

NO. 49951-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RON ERICKSON, an individual

Appellant,

v.

THE PORT OF PORT ANGELES, a government agency, THE CITY OF
PORT ANGELES, a government agency, NIPPON PAPER IND. USA, a
corporation, CLALLAM COUNTY, a government agency, PUGET
SOUND MILLS & TIMBER CO., a corporation

Respondents.

RESPONDENT CITY OF PORT ANGELES'S BRIEF

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I. INTRODUCTION

In 1997, Mr. Erickson bought a 140 square foot parcel of property at a tax foreclosure sale. Then, according to his declaration, he “prayed the Old Testament Jabez prayer” that God would “enlarge his territory,” which led to a series of convoluted assumptions and maneuvers leading him to believe he could lay claim to large swaths of public and private land—for which he sought to erect and operate a toll booth. This lawsuit against local, state and national government, private parties, and an Indian Tribe followed.¹

At the outset, at Mr. Erickson’s request, a “litigation guardian” was appointed to review his claims for merit. He found little, especially with regard to the damage claims. On the defendants’ motion, the superior court dismissed all but the quiet title and property line dispute. Mr. Erickson subsequently conceded that he had no claim to one of the subject roadways—Marine Drive, which is owned by the City—leaving only one disputed parcel remaining (former K-Street). The City, at this point, indicated that it no longer had a dog in the fight. Quiet title actions are only for parties “claiming the title or some interest” in real property, RCW 7.28.010, and the City was not claiming any part of K-Street. It therefore asked Mr. Erickson to voluntarily dismiss it from the case. Mr. Erickson

¹ Through various dismissals, many of the parties were let out of the case.

refused; instead, propounding over 60 interrogatories (admittedly, to aid in his case against the *other* defendants). He told the City to “sit on it for a bit.”

The City was forced to proceed by motion. It requested summary judgment, as well as a modest fee award pursuant to CR 11 and RCW

4.84.185. Judge Harper agreed:

Mr. Erickson’s conduct meets both prongs of the [CR 11] inquiry. He is asserting a legal position which is without merit and inconsistent with a plausible view of the law; namely, the statute he is relying upon. And he is doing it for improper purpose. He received notice of both problems, but refused to withdraw the offending pleading. The Court finds the conduct sanctionable under both CR 11 and RCW 4.84.185.

CP 458. The amount awarded was, by design, partial recovery. The City hoped that it would deter additional filings, while not being excessive.

Unfortunately, Mr. Erickson has only become more abusive, filing several more motions, two unsuccessful interlocutory appeals, and this present appeal.

Mr. Erickson’s opening brief is presents no ground upon which the trial court erred. His substantive position is a mix of (1) arguments that were frivolous in first instance, (2) arguments never raised below, and (3) stark silence in response to the actual basis for trial court’s orders.

The trial court should be affirmed in all respects.

II. STATEMENT OF THE CASE

A. The Underlying Land Issues

In 1997, Mr. Erickson purchased the following piece of property (“the Property”) at a tax foreclosure auction for a nominal price:

Beginning at the intersection of the northerly line of Third Street North [now Marine Drive] and the easterly line of “K” Street [now vacated], in said City of Port Angeles, and running thence northerly along the easterly line of said “K” Street a distance of 13.00 feet; thence southerly along a straight line to a point in the northerly line of said Third Street North distant 23.00 feet easterly measured along said northerly line, from the easterly line of said “K” Street; thence westerly along the northerly line of said Third Street North a distance of 23.00 feet to the point of beginning; containing an area of 140.00 square feet, more or less.

CP 38, 48, 366, 1074.

According to Mr. Erickson’s Complaint, it held “reversion rights” to several of the adjoining properties and streets. CP 1075. To summarize the somewhat confusing series of claims and allegations:

- Marine Drive:
 - Marine Drive² was deeded to the City in 1913 to use or improve. RP 36-37 (6/15/2016). The City has used Marine Drive as a major thoroughfare for several decades. RP 37, 56 (6/15/2016).
 - Mr. Erickson claimed ownership of portions of Marine Drive. However, Mr. Erickson ultimately “reversed [his] perception of the facts” and conceded that he had no legitimate claim to this property. CP 782, 1093.
- K Street:

² Third Street is presently known as Marine Drive.

- The other piece of property Mr. Erickson claimed ownership of was the property that was formerly K-Street. CP 1094.
- K Street used to be held by the City as right-of-way, but, upon request of the Port of Port Angeles (“the Port”) and Nippon Paper Industries USA (“Nippon”), in 1989, the City vacated the property in Ordinance 2527, resulting in a quit claim to the Port and Nippon. CP 792, 1085-1086. This *predated* Mr. Erickson’s ownership interest in the area.
- Since the street vacation, the City has not claimed any ownership or interest in the former K-Street area; nor does it now.

