IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 93062-7

(Court of Appeals No. 46774-7-II)

D. NORMAN FERGUSON AND KAREN FERGUSON

Petitioners,

v.

ALLEN MCKENZIE AND JANE MCKENZIE,

Respondents.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioners D. Norman Ferguson and Karen Ferguson, the appellants below, ask this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this Petition.

B. DECISION OF THE COURT OF APPEALS

Opinion in *Ferguson v. McKenzie,* 2016 WL 900921 (Div. 2, 2016) filed March 1, 2016, and subsequent denial of motion for reconsideration, filed March 24, 2016. A copy of the decision is in the Appendix at pages A-1 through A-9. A copy of the order denying Fergusons-Petitioners' motion for reconsideration is in the Appendix at page A-10. A copy of the ruling awarding attorney fees and costs (as sanctions under RAP 18.9) is in the Appendix at page A-11.

C. REASONS TO ACCEPT REVIEW

The opinion in *Ferguson v. McKenzie* conflicts with the decisions of this Court, the Divisions of the Court of Appeals and involves an issue of substantial public interest that should be determined by this Court. Review is appropriate under RAP 13.4(b)(1), (2) and (4).

D. ISSUES PRESENTED FOR REVIEW

1. May RAP 18.9(b) sanctions be imposed for an allegedly frivolous issue when an appeal presents:

(a) Review of a debatable legal issue;

(b) The Acting Chief Judge dissents from the decision awarding sanctions because he "cannot agree the Fergusons' [Petitioners'] appeal" is frivolous; and,

(c) The remaining two appellate judges do not apply the analysis set out and adopted by this Court for determining when an appeal is frivolous under RAP 18.9.

2. Whether an appellate court errs when it fails to review an adverse possession claim under the standard of "a question of mixed law and fact" but instead reviews the claim under an abuse of discretion standard to find the appeal frivolous and with one judge dissenting from that frivolous finding.

E. STATEMENT OF THE CASE

1. Introduction

This case started when the Fergusons (Petitioners) disputed a boundary line with their neighbors, the McKenzies. Opinion at 1. The Fergusons sought to quiet title and adjust their property to include a strip of land claimed through adverse possession. After a bench trial, the trial court entered judgment in favor of the McKenzies. *Id.* The trial court did not find the action to be frivolous, and there were no attorney fees awarded. The Fergusons appealed. On March 1, 2016, the trial court's decision was affirmed by the Court of Appeals. Appendix A-1. But the Court of Appeals, with the Acting Chief Judge dissenting, went a step further and by a two-to-one vote sided with the McKenzies that the Fergusons-Petitioners' appeal was frivolous. Opinion at 11. On March 21, 2016, the Fergusons filed a

motion for reconsideration to the appellate court. On March 24, 2016, Judge Melnick and Judge Sutton denied the motion and Acting Chief Judge Bjorgen dissented from the denial of the motion. Appendix A-10. On April 1, 2016, the court commissioner issued a ruling awarding attorney fees and costs. Appendix A-11. The Fergusons-Petitioners now seek acceptance of their petition from this Court for discretionary review.

2. Relevant Facts

On June 3, 2011, the Fergusons brought an action seeking to quiet title by way of an adverse possession claim to a disputed strip of land between their property and the McKenzies' property. Opinion at 1. The trial court found the Fergusons did not prove the elements of adverse possession by a preponderance of the evidence. *Id.* Further, the trial court found the McKenzies more credible on issues of contradiction between the parties. *Id.* The Fergusons timely appealed.

In its briefing below, the Fergusons asked the appellate court to review the trial court's findings based on admitted photographic evidence, arguing that under *Bering v. SHARE,* 106 Wn.2d 212, 220 (1986) the appellate court was not bound by the trial court's findings because the findings were inconsistent with the photographic evidence presented at trial and therefore not supported by substantial evidence. Appellants' Reply Brief at 4, 20-21.

Similarly, the Fergusons pointed to specific photographic evidence, for

example Exhibit 42, to argue more than one interpretation of the photographic evidence was possible and that interpretation could be reviewed de novo on appeal. Appellants' Opening Brief at 19, 33. The appellate court included the trial court's finding on this issue in its entirety in the opinion, specifically the trial court's Finding 22. In relevant part, it reads "One could argue that the [disputed] area is cleared through to the trees, as trees can be seen. But one could equally argue that because it is impossible to tell from the picture, specifically as it relates to angle and depth, how much shrubbery has been cleared below the windowsill... [it] is difficult to tell from this exhibit [42]." Opinion at 4.

