed on the McKenzie property was removed long before Norman Ferguson purchased. *Id.*

Further, neither Slye nor the McKenzies testified that Slye "cleared, graded, filled and installed improvements with permission." BA 23. Rather, all three testified that Slye encroached on the McKenzies' property for construction purposes only. *Supra*, Statement of the Case §§ A, C. They were unequivocal that Slye did not clear the property. *Id.*

ARGUMENT

A. Standards of review – this Court will not review the trial court's credibility determinations or reweigh the evidence.

This Court will accept the trial court's findings as verities "so long as they are supported by substantial evidence." ***In re Marriage of Katare***, 175 Wn.2d 23, 35, 283 P.3d 546 (2012) (citing ***Ferree v. Doric Co.,*** 62 Wn.2d 561, 568, 383 P.2d 900 (1963)). "Substantial evidence" is not uncontroverted evidence – it "is that which is sufficient to persuade a fair-minded person of the truth of the matter asserted." ***Katare***, 175 Wn.2d at 35 (citing ***King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.,*** 142 Wn.2d 543, 561, 14 P.3d 133 (2000)).

This Court will not re-weigh evidence. ***Bale***, 173 Wn. App. at 458. A party challenging the court's findings of fact cannot rely on "contrary evidence and testimony that was rejected by the trial court." 173 Wn. App. at 458. Rather, this Court defers to the trial court's factual findings:

> We do not reweigh or rebalance competing testimony and inferences even if we may have resolved the factual dispute differently. . . . This is especially true when the trial court finds the evidence *unpersuasive*. As Division Three of this court explained in ***Quinn v. Cherry Lane Auto Plaza, Inc.***, 153 Wn. App. 710, 717, 225 P.3d 266 (2009):
>
> The function of the appellate court is to review the action of the trial courts. Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact. ...

Id. (emphasis in original).

Reweighing the evidence is markedly different from determining whether the trial court's findings are supported by substantial evidence. *Id.*; ***Quinn***, 153 Wn. App. at 717. Whether evidence is sufficient to support a finding is a legal determination. *Id.* But when the evidence fails to persuade the trial court, the appellate court cannot reweigh the evidence to reach a different conclusion (*id.*) (emphasis in ***Bale***):

> It is one thing for an appellate court to review whether sufficient evidence supports a trial court's factual

> determination. That is, in essence, a legal determination based upon factual findings made by the trial court. *In contrast, where a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding. It invades the province of the trial court for an appellate court to find compelling that which the trial court found unpersuasive.*

Finally, this Court "cannot" review "[c]redibility determinations . . . on appeal." ***Morse***, 149 Wn.2d at 574 (citing ***Camarillo,*** 115 Wn.2d at 71). Rather, "credibility determinations are solely for the trier of fact." ***Morse***, 149 Wn.2d at 574.

B. The trial court's findings are amply supported.

The Fergusons' entire argument is that the findings are not supported by substantial evidence. BA 25-33. The trial court's findings are in lockstep with testimony from Slye and the McKenzies. This Court should affirm.

1. Norman Ferguson admitted that he received the septic permit application, including plat maps that accurately depict the legal boundary line.

Trial exhibit D-1 is a septic system permit application Slye obtained during construction. CP 631-53. The application contains two plat maps showing the legal description of the property. CP 544, FF 16; CP 642, 644. During his deposition, Norman Fergusons was shown 6 pages of trial exhibit D-1, the last two of which are the plat maps showing the property boundaries. CP 358-63. Ferguson

acknowledged that Slye gave him the application during the purchase and sale. RP 150, 152.