Mr. Erickson appears to claim that he is entitled to enlarge the small parcel he purchased and/or receive compensation of some kind based upon issues and rights that go back 100 years. CP 38.

B. The Superior Court Litigation³

Mr. Erickson brought suit in May 2015. CP 1150. He filed a Second Amended Complaint (“Complaint”) in June 2015, naming the City, the Port of Port Angeles, Nippon Paper Industries, USA (“Nippon”), Clallam County, the State Departments of Transportation and Ecology, the U.S. Department of Interior, and others. CP 1073. The 60+ page Complaint alleged various causes of action and claims against the various defendants. The initial claims against the City, although not utterly clear,

³ The City also concurs to the “Statement of the Case” as set forth in the Port of Port Angeles and Nippon Paper Industries, USA’s Opening Brief, and is deliberately not repeating the facts they accurately lay out.

appear to include the following: Property line designation; Quiet Title (to property which the City holds no interest); Utility Trespass; Injunctive Relief; Declaratory Relief; Fraud; and Damages. CP 1068-1134. He sought \$1.5 million, or in the alternative, a right to “construct a toll booth” on the public roadway. CP 1131.

Mr. Erickson claims a mental disability that causes him to have difficulty coping with stress and emotions; periods of hyper activity or impulsivity, periods maintaining concentration, stamina or memory.⁴ CP 39, 48, 393-400. As a result of his claimed disabilities, Mr. Erickson asked the trial court to appoint a trial attorney to represent him in his lawsuit, or in the alternative, he asked the court to appoint a competent “next friend” to assist him in the courtroom. CP 49, 393-400.

Based upon Mr. Erickson’s representation, on June 24, 2015, Judge Jeanette Dalton appointed a “litigation guardian” to review his claims for merit. CP 19, 49, 447, 565, 795-96. Local attorney, Larry Freedman, was accepted the job. About a month later, the Superior Court stayed the proceedings so that Mr. Freedman could conduct his review. CP 20-21, CP 986, CP 990-991.

⁴ Despite the challenges Mr. Erickson claims, he is able to undertake litigation against government agencies, perform legal research, follow court rules, understanding the nature of proceedings and respond to opposing counsel’s briefs. CP 39, 208. *See Erickson v. Washington State Department of Natural Resources*, 127 Wn.App. 1024, 2005 WL 1101561 (2005) (unpublished opinion), *rev. denied*, 156 Wn.2d 1021, 132 P.3d 735 (2006).

The scope of the Litigation Guardian's role was well-understood by all parties, including Mr. Erickson (who requested it, and never objected to the proposed scope of his work). CP 986, 988, 907. Mr. Erickson received correspondence from the Superior Court confirming the litigation guardian's role. CP 50, 986. In one of his affidavits, Mr. Erickson confirmed that "[t]he Litigation Guardian made it clear that he did not represent my interests in this matter." CP 907.

Mr. Freeman's conclusion was that the bulk of Mr. Erickson's lawsuit was not supportable. CP 981-985. He reported that, apart from the property line dispute, the claims should be dismissed. CP 981-985. Mr. Freeman concluded, "[t]here seems to be no disputed facts in the case the [final] determination should be made on a summary judgment motion if made by any of the remaining parties."

It was at this point that Mr. Erickson raised issue, staking out the position that a Court can compel a civil lawyer, like Mr. Freedman, to bring and assert frivolous claims on his behalf.⁵

The remaining parties were the City, the Port, Nippon, the County, and Puget Sound Mills and Timber Company stockholders.⁶ CP 973, 984.

⁵ This cannot be correct. Regardless of a client's handicaps, RPC 3.1 specifically disallows civil attorneys from "bringing... a proceeding... or asserting... an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." The Litigation Guardian did precisely what the rules permitted him to do: analyze Mr. Erickson's claims for merit. CP 51, 801, 984.

They brought a joint motion to lift the stay, seeking dismissal of all claims the litigation guardian identified of being void of legal merit. CP 972. On April 15, 2016, Mr. Erickson filed material in opposition to this request. CP 889-971. He also filed a letter with the Superior Court requesting certain accommodations, CP 52, 887, which specifically conceding that the facts do not support his claim to any reversionary interest in Marine Drive. CP 790, 887.