The appellate court disagreed with the Fergusons on the point of law in *Bering* and found "*Bering*'s rule is inapplicable to this case." Opinion at 8. And, in a two-to-one decision, the appellate court found the "Fergusons' appeal is frivolous because the appeal presented no debatable issues upon which reasonable minds could differ, and each argument the Fergusons presented was so devoid of merit that there is no possibility for reversal." Opinion at 11. The appellate court ultimately awarded, as a sanction under RAP 18.9, $32,992.19 in appellate attorney fees to the McKenzies, plus $317.17 in costs. Opinion at 11; Appendix at A-11.[1]

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1 The Fergusons-Petitioners did not object to the amount of attorney fees requested because the amount of fees supported by affidavit in light of the high level of experience of opposing counsel did not seem unreasonable, rather the Petitioners-Fergusons believe the appellate court's award of

The third judge, Acting Chief Judge Bjorgen, dissented and disagreed that the appeal was frivolous, writing that:

> Although I agree with the majority to affirm the merits of the trial court's decision, I cannot agree that the Fergusons' appeal presents "no debatable issues upon which reasonable minds might differ, and [that the appeal] is so totally devoid of merit that there [is] no reasonable possibility of reversal." *Tiffany Family Tr. Corp. v. City of Kent,* 155 Wn.2d 225, 241, 119 P.3d 325 (2005). Therefore, I dissent from the award of attorney fees to the McKenzies on appeal.

Opinion at 11.

F. ARGUMENTS FOR WHY REVIEW SHOULD BE GRANTED

1. Summary of Argument

The sole issue here is whether this Court should review the award of attorney's fees under RAP 18.9 for the filing of a frivolous appeal. The Fergusons presented a debatable issue below in appealing an adverse possession determination which is a mixed question of fact and law. Moreover, the Fergusons argument was based on a debatable legal interpretation of this Court's decision in *Bering v. SHARE,* 106 Wn.2d 212, 220 (1986) which the appellate court below rejected as a matter of law, not fact. And it is significant that Acting Chief Judge Bjorgen agreed and dissented from the award of fees. Opinion at 11. Simply put, as demonstrated below, the appellate court applied a standard inconsistent with the

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those fees as sanctions under RAP 18.9 on the shoulders of the Fergusons-Petitioners is entirely wrong.

holdings of this Court and other courts of appeal on the proper application of RAP 18.9. And in so doing, the Court of Appeals effectively chilled the right of appeal contrary to this Court's holdings.

The Fergusons do not ask this Court to disturb the appellate court's holding on the merits below or to revisit the credibility determinations or graphic evidence or even the interpretation of the *Bering* rule. Rather they ask this Court to accept review only on the issue of frivolity on whether the Fergusons presented a debatable issue of law in their appeal

2. Imposition of RAP 18.9 Sanctions for an Appeal Containing Debatable Issues Conflicts with Decisions of this Court and All Divisions of the Court of Appeals.

Whether Fergusons-Petitioners' arguments on appeal are without merit to establish grounds for relief, and whether Fergusons-Petitioners' appeal is frivolous are two separate issues—each entitled to the appellate court's attention on appeal. Without the appropriate analysis, the majority's opinion awarding fees cannot stand simply because Fergusons-Petitioners' arguments may be deficient to obtain reversal on appeal. Should it stand, the decision below will conflict with this Court's precedent and all divisions of the Court of Appeals.

Here, while the appellate court cited to proper authority (*Advocates for Responsible Dev. v. W. Wash. Growth Mgmt Hr'gs Bd.* and *Streater v. White*) it did not apply the proper analysis for determination of whether the Fergusons-

Petitioners' appeal was frivolous under the five principles adopted by this Court. Simply citing to authority without applying analysis is in effect ignoring the standard and thus, the decision is in conflict with the decisions of this Court and decisions of the Court of Appeals under RAP 13.4(b) (1) and (2).

a. Legal Authority

i. The Five Principles this Court Considers to Determine Whether an Appeal is Frivolous.

In the case cited to by Acting Chief Judge Bjorgen, *Tiffany Family Tr. Corp. v. City of Kent,* this Court set out the following five principles to guide itself and lower courts when determining whether an appeal is frivolous: (1) a civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant (here, the Fergusons-Petitioners); (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; and (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable probability of reversal. *Tiffany Family Tr. Corp. v. City of Kent,* 155 Wn.2d. 225, 241 (2005) (internal citations omitted).

ii. History of RAP 18.9 and the Subsequent Case Development Adopting the Five Principles.

When RAP 18.9 was first adopted in 1976, along with the sum of the Rules

of Appellate Procedure, the Task Force noted RAP 18.9 was meant to guide courts with the ultimate goal in mind: to reach appellate cases on their merits. "RAP 18.9 reflects a balance between the basic theme of the rules that appellate cases should be heard on their merits, and a recognition that unstructured appeals would be of great inconvenience to the courts[.] 3 Wash. Prac., Rules of Practice RAP 18.9. This guidance from the task force is reflected in the language of RAP 1.2(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 in rule 18.8(b).

At one time, the courts held CR 11 applied at the appellate level under RAP 18.7. (3 Wash. Prac., Rules Practice RAP 18.9). In 1994, RAP 18.7 was amended to remove the reference to CR 11 with the following Author's Comments:

> Civil Rule 11 was designed for use in the superior courts and specifies sanctions for a failure to comply with the rule. (Rule 11 has also generated a great deal of controversy, including arguments that it has spawned "satellite" litigation.) If sanctions are to be imposed at the appellate level, this should be done pursuant to an appellate rule, not a superior court rule. (See the amendment to RAP 18.9.) The amendment to rule 18.7 strikes the reference to CR 11, so that only sanctions under the RAP's will apply.

3 Wash. Prac., Rules Practice RAP 18.7

Despite the removal of CR 11 from the Rules of Appellate Procedure, the

spirit of its application, or more specifically, the Court's refusal to apply it, is instructive here: "[t]he purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system," but "the rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219 (1992).

