No. 93062-7

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

D. NORMAN FERGUSON and KAREN FERGUSON,

Appellants,

and

ALLEN McKENZIE and JANE McKENZIE,

Respondents.

ANSWER TO PETITION FOR REVIEW

MASTERS LAW GROUP, P.L.L.C.
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033
Attorney for Respondents

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INTRODUCTION

Respondents Bruce and Jane McKenzie granted their former neighbor Christopher Slye permission to minimally intrude on their undeveloped parcel when he constructed his residence in 1987. The construction slightly disturbed some vegetation on the McKenzies' parcel. Slye – the only neutral person who testified – agreed with the McKenzies that any damaged area regrew after construction ceased. The area was never cleared, and after construction it was again covered with native northwest vegetation – grasses, scrub brush, trees, blackberries and the like.

The Ferguson's adverse possession claim relied largely on inconclusive photos purporting to show that Slye cleared and maintained what came to be called the "disputed strip" until he sold to the Fergusons. Unpersuaded by the photos, the trial court entered detailed findings rejecting the Ferguson's claims. The court specifically found Jane McKenzie's and Slye's testimony credible.

The appellate court unanimously affirmed the ruling on the merits, declining to review the trial court's credibility determinations and reweigh the photographs it found unpersuasive. Two appellate judges awarded fees, holding that the appeal was frivolous. Where neither holding presents a conflict, this Court should deny review.

RESTATEMENT OF ISSUES

1. Where this Court and the appellate courts have awarded fees for a frivolous appeal absent a unanimous decision on the fee award, are the Fergusons incorrect that a conflict exists?

2. Where this Court and the appellate courts have repeatedly held that appellate courts do not review credibility determinations or reweigh evidence to reach a conclusion the trial court rejected, are the Fergusons incorrect that a conflict exists?

STATEMENT OF THE CASE

Jane and Bruce McKenzie's Bainbridge Island home partially abuts a large, undeveloped parcel they also own. RP 219-20, 225. The McKenzies' undeveloped parcel is densely vegetated with trees and shrubs typical to the area, including firs, alders, Madrona, holly, blackberry, Scotch Broom and other shrubs. RP 32-33, 75, 85, 86, 105, 224-25, 228, 250, 315-16. Jane often walked the property line near what came to be the disputed strip.[1] RP 226.

After purchasing an undeveloped parcel adjacent to the McKenzies in 1986, Christopher Slye asked permission to intrude on their undeveloped parcel while he constructed his residence. RP 74,

[1] First names are used to avoid confusion. No disrespect is intended.

75-76, 90, RP 240, 317-18. Jane gave Slye permission to intrude on the McKenzies' property for construction purposes, and Slye did so, minimally disturbing some vegetation on a small area of the disputed strip. RP 43, 90. Jane was well aware of Slye's minor encroachment, which was necessary for construction. RP 240, 317-18.

Other than a small area disturbed by construction dirt and debris, the disputed strip remained "completely overgrown, lush vegetation, trees and shrubs." RP 250, 318. Slye did not "clear" the disputed strip, plant anything on it, or otherwise change it. RP 82, 89-90, 92. He "allowed the vegetation to grow" and it grew. *Id.*

Slye lived in the home he constructed until he sold it to Norman Ferguson in 1994. RP 41, 92, 119. While Slye lived there, and for over ten years after Norman moved in, the McKenzies saw no indication that vegetation was being removed from the disputed strip.[2] RP 251-52, 324. It was not until late 2006 or early 2007 that Jane first noticed a "substantial clearing" in the disputed strip. RP 254-55.

In 2011, the McKenzies had a fence installed along the survey line, six-inches onto their property. RP 269, 325. The Fergusons filed

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

a complaint on June 3, 2011, claiming adverse possession from Norman's purchase date in 1994 to 2004. CP 3, 541, FF 2.

The Fergusons claimed that during that 10-year period, the disputed strip was cleared, while Slye (and the McKenzies) countered that the strip was covered in thick natural brush, typical of undeveloped property in the Pacific Northwest. CP 542, FF 11. The Fergusons argued that they landscaped the disputed strip and used it for storage and for backyard activities. CP 542, FF 10. The McKenzies countered that they walked the area and observed no evidence of these activities taking place in the disputed strip. *Id.*