This permit application is relevant to the Fergusons' claim that when Norman Ferguson purchased the property from Slye, Slye identified the boundary line as running from a boundary marker at the property's north end to a telephone pole on the property's south end. CP 542, FF 12; RP 120-22. That boundary line would include the disputed strip in the Fergusons' parcel. *Id.*

Slye denied that claim. CP 542, FF 13; RP 88-89. The trial court found that Slye testified that he gave Norman Ferguson the septic permit application during the sales negotiations. CP 542, FF 13. The court went on to find that Ferguson claimed he received only a single page. *Id.* The court found Slye more credible on this point:

> On this point, Slye's testimony is more credible than D. Norman Ferguson's testimony. It is reasonable, if not likely, that Slye gave D. Norman Ferguson the entire septic system permit application, as it would make little sense for Slye to provide D. Norman Ferguson with only one page of the document. This Court is persuaded that it is more likely that Slye gave D. Norman Ferguson the entire document rather than just the cover sheet. Thus, it would be a clear contradiction and very unlikely that Slye identified the power pole as the property line marker. [That] would be nonsensical in light of the septic system permit application Slye gave to D. Norman Ferguson when they discussed the property line prior to purchase.

CP 543, FF 14.

The Fergusons challenge this credibility determination, arguing: (1) that Ferguson testified that he received only the first page of the septic permit application; and (2) that Slye never testified that he gave Ferguson the septic system permit application, or that he discussed it with Ferguson. BA 26-27. This argument is woefully incomplete.

It is accurate that after identifying D-1, Slye did not testify that he gave it to Ferguson. RP 79-82. But it is entirely inaccurate to state that Ferguson testified that he received only the first page of the septic permit application. BA 26. In fact, Ferguson was impeached by his deposition testimony, in which he acknowledged receiving from Slye during the sale process a 6-page document that included the septic permit application and the two plat maps showing the property boundaries[5]:

> Q. I would like you to look again at Defendants' Exhibit D-1. That's that document you were just looking at, the application for sewage permit. Okay.
>
> I believe your testimony was that you have only seen the first page of this document; is that right?
>
> A. That is right.

[5] This 6-page document is found at CP 358-63. This is exhibit 6 to Karen Fergusons' deposition. *Id.* The exhibits were the same at Norman Ferguson's deposition. RP 151.

Q. Did you receive from Mr. Slye, or anyone else, at the time of the sale more than just the first page of this document?

A. I don't recall ever receiving more than one page of the document.

Q. So you believe you were just given one page of this document by Mr. Slye?

A. That's all I remember getting. That is correct.

Q. Do you recall reviewing that document with me at your deposition?

A. I don't recall this specific document, no.

Q. Okay. All the rest of the pages?

A. Yeah. I don't recall going over the entire thing, no.

Q. Do you recall receiving more than one page from me of this document at the deposition?

A. I guess you did give me more than one page; that is correct.

Q. Do you recall you acknowledged that you did, in fact, receive that document at the time of closing?

A. I don't recall that.

Q. Okay. Well, let's pull up your deposition and take a look.

A. Yes.

. . .

Q. I'm going to start reading at Line 6, and I want you to follow along with me. And when I'm done, I'll ask my question.

"Take a look at Exhibit 6, please. This is an application for sewage permits. Have you seen this before?

> Answer: "Yes. I saw it at the time we were doing the house sale."
>
> Did I read that correctly, sir?
>
> A. You did, sir.

RP 149-50, 152-53.

The Fergusons' counsel objected, arguing that this was not proper impeachment. RP 153. The McKenzies' counsel countered that the deposition testimony plainly established that counsel handed Norman Ferguson a several-page document and that Ferguson acknowledge receiving "this document." RP 154-55. The trial court agreed:

> THE COURT: And that's what I'm focusing on. Apparently the witness said at the deposition that he saw this several-page document. He didn't say "several-page," but he said this is the document, which was No. 6, at the time of the house sale."
>
> . . .
>
> [McKENZIES' COUNSEL] Your honor, the deposition clearly states that I handed Mr. Ferguson a multipage document and asked if he's seen it before, and he said "Yes."
>
> THE COURT: And I'm -- I am going to allow this question and the answer based upon the deposition testimony.
>
> I understand the objection. But as far as the question at deposition, whether or not the document had been seen before -- and it's clear from what we have seen today that it's a six-page document – I'm going to accept that he was handed a six-page document and the witness said he had not seen it. Or that –

[McKENZIES' COUNSEL]: That he had seen it.