Soon after RAP 18.9 was adopted in 1976, *Streater v. White,* 26 Wn.App. 430 (Div. 1, 1980) was decided. The *Streater* decision was the first to promulgate all five principles that today guide decisions on whether appeals are frivolous. When laying out those five principles for the first time, the *Streater* court cited to a 1980 Washington State Bar News article (*Id.* at 435) written by the then-Division I Court of Appeals Commissioner, Larry A. Jordan. 34 Wash. St. B. News 46 1980. Commissioner Jordan began his article with these words:

> It might be argued that a frivolous appeal is like pornography: difficult to define but easy to recognize. A frivolous appeal is said to be one "presenting no justiciable question and so readily recognizable as devoid of merit on face of record that there is little prospect that it can ever succeed...or one that "presents no debatable question or no reasonable possibility of reversal, the word [frivolous] meaning of little weight or importance, not worth notice, slight."

Id. (internal citations omitted).

The *Streater* decision concerned an earnest money agreement with an attorney fees clause. *Streater v. White,* 26 Wn.App. at 434. After ruling against the

appellant, the appellate court determined it was constitutionally prohibited from substituting its judgement for that of the trial court in factual matters further stating "[s]ince this is a factual appeal and is totally devoid of merit, we impose $1,000 as terms and sanctions..." *Id.*

The Supreme Court first adopted these five principles in *Millers Casualty Insurance Co., of Texas v. Briggs,* 100 Wn.2d 9 (1983). There, two insurance companies battled over paying the insured following a car accident. This Court found the Texas insurance company used the appellate process for purposes of delay under RAP 18.9 and awarded PEMCO terms and compensatory damages.

Since the *Millers Casualty Insurance Co., of Texas* decision, this Court has repeatedly set out the same five principles to guide it and lower courts when determining whether an appeal is frivolous, including the case cited by dissenting Acting Chief Judge Bjorgen, *Tiffany Family Tr. Corp. v. City of Kent,* 155 Wn.2d 225 (2005).

In *Tiffany Family Tr. Corp. v. City of Kent,* this Court determined a local improvement district (LID) assessment was not a constitutional taking because the family trust failed to follow the proper statutory procedures to challenge the LID assessment. The city of Kent asked this Court to find the family trust's appeal frivolous. Even though the family trust's claims were without merit, this Court refused to find the appeal frivolous after considering the five principles set out in

Streater because "the parties set forth debatable issues." 155 Wn.2d at 241 (*citing Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Personnel Bd.*, 107 Wn.2d 427, 442–43 (1986) (*quoting Streater v. White*, 26 Wn.App. 430, 434–35 (Div. 1, 1980)).

Five years later, this Court again cited to those same five principles in *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 170 Wn.2d 577, 580 (2010). There, in a *per curiam* decision, this Court reversed the Court of Appeals imposition of sanctions. The Court of Appeals awarded attorney fees and sanctions pursuant to RAP 18.9(a) because the appellate court found frivolous the argument that the president of a non-profit had standing to represent the non-profit in court. This Court, applying the five principles for determining when an appeal is frivolous (citing to *Tiffany Family Trust Corp.*) reversed, finding the Court of Appeals erroneously imposed sanctions under RAP 18.9 for filing a frivolous appeal asserting that "While we do not hold that the argument [of Petitioner] has merit, it is not so totally devoid of merit as to be frivolous." *Id.*

Finally, in a review of Washington cases, Fergusons-Petitioners could find no opinion whereby a court granted fees under RAP 18.9 in an adverse possession action even though the prevailing party so requested. *See Daubner v. Mills*, 61 Wn.App. 678, 684-85 (Div. 3, 1991) (denial of request for sanctions under RAP 18.9 (resolving all doubts in favor of appellant from an adverse possession action,

court "cannot say her appeal presented no debatable issues or possibility of reversal"); *Proctor v. Huntington*, 146 Wn.App. 836, 854 (Div. 2, 2010) (denial of request for sanctions under RAP 18.9 in cross-appeal of adverse possession claim because cross-appellants cited to cases in which easements by estoppel discussed favorably).

b. The Fergusons Appealed an Issue of Mixed Law and Fact.

As discussed *supra,* Fergusons-Petitioners could find no opinion where the courts have awarded attorney fees as sanctions under RAP 18.9 for a frivolous appeal where the underlying claim was an adverse possession action.

In cases 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. For example, in *Streater,* also discussed *supra,* the appellate court considered the bounds of an earnest money agreement and found it an "essentially factual appeal" and that the record did not indicate the "trial court abused its discretion in setting the amount to be awarded [for specific performance pursuant to the earnest money agreement]." *Streater v. White,* 26 Wn.App. at 434-35. The appellate courts should be especially reluctant to issue sanctions for filing a frivolous appeal where the issue on appeal is a mixed question of law and fact, rather than of essentially of fact. The Acting Chief appellate judge's dissent from the award of attorney fees under RAP 18.9 reflects the appropriate reluctance.