Defendants' motion to lift the stay and seeking dismissal of frivolous claims was granted on April 22, 2016⁷ by the Honorable Keith Harper, leaving only the vacated former K-Street property at issue – which, according to Mr. Erickson's own Complaint, the City abandoned any right to in 1989. CP 444-445, 792-793, 1085. At the hearing, Mr. Erickson made additional concessions that he was willing to dismiss claims involving reversionary interest in Marine Drive, the City's vacation of "K", among others. VRP 13 (4/22/2016).⁸

At this point, the City had no remaining role to play in the case. Further, in response to Mr. Erickson's April 15, 2016, the Superior Court denied Mr. Erickson's request for legal counsel, reasoning that he was not

⁶ Puget Sound Mills and Timber Company was never served, and no appearance was made on their behalf.

⁷ Order was signed by the Honorable Keith Harper on April 22, 2016, and filed on April 26, 2016.

⁸ On May 24, 2016, Mr. Erickson filed a notice of discretionary appeal of the Superior Court's April 26, 2016 order dismissing claims and lifting the stay. CP 54.

entitled to a court appointed attorney in connection with the accommodation rule because the case is civil matter, not a criminal matter. CP 53; VRP 11 (4/22/2016).

The fact that the City no longer had a role to play was respectfully conveyed to Mr. Erickson in early May via telephone call. CP 783, 846. But rather than dismiss pursuant to the agreed order the City sent to him, Mr. Erickson propounded 60 interrogatories – adding that the City should “sit on it for a bit,” while Mr. Erickson used the onerous discovery he propounded on the City to develop claims against others. *Id*; 804-835.

The City immediately responded, respectfully but firmly, that what Mr. Erickson was doing was improper:

I appreciate your queries and concerns, but fundamentally, you have no remaining legal issues with the City of Port Angeles. Everything—other than the boundary line dispute—was dismissed by Judge Harper. And you’ve conceded that your claims vis-à-vis Marine Drive were based upon a misperception of the facts... We are therefore not properly a party to the remainder of the dispute.

As far as the Interrogatories you served on us, respectfully, they amount to an abuse of process. I don’t believe that was your intent, but it is wholly impermissible...

I am once again requesting and encouraging you to authorize me to endorse the attached dismissal order on your behalf. If you refuse, it is my intention to bring a motion for summary judgment in the very near future. If I have to prepare and file something

like that, the City is considering a request for sanctions under Rule 11 and RCW 4.84.185, which would... require you bear the heavy cost of the motion. I seldom seek sanctions, but believe it would have a basis here for the reasons noted above. I hope it does not come to that.

CP 838-839. Despite being put unequivocally on notice of the wrongful conduct and the City's intent to seek a remedy, Mr. Erickson refused to change course.

The City filed its motion for summary judgment and a modest sanction award on May 17, 2016. CP 842. The hearing was held on June 15, 2016. Despite Mr. Erickson abruptly changing his position—and suddenly claiming he now *did* own Marine Drive, too—summary judgment was granted for a series of undisputed reasons. CP 55-58, 445, 461-77, 581-645. The Superior Court found: (1) that the City had no interest in “K” street and the City is not claiming any interest in “K” Street; (2) Mr. Erickson previously admitted he did not have an interest in Marine Drive; (3) Mr. Erickson was not a party to the 1913 deed and but rather he is a stranger and not in a position to challenge it; and (4) Marine Drive is being maintained as a highway in accordance with the applicable deed. CP 55, 459. Additionally, the fee request was granted and supported by a detailed 6-page Order. CP 445-459. In no uncertain terms, Judge

Harper agreed that Mr. Erickson's claims and intentions violated CR 11 and RCW 4.84.185. *Id.* CP 445-459.

Unfortunately, rather than accept the trial court's guidance, Mr. Erickson pursued his course of conduct with even more aggression. He did not wait for final judgment. Instead, he took a *second* piecemeal discretionary appeal, separately challenging the summary judgment order and award of attorney's fees in favor of the City. CP 54, CP 60.

The Commissioner consolidated Mr. Erickson's appeals, and, following argument, entered an Order denying review. CP 47-69. The Commissioner noted that Mr. Erickson's claims about the Litigation Guardian were "contradicted by the appointment order and follow-up correspondence." CP 64. In regard to order dismissing claims, the Commissioner concluded that Mr. Erickson failed to demonstrate obvious or probable error. CP 64. The same was true of the trial court's order granting summary judgment. CP 66. The award of attorney's fees was likewise upheld. CP 68.

On August 12, 2016, the Port and Nippon filed a motion for summary judgment, CP 214-15, 375-76, which was granted on September 23, 2016. CP 41-43. Reconsideration was denied, CP 95, 177-191, and this third appeal followed.

