

No 43137-8-II.

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

PETER VANDERHOOF and JANE VANDERHOOF, husband and wife,
Appellants,

v.

BERNARD W. MILLS and HEDY L. MILLS, husband and wife,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a
Delaware corporation; PENINSULA MORTGAGE, INC., a Washington
corporation, FLAGSTAR BANK, FSB; and all other persons or parties
unknown claiming any right, estate or interest in the real estate described
in the complaint herein,

Respondents.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable George L. Wood
Cause No. 10-2-00356-1

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT.....1

 A. Standard of Review.....1

 B. The Mills Erroneously Conclude the Vanderhoofs’
 Claims are Precluded From Further Review Pursuant
 to RAP 10.3(g).....2

 C. The Mills Misconstrue the Documents Properly
 Included Within the Record on Appeal and
 Designated as Clerk’s Papers.....6

III. CONCLUSION8

TABLE OF AUTHORITIES

Cases

<i>Dash Point Village Associates v. Exxon Corp.</i> , 86 Wash. App. 596, 937 P.2d 1148 (Div. 1 1997).....	6
<i>Daughtry v. Jet Aeration Co.</i> , 91 Wash.2d 704, 709–10, 592 P.2d 631 (1979).....	4
<i>Dorsey v. King County</i> , 51 Wn.App. 664, 754 P.2d 1255 (1988)	2
<i>King County v. Washington State Boundary Review Bd.</i> , 122 Wn.2d 648, 860 P.2d 1024 (1993).....	2
<i>National Federation of Retired Persons v. Insurance Commissioner</i> , 120 Wash 2d. 101, 115-116, 838 P.2d 680 (1992)	3, 4
<i>State v. Olson</i> , 126 Wash.2d 315, 893 P.2d 629 (1995)	4
<i>Sunnyside Valley Irrig. Dist. v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003).....	2
<i>World Wide Video, Inc. v. City of Tukwila</i> , 117 Wn.2d 382, 816 P.2d 18 (1991), <i>cert. denied</i> , 503 U.S. 986 (1992)	2
<i>Zunino v. Rajewski</i> , 140 Wn.App. 215, 165 P.3d 57 (2007)	2

Statutes

CR 41(b)(3).....	1
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Rules

RAP 1.2(a)	3, 4
RAP 10.3(a)(3).....	4
RAP 10.3(g)	2, 3, 4, 6
RAP 9.1(a)	6
RAP 9.1(c)	6

I. INTRODUCTION

The Vanderhoofs' submit this brief in reply to Respondents Brief. Matters not discussed herein were sufficiently discussed within the Brief of Appellant.

As previously stated, this case involves a real property line dispute that arose after the respondents, the Mills, obtained a real property survey in 2007 which revealed the western end of both the north and south fences along Wasankari Road were approximately 43 feet too far to the north. Subsequently, the Vanderhoofs filed a complaint to quiet title in the disputed area and following a bench trial, the trial court dismissed the Vanderhoofs case pursuant to CR 41(b)(3) and granted the Mills' counterclaim to quiet title in the disputed area. For the reasons argued herein, as well as those within the Vanderhoofs opening brief, the judgment should be reversed and this case should be remanded for a new trial consistent with this Court's ruling.

II. ARGUMENT

A. Standard of Review

The Mills' partially identified the appropriate standard of appellate review; however, such identification arrived at the erroneous conclusion that the trial court clearly weighed the evidence and that such "extensive

findings of fact with corresponding conclusions of law” supported the trial court’s decisions.

On appeal, the appellate court reviews the trial court’s decision following a bench trial to determine whether the findings of fact are supported by substantial evidence and whether those findings support the trial court’s conclusions of law. *Zunino v. Rajewski*, 140 Wn.App. 215, 220, 165 P.3d 57 (2007), citing *Dorsey v. King County*, 51 Wn.App. 664, 668-69, 754 P.2d 1255 (1988). Substantial evidence supports a finding of fact where the “record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *King County v. Washington State Boundary Review Bd.*, 122 Wn.2d 648, 675, 860 P.2d 1024 (1993) (quoting *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991), *cert. denied*, 503 U.S. 986 (1992)). All conclusions of law are reviewed *de novo*. *Zunino, supra*, citing *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). After appropriate appellate review, the findings of fact and corresponding conclusions of law are clearly not supported by the substantial evidence in this case.