THE COURT: That he had seen it at the time of the transaction.

RP 155-57.

In short, Norman Ferguson acknowledged that Slye gave him a 6-page document that includes the septic permit application and two plat maps showing the proper boundary line. RP 150, 152-56; CP 358-63. It is irrelevant that Slye did not testify that he gave the septic permit application to Ferguson. BA 26-27. Ferguson's own testimony amply supports the trial court's finding that Ferguson received the septic permit application including the plat maps. RP 150, 152-56. And Ferguson's admission that he received this document from Slye, coupled with his later effort to back away from that admission, amply support the trial court's credibility determination in this point. BA 26-27; CP 543, FF 14.

But in any event, the Fergusons concede that this entire issue is "legally irrelevant," stating that it "literally does not matter if Mr. Ferguson knew where the boundary was in 1994." BA 27, 28. Their point is that adverse possession is not focused on the would-be possessor's thought process, or his good or bad faith, but on the nature of his possession. BA 27. Indeed, "the claimant's subjective belief regarding the claimant's true interest in the land and intent to

dispossess or not dispossess another is irrelevant." ***Anderson v. Hudak***, 80 Wn. App. 398, 402, 907 P.2d 305 (1995).

That being the case, any error in the trial court's finding is harmless. *See e.g.* ***Jones v. City of Seattle***, 179 Wn.2d 322, 355-60, 314 P.3d 380 (2013). The court found Slye more credible on "this point," referring to whether Slye identified the proper legal boundary line. CP 542-43, FF 12-14. Since the Fergusons' acknowledge that it "literally does not matter if Mr. Ferguson knew where the boundary line was," then it "literally does not matter" whether Slye identified the proper legal boundary.

2. Substantial evidence supports the trial court's finding 18 that Slye encroached on the disputed strip for the limited purpose of construction, after which the affected area regrew.

The trial court accepted testimony from Slye and Jane McKenzie that the McKenzies permitted Slye to encroach on the disputed strip for construction purposes only, after which the affected area regrew. CP 545, FF 18. As Slye put it, Jane gave him permission to use a portion of the disputed strip during construction, because he "asked them nicely." RP 86-87, 90. And as Jane put it, it was "apparent that it was necessary" for the construction process to impact the McKenzie property. RP 240. Slye was a "nice young

man," so the McKenzies had no problem accommodating him. RP 241.[6]

The trial court rejected the Fergusons' argument that Slye sought the McKenzies' permission to encroach for construction purposes, only to turn around and clear the disputed strip, maintaining it for six or seven years until selling to Norman Ferguson in 1994. CP 545, FF 18. Again, Slye, Jane and Bruce McKenzie all testified that the area affected by Slye's construction regrew and remained heavily vegetated until late 2006, or early 2007. RP 92, 250-52, 318, 324.

The Fergusons ask this Court to compare photographs, arguing that the only way Slye obtained the view described in a home magazine was by "denuding the Strip of vegetation." BA 28-29. They ask this Court to reject testimony from Slye and Jane and Bruce McKenzie – that the trial court believed – and hold that finding 18 is unsupported. *Id.* In short, the Fergusons ask this court to do something appellate courts cannot do. Again:

> [W]here a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a

[6] Jane did not recall expressly giving Slye permission to encroach on the disputed strip during construction, but stated that they may have talked about it. RP 240.

> contrary finding. It invades the province of the trial court for an appellate court to find compelling that which the trial court found unpersuasive.

Quinn, 153 Wn. App. at 717. That is exactly what the Fergusons ask this Court to do. BA 28-29.

