96855-1

FILED

FEB 19 2019

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DOUGLAS COUNTY,	) COA No. 33928-9-111
Respondent,	)
	) APPELLANT'S
MARK MARLOW and	) PETTITION FOR REVIEW
NANCY MARLOW,	)
Appellants	)

A. DIVISION IDENTITY OF PETITIONERS

We, Marlow's pro se petitioners, ask this Court to accept review of the Court of Appeals opinion designated in Part B.

B. COURT OF APPEALS DECISION

The unpublished Court of Appeals opinion which the Marlow's want reviewed was filed on November 29, 2018. A copy of the opinion is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the court commit reversible error when it decided it had subject matter jurisdiction over this case?

2. Did the court commit reversible error when it failed to consider our claim that the County Commissioners were bound by an oral agreement with the4 Marlow's resolving this case?

3. Did the Court of Appeals err by determining our appeal was frivolous and awarded attorney fees against us?

D. STATEMENT OF THE CASE

We incorporate by reference the statement of facts in our verified brief of appellants and our verified reply brief of appellants.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Our case warrants review because Division III's decision conflicts with other decisions of the Court of Appeals and the Supreme Court. RAP 13.4(b)(2).

As to the court's lack of subject matter jurisdiction, the Marlow's claim that no Washington state court can overrule or set aside many years of U.S. Supreme Court cases as they relate to UNITED STATES LAND PATENTS. Federal Land Bank of Spokane v. Redwine, 51 Wn. App. 766, 755 P.2d 622 (1988), does not overrule the U.S. Supreme Court's decision in Summa Corp. v. California, 466 U.S. 198 (1994). Summa Corp. recognizes the power and force of a UNITED STATES LAND PATENT, but this was ignored by the Court of Appeals. Its decision

therefore conflicts with other appellate decisions and review is proper under RAP 13.4(b)(2).

The Marlow's also want to point out that Douglas County acknowledged all land is allodial in this state. Because it is, we have all the benefits of the original UNITED STATES LAND PATENT as it relates to our Legal Description, which quitclaim transferred all allodial land ownership rights, title, interest, estate, use, and control once held by the government of the United States of America to the private sector with our UNITED STATES LAND PATENT, as assignees. (CP 12-76, 110, 129, 139, 149, 150, 170, 256). The court had no subject matter jurisdiction because the Marlow's obtained this property from their predecessors in title, who acquired the property from the United States government through a land patent and the land is admittedly allodial land. The Court of Appeals did not recognize this concession and applicable principle, also conflicting with Redwine. RAP 13.4(b)(2).

The trial court failed to consider our claim that we had an agreement with the County Commissioners resolving this case because it was unaware of any settlement and did not rule on it. The Marlow's, however, did raise this issue. (RP 10-12). The Court of Appeals followed suit, refusing to consider it in a footnote. (Op. fn. 2).

The Court of Appeals stated the Marlow's did not appeal the findings of fact and conclusions of law from the November 18, 2014 trial. But the issue was later discussed in a May 12, 2015 hearing; they are reviewable in this appeal under RAP 2.4(b). Suffice it to say that we, Marlow's pro se, raised the oral agreement issue from the beginning. But the trial court refused to rule. Contrary to the Court of Appeals' decision, this refusal does not make it a verity on appeal. The court's failure to make a finding on an issue we raised timely and directly is instead an abuse of discretion because it was not exercised at all. Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 976 P.2d 643 (1999). In re Interest of Mahaney, 146 Wn.2d 878, 51 P.3d 776 (2002), is not applicable. The Court of Appeals' reliance on it conflicts with Bowcutt and the courts should have considered the issue.

This is particularly important for us because Washington law supports our claim the oral agreement with the County Commissioners was enforceable. Giffin v. King County, 50 Wash. 327, 97 P.230 (1908); Beseloff v. Whatcom County, 133 Wash. 109, 233 P. 284 (1925). We complied with the agreement and the County Commissioners should be just as bound to it as we are. This claim has merit and should have been considered. The Court of Appeals decision conflicts with other appellate decisions, thus making review appropriate under RAP 13.4(b)(2).

Last, it is very important that this court consider our oral agreement claim. By refusing to do so, the Court of Appeals stated the "sole issue presented by this appeal is a contention that the trial court lacked jurisdiction to enforce the compliance orders due to the nature of the original land conveyance from the federal government. (Op. at 4-5). That was not our sole issue at all. We have always relied on the oral agreement and our claim was properly raised before the trial court.