Further, the Fergusons-Petitioners requested the appellate court to review photographic evidence de novo in light of the legal principle articulated in *Bering v. SHARE*. Rather than treating that issue as a legal question regarding the application of *Bering v. SHARE*, the appellate court wrongly asserted "the findings challenged were prefaced on [Fergusons-Petitioners'] request" to reweigh the evidence and reevaluate credibility.

More specifically, the Fergusons-Petitioners here 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. Opinion at 7. As this Court noted in *Bering*: "this court is not necessarily bound by the trial court's findings when based solely upon written or graphic evidence" 106 Wn.2d 212, 220 (1986) *citing State v. Rowe*, 93 Wn.2d 277 (1980). In *Rowe*, this Court noted: "Where the interpretation of a document must be made from the face of the instrument itself, this court is in as good a position as the trial court to interpret its meanings." *Id.* at 280. The rationale of these conclusions is that certain types of evidence – including the photographic evidence at issue here – can be reviewed de novo on appeal as a basis for overturning a trial court decision as not based on substantial evidence.

The appellate court below refused to apply the *Bering* holding here because the evidence below comprised both testimonial and photographic evidence. The

court in effect rejected the Fergusons-Petitioners request to extend *Bering* to review on appeal of all photographic evidence. The argument advanced by Fergusons-Petitioners, however, was at least debatable and more significantly was a debatable issue of law, not of fact.

Unlike *Streater,* the appellate court here reviewed, addressed, and distinguished an issue of law in its opinion. Simply stated, the appellate court asserted a legal opinion on the interpretation of case law when it stated that the Fergusons-Petitioners misapprehended the *Bering* rule. Opinion 7-8. The argument related to *Bering* advanced by the Fergusons-Petitioners had not been previously squarely rejected and thus was at least debatable.

The appellate court erred in its determination that the appeal contained no debatable issues upon which reasonable minds could differ and it erred in awarding appellate attorney fees as sanctions under RAP 18.9 in the amount of $32,992.19 - a substantial sum considering the sanctions in today's dollars of roughly $2,900 awarded in the *Streater* case.

Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd., 170 Wn.2d 577, 580 (2010), where this Court declined to award attorney fees under RAP 18.9, is very similar to the Fergusons-Petitioners case. There, the Court of Appeals Division Two awarded attorney fees as sanctions under RAP 18.9 because it found frivolous the argument that the president of a non-profit could represent

the non-profit in court. This Court reversed, citing to a case outside its jurisdiction to find that "at least one court in a foreign jurisdiction has allowed non-attorney representation of an environmental organization where the lay representative shared a common interest with the organization." *Id.* (internal citations omitted). This Court went on to say,

> While we do not hold that the argument has merit, it is not so totally devoid of merit as to be frivolous. Moreover, even if the issue was frivolous, it did not alone justify the Court of Appeal in awarding sanctions under RAP 18.9(a) because the court specifically acknowledged that the issue of [the representative's] personal standing was not frivolous. Raising at least one debatable issue precludes finding that the appeal as a whole is frivolous.

Id.

In keeping with *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, here the Fergusons-Petitioners' argument may not have merit - but it is not so totally devoid of merit as to be frivolous. Regardless whether other parts of the Fergusons-Petitioners appeal were frivolous, raising at least one debatable issue precludes finding that the appeal as a whole is frivolous.

Further, the Fergusons-Petitioners raised, at a minimum, at least one debatable issue, that the graphic evidence relied on by the trial court could be reviewed de novo on appeal under the *Bering* rule. Although the appellate court disagreed, this position is not a position totally devoid of merit and is an issue of

great importance in an era where a large portion of society now has the ability to take pictures and videos with their mobile phones. The U.S. Supreme Court, among others, has even reviewed and relied on video evidence (de novo) and given it greater weight than conflicting testimony. *See Scott v. Harris*, 550 U.S. 372, 380-81, 127 S. Ct. 1769, 1776, 167 L. Ed. 2d 686 (2007) ("Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such a visible fiction; it should have viewed the facts in the light depicted by the video tape."). *See also* Leah A. Walker, *Will Video Kill the Trial Courts' Star?: How "Hot" Records will Change the Appellate Process*, 19 ALB. L.J. SCI & TECH. 449, 473-74 (2009) (lamenting that appellate courts show less deference to trial courts when there is a video tape).

RAP 18.9 was adopted to guide courts with the ultimate goal in mind: to reach appellate cases on their merits. Here, the underlying claim of adverse possession is anything but a simple cause of action. The standard of review for adverse possession is a question of mixed law and fact, as stated in the opinion below (Opinion at 7). Here, the Fergusons-Petitioners put forth mixed questions of law and fact in their appeal, and argued that the admitted photographic evidence was superior to the conflicting witness testimony. Although the appeal challenged the underlying findings of fact as unsupported by substantial evidence, it was not

a "factual appeal" as in the *Streater* case. Rather as in *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. H'rgs Bd.*, the Petitioners put forth a debatable issue and whether that issue had merit is a different question from whether the appeal as a whole was frivolous.

3. Imposition of RAP 18.9 Sanctions for an Appeal Containing Debatable Issues Chills the Right to Appeal, Triggering an Issue of Substantial Public Interest that should be Determined by this Court.