Since the Fergusons challenge the trial court's findings, this Court's role is to determine whether sufficient evidence supports them. 153 Wn. App. at 717. The issue, then, is whether testimony from Slye and Jane and Bruce McKenzie is sufficient to support finding 18. It plainly is, and this Court should affirm.

The trial court was unpersuaded by the photos that Slye "denuded" the disputed strip. *Compare* BA 29 *with* CP 544-46, FF 17-20. Indeed, the trial court specifically found that the photos proved little:

- The photos show only partial areas of the disputed strip. . . . It is impossible to conclude that the whole disputed strip was cleared and planted. CP 544, FF 17.
- The photos of the construction site do not illustrate what the land looked like as it existed in 1994. *Id.*
- There is little photographic evidence that can be relied upon to definitively persuade this Court that the area cleared in the construction phase, remained cleared and thereafter possessed in an open, notorious, and hostile fashion from 1994 to 2004. CP 545, FF 20.
- [Photos purporting to show that Slye cleared the disputed strip] are ambiguous as to angle and depth and of limited value in drawing definitive and reliable conclusions. CP 546, FF 20.

This Court should reject the invitation to review the very photos the trial court found unpersuasive to reach a contrary decision. ***Quinn***, 153 Wn. App. at 717.

3. Sufficient evidence supports finding 18 that Slye allowed the area in the disputed strip affected by construction to regrow.

The trial court found that after Slye completed construction, any area in the disputed strip affected by the construction regrew:

> This Court accepts that the encroachment was for a limited time and purpose, and that after the construction, the area affected regrew and returned to its natural state by 1994.

CP 545, FF 18. Again, this Court's inquiry is whether there is substantial evidence to support this finding. ***Bale***, 173 Wn. App. at 458. There is – Slye plainly testified that the affected areas regrew after he completed construction. RP 92. The McKenzies also plainly testified that the disputed strip was heavily vegetated until 2006. RP 250-52, 324. This Court should affirm.

Here too, the Fergusons ask this Court to reject this testimony – that the trial court believed – and make a contrary factual finding based on pictures of pampas grass and the same magazine description discussed above. BA 29-30. That would plainly invade the trial court's province. ***Quinn***, 153 Wn. App. at 717. Again, this Court should affirm.

a. The pampas grass is a red herring.

The Fergusons next attack Slye's assertion that he planted pampas grass on his property, but did not plant anything in the disputed strip. BA 29, 31; RP 82-83, 92. Relying on photos purporting to show pampas grass in the disputed strip, the Fergusons accuse Slye of making "a blatant misstatement of fact," arguing "Well, pampas grass is not native and not natural state." BA 31. The Fergusons are apparently asking this Court to look at photos to impeach Slye. BA 29.

The pampas grass is a red herring. The trial court simply did not believe that Slye cleared the disputed strip and maintained it after completing his construction. CP 545, FF 18. The court did not believe that Slye would seek the McKenzies permission for construction purposes and then exceed the scope of the permission he was given. *Id.* The court did not believe that Jane McKenzie would give Slye permission, and then watch as he cleared her property – and planted pampas grass. *Id.* The court did not believe these things because they are unbelievable. *Id.*

But even assuming arguendo that there is pampas grass in the disputed strip, there is no indicated Slye put it there. Slye plainly stated that he did not do so. RP 82-83, 92. The trial court either

believed Slye, or found the pampas grass irrelevant. There is no finding specifically addressing pampas grass, and the Fergusons proposed no findings.

And even assuming arguendo that Slye planted pampas grass in the disputed strip, his inadvertent mistake proves nothing. Planting pampas grass is not hostile or open and notorious. ***Anderson***, 80 Wn. App. at 402-05. In ***Anderson***, this Court held that just planting a row of trees to mark a boundary line is neither hostile, nor open and notorious. 80 Wn. App. at 402-05. Rather, to meet these adverse possession elements, the claimant must have also cultivated and maintained the trees, such as by removing and replacing dead trees, taking steps to care for the trees, and maintaining and occupying the land around the trees. *Id.* at 404-05.