III. RESTATEMENT OF ISSUES PRESENTED

1. Whether the trial court appropriately granted summary judgment in favor of the City when the claim was neither colorable or brought by a party with standing, nor supported by admissible evidence.
2. Whether the Superior Court erred in applying the recommendations of a Litigation Guardian, which the proponent of the claims requested, and in any event failed to support with admissible evidence.
3. Whether a superior court abuses its discretion in sanctioning a litigant who pursues frivolous legal theories, against the wrong litigant, despite notice of the frivolity.
4. Whether this appeal is frivolous and the Court of Appeals should award attorney fees to the City.

IV. ARGUMENT

A. The Legal Standard

Summary judgment orders are reviewed *de novo*. *Smith v. Safeco Insurance Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). The appellate court may, however, “affirm on any basis supported by the record.” *Redding v. Virginia Mason Medical Center*, 75 Wn. App. 424, 426, 878

P.2d 483 (1994); *see also Champagne v. Thurston Cnty.*, 134 Wn. App. 515, 520, 141 P.3d 72 (2006).

The standard of review for CR 11 sanctions is abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994) (citing *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 338-39, 858 P.2d 1054 (1993)). “A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.” *Fisons*, 122 Wn.2d at 339, 858 P.2d 1054.

Decisions about any needed accommodations are left to the sound discretion of the trial court. *State v. Gonzales-Morales*, 138 Wn.2d 374 381, 979 P.2d 826 (1999).

Assignments of error that are not supported by citations to authority on appeal will not be reviewed on appeal. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). .

B. Judge Harper’s Ruling that the City was entitled to Summary Judgment Was Objective Correct

Mr. Erickson’s appeal lacks substantive merit. He does not explain how Judge Harper erred, because Judge Harper did not err. All of his rulings were objectively correct and should therefore stand.

1. There Was No Basis For Alleging Quiet Title Against A Disinterested Party

The relevant statute provides, in pertinent part:

Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, *to be brought against* the tenant in possession; if there is no such tenant, then against *the person claiming the title or some interest therein*, and may have judgment in such action quieting or removing a cloud from plaintiff's title...

RCW 7.28.010 (emphasis added). This plain language, by its own terms, limits quiet title actions to parties who actually “claim an interest” in the property at issue. Conversely, when the defendant has no claimed interest, it should be dismissed or substituted. This practical limitation on quiet title actions has existed for over a century, without contradiction. *See, e.g., Thurston Vietzen v. Otis*, 46 Wash. 402, 90 P. 264 (1907) (substituting party in interest following mid-litigation sale of property); *McNamara v. Crystal Min. Co.*, 23 Wash. 26, 62 P. 81 (1900) (reversing trial court ruling that permitted intervention of third party who owned property adjacent to disputed property, because the third party had no actionable interest in the matter in litigation).

Judge Harper rightly observed that Mr. Erickson had no live controversy or actionable interest against the City vis-à-vis K-Street. According to even Mr. Erickson’s own complaint, the City quitclaimed whatever rights it had in 1989. For both legal and practical reasons, the City was properly dismissed from the lawsuit. *See generally Pentagram*

Corp. v. City of Seattle, 28 Wn. App. 219, 223, 622 P.2d 892 (1981) (a case is properly dismissed “if there is no longer a controversy between the parties, if the question is merely academic, or if a substantial question no longer exists.”) (internal citations omitted).

Mr. Erickson identifies no reason for a different result. With respect to this element of the case, the Court can end its analysis there.

2. Mr. Erickson Lacks Standing To Challenge A Legislative Street Vacation – And The Clerical Error He Cites Would Not Support Relief In Any Event

Mr. Erickson, however, continues to point to a perceived—but unproven—clerical error in the vacation of K-Street. Even assuming for the sake of argument that there was such an error, it would not establish a right to relief in Mr. Erickson’s favor.

For one thing, only *abutters* to the vacated right-of-way have the right to challenge a street vacation. In *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 937 P.2d 1082 (1997), for example, a class of taxpayers challenged a vacation of streets by Seattle, with the property reverting to the Port of Seattle. The trial court dismissed the action, noting that “plaintiffs in this matter do not have standing to challenge the actions of the City Council in this matter.... they are not property owners that abut to it, at least the streets that are involved in this matter.” *Id.* at 277-78; *see also London v. City of Seattle*, 93 Wn.2d 657, 660, 611 P.2d 781 (1980)

(similar). As noted above, when Ordinance 2527 was enacted in 1989, Mr. Erickson was *not* an abutter. He did not buy the 140 square foot parcel until 1997, almost a decade later. He therefore has no standing to challenge or take issue with a street vacation that did not impact him; *i.e.*, he purchased only the rights and value that existed *post*-street vacation.⁹

For another thing—in addition to the lack of standing—Mr. Erickson is not entitled to overturn a legislative decision on the basis of negligence or clerical error. It is well-established that absent collusion or fraud, the street vacation decision must stand.