B. The Mills Erroneously Conclude The Vanderhoofs Claims Are Precluded From Further Review Pursuant to RAP 10.3(g).

As the Mills’ properly stated RAP 10.3(g) provides as follows:

(g) **Special Provision for Assignments of Error.** A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or *clearly disclosed in the associated issue pertaining thereto*.

Failure to specifically state each separate assignment of error for each finding of fact does not affirmatively bar nor preclude further review of an individual's appeal. In *National Federation of Retired Persons v. Insurance Commissioner*, 120 Wash 2d. 101, 115-116, 838 P.2d 680 (1992), the court was faced with a similar situation. In analyzing and applying RAP 10.3(g), the court looked for additional guidance from RAP 1.2(a), which states:

(a) **Interpretation.** These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions of rule 18.8(b).

In *National Federation*, the court indicated it had previously stated on numerous occasions that RAP 1.2(a) "makes clear that technical violation of the rules will not ordinarily bar appellate review, where justice is to be served by such review.... [W]here the nature of the challenge is

perfectly clear, and the challenged finding is set forth in the appellate brief, [this court] will consider the merits of the challenge.” *Id.* at 116-117.

Further, in *State v. Olson*, 126 Wash.2d 315, 893 P.2d 629 (1995), the court noted when a challenge is clear, the court will decide the case on its merits, promoting substance over form and such result is particularly warranted where the violation is minor and results in no prejudice to the other party. *Id.* at 318-319. The court concluded in *State v. Olson* that the cases Mr. Olson relied upon, much like the Mills’ in this action, stand only for the proposition that when an appellant fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), ***and*** fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue. *Id.* at 321. Repeatedly the court has waived technical violations of RAP 10.3(g) when both party's briefs make the nature of the challenge clear. *Daughtry v. Jet Aeration Co.*, 91 Wash.2d 704, 709–10, 592 P.2d 631 (1979); RAP 1.2(a).

Within the briefing, the Vanderhoofs’ specifically challenged the elements of open and notorious and hostility, notably the trial courts erroneous conclusions that “the activity could be seen as random and convenient” and that the activities performed on the premises were neither open nor notorious and performed with sufficient obtrusiveness so as to

give notice that an adverse claim of ownership was being made. ¹ *See p. 12 of the Brief of Appellant* and CP 19-20.

Furthermore, the Vanderhoofs' specifically challenged the court's erroneous conclusions with regards to the perimeter fencing and that the running of cattle was not "hostile" in the sense required by the law of adverse possession, despite evidence presented at trial and case law suggesting otherwise. *See p. 13 of Brief of Appellant*. Additionally the Vanderhoofs' unequivocally discussed in depth the trial court's inaccurate tacking analysis and its flawed mutual recognition and acquiescence findings. ^{2 3}

Notwithstanding the Mills' preposterous conclusions that there was no evidence of the trial court's challenged findings within the Vanderhoofs' brief, it is quite clear and obvious what the nature and extent of the Vanderhoofs' challenges are. In fact, such challenges are so clear the Mills' devoted nearly twenty pages of case law and argumentation in response to the Vanderhoofs' challenges. In addition, the Mills' devoted

¹ As previously mentioned, the court did not address the adverse elements of actual and uninterrupted and exclusivity in rendering its Findings of Fact and Conclusions of Law; therefore, such elements are deemed met and are not addressed herein.

² The Vanderhoofs' also specifically challenged the trial court's erroneous conclusion that tacking was not permitted. *See p. 21 of Brief of Appellant*; CP 33. In addition, the Mills' responded in depth, pages 38-43 of Respondents Brief, to the Vanderhoofs' tacking challenge.

³ With regards to the doctrine of mutual recognition and acquiescence, the Vanderhoofs' specifically challenged such finding of fact on p. 25 of the Appellant's Brief and the Mills' explicitly responded in depth on pages 33-37 of Respondents Brief.

an additional four pages within their brief unambiguously listing each finding of fact the Vanderhoofs' were challenging. *See p. 6-9 Brief of Respondents*. As this court has repeatedly stated, when the party's briefs, as they undoubtedly do here, make the nature of the challenges abundantly clear, the court will waive any technical violation of RAP 10.3(g), as justice would be served by such appellate review.