Even assuming that Slye inadvertently planted pampas grass on the disputed strip, there is no indication that he maintained it, cultivated it, are occupied the area around it. Putting in some grass, amidst grass, trees, shrubs, and scrub brush is not sufficient to establish averse possession. *Id.*

b. This Court should not reweigh photographic evidence that proves nothing in any event.

The Fergusons next ask this Court to compare different photographs showing a utility pole, which – the Fergusons claim – will lead inexorably to the realization that "no reasonable person would conclude that there was re-grown vegetation obscuring the view across the Disputed Strip." BA 30. Though difficult to ascertain, the Fergusons' argument seems to be that since it is possible – in some photos – to see the utility pole, it necessarily follows that Slye cleared and maintained the disputed strip. BA 30. This argument has at least four fatal flaws.

First, the Fergusons confuse the issue. The trial court found that any part of the disputed strip damaged during construction regrew. CP 545, FF 18. As discussed above, ample evidence supports that finding. *Supra*, Statement of the Case § C. Neither Slye nor the McKenzies asserted that the vegetation on the disputed strip "obscure[d] the view across the Disputed Strip," such that it would be impossible to see the utility pole. BA 30. Before it was cleared in 2006, much of the vegetation on the disputed strip was grass, shrubs, scrub brush, blackberries, and the like. *Supra*,

Statement of the Case § A. One's ability to see a utility pole does not disprove that these native plants were on the disputed strip.

Second, the pictures the Fergusons rely on to establish a clearing show the above-described vegetation in the disputed strip. BA 30 (citing Ex 2, 28, 33, 42).[7] Exhibit 28, taken from the disputed strip, shows dense vegetation including trees, ground covers, and what appears to be Scotch broom. RP 183-84; Ex 28. Although it is difficult to identify anything in exhibit 33, other than Slye's house and the truck parked next to it, there is plainly dense vegetation behind the house. RP 298-99; Ex 33. And exhibit 42, a picture of Slye's kitchen, shows vegetation out each of Slye's kitchen windows. Ex 42.

Third, the trial court specifically rejected the Fergusons' argument that exhibit 42 shows that Slye cleared the disputed strip. CP 546, FF 22. The court noted that since trees can be seen out the windows, "[o]ne could argue that the area is cleared though to the trees." *Id.* But the court found this photo inconclusive, stating (*id.*):

> [O]ne could equally argue that because it is impossible to tell from the picture, specifically as it relates to angle and depth, how much shrubbery has been cleared below the windowsill,

[7] Although discussed at trial, exhibit 2 was never admitted. It appears that a copy of exhibit 2, a drawing of the disputed strip, is at CP 7. CP 4, 7. It is unclear why the Fergusons rely on exhibit 2. BA 30.

> the area purported to be cleared and cultivated between the house and vegetation is difficult to tell from this exhibit.

Fourth, this Court should decline yet another invitation to reweigh the photographs the trial court found unpersuasive. ***Quinn***, 153 Wn. App. at 717. To conclude as the Fergusons request, this Court would have to reject evidence the trial court believed, and be persuaded by evidence the trial court rejected. This Court cannot do so.

c. This Court should not review the trial court's credibility determination.

The trial court found credible Jane McKenzie's testimony that she allowed Slye to intrude on a portion of the disputed strip for construction purposes only, rejecting the Fergusons' claim that Jane passively looked on while Slye cleared and cultivated her property:

> This Court accepts as credible Jane McKenzie's testimony that she visited her own property, which became the disputed strip, during Slye's construction, and observed and witnessed Slye's construction site many times. It defies reason to accept the Fergusons' claim that Slye cleared an area that encroached on the McKenzie property while Jane McKenzie passively looked on, allowing it to be cleared and effectively occupied by Slye from 1987 to the Fergusons' purchase in 1994. The Court would have to accept that Jane McKenzie not only observed Slye clearing the McKenzies' property, but allowed the clearing and the use of the property to exist thereafter. Jane McKenzie's rendition is more feasible in that she allowed the area to be trampled and effectively cleared as needed for construction purposes.