Baumgardner v. Town of Ruston, 712 F. Supp.2d 1180, 1201 (W.D. Wash. 2010), provides a good illustration. There, a party argued that the procedure operated to deprive him of his constitutional due process rights. The court responded:

A statute that grants the reviewing body unfettered discretion to approve or deny an application does not create a property right. Ruston has discretion on whether or not to vacate public streets. Ruston has the discretion to require property owners who request street vacations to pay for property vacated. The Washington Supreme Court has upheld the payment of cash for vacated street, an exchange of property, and permitted the retention of easements as all part of the “payment” contemplated in RCW 35.79.030.

⁹ In other words, Mr. Erickson is attempting to exercise rights he did *not* purchase. He is no more entitled to do this than a purchaser of a used car would be entitled to sue a tortfeasor who dented it ten years prior to the sale. The damages, as claimed by Mr. Erickson, are necessarily personal to the prior property owner/abutter, absent a timely contractual assignment of the *claim* (which he does not allege or prove).

Id. at 1201 (internal citations omitted); *see also Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash. 303, 309, 83 P. 316 (1906) (“From the above authorities, and many others which might be cited, we conclude respondents are not entitled to recover damages for the vacation of said street, nor to enjoin such vacation; no collusion or fraud having been shown.”); *cf. Andersen v. King Cnty.*, 158 Wash. 2d 1, 39, 138 P.3d 963 (2006) (“But legislative bodies, not courts, hold the power to make public policy determinations, and where no suspect classification or fundamental right is at stake, that power is *nearly limitless.*”) (emphasis added).

Like any other decision by a legislative body, it is not subject to challenge absent extraordinary circumstances. The points made by Mr. Erickson—*e.g.*, the City “awkwardly changes the name of streets,” there was insufficient research related to “past ordinances,” there was an untimely recording—are not extraordinary, and do not support overturning a legislative decision.

3. Mr. Erickson Has No Claim To Marine Drive

Despite a judicial admission that Mr. Erickson had no legitimate claim to Marine Drive, in response to summary judgment, he changed his mind and claimed that road, too. Judge Harper was right to reject the newly-minted claim—for many reasons.

First, Mr. Erickson was bound by his earlier judicial admission. The general rule is that “[f]ormal, deliberate admissions by counsel in open court are generally binding.” Tegland, 5B WASHINGTON PRACTICE § 801.54 (5th ed. 2015); *see also Escude ex rel. Escude v. King County Public Hosp. Dist. No. 2*, 117 Wn. App. 183, 69 P.3d 895 (2003) (trial court properly ruled that voluntary dismissal would be with prejudice where, prior to the motion, plaintiffs had made formal concessions and admissions during summary judgment proceedings that effectively precluded the plaintiff from refiling); *United States v. One Heckler-Koch Rifle*, 629 F.2d 1250, 1253 (7th Cir.1980) (for purposes of summary judgment, federal courts have treated representations of counsel in a brief as admissions even though not contained in a pleading or affidavit); *Ferguson v. Neighborhood Housing Services.*, 780 F.2d 549, 551 (6th Cir.1986) (“[U]nder federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court. Not only are such admissions and stipulations binding before the trial court, but they are binding on appeal as well.”).

In this case—in the context of seeking relief related to the first motion to dismiss, Mr. Erickson stated in a filing, without qualification:

I reversed my perception of the facts supporting my opinion that The City activated the reversion clause on PSM&T’s dedication deed for Marine Drive (Third Street North). Discovering that Hill Street was authorized to be constructed near the time of the first construction of a road around the PSM&T mill site etc. and admitting to myself that this action likely met with approved by PSM&T took “the wind out of my sails.”

CP 790, 887. This is the type of admission on which Mr. Erickson could not simply change his mind. Motions were drafted and brought based upon the admission. He cited no reason that his judicial admission regarding Marine Drive should *not* have bound him below, and posits none now.