After a bench trial, the trial court entered a judgment quieting title in the McKenzies, along with lengthy and detailed findings of fact and conclusions of law. CP 540-53. The findings begin by stating that the Ferguson's adverse possession claim was factual and that since "[t]he parties have asserted many contradictory facts . . . this [c]ourt has carefully considered the credibility of the witnesses." CP 542, FF 9. The court found credible Jane's testimony that she witnessed Slye's construction, finding "[i]t 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. The court was persuaded that the McKenzies permitted Slye to encroach on their property in the construction phase, 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." *Id.*

The trial court also found Slye's testimony regarding Norman's purchase of the property more credible than Norman's testimony. CP 543, FF 14. The court noted that while they criticized Slye's testimony, the Fergusons failed to produce any non-party testimony. CP 550-51, FF 34. This weakened the Fergusons' heavily fact-dependent adverse-possession claim. *Id.*

Finally as to credibility, the trial court entered seven findings addressing the Fergusons' efforts to improve their property after they had supposedly adversely possessed the disputed strip in 2004. CP 546-49, FF 23-29. From 2006 to 2010, the Fergusons held themselves out as owning their legal parcel only, and took other action inconsistent with their claimed adverse possession. *Id.* The

court admitted this evidence, ruling that "it goes to the credibility of the witness." RP 165.[3]

The trial court also painstakingly considered and rejected the Fergusons' claims that photographs taken during Slye's construction show a clearing in the disputed strip. CP 544-45, FF 17. Where the photos depicted "only partial areas of the disputed strip . . . [i]t is impossible to conclude that the whole disputed strip was cleared and planted." *Id.* But in any event, photos taken during construction do not show what the area looked like six or seven years later when Ferguson purchased in 1994, the date their adverse-possession claim began. CP 541, FF 2; CP 544-45, FF 17

Continuing, the court found that photos purporting to show cleared and cultivated areas in the disputed strip are "ambiguous as to the angle and depth and of limited value in drawing definitive and reliable conclusions." CP 545-46, FF 20. The photos simply were not dispositive. *Id.*

In an unpublished opinion, the appellate court unanimously affirmed on the merits, rejecting the Fergusons' requests to reweigh

[3] This is consistent with ***Riley v. Andres***, 107 Wn. App. 391, 397-98, 27 P.3d 618 (2001) (holding that a would-be adverse possessors' statement that they do not own the disputed parcel bears on their credibility).

photographs and revisit credibility determinations. ***Ferguson v. McKenzie***, No. 46774-7-II at 10 (2016) ("many of the Fergusons' challenges to the trial court's findings essentially ask us to reweigh the evidence and to evaluate the credibility of witnesses. We do not substitute our judgment for that of the trial court's regarding witness credibility or evidentiary weight) (citing ***Quinn v. Cherry Lane Auto Plaza, Inc.***, 153 Wn. App. 710, 717, 225 P.3d 266 (2009)). Two judges awarded the McKenzies fees under RAP 18.9, while the third dissented only on the fee award. Unpub. Op. at 15-17. The Fergusons seek review of the fee award alone. Pet. at 5.

ARGUMENT

A. The Fergusons overlook cases from this Court and the appellate courts awarding fees for a frivolous appeal absent unanimity.

The Fergusons repeatedly suggest that appellate courts may not award fees under RAP 18.9 where the court is unanimous on the merits, but divided on the fee award. Pet. at 2, 5, 18-19. The Fergusons fail to address decisions from this Court and the appellate courts awarding fees under RAP 18.9 absent unanimity on the fee award. ***Boyles v. Dep't of Ret. Sys.***, 105 Wn.2d 499, 506-08, 716 P.2d 869 (1986) (awarding fees under RAP 18.9 over a dissent on the fee award); ***Suarez v. Newquist***, 70 Wn. App. 827, 855 P.2d

1200 (1993) (reversing and remanding for the imposition of sanctions under CR 11 over a dissent on the same); ***In re Marriage of Healy***, 35 Wn. App. 402, 406, 667 P.2d 114 (1983) (awarding fees under RAP 18.9 over a dissent on the fee award).

It is simply incorrect to suggest that Judge Bjorgen's dissent on the fee award is reason to accept review and reverse. Pet. at 2, 3, 17-18. The appellate majority is consistent with the above cases from this Court and the Court of Appeals. Since there is no conflict, this Court should deny review.

B. The appellate court correctly awarded fees for a frivolous appeal.

1. The standard for fees under RAP 18.9 is not contested. (Pet. at 7-12).

The Fergusons dedicate much of their Petition to addressing the standard for awarding fees under RAP 18.9. Pet. at 7-12 (addressing ***Streater v. White***, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980). This point is uncontested. The McKenzies' fee request was based on ***Streater***, *supra*. BR 43-46.