The appellate court below, with Acting Chief Judge Bjorgen dissenting, awarded sanctions in the form of attorney fees to McKenzies citing RAP 18.1(b), RAP 18.9 and *Streater v. White,* 26 Wn.App. 430, 434-35 (Div.1, 1980). Then the two judge panel identified four of its own reasons for its finding the appeal frivolous: (1) the Appellants (Fergusons-Petitioners) "did not specifically identify the findings of fact they were challenging in their assignments of error"; (2) "the findings challenged were prefaced on [Fergusons-Petitioners'] request" to reweigh evidence and reevaluate credibility; (3) the challenged findings were supported by substantial evidence; and (4) the [Fergusons-Petitioners] failed to adequately argue their second assignment of error in the brief. Opinion at 11. Thus, the two-judge appellate panel did not apply the five principles in *Streater* to the Fergusons-Petitioners' appeal as a whole.

The first three of the five *Streater* principles reflect an implicit understanding that appellants should not be chilled in their right to appeal an

unfavorable trial decision for fear of risking sanctions in the form of thousands of dollars in opposing counsels' fees. The Fergusons-Petitioners clearly have a right to appeal under RAP 2.2; all doubt as to whether this appeal was frivolous should be resolved in favor of the Fergusons-Petitioners and the trial record should be considered as a whole for reasons discussed in §F(b) above.

In considering the fourth principle, this appeal cannot be deemed frivolous simply because the appellate court rejected the Fergusons-Petitioners' arguments as discussed in §F(b) (*supra*). And insofar as the appellate court based its sanctions under RAP 18.9 on Fergusons-Petitioners' failure to include specific assignments of error, the Fergusons-Petitioners made perfectly clear what part of the decision below was being challenged. The courts have (and do) use their discretion to address findings of fact not included in specific assignments of error where the nature of the challenge is apparent from the context of the opening brief.

> Where a party's brief makes perfectly clear what part of the decision below is being challenged, however, the appellate court will overlook the party's failure to specifically assign error to it, particularly when the text of the brief includes the disputed portion.

CalPortland Co. v. LevelOne Concrete, LLC, 180 Wn.App. 379, 392 (Div. 2, 2014); RAP 1.2(a).

Finally, with respect to the fifth principle, the arguments discussed above and Acting Chief Judge Bjorgen's dissent is persuasive to support Fergusons-

Petitioners' position that a debatable issue upon which reasonable minds can differ was presented to the appellate court. Opinion at 11. Reasonable minds actually did differ in the form of the majority and dissenting views in the Opinion.

It follows that should this decision stand, RAP 18.9 will "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." *Bryant v. Joseph Tree, Inc.,* 119 Wn.2d 210, 219 (1992). Chilling a civil litigant's right to appeal is an issue of substantial interest that should be reviewed by this Court.

Accordingly, review is warranted under RAP 13.4(b)(4).

G. CONCLUSION

Petitioner respectfully submits that this Court should grant review on the issue of whether the Fergusons-Petitioners appeal was frivolous.

DATED this 25th day of April, 2016.

Respectfully Submitted,

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APPENDIX

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NOTE: UNPUBLISHED OPINION,
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Court of Appeals of Washington,
Division 2.

D. Norman FERGUSON and
Karen Ferguson, Appellants.
v.
Allen McKENZIE and Jane McKenzie,
husband and wife, Respondents.

No. 46774–7–II.
|
March 1, 2016.

Appeal from Kitsap Superior Court; Hon. Leila Mills, J.

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UNPUBLISHED OPINION

MELNICK, J.

*1 D. Norman and Karen Ferguson appeal the trial court's judgment in favor of Allen and Jane McKenzie, [1] and its denial of the Fergusons' request to quiet title and to adjust the Fergusons' property to include a disputed strip of property claimed through adverse possession. The Fergusons argue that substantial evidence did not support the trial court's findings of fact and irrelevant evidence should have been excluded. We affirm.

FACTS

I. FACTUAL OVERVIEW

In 1987, Christopher Slye built a house on the southern end of Bainbridge Island. In 1994, D. Norman purchased the property from Slye and began residing on it. The next year, he married Karen and together they lived on the property. The Fergusons claimed that since 1994 until the installation of a fence in 2011, they adversely possessed a strip of property where they installed landscape grass, trimmed the grass, and used it for their compost pile, wood chopping, and storage.

The McKenzies own the neighboring parcel east of the Ferguson's property. They reside on another parcel north of the east parcel. The strip of property the Fergusons claimed they maintained is contained within the McKenzie's property description.

The McKenzies built a fence along the surveyed boundary line between their property and the Ferguson property, blocking the Fergusons' access to the disputed strip. Six months after the construction of the fence, the Fergusons initiated an adverse possession claim. On June 3, 2011, the Fergusons brought an action seeking to quiet title to the disputed strip, alleging they adversely possessed the property from June 23, 1994 until approximately June 23, 2004. [2]

II. FINDINGS OF FACT

After a bench trial, the trial court entered written findings of fact and conclusions of law, along with a judgment quieting title in the McKenzies. In its findings of fact, the trial court determined that because the "parties have asserted many contradictory facts ... this [c]ourt has carefully considered the credibility of the witnesses." Clerk's Papers (CP) at 542. The trial court found Slye and the McKenzies to be more credible on all issues of contradiction between the parties, and that ultimately the Fergusons did not prove the elements of adverse possession by a preponderance of the evidence. The trial court's extensive findings, relevant to this appeal follow.