Second, Mr. Erickson is a “stranger to the deed,” and thus, is not entitled to raise the rights identified in it against the City. Washington follows the majority rule, which limits deed challenges to those who were party to it. As here, Mr. Erickson—who was not party to the Marine Drive deed—cannot avail himself to restrictive language for his own purposes. *See, e.g., Pitman v. Sweeney*, 34 Wn. App. 321, 322, 661 P.2d 153 (1983) (“The majority rule is that a reservation or exception in a deed cannot create rights in strangers to the instrument”; deed ineffective to create rights in favor of strangers to the instrument); *Donald v. City of Vancouver*, 43 Wn. App. 880, 884-85, 719 P.2d 966 (1986) (plaintiff lacked standing to stop city from transferring land, contrary limitations imposed by deed). There was no dispute below with respect to this issue, and none here.

Third, even if Mr. Erickson could raise the issue, there is no actual violation. The deed requires that the City use the property for highway purposes – which it is. Marine Drive is a “highway” by statutory

definition. *See* RCW 47.04.010(11) (“Every way, lane, road, street, boulevard, and every way or place in the state of Washington open as a matter of right to public vehicular travel both inside and outside the limits of incorporated cities and towns”). Marine Drive easily meets this definition.

Fourth—even assuming Mr. Erickson *could* raise somebody else’s challenge (which he cannot), and assuming there is a violation (which there is not)—the reversionary rights have long since been waived. As a general rule, the type of forfeiture Mr. Erickson is advocating is strongly disfavored. *See Shoemaker v. Shaug*, 5 Wn. App. 700, 704, 490 P.2d 439 (1971) (“It is elementary law in this jurisdiction that forfeitures are not favored and never enforced in equity unless the right thereto is so clear as to permit no denial.”). Accordingly, when there are “substantial unchecked prior violations of the restrictions,” courts have deemed restrictive covenants “terminated by abandonment.” *See e.g. Mount Baker Park Club, Inc. v. Colcock*, 45 Wn.2d 467, 275 P.2d 733 (1954); *Martin v. City of Seattle*, 111 Wn.2d 727, 732-34, 765 P.2d 257 (1988) (“If a forfeiture is not declared within a reasonable time, the power of termination expires.”). Here, the first challenge, based upon a picture from the early 1900’s, was coming approximately a century after the fact.

If this is not an untimely exercise of a disfavored right, one wonders what would be.

And fifth, assuming, without conceding that the Property at one time carried a reversionary right, that reversionary right did not pass to Mr. Erickson when he acquired title to the Property via Tax Deed. “A tax deed extends only to the real property over which the court in the foreclosure proceeding has obtained jurisdiction.” *Carlson v. Stair*, 3 Wn.App. 27, 30, 472 P.2d 598 (1970). In *Bassett v. City of Spokane*, 98 Wn. 654, 656, 186 P. 478 (1917), the Court held, “judgment of foreclosure is the source of a new and independent title, superior to all prior titles. It makes a straight line between the old and the new titles, destroying the validity of the old title as a title and forever barring any enforcement of that title as a valid subsisting title.” Therefore, any reversionary interest that Mr. Erickson’s predecessor may have had was extinguished when the judgment of foreclosure was entered against the Property. Mr. Erickson’s only legal title is to the Property itself described in the Tax Deed.

For a variety of reasons, Judge Harper was correct in his assessment of Mr. Erickson’s Marine Drive claims. As such the decisions should be affirmed.

4. The Sanctions Award Was Appropriate, If Not Insufficient

The standard of appellate review for such sanctions is the abuse of discretion standard. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994) (citing *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 338-39, 858 P.2d 1054 (1993)). Here, Judge Harper did not abuse his discretion.

As discussed above, the claims were indeed baseless, and the purpose for bringing them was improper. What is more, Mr. Erickson was placed on unequivocal notice of the problem, and decided to flippantly proceed. CP 838-839 (“sit on it for a bit”). The findings in the Order fully support the sanction, which represents only a fraction of what the City incurred in defending this lawsuit—which was meritless, as the Litigation Guardian confirmed, since Day One.

The \$1500 sanction should stand.

C. The Superior Court did not err in declining to appoint counsel to represent Mr. Erickson in his civil case.

The Superior Court granted various accommodations to Mr. Erickson. While the court did not appoint an attorney to represent him in the litigation, the Superior Court awarded Mr. Erickson his “alternative” by appointing a litigation guardian to review the case for merit, and later granted him accommodations in two other instances.

GR 33 sets forth the Washington rule for requesting accommodations. “Accommodation” means measures to make each court service, program, or activity, when viewed in its entirety, readily accessible and useable by a person with a disability.” GR 33. GR 33 does not provide that all civil litigants should be appointed counsel. Rather, the rule states that for unrepresented parties, an accommodation *may* include representation by counsel, as appropriate or necessary to make each service, program, or activity, when viewed in its entirety, readily accessible to and usable by a person with a disability. GR 33.