2. The Fergusons' appeal was nothing more than challenges to numerous unfavorable credibility determinations and decisions regarding the weight given to the evidence. (Pet. at 12-13).

The Fergusons repeatedly suggest that the fee award is improper because adverse possession cases present mixed

questions of law and fact. Pet. at 2, 5, 11-12. The Fergusons ignore the trial court's correct and unchallenged finding that "the dispute in this case was factual." CP 93, FF 4. And the Fergusons' appeal did not raise a legal question, as they did not address whether the established facts satisfied the elements of adverse possession. BA 26-33; *see also* BA 25 setting forth the substantial evidence standard of review applied to challenged findings of fact). Rather, their appeal asserted that the findings lacked adequate evidentiary support. *Id.* That is, of course, a factual question.

The Fergusons relatedly argue that "where courts have granted an award of sanctions under RAP 18.9, the standard of review on the underlying claim was a purely factual one, an abuse of discretion." Pet. at 12. Again, the Fergusons' appeal was "purely factual" – they asked the appellate court to disbelieve testimony the trial court found credible, to believe testimony the trial court found not credible, and to review photographs to arrive at a conclusion that the trial court rejected. BR 25, 29-42; Unpub. Op. at 10, 11-14, 16. The appellate court correctly declined to "substitute [its] judgment for that of the trial court's regarding witness credibility or evidentiary weight." Unpub. Op. at 10 (citing ***Quinn v. Cherry Lane Auto Plaza, Inc.***, 153 Wn. App. 710, 717, 225 P.3d 266 (2009)).

This is consistent with scores of cases holding that appellate courts do not review credibility determinations. *See e.g.,* ***Morse v. Antonellis***, 149 Wn.2d 572, 574-75, 70 P.3d 125 (2003) (holding that "credibility determinations are solely for the trier of fact") (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). It is also consistent with numerous holdings that appellate courts will not "reweigh or rebalance competing testimony and inferences." ***Bale***, 173 Wn. App. at 458; ***Quinn***, 153 Wn. App. at 717.

Instead, the appellate court defers to the trial court's factual determinations, even when it may have resolved a factual dispute differently. ***Bale***, 173 Wn. App. at 458. This is "especially true" where, as here, "the trial court finds the evidence *unpersuasive*." 173 Wn. App. at 458 (emphasis original). It "invades the province of the trial court for an appellate court to *find compelling that which the trial court found unpersuasive*." ***Bale***, 173 Wn. App. at 458 (quoting ***Quinn***, 153 Wn. App. at 717) (emphasis ***Bale***).

In short, the appellate decision is consistent with scores of cases holding that appellate courts "are constitutionally prohibited from substituting [their] judgment for that of the trial court in factual matters." ***Streater***, 26 Wn. App. at 434-435 (citing ***Thorndike v.***

Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 183 (1959)). There is no conflict here.

3. *Bering v. SHARE* does not turn the Fergusons' factual appeal into a legal one. (Pet. at 12-14).

Attempting to recast a factual appeal as one presenting a legal question, the Fergusons argue that they "asked the appellate court to review more than evidence and credibility, they requested the court review the objective graphic evidence under what Fergusons-Petitioners argued as its interpretation of the ***Bering*** rule." Pet. at 13 (referring to ***Bering v. SHARE***, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)). This grossly overstates the Ferguson's reliance on ***Bering*** before the appellate court. But the appellate decision is consistent with ***Bering*** in any event. This Court should deny review.

For the first time in their Reply brief, the Fergusons cited ***Bering*** for the proposition that "an appellate court is not necessarily bound by the trial court's findings when based *solely* on written or graphic evidence." Reply at 4-5 (quoting 106 Wn.2d at 220). Without elaboration – or support – the Fergusons later suggested that ***Bering*** may allow appellate courts to review credibility determinations. Reply at 20. ***Bering*** is now a principal basis of the Fergusons' Petition. Pet. at 3, 4, 5, 6, 13, 14, 15.

Although the argument was not articulated in their opening or reply briefs on appeal, the Fergusons now claim that they raised a legal question, asking the appellate court "to extend ***Bering*** to review on appeal of all photographic evidence." Pet. at 14. But the Fergusons' appeal was not "of all photographic evidence." *Id.* Again, the Fergusons asked the appellate court to review the trial court's many credibility determinations, directly implicating the live testimony before the trial court. Unpub. Op. at 10, 11-14, 16. It is simply incorrect to suggest that the Fergusons were only asking the appellate court to review photographs. Pet. at 14. Nor could ***Bering*** logically permit an appellate court to ignore the live testimony before the trial court and review "documentary evidence" in a vacuum.