But the Court of Appeals decided our appeal was frivolous because of our land patent argument and its refusal to consider our oral agreement claim. The land patent argument is not frivolous as Redwine does not apply to our facts and is contrary to the U. S. Supreme Court decision in Summa Corp. Our appeal in this regard is made in good faith and should not have been determined to be frivolous.

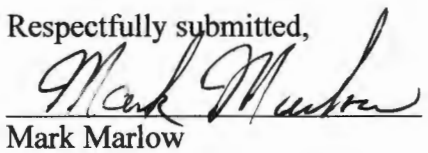
Moreover, the oral agreement issue is not frivolous as Washington case law supports our position and it should have been considered by the Court of Appeals under RAP 2.4(b). Before an appeal can be said to be frivolous, it must be frivolous in its entirety. Biggs v. Vail, 119 Wn.2d 129, 830 P.2d 350 (1992). This appeal is not frivolous. The Court of Appeals' determination to the contrary conflicts with other appellate decisions, warranting review. RAP 13.4(b)(2).

F. CONCLUSION

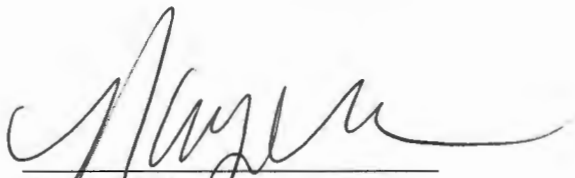
Based on the foregoing, petitioners Marlow pro se respectfully urge this Court to grant their petition for review.

DATED this 16 day of February, 2019.

Respectfully submitted,



Mark Marlow
Authorized Representative of
MARK MARLOW
(Legal distinction being made ON THE RECORD.)
All Rights Reserved
UCC 10380, Without Prejudice



Nancy Marlow
Authorized Representative of
NANCY MARLOW
(Legal distinction being made ON THE RECORD.)
All Rights Reserved
UCC 1-308, Without Prejudice

VERIFICATION

We have read the foregoing document entitled Marlow's Verified Petition for Review and know the contents thereof.

We, the Marlow's, declare that:

We are a party to the above entitled action or proceeding, and certify that the matters stated therein are facts of our knowledge.

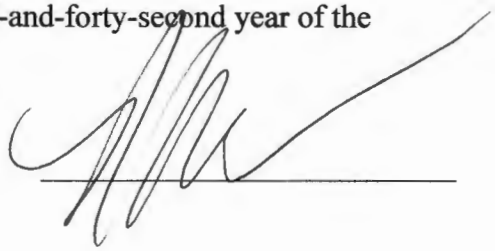
We declare under the penalty of perjury under the Laws of the STATE OF WASHINGTON and *these* United States of America, that the foregoing is correct and complete to the best of my knowledge, information and belief, and that this verification is executed by the voluntary act of our own hands in DOUGLAS COUNTY and is dated this 16th day of the second month, in the year two thousand and nineteen, Anno Domini, in the two-hundred-and-forty-second year of the Independence of the America.

PROOF OF SERVICE BY MAIL

I hereby declare under the penalty of perjury in the STATE OF WASHINGTON and *these* United States of America, that I served the foregoing document entitled MARLOW'S PETTITION FOR REVIEW on the opposing party by depositing in a Mail Box maintained by the United States Postal Service, addressed as follows:

James T. Mitchell
WSBA# 31031
PO BOX 360
Waterville, WA 98858-0369

I declare under penalty of perjury of the Laws of the STATE OF WASHINGTON and *these* United States of the America, that the foregoing is correct and complete to the best of my knowledge, information, and belief, and that this PROOF OF SERVICE is executed by the voluntary act of my own hand in DOUGLAS COUNTY and is dated this 16th day of the second month, in the year two thousand and nineteen, Anno Domini, in the two-hundred-and-forty-second year of the Independence of the America.



FILED
JANUARY 22, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

DOUGLAS COUNTY, WASHINGTON, a Political subdivision of the State of Washington, Respondent, v. MARK MARLOW and NANCY MARLOW, Husband and wife, and PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, a Washington municipal corporation, Appellant.	)	No. 33928-9-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of November 29, 2018 is hereby denied.