CP 545, FF 18. Challenging this finding, the Fergusons argue that "[n]o rationale fair minded person" would accept Jane McKenzie's testimony that "she refused to give Slye permission to remove any trees [but] didn't do anything in 2006 when . . . the Fergusons cut that same tree down with many others." BA 32.

The Fergusons ignore that Jane did not visit the McKenzies' property often from 2006 to 2009, where she was working full time, traveling for the birth of her grandchildren, and traveling to help her mother who was ill, and later to attend to her estate after she passed away. RP 224. Again, that Jane was unavailable to stop the Fergusons from clearing a portion of her property or to immediately respond, does not discredit her testimony. BA 32.

But in any event, this Court does not review credibility determinations on appeal. ***Morse***, 149 Wn.2d at 574.

C. The trial court entered findings 23 through 29 because they are directly related to the Fergusons' credibility.

The Fergusons argue that it is "unclear" why the trial entered findings 23 through 29. BA 32-33. These findings pertain to the Fergusons' 2006 through 2010 efforts to improve their property, during which time they acted in a manner inconsistent with their claim that they had adversely possessed the disputed strip by 2004. CP

546-49, FF 23-29. It is abundantly "clear" why the trial court entered these findings. The Fergusons' actions to improve their property bore directly on their credibility. RP 165; CP 542, FF 9; CP 547, FF 24; CP 548, FF 27. The Fergusons' claim that this issue lacks clarity is itself not credible.

As this Court previously held, a would-be adverse possessors' statement that they do not own the disputed parcel bears on their credibility. ***Riley v. Andres***, 107 Wn. App. 391, 397-98, 27 P.3d 618 (2001). The Fergusons claimed that they had adversely possessed the disputed strip by 2004. CP 52, 89. Yet from 2006 to 2010, they repeatedly held themselves out as owning their legal parcel only, not the disputed strip. CP 546-49, FF 23-29.

The trial court ruled that the Fergusons' actions to improve their property bore directly on their credibility:

> THE COURT: [The McKenzies] can pursue their theory of the case. If their theory of the case is, "This is a big lie . . ." . . . I'll allow it for that purpose. But it's going to be for a very, very limited purpose . . . it goes to the credibility of the witness. . . . The only issue that you're saying it is for is the purpose of credibility.
>
> [COUNSEL]: Absolutely, Your Honor.
>
> THE COURT: And so on that very limited basis, I'll allow the testimony.

RP 165. "Given the contradictory factual assertions in this case," the trial court "carefully considered the credibility of the witnesses." CP 542, FF 9. The Fergusons' credibility is plainly relevant. BA 32-33.

Since the Fergusons do not challenge – or even substantively address – findings 23 through 29, they are verities on appeal. ***In re Welfare of A.W.***, 182 Wn.2d 689, 711, 344 P.3d 1186 (2015). In brief sum, the trial court found:

- The Fergusons' actions regarding various land use applications do not suggest that they considered the disputed strip to be part of their property;
- The Fergusons' 2006 short plat application does not include the disputed strip;
- The application includes a hand-drawn map with a boundary line that does not include the disputed strip, and makes no reference to the disputed strip.
- The Fergusons certified that their 2006 short plat application was true and correct. If they believed that they had already acquired the disputed strip through adverse possession, then the proposed boundary lines would have incorporated the disputed strip.
- The Fergusons' claim that Norman Ferguson had little input in the application process is not credible.
- In 2010, the Fergusons recorded a Notice to Title including a survey showing that their deck is 5.5 feet from the eastern boundary.[8]
- In 2010, the Fergusons applied for a boundary line adjustment, in which their property description was consistent with the recorded legal property description. The City denied

[8] That is legal boundary line, not the boundary line consistent with the clamed adverse possession. CP 539.

the application, finding that the Fergusons lacked the necessary square footage. The Fergusons did not claim that their square footage was more than the legal description based on their adverse possession claim. They did not hold themselves out as owners of the disputed strip or any portion of the disputed strip.