> 10. The Fergusons claim that during the 10–year period at issue, they stored firewood and furniture on the disputed strip, conducted landscaping on the disputed strip, and participated in other backyard activities there. The McKenzies state that they walked their property from time to time and that they observed none of these activities taking place in the disputed strip.
>
> 11. The Fergusons maintain that when they purchased the property from Slye, it was cleared and covered in ornamental plants and grasses. Slye testified that when he owned the property it was covered in thick natural brush, typical of an undeveloped piece of property in the Pacific Northwest.

*2 12. D. Norman Ferguson claims that before purchasing the Ferguson property from Slye, Ferguson and Slye discussed the legal description and the boundary line. The Fergusons claim that Slye identified the boundary as running from a boundary-line marker at the north of the property extending south to the telephone pole. Such a property line would include the disputed strip in the Ferguson parcel.

13. Slye denied this claim. Slye stated that he advised D. Norman Ferguson that there were approximately five feet between the house deck and the legal property line. Slye further stated that he gave D. Norman Ferguson Exhibit D1, a septic system application for permit, during the sale negotiations. The septic system permit application included a plat map of the legal boundaries. D. Norman Ferguson acknowledged receiving only a single page of the septic system permit application, claiming that he did not receive the entire document including the plat map. The Fergusons have not proven by a preponderance of the evidence that D. Norman Ferguson did not receive the entire septic system permit application, including the plat map.

14. On this point, Slye's testimony is more credible than D. Norman Ferguson's testimony. It is reasonable, if not likely, that Slye gave D. Norman Ferguson the entire septic system permit application, as it would make little sense for Slye to provide D. Norman Ferguson with only one page of the document. This Court is persuaded that it is more likely that Slye gave D. Norman Ferguson the entire document rather than just the cover sheet. Thus, it would be a clear contradiction and very unlikely that Slye identified the power pole as the property line marker, as claimed by D. Norman Ferguson. Identifying the power pole as the property line marker would be nonsensical in light of the septic system permit application Slye gave D. Norman Ferguson when they discussed the property line prior to the purchase. To accept the Fergusons' rendition of this representation, Slye would have had to have been unaware of the property line as it legally existed, which is unlikely given its inclusion in the septic system permit application, or would have had to have brazenly misrepresented the property line and contemporaneously called into question his own credibility to the potential purchaser by providing a copy of the septic system permit application while (allegedly) identifying the power pole as the property line marker, inconsistent with the septic system permit application.

15. It is also concerning that Karen Ferguson testified that the Fergusons did not receive the septic system permit application until after commencing the present litigation, contradicting D. Norman Ferguson's testimony that he received just a single page of the septic system permit-application during the presale negotiations. This raises concern about the credibility of both Fergusons as to their knowledge of the septic system permit application, which in turn leads to credibility concerns regarding the Fergusons' claim that Slye identified the power pole as a property line marker.

*3 16. Slye testified that he advised D. Norman Ferguson where the legal property line was in relation to the house and the deck. D. Norman Ferguson denies this. This Court finds that Slye is more credible on this issue in light of the provision of the application for the septic system permit. This is important as the septic system permit application contains a plat map showing the legal description of the property itself. The Fergusons are less credible on this issue given the inconsistencies about when they became aware of the septic system permit application.

17. D. Norman Ferguson relies heavily on photos taken during the construction of the residence. His theory is that Slye cleared the area of the disputed strip during construction and that the partial photographic shots of the construction site show that it was indeed cleared. The photos show only partial areas of the disputed strip. For example, the Fergusons rely on Exhibit 19 for the proposition that the disputed strip was cleared. Exhibit 19 depicts only a very limited area of the disputed strip where the construction was occurring. It is impossible to conclude that the whole disputed strip was cleared and planted. The McKenzies do not dispute that during Slye's construction, they permitted him to enter onto their property for construction purposes, causing certain areas within the disputed strip to be trampled on and effectively cleared, at least in part, to allow for construction machinery and construction work to be performed. The Fergusons tend to rely on this construction work and the effects of this construction work on the surrounding areas as proof that the disputed strip was permanently cleared, remained cleared, and was occupied by Slye as his own, thus presenting the disputed strip as his own when D. Norman Ferguson sought to purchase the property. The fact that there was construction does not prove that Slye had cleared and cultivated the disputed strip as the Fergusons claim. This is not supported by the evidence. The photos of

the construction site do not illustrate what the land looked like as it existed in 1994. Even if this Court accepts that the area was cleared during construction, that was six to seven years before D. Norman Ferguson bought the property.

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

*4 ....

20. There is little photographic evidence that can be relied upon to definitively persuade this Court that the area cleared in the construction phase remained cleared and thereafter possessed in an open, notorious, and hostile fashion from 1994 to 2004. The Fergusons argue that some photos of purportedly cleared and cultivated areas show areas located within the disputed strip. These photos are ambiguous as to angle and depth and of limited value in drawing definitive and reliable conclusions. By way of example, the Fergusons point to Exhibit 45 from 2003 for the argument that the disputed strip was cleared. This photo is open to interpretation, and without a clearer picture as to depth, it is difficult to draw any conclusions. Although the photos are open to interpretation, they are not dispositive. The Fergusons have failed to carry their burden of proof with the photographic evidence.