PANEL: Korsmo, Siddoway, Lawrence-Berrey

FOR THE COURT:

Lawrence-Berrey, C.J.
ROBERT LAWRENCE-BERREY
Chief Judge

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

January 22, 2019

Nancy Marlow ,Mark Marlow
c/o 5050 State Route 28
Rock Island, WA 98850-9564

E-mail:
James T Mitchell
Douglas County Prosecuting Attorney
PO Box 360
Waterville, WA 98858-0360

CASE # 339289
Douglas County v. Mark Marlow and Nancy Marlow, et al
DOUGLAS COUNTY SUPERIOR COURT No. 142000666

Dear Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy (unless filed electronically) of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
Attachment

FILED
NOVEMBER 29, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

DOUGLAS COUNTY, WASHINGTON, a Political subdivision of the State of Washington, Respondent, v. MARK MARLOW and NANCY MARLOW, Husband and wife, and PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, a Washington municipal corporation, Appellant.	)	No. 33928-9-III UNPUBLISHED OPINION

KORSMO, J. — Mark and Nancy Marlow brought this latest appeal in their long-running battle with Douglas County to assert a frivolous argument concerning title to their land. We affirm the trial court's ruling that it had subject matter jurisdiction and award respondent its attorney fees.

FACTS

The Marlows own land in Douglas County along the Columbia River. They made a series of unauthorized improvements to their property in and out of the water, including the installation of docks, a boat ramp, retaining walls, a gazebo, sidewalks, and a diving

board and slide. In June 2011, the County served a notice of violation and order to comply alleging violations of the Shoreline Management Act of 1971, ch. 90.58 RCW, the Douglas County Shoreline Master Program, and the County's Critical Areas Ordinance.

The Marlows appealed the notice, but a hearing examiner upheld the violations and directed them to comply with the statutes. The Marlows filed a land use petition, but lost that action in superior court and appealed to this court. We affirmed the rulings in 2013. *Marlow v. Douglas County*, No. 31013-2-III (Wash. Ct. App. Oct. 22, 2013) (unpublished), http://www.courts.wa.gov/opinions/pdf/310132.pdf.

The county then sought to enforce the 2011 ruling. Several review hearings were continued during 2014 in order to allow the Marlows to seek appropriate permits. A trial was held November 18, 2014. The unauthorized development had not been removed, nor had the Marlows sought appropriate permits. The court ordered the Marlows to comply and set a review hearing for March 24, 2015. That hearing, as well as a review hearing held July 14, 2015, found the Marlows were still out of compliance.

On August 11, 2014, the Marlows filed a "notice of chain of title" listing the purported owners of their property dating back to a 1906 land patent issued by President Theodore Roosevelt to the Northern Pacific Railway. The deed issued to the Marlows locates the property within section 26, township 22, range 21. The federal "land patent" does convey some land within the "north half of the northwest quarter of section" 26.

Clerk's Papers (CP) at 14. However, the Marlows did not show that their property was within that description.[1]

At the July 14 hearing, the Marlows attempted to challenge the jurisdiction of the court rather than address their compliance with the court's earlier orders. The trial court responded:

> Let me tell you this, Mr. and Mrs. Marlow, and we said this before. You're nice people and that sort of thing, but I hate to tell you I think you're going way down the wrong trail. . . .
>
> We're here for a review hearing. You have not complied. The stuff that you sent me is Constitutional stuff that I have dealt with twenty years. I'm not aware of anybody, anywhere, in any state, any county, who has ever prevailed on such an argument. It's gobbledygook and it's not going to help you.
>
> We're here for a review hearing. You haven't don't what you're supposed to do. You haven't done what the Court ordered you to do so the Court's going to go ahead and sign the order.

Report of Proceedings (RP) at 16-17.