- Karen Ferguson had previously attempted to purchase property from the McKenzies. The Fergusons also proposed a boundary line adjustment to the McKenzies. At no time did the Fergusons suggest that they had adversely possessed the disputed strip.
- The fact that the underlying litigation followed the Fergusons' offer to purchase, their failed short plat, and their failed boundary line adjustment, suggests that the Fergusons were intent on making their properties more attractive, more profitable, and viable. This raises the specter that this current litigation is another attempt to improve, increase, or realign their property. This creates further concerns about the Fergusons' credibility.

CP 546-69, FF 23-29.

The Fergusons ignore the trial court's ruling that their post-2004 actions are relevant to credibility. RP 165. They do not challenge the findings that these activities bore directly on their credibility. CP 542, FF 9; CP 547, FF 24; CP 548, FF 27. It is entirely "clear" why the trial court entered these findings – the Fergusons actions bore directly on their credibility. CP 542, FF 9; CP 547, FF 24; CP 548, FF 27; ***Riley***, 107 Wn. App. at 397-98. These findings are verities. ***Welfare of A.W.***, 182 Wn.2d at 711; ***Streater v. White***, 26 Wn. App. 430, 432, 613 P.2d 187 (1980).

In sum, the Fergusons' entire appeal is an invitation to review the photographic evidence to reach a conclusion the trial court rejected. This Court should decline and affirm.

D. This Court should award the McKenzies fees for responding to the Fergusons' frivolous appeal.

This appeal is frivolous. The Fergusons make only two assignments of error: (1) that the trial court erred "by making [unidentified] Findings which are not supported by substantial evidence"; and (2) that the trial court erred "by admitting evidence relating to the period after 1994." [sic][9] BA 5. As to the first, the findings are plainly supported by testimony from Slye and the McKenzies, so are verities on appeal. *Supra* Argument § A. As to the second, the Fergusons fail to provide any argument or authority, stating only that it is "unclear" why the court entered findings related to the Fergusons' post 2004 activities. BA 32-33; ***Stiles v. Kearney***, 168 Wn. App. 250, 268, 277 P.3d 9 (2012) (imposing fees under RAP 18.9 where the arguments "lack merit, rely on a misunderstanding of the record, require a consideration of evidence outside the record, or are not adequately briefed"). But it is clear: the trial court's was ruling

[9] The Findings refer to evidence after 2004, not 1994. CP 546-49, FF 23-29.

on the Fergusons' credibility. This Court should award fees under RAP 18.9.

To determine whether an appeal is frivolous, this Court considers the following:

> (1) "A civil appellant has a right to appeal under RAP 2.2;
>
> (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant;
>
> (3) the record should be considered as a whole;
>
> (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous;
>
> (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal."

Streater, 26 Wn. App. at 434-435 (paragraphing added). An appeal is frivolous where, as here, the appeal is factual, but the challenged findings are amply supported by the evidence, and the findings support the legal conclusions. 26 Wn. App. at 434-435. Indeed, appellate courts "are constitutionally prohibited from substituting [their] judgment for that of the trial court in factual matters." *Id.* (citing ***Thorndike v. Hesperian Orchards, Inc.***, 54 Wn.2d 570, 343 P.2d 183 (1959)).

The Fergusons' first assignment of error is that the court erroneously entered findings unsupported by substantial evidence.

BA 5. The Fergusons fail to identify any supposedly deficient findings, making the McKenzies' response far more difficult and time consuming than it should have been *Id.*; RAP 10.3(a)(4). But as discussed at length above, the trial court's findings are amply supported by testimony from Slye – the only non-party witness – and from Jane and Bruce McKenzie. *Supra*, Argument § B. The Fergusons do not argue that this testimony is insufficient to support the findings. They instead ask this Court to disbelieve testimony the trial court found credible, to believe testimony the trial court found not credible, and to review photographs the trial court rejected. This Court cannot do so. *Supra*, Argument § A.