21. When Slye occupied his residence, he sought the McKenzies' permission to trim trees in the disputed strip, to fill a well that was located in the disputed strip, to install electric utilities under the disputed strip, and to encroach upon a small portion of the disputed strip with his driveway and rock retaining wall. The McKenzies gave their permission for these uses. Consistent with this, Slye did not occupy the disputed strip before he sold the property to D. Norman Ferguson. If Slye occupied the disputed strip, it would be inconsistent for him to seek out the McKenzies' permission to trim trees, fill the well, etc.

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

23. The Fergusons' actions regarding their land use applications do not suggest that they considered the disputed strip to be a part of their property at the time of the applications. Specifically, the Fergusons attempted to short plat their property in 2006, seeking to divide their two parallel properties into three lots. The pre-application conference request and the map show an eastern boundary that runs north and south. This boundary does not run in a diagonal that would be required if the disputed strip were included in the property description in their application. The hand-drawn map makes no reference to the disputed strip, or any portion of it, which presumably would have been included in the short-plat proposal for the three intended lots. Added to this is the Fergusons' certification that the 2006 short-plat application was true and correct. If in fact they believed that they had acquired the disputed strip through adverse possession, then it follows that the proposed boundary lines would have incorporated the disputed strip.

*5 24. The Fergusons both attempt to minimize D. Norman Ferguson's involvement with the 2006 short-plat application, suggesting that he was a busy person and did not have much input into that application. This Court does not find this credible. Adjustment of property lines that

affect future use and value of the property and desirability of the property are significant issues which are beyond the ordinary day-to-day household issues that might be discussed between husband and wife or couples. While it is possible that D. Norman Ferguson was unknowing about the 2006 application, this Court finds it less credible that the Fergusons were barely communicating about their plans for future development of the property with each other. This further raises doubts about D. Norman Ferguson's purported belief about the boundary line to his property, as the legal description and property lines were drawn and included in the proposed 2006 application to the City of Bainbridge Island. This application specifically did not include the area of the disputed strip, including the driveway, rock wall and underground utilities.

25. In 2010, the Fergusons recorded a Notice to Title for the Ferguson property. A survey was prepared by WestSound Engineering and was recorded as part of the Notice to Title. The survey shows the deck as being 5.5 feet from the eastern boundary.

26. The 2010 boundary-line-adjustment application was problematic for the Fergusons as demonstrated by the letter submitted by an attorney representing a neighbor, apparently identifying the actual size of the Ferguson property as falling short of the legal requirements for a boundary-line adjustment. This Court finds less than credible Karen Ferguson's testimony that she was not aware that they did not have the necessary square footage for the 2010 boundary-line adjustment application. The denial letter from the City of Bainbridge Island indicates that the application does not show conformity with the 20,000–square–foot–minimum lot area. It follows that the 2010 application was made by the Fergusons presenting their two legally described properties based upon the recorded legal property description. The Fergusons did not assert that their square footage of real estate was more than the legal description based upon their claimed adverse possession. In this regard, the Fergusons did not hold themselves out to be the owners of the disputed strip, or any portion of the disputed strip. To the contrary, the 2010 application submits the legal boundary lines as the property lines to be considered for the boundary-line adjustment. There was no assertion that the disputed strip, or any portion of it, should be included in the Fergusons' parcel for that application.

27. Karen Ferguson also had previously attempted to purchase the property from the McKenzies. There was no mention that the Fergusons were asserting ownership over the disputed strip at the time they suggested the purchase, raising doubt that the Fergusons believed that they had acquired the property through adverse possession when those discussions occurred. Moreover, the Fergusons proposed to the McKenzies readjusting the boundary lines and reconfiguring the properties so the McKenzies would own the northern halves of the two properties and the Fergusons the southern two halves. No issue of occupation of the disputed strip was raised, again raising doubts with this Court about whether the Fergusons were hostilely asserting their ownership at the time that they were seeking to purchase. This again bolsters the McKenzies' position that the Fergusons have had a consistent motivation and goal to improve their property and that this claim of adverse possession may be yet another attempt. This creates further concern about the credibility of the Fergusons and weighs against them in being able to meet their burden of proof.

*6 28. The fact that this quiet-title action followed the Fergusons' proposal to purchase from the McKenzies themselves, a failed attempt at a short plat, and then a few years later a boundary line adjustment, suggests that the Fergusons were intent on making their properties more attractive, profitable, and viable. It raises the specter that this current litigation might be another attempt by the Fergusons to improve, increase, and/or realign their property and raises the question as to whether they were really adversely possessing the disputed strip at the time in question, or whether this current litigation is yet another similar attempt to increase their property size and configuration.