Under CR 33, in determining whether to grant an accommodation, the court should shall give primary consideration to the request of the individual and “make its decision on an individual-and case-specific basis with due regard to the nature of the applicant's disability and the feasibility of the requested accommodation.” GR 33(c)(1)(C).

Decisions about any needed accommodations are left to the discretion of the trial court. *State v. Gonzales-Morales*, 138 Wn.2d 374 381, 979 P.2d 826 (1999) (citing *State v. Trevino*, 10 Wn.App. 89, 94-95, 516 P.2d 779 (1974)) (the appointment of an interpreter is a matter within the discretion of the trial court to be disturbed only upon a showing of abuse). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *Washington State Physicians*

Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash.2d 299, 338-39, 858 P.2d 1054 (1993)). And rightly so. Every day, pro se litigants walk into civil cases at a disadvantage because they cannot afford or find an attorney willing to represent them. The fact that somebody claims a disability entitles them to accommodations—as in this case, extra time for briefing, extra explanation at hearings—but not to be made better than whole, in the form of a free attorney as a matter of course. That is a decision the trial court *can* make, but is not *required* to make.

Mr. Erickson does not point to any relevant case law which states that the trial court was required to appoint a pro se civil litigant counsel. As laid out in Judge Harper's September 12, 2016, Order: "Plaintiff is not a criminal defendant. Plaintiff in this litigation is not involved with any issue or claim that entitled him to an attorney at public expense. His legal abilities as a pro se litigant are not markedly inferior or deficient as compared to other pro se litigants. Plaintiff understands and comprehends these proceedings." CP 39.

The trial court did precisely what it was required to do. It considered the facts and circumstances—which it was in the best position to do—and exercised very reasonable discretion. Its orders should stand.

report, review of responsive materials and oral argument, the Superior Court dismissed all causes of action except for quiet title, declaratory judgment and attorney's fees. CP 869.

In granting the April 26, 2016 motion to dismiss, the court followed the recommendations of the Litigation Guardian. Mr. Erickson does not identify how it was error for the court to follow the Litigation Guardian's recommendation. Even though the result was not one which Mr. Erickson may be pleased with, it was not error for the court to rely on a report that a litigation guardian was put in place to make.

What is more, Mr. Erickson presented materials in response to the motion, thereby converting it into one under CR 56. *See* CR 12(b)(7). No admissible evidence supporting a cause of action was found, in law or fact, which furnished an alternative basis for the trial court's order.

It should be affirmed.

2. The Utility Pole and Wire

Mr. Erickson's brief appears to assert that the court improperly dismissed claims relating to the utility pole/lines against the City. Even though no error is assigned to the order dismissing the claim, there is no evidence presented to the contrary and the Superior Court's ruling should be affirmed.

D. The Superior Court did not err in dismissing Mr. Erickson's Claims In Accordance With the Recommendation of the Litigation Guardian, including Mr. Erickson's claim regarding utility poles/lines.

1. Mr. Erickson Fails to Identify an Error in Following Litigation Guardian's Recommendations.

Mr. Erickson assigns error to the Superior Court's order dismissing claims and lifting the stay, but fails to identify the error. Pursuant to Mr. Erickson's own request for accommodation, the Superior Court appointed a Litigation Guardian tasked with creating a report for the Court as to which claims in the Complaint have merit and which claims do not. CP 447, 981. Specifically, the Litigation Guardian was to review the pleadings in the matter, and conduct research necessary to make a determination "whether any of Mr. Erickson's claims have merit and/or whether it is in his best interests to proceed with the lawsuit." CP 447. Mr. Erickson was fully aware of the litigation guardian's role.

The Litigation Guardian determined that Mr. Erickson's claims against certain defendants lacked merit and that they should be dismissed. Mr. Erickson stipulated to dismissal of said defendants. CP 973.

It was further determined by the litigation guardian that only Mr. Erickson's claim to a reversionary right to property adjacent to his Property, and to the extension of the boundary lines of his Property should be addressed. CP 984. After consideration of the Litigation Guardian's

Mr. Erickson appears to argue on appeal that his claims in relation to a utility pole and/or wire for trespassing on the property should not have been dismissed. From a *factual* perspective, there is no admissible evidence of this. *See Pierce v. Ne. Lake Washington Sewer & Water Dist.*, 123 Wn.2d 550, 563-64, 870 P.2d 305, (1994) (burden to prove ownership of property is on the party asserting it). And from a *legal* perspective, it is not colorable. *McCullough v. Interstate Power & Light Co.*, 163 Wash. 147, 148, 300 P. 165 (1931) (“In this state the transmission of electric energy over a power line in a city street for the purpose of furnishing light, heat, and power to the public does not create an added burden for which the abutting property owner is entitled to compensation.”).