This appeal is entirely factual. See BA 5; CP 541, FF 4 (noting that the parties do not dispute the law, but the facts). As such, the Fergusons' challenge to findings that are plainly supported by substantial evidence is frivolous. ***Streater***, 26 Wn. App. at 434-435. This is only made worse by the Fergusons' insistence that this Court re-try the case to reach a conclusion the trial court rejected.

The single exception is that the trial court incorrectly found that Slye testified that he gave Norman Ferguson the septic permit application. *Supra*, Argument § B 1. It was not Slye, but Ferguson who testified that Slye gave him the permit application with two plat

maps depicting the legal boundary. *Id.* The pertinent point is not who said it, but that Slye did give Ferguson plat maps showing the legal boundary, lending credibility to Slye's assertion that he identified the proper legal boundary, and discrediting Ferguson's assertion that Slye identified a boundary that would include the disputed strip. CP 543, FF 14. Any error as to who said this is harmless. *Supra*, Argument § B 1.

Moreover, the Fergusons conceded that this issue is "legally irrelevant," where it "literally does not matter" whether Norman Ferguson knew where the legal boundary was. BA 27, 28. Correcting a factual misstatement on a "legally irrelevant" issue does not save the Fergusons' frivolous challenge to the trial court's amply supported findings. This Court should award fees under RAP 18.9.

The Fergusons never address their second assignment of error: that the trial court erred in admitting evidence of the Fergusons' post-2004 efforts to improve their property. BA 5. From 2006 to 2010, the Fergusons repeatedly took action to improve their property in a manner inconsistent with their claimed adverse possession. *Supra*, Argument § B 4. The trial court allowed testimony on this point for the "very limited basis" of assessing witness credibility. RP 165.

The trial court has broad discretion in ruling on evidentiary matters. ***Cox v. Spangler***, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). The Fergusons do not provide any argument or authority challenging this highly discretionary ruling. RAP 10.3(a)(6). The ruling is obviously sound, where credibility is plainly relevant in this entirely factual case. CP 542, FF 9. Thus, this "issue" – that is not even briefed – is frivolous. ***Stiles***, 168 Wn. App. at 268.[10]

The Ferguson's appeal is frivolous. It challenges findings plainly supported by substantial evidence, and fails to even argue the only other assignment of error identified. This Court should award the McKenzies their appellate fees as a sanction under RAP 18.9. This Court should also award the McKenzies appellate costs as the prevailing party. RAP 14.2.

CONCLUSION

As the trial correctly found, this was a factual decision. CP 542, FF 9. Substantial evidence, including testimony from Slye and the McKenzies, plainly supports the trial court's factual findings. The

[10] The only arguably related "argument" is the single-paragraph assertion that since the trial court ruled that the Fergusons' post-2004 actions would not be considered as to their adverse possession claim, it is "unclear" why the trial court entered findings on the Fergusons' post-2004 efforts to improve their parcel. BA 32-33. As discussed above, it is abundantly clear why the trial court entered these findings. *Supra*, Argument § B 4.

Fergusons do not disagree, but invite this Court to reweigh evidence and revisit credibility determinations to reach a different conclusion about the facts. It is well settled that this Court defers to the trial court on these matters.

The Fergusons' only other "argument" is that it is unclear why the trial court entered findings 23 through 29. The trial court's reasoning is abundantly clear: these findings go to the Fergusons' credibility, which is plainly at issue.

This appeal is frivolous. This Court should affirm and award the McKenzies fees under RAP 18.9.

RESPECTFULLY SUBMITTED this 20th day of May, 2015.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENTS** postage prepaid, via U.S. mail on the 18th day of May, 2015, to the following counsel of record at the following addresses:

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