C. The Mills Misconstrue The Documents Properly Included Within The Record On Appeal And Designated As Clerk's Papers

Pursuant to the Mills' Assignments of Error, specifically assignment C, the Mills' have misconstrued the documents properly included within the record on appeal. Pursuant to RAP 9.1(a), the "record on review" may consist of (1) a "report of proceedings", (2) "clerk papers", (3) exhibits, and (4) a certified record of administrative adjudicative proceedings. The clerk's papers include the pleadings, orders, and other papers filed with the clerk of the trial court. RAP 9.1(c). The party seeking appellate review has the burden of perfecting the record so the Court of Appeals has before it all evidence relevant to issues raised. *Dash Point Village Associates v. Exxon Corp.*, 86 Wash. App. 596, 937 P.2d 1148 (Div. 1 1997).

In analyzing the Mills' assignment, it is argued that the Declarations of Jean Liljedahl and Dana Lothrop are not properly before the court and were not part of the substantive evidence presented at trial and are irrelevant; however, such argument is not supported by the rules of appellate procedure or corresponding case law.

In addressing the Mills' first assertion that the documents were not part of the substantive evidence presented at trial, one need not look any further than the Findings of Fact and Conclusions of Law, which were drafted by the Mills, which state "the trial court specifically reviewed the exhibits admitted into evidence, the legal memoranda of the Mills' filed in support of the motion and the legal memoranda filed by both parties in connection with the previous motion for summary judgment, as well as the trial court's memorandum opinion." CP 13-14. In addition, the documents were used for impeachment purposes during the trial to which opposing counsel objected on numerous occasions and was overruled each time. RP Day 2, pp. 12-17.

As to the Mills' second assertion the documents are irrelevant, ironically the Mills' both cite and include some of these "irrelevant" and "inadmissible" documents within their brief. (*See* Respondents brief page 6 (reference to Appendix A1-A13); page 21-22 (reference to Exhibits 7, 9, 10 and Appendix A13-A18).

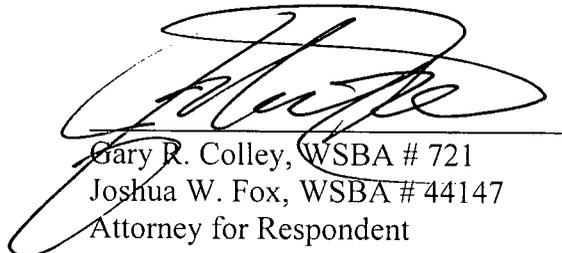
Despite the Mills' erroneous conclusions that the record on appeal is not properly before the Court, they have failed to cite any rule of appellate procedure in support of their conclusion. As the appellants, the Vanderhoofs' have met their burden of perfecting the record and have included all evidence relevant to issues raised.

III. CONCLUSION

The lower court erred when rendering its opinion as neither the evidence nor testimony supports the court's decision to grant the Mills' Motion to Dismiss. Substantial evidence does not support the trial court's findings nor do the findings support the courts conclusions of law. For the reasons argued within the Vanderhoofs opening brief, as well as those above, the judgment should be reversed and this case should be remanded for a new trial consistent with this Court's ruling.

DATED this day 15 of October, at Port Angeles, Washington.

Respectfully submitted,



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CERTIFICATE OF MAILING

I am a resident of the state of Washington and over the age of 18 years.
On the 17th day of October, 2012, I deposited in the United States Mail a
properly stamped and addressed envelope containing a copy of REPLY BRIEF
OF APPELLANT and this CERTIFICATE OF MAILING to the following:

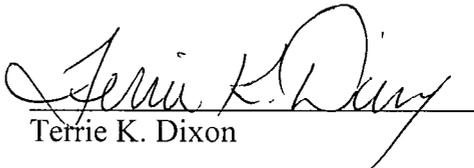
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DATED this 15th day of October, 2012.


Terrie K. Dixon