The day before the scheduled October review hearing, the Marlows filed a series of documents carrying titles such as "verified jurisdictional challenge" relating to their land patent filing. The review hearing was continued and a hearing was held November 10, 2015, on the State's motion to strike the new documents. The court found that the documents were irrelevant, untimely, and frivolous, and ordered them stricken. Supp. CP

---

[1] The county's geographical information system indicates that the Marlow property is not located in the north half of the northwest quarter of section 26.

at 310-311. In response to appellants' claim that they were entitled to challenge jurisdiction, the trial judge replied:

> But you're wrong. I am sure that I told you before, somebody, whether it be the internet or somebody else you're talking to is leading you astray and it's going to cost you and I'm afraid that it's going to cost you your property. I have been involved in these kinds of issues since before I took the bench. Never in this County, in any County in the State of Washington, in any State in the United States of America, have I seen this argument prevail because it shouldn't and won't and pretty soon in January they're going to dismiss the United States District Court case in Spokane. That will be dismissed and pretty soon, as Mr. Clem indicates, he's going to ask for CR 11 sanctions and pretty soon, before you're done, you're liable to have to move out. I don't know how—
>
> N. MARLOW: We—we—we
>
> JUDGE: Else to help you and tell you.

RP at 27-28.

The subsequent review hearing confirmed that the Marlows still had not complied with the court's orders. The Marlows then filed a notice of appeal to this court on November 30, 2015.

The Marlows continued to represent themselves in this court. A panel considered their appeal without hearing argument.

ANALYSIS

The sole issue presented by this appeal is a contention that the trial court lacked jurisdiction to enforce its compliance orders due to the nature of the original land

conveyance from the federal government.[2] They believe that some attributes of the federal government's sovereignty somehow passed with the land when it was conveyed to the railroad. This argument is utterly without merit and is frivolous under our precedent.

There is little benefit to discussing this matter at any length. The Marlows argue that their land is forever free of state regulation because it originally came from the federal government. They cite no relevant law in support of this proposition and we have no obligation to disprove their arguments.

Whether a court has subject matter jurisdiction is a question of law reviewed de novo. *In re Marriage of Kastanas*, 78 Wn. App. 193, 197, 896 P.2d 726 (1995). Subject matter jurisdiction is the authority to hear and determine the class of action to which a case belongs, not the authority to grant the relief requested, or the correctness of the decision. *In re Marriage of Major*, 71 Wn. App. 531, 536, 859 P.2d 1262 (1993). "As

---

[2] The Marlows also assign error to the superior court's failure to consider their allegation that they had entered into an oral agreement with the county commissioners regarding compliance with the superior court's order affirming the notice of land use violations and order to comply. The final review hearing from which this appeal was taken does not contain any mention of allegations of an oral agreement between the Marlows and the county commissioners. Indeed, the only mention of these allegations are from the Marlow's narrative report of proceeding from the November 18, 2014 trial and from a May 12, 2015 scheduling hearing. Br. of Appellant at 2-4; RP at 10-12. They failed to appeal the findings of fact and conclusions of law from the 2014 trial. The court's findings, and refusal to make other findings, are verities on appeal. *In re Interest of Mahaney*, 146 Wn.2d 878, 895, 51 P.3d 776 (2002). They simply do not get to contest this allegation in this case.

courts of general jurisdiction, superior courts have long had the 'power to hear and determine all matters, legal and equitable, . . . except in so far as these powers have been expressly denied.'" *Id.* at 533 (*quoting State ex rel. Martin v. Superior Court*, 101 Wash. 81, 94, 172 P. 257 (1918)).

Douglas County commenced this action pursuant to the Shoreline Management Act of 1971, ch. 90.58 RCW, and the Growth Management Act, ch. 36.70A RCW. CP at 259. The superior court is empowered to act under both of these statutes. The Marlow property is located within Douglas County. Therefore, the superior court had subject matter jurisdiction.

The subject matter jurisdiction challenge brought by the Marlows fails. While that observation is sufficient to conclude this appeal, we will briefly note some of the shortcomings in their argument: (1) they have not established that their land was part of the 1907 government transfer to the railroad; and (2) they have not established that the property, once it was transferred from the government into private hands, somehow retained vestiges of federal sovereignty that exempted it from state regulation. As the trial judge tried to warn them, these arguments have never prevailed in any court in this country.

The county seeks its attorney fees due to the frivolous nature of its appeal. We agree. RAP 18.1 and 18.9(a) provide that this court may award attorney fees on appeal where authorized by law, court rule, or where the appeal is frivolous. *Harrington v.*

Pailthorp, 67 Wn. App. 901, 913, 841 P.2d 1258 (1992). An appeal is frivolous if it presents no debatable issues upon which reasonable minds could differ and it is so devoid of merit that no reasonable possibility of reversal exists. *Id.* Further, all doubts as to whether an appeal is frivolous are resolved in favor of the appellant. *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 906, 151 P.3d 219 (2007). "An appeal that is affirmed merely because the arguments are rejected is not frivolous." *Halvorsen v. Ferguson*, 46 Wn. App. 708, 723, 735 P.2d 675 (1986).