Further, the ***Bering*** Court already rejected the "extension" the Fergusons purportedly sought on appeal. Pet. at 13. In ***Bering***, the trial court entered findings supporting a permanent injunction, based on live testimony, affidavits, and photographs. 106 Wn.2d at 219-20. On appeal, SHARE asked this Court to "substitute its findings for those of the trial court because the trial court based its findings in part on affidavits and photographs." *Id.* at 220. This Court refused, distinguishing ***State v. Rowe***, in which "the trial court's findings

stem[med] exclusively from the stipulation and attached standards rather than from the testimony of witnesses"[4]:

> Although this court is not necessarily bound by the trial court's findings when based *solely* upon written or graphic evidence, ***State v. Rowe***, 93 Wn.2d 277, 609 P.2d 1348 (1980), the trial court in this case also considered considerable live testimony during a daylong show cause hearing. Accordingly, because the rule enunciated in ***State v. Rowe***, *supra*, does not apply, this court must affirm the trial court's findings if supported by substantial evidence.

(*Id.* at 220-21).

Bering does not support the Ferguson's position. Together, ***Rowe*** and ***Bering*** provide that appellate courts must defer to findings supported by substantial evidence unless they are based "*solely* upon written or graphic evidence." *Id.* ***Bering*** makes clear that the rule enunciated in ***Rowe*** does not apply where, as here, the court also hears live testimony. *Id.*

The Fergusons' reliance on ***Scott v. Harris*** is similarly misplaced. Pet. at 16 (citing 550 U.S. 372; 127 S. Ct. 1769; 167 L. Ed. 2d 686 (2007). In ***Scott***, the Court relied on videotape evidence to reverse an order denying summary judgment. 550 U.S. at 380-81. But since the matter was decided on summary judgment, no findings were entered – or testimony taken. *Id.* ***Scott*** is inapposite.

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[4] ***Rowe***, *supra*, at 280.

In sum, the appellate court correctly held that ***Bering*** does not apply:

> In this case, the trial court heard extensive testimony. It clearly did not rely solely on written or graphic evidence. It clearly found that the photographs were susceptible to more than one interpretation. It clearly relied on the testimony and weighed the credibility of the witnesses and their testimony. Accordingly, *Bering*'s rule is inapplicable to this case.

Unpub. Op. at 11. Since the appellate court held that the findings are supported by substantial evidence (unchallenged here), it correctly affirmed. *Id.* at 11-14. This is consistent with ***Bering*** and ***Rowe*** – and scores of other cases.

4. The appellate majority awarded fees under RAP 18.9. (Pet. at 17-19).

The Fergusons argue that the appellate majority failed to apply ***Streater*** to the Fergusons' appeal "as a whole." Pet. at 17-18 (citing ***Streater***, 26 Wn. App. at 434-35). That is false. The appellate majority was well aware of the controlling law and correctly applied it. Unpub. Op. at 15-16. This Court should deny review.

While the Fergusons now spend most of their time on ***Bering***, it was barely mentioned on appeal. *Supra*, Argument § B 3. Instead, the appeal did nothing more than challenge findings that were supported by substantial evidence. Unpub. Op. at 16. What made the appeal frivolous was that in addition to being entirely factual, the

challenges to the findings were prefaced on the Fergusons' request that the court "reweigh the evidence and reevaluate the credibility of witnesses" – both tasks that appellate courts do not perform. *Id.* The Fergusons failed to adequately argue their only other assignment of error, a point they do not contest. *Id.* Thus, the Fergusons' appeal was "so devoid of merit that there [was] no reasonable possibility of reversal." Unpub. Op. at 15 (quoting ***Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd.***, 170 Wn.2d 577, 580, 245 P.3d 764 (2010)).

The appellate majority addressed the controlling law on fee awards under RAP 18.9. *Id.* at 15-16. It applied the law to the only two arguments the Fergusons raised. *Id.* at 16. Nothing more is required.

As discussed above, Judge Bjorgen's dissent on the fee award is not a basis for setting it aside. Pet. at 18-19. There is no legal support for the Fergusons' suggestion that a fee award under RAP 18.9 requires unanimity, and cases from this Court and the appellate court demonstrate otherwise. *Supra*, Argument § A.

And the Fergusons misconstrue the law in suggesting that a dissent means that "reasonable minds actually did differ." Pet. at 19. The issue is whether the Fergusons' appeal presented "debatable

issues upon which reasonable minds might differ." Unpub. Op. at 15 (quoting ***Advocates***, 170 Wn.2d at 580). The appellate court unanimously rejected the "issues" the appeal presented.