But even if factually and legally supportable, the utility pole at or near plaintiff’s property was placed in 2003.¹⁰ This lawsuit was brought in 2015. A prescriptive right has ripened, foreclosing a trespass or inverse condemnation. Adverse possession occurs when there is an entry or use of land that is (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile. *Chaplin v. Sanders*, 100 Wash.2d 853, 857, 676 P.2d 431 (1984). The statutorily prescribed period for adverse possession is ten years. RCW 4.16.020; *ITT Rayonier, Inc. v. Bell*, 112 Wash. 2d 754, 757, 774 P.2d 6 (1989).

¹⁰ *See* CP 1087 (granting of utility easement to City on June 4, 2003).

A pole is plainly there to be seen. When, as here, “objects are open and visible on the land, they will be known or discoverable.” Stoebuck and Weaver, 17 Wash. Prac., Real Estate § 8.11 (2d ed. 2015). It has been in place continuously, and, according to Mr. Erickson’s allegations, without his consent, for over 10 years. The land is subject to adverse possession.

Assuming that the pole does belong to the City—as plaintiff claims—the City has had a right to maintain that pole since, at least, June 2013. Trespass and takings fail. As such, the order dismissing claims should be reaffirmed.

E. The City Respectfully Requests An Award Of Reasonable Fees and Costs Pursuant To RAP 18.9 and RCW 4.84.185

RAP 18.9(a) authorizes the appellate court, on motion of a party, to order a party who files a frivolous appeal “to pay terms or compensatory damages to any other party who has been harmed.” RAP 18.9(a); *Kinney v. Cook*, 150 Wn. App. 187, 195, 208 P.3d 1 (2009). “Appropriate sanctions may include, as compensatory damages, an award of attorney fees and costs to the opposing party.” *Yurtis v. Phipps*, 143 Wash.App. 680, 696, 181 P.3d 849 (citing *Rhinehart v. Seattle Times, Inc.*, 59 Wn. App. 332, 342, 798 P.2d 1155 (1990)). “An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ

and that it is so devoid of merit that there is no possibility of reversal.”
Lutz Tile, Inc. v. Krech, 136 Wn. App. 899, 906, 151 P.3d 219 (2007).

This appeal fits the bill in every conceivable way. As discussed above, Mr. Erickson’s arguments are belied by the plain language of Washington statute and nearly a century of case law. And his arguments are not even directed at those problems; they are focused on other concerns, which do not support relief. Worse, when these defects are raised to him, he ignored the overture and proceeded to proliferate the litigation even more aggressively and needlessly—and now in spite of clear guidance from a respected superior court judge. Mr. Erickson is a pro se litigant, to be sure, but the rules draw no distinction. *See, e.g., Harrington v. Pailthorp*, 67 Wn. App. 901, 911, 841 P.2d 1258 (1992). He is held to the same objective standard as an attorney; and a reasonable attorney would know better than to pursue this discretionary appeal. This is especially true at this juncture, with Mr. Erickson have had guidance from (1) the defendants’ correspondence and briefing; (2) the trial court’s orders and admonitions; (3) an earlier sanctions order; and (4) two failed discretionary appeals. Even giving Mr. Erickson every benefit of every doubt, this appeal never should have happened.

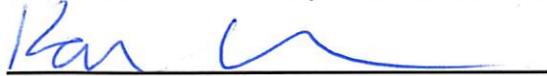
In hopes of defraying the cost burden of this unnecessary appeal—and perhaps deterring future baseless filings—the City respectfully

requests that the Court enter an Order granting it reasonable costs and fees incurred in defending this appeal.

V. CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court affirm the Superior Court's rulings and grant the City an award of reasonable fees and costs incurred in prepare this brief.¹¹

RESPECTFULLY SUBMITTED this 10th day of October, 2017.



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¹¹ Should the Court grant this relief, the City will promptly file a supported fee petition setting forth its expenditures.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on 10th day of October, I caused a true and correct copy of the foregoing document, “**RESPONDENT CITY OF PORT ANGELES'S BRIEF,**” to be delivered in the manner indicated below to the following:

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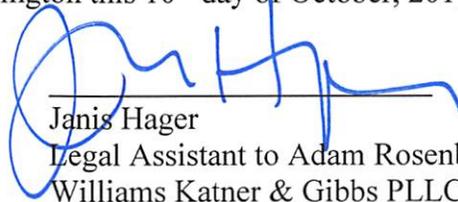
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