Here, we have no hesitancy concluding that this appeal was frivolous. The Marlows were repeatedly warned by the trial court that their course of action was frivolous. Not only was there no evidentiary basis for the argument, but its essence was a claim that this court found frivolous three decades ago. *Federal Land Bank v. Redwine*, 51 Wn. App. 766, 755 P.2d 822 (1988). There this court determined that a land patent, even if valid, did nothing more than transfer land. *Id.* at 769. We concluded that the appeal based on a land patent argument was frivolous and awarded the respondent its reasonable attorney fees on appeal. *Id.* at 770-771.

We do the same here. The record justifies our view that this meritless appeal was brought in bad faith for the purpose of delay. It was simply the latest step in a lengthy effort to avoid complying with the 2011 enforcement order and subsequent court judgments. The time for fighting is over; compliance is necessary.

Accordingly, our commissioner will award respondent its reasonable attorney fees in this court upon timely compliance with RAP 18.1(d). The judgment of the superior court is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Siddoway, J.

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

November 29, 2018

Nancy Marlow ,Mark Marlow
c/o 5050 State Route 28
Rock Island, WA 98850-9564

E-mail:
Steven Michael Clem
Douglas County Prosecuting Attorney
PO Box 360
213 Rainer
Waterville, WA 98858-0360

CASE # 339289
Douglas County v. Mark Marlow and Nancy Marlow, et al
DOUGLAS COUNTY SUPERIOR COURT No. 142000666

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
c: **E-mail** Hon. John Hotchkiss

Log Number: U-256
Oral Argument Date:

DO NOT CITE. SEE GR 14.1(a).

Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 33928-9
Title of Case: Douglas County v. Mark Marlow and Nancy Marlow, et al
File Date: 11/29/2018

SOURCE OF APPEAL

Appeal from Douglas Superior Court
Docket No: 14-2-00066-6
Judgment or order under review
Date filed: 11/10/2015
Judge signing: Honorable John James Hotchkiss

JUDGES

Authored by Kevin Korsmo
Concurring: Robert Lawrence-Berrey
Laurel Siddoway

COUNSEL OF RECORD

Counsel for Appellant(s)

Counsel for Respondent(s)
Steven Michael Clem
Douglas County Prosecuting Attorney
Po Box 360
213 Rainer
Waterville, WA, 98858-0360

OPINION FACT SHEET

Case Name: Douglas County v. Mark & Nancy Marlow
Case Number: 33928-9-III

1. TRIAL COURT INFORMATION:

A. SUPERIOR COURT: Douglas County; 14-2-00066-6
Judgment/Order being reviewed: Order on Third Review Hearing & Supplemental Judgment; Order on Plaintiff's Motion to Strike Pleadings
Judge Signing: John Hotchkiss
Judgment Date: 11/10/2015

2. COURT OF APPEALS INFORMATION:

Disposition: Check only 1

(X) Affirmed
( ) Affirmed as Modified
( ) Affirmed in Part/Remanded**
( ) Affirmed/Reversed-in part and Remanded**
( ) Affirmed/Vacated in part
( ) Affirmed in part/Reversed in part
( ) Denied (PRP, Motions, Petitions)
( ) Dismissed (PRP)
( ) Granted/Denied in part
( ) Granted (PRP, Motions, Petitions)
( ) OTHER
( ) Reversed and Dismissed
( ) Remanded**
( ) Reversed
( ) Reversed in part
( ) Remanded with Instructions**
( ) Reversed and Remanded**
( ) Reversed, Vacated and Remanded**
( ) Vacated and Remanded**

* These categories are established by the Supreme Court
** If remanded, is jurisdiction being retained by the Court of Appeals?
( ) YES
(X) NO

3. SUPERIOR COURT INFORMATION (IF THIS IS A CRIMINAL CASE, CHECK ONE)

Is further action required by the superior court?
( ) YES
(X) NO

Judge's Initials: _____