Finally, a fee award under RAP 18.9 does not present an issue of substantial public interest warranting this Court's review. Pet. at 19. Fee awards for a frivolous appeal are exceedingly rare. And the appellate court's unpublished decision has no precedential value. It is simply incorrect to suggest that the decision will effect a significant portion of the public. *Id.*

C. The Court should award fees for responding to the petition.

RAP 18.1(j) permits this Court to award fees incurred in preparing the answer to a petition for review where the appellate court awards fees to the prevailing party and this Court subsequently denies the petition for review. ***Manary v. Anderson***, 176 Wn.2d 342, 362, 292 P.3d 96 (2013). Fees are appropriate where the McKenzies are forced to continue litigating the Fergusons' frivolous claims. A fee award would also be consistent with the statutory amendment allowing the courts to award fees to prevailing parties in adverse possession cases filed on or after July 1, 2012. RCW 7.28.083(3).

CONCLUSION

The appellate decision is entirely consistent with decisions from this Court and the Court of Appeals, and presents no questions of significant public interest. This Court should deny review.

RESPECTFULLY SUBMITTED this 23rd day of June, 2016.

MASTERS LAW GROUP, P.L.L.C.

Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE

I certify that I caused to be mailed via U.S. mail, postage prepaid, and/or emailed, a copy of the foregoing ANSWER TO PETITION FOR REVIEW on the 27th day of June, 2016 to the following counsel of record at the following addresses:

Co-counsel for Respondents
Gary Chrey
Mike Uhlig
SHIERS LAW FIRM
600 Kitsap Street - Suite 202
Port Orchard, WA 98366-5397

___ U.S. Mail
_✓_ E-Mail
___ Facsimile

Counsel for Appellants
Joseph A. Grube
Karen K. Orehoski
Breneman Grube Orehoski, PLLC
1200 Fifth Avenue, Suite 625
Seattle WA 98101

___ U.S. Mail
_✓_ E-Mail
___ Facsimile

Counsel for Appellants
Cynthia Jones
Jones Legal Group, LLC
1425 Broadway, Suite 544
Seattle WA 98122

___ U.S. Mail
_✓_ E-Mail
___ Facsimile

Shelby R. Lemmel, WSBA 33099
Attorney for Respondents

RCW 7.28.083

Adverse possession—Reimbursement of taxes or assessments—Payment of unpaid taxes or assessments—Awarding of costs and attorneys' fees.

(1) A party who prevails against the holder of record title at the time an action asserting title to real property by adverse possession was filed, or against a subsequent purchaser from such holder, may be required to:

(a) Reimburse such holder or purchaser for part or all of any taxes or assessments levied on the real property during the period the prevailing party was in possession of the real property in question and which are proven by competent evidence to have been paid by such holder or purchaser; and

(b) Pay to the treasurer of the county in which the real property is located part or all of any taxes or assessments levied on the real property after the filing of the adverse possession claim and which are due and remain unpaid at the time judgment on the claim is entered.

(2) If the court orders reimbursement for taxes or assessments paid or payment of taxes or assessments due under subsection (1) of this section, the court shall determine how to allocate taxes or assessments between the property acquired by adverse possession and the property retained by the title holder. In making its determination, the court shall consider all the facts and shall order such reimbursement or payment as appears equitable and just.

(3) The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.

[2011 c 255 § 1.]

NOTES:

Application—2011 c 255: "This act applies to actions filed on or after July 1, 2012." [2011 c 255 § 2.]

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Cc: Shelby Lemmel <shelby@appeal-law.com>; 'Cynthia Jones' <cjones@joneslegalgroup.net>; chrey@shierslaw.com; joe@bgtrial.com; karen@bgtrial.com; Mike Uhlig <Uhlig@shierslaw.com>
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Attached please find the following document filed on behalf of Respondents, Allen and Jane McKenzie:

Answer to Petition for Review.

Case Name: D. Norman Ferguson and Karen Ferguson v. Allen McKenzie and Jane McKenzie
Case No. 93062-7
Counsel for Respondents
Masters Law Group, PLLC
Shelby R. Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
shelby@appeal-law.com

Thank you,

Jaimie

Jaimie M.L. O'Tey
Appellate Paralegal

MASTERS LAW GROUP PLLC
241 Madison Avenue
Bainbridge Island, WA 98110
(206) 780-5033
www.appeal-law.com