29. The aerial photo, while not dispositive, offers some corroboration of the McKenzies' position. While these photos were not interpreted by an expert, it does appear that the February 28, 2007 photo shows a less treed and overgrown area than the earlier photo of 2002. More importantly, the 2002 photo appears to show significant growth in the disputed strip. The photo speaks for itself and it is not refuted by any expert testimony; only argument by the attorney for the Fergusons that they are unreliable. On its face, the 2002 photo suggests significant growth in the disputed strip, supporting the McKenzies' position that it was not cleared or cultivated at this critical time which falls in the period claimed to be adversely possessed. This Court is not intending to inflate the value of the 2002 photo as it was not professionally explained, and so while it bears relevance, the weight is of limited value. Even if this photo

had not been presented, this Court would still arrive at the same conclusion.

[3] 30. In 2011, the McKenzies constructed a fence in the disputed strip six inches on their side of the correct property line. The photos taken after the fence was constructed have little bearing on the condition of the disputed strip during the relevant time period of 1994 to 2004. The photos that show the state of the vegetation after the fence was constructed, fall far outside of the relevant adverse-possession time frame. These photos overall bear little weight.

31. The Fergusons rely upon the purchase and sale agreement with Slye to demonstrate that Slye was required to point out the property markers and that the inspection report indicates that the purchaser (D. Norman Ferguson) accepted only one corner marker. While it is specific that one marker and not all markers were indicated, such an acknowledgement is of limited value. Presumably the corner that was identified was that in the north of the property. It does not necessarily follow, nor can this Court conclude, that Slye must have represented that the other property marker was the telephone pole. He might have, but it is unlikely in light of the septic system permit application which appears to have been provided to D. Norman Ferguson as previously found by the Court.

*7 32. 2006 was a significant year regarding the disputed strip. There is testimony regarding the Fergusons' request to trim some trees in the disputed strip. Karen Ferguson is ambiguous about what happened as to that request. Jane McKenzie's note of a conversation regarding trimming of trees, or at least communication by voicemail, occurred on May 31, 2006, the same time that the Fergusons applied to the City of Bainbridge Island to develop the property through a short plat. The attempt to short plat the two Ferguson properties into three was rejected by the City of Bainbridge Island. In the same time period, the Fergusons requested to buy the McKenzies' property. The attempts in 2006 to develop the property fit in with the attempts around the same time to clear the property.

33. The attempt to adjust the boundary line in 2010 was met with opposition. In addition to the neighbor opposition to the short plat, which identified the shortage of square footage to allow for division of the properties, the City of Bainbridge Island sent letters to the Fergusons indicating that they needed more area if they were to divide. It was only six months after the City of Bainbridge Island canceled their application that this litigation began.

34. As with all trials, the finder of fact may consider the evidence and lack of evidence. Once more, the Fergusons have the burden of proof. While there was considerable criticism espoused about the unreliability of the only non-party witness in the case Chris Slye, it became evident that while the Fergusons criticized Slye's testimony, they did not produce any testimony from a non-party and non-interested witness. It appears that the Fergusons are professional people who are engaged, and seem to work and be involved in the world around them. However, there is a marked absence of evidence, in that there is an absence of any testimony from family, friends, acquaintances, or neighbors who might have been able to testify regarding the use of the disputed strip from 1994 to 2004. Again, it is the Fergusons' burden. And the distinct lack of evidence further weakened the Fergusons' claim of adverse possession, which is a claim that relies, in this instance, heavily upon factual support.

CP at 542–51. The Fergusons appeal.

ANALYSIS

I. SUBSTANTIAL EVIDENCE FOR FINDINGS OF FACTS

The Fergusons argue that a number of the trial court's findings are not supported by substantial evidence and do not support the trial court's conclusions. They also argue that we are not bound by the trial court's findings because the photographic evidence refutes them. The Fergusons rely on *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986), for support. Because substantial evidence supports the trial court's findings of fact and because the Fergusons misunderstand *Bering's* holding, we disagree.

A. Standards of Review

The trial court's findings on the elements of adverse possession are mixed questions of law and fact. *Harris v. Urell*, 133 Wn.App. 130, 137, 135 P.3d 530 (2006); *Petersen v. Port of Seattle*, 94 Wn.2d 479, 485, 618 P.2d 67 (1980). The fact finder determines whether the essential facts giving rise to adverse possession exist. *Chaplin v. Sanders*, 100 Wn.2d 853, 863, 676 P.2d 431 (1984). "We review whether substantial evidence supports the trial court's challenged

findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment." *Harris*, 133 Wn.App. at 137; *Ridgeview Prop. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). "Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding." *Harris*, 133 Wn.App. at 137.

***8** All unchallenged findings of fact are verities on appeal. *Harris*, 133 Wn.App. at 137. Here, the Fergusons assigned error to the findings of fact generally and only challenge a few of the trial court's findings of fact in their argument: 13, 14, 15, 18, 20, 22, 23, 24, 25, 26, 27, 28, and 29. Therefore, we will treat all the unchallenged findings as verities on appeal. *See Harris*, 133 Wn.App. at 137.

To establish a claim of adverse possession, a party must show that her possession of the claimed property was, (1) for ten years, (2) exclusive, (3) actual and uninterrupted, (4) open and notorious, and (5) hostile. *Chaplin*, 100 Wn.2d at 857. The party claiming adverse possession bears the burden of establishing the existence of each element by a preponderance of the evidence. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).

The Fergusons acknowledge that the trial court based its findings on its assessment of the witnesses' credibility. However, 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. *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn.App. 710, 717, 225 P.3d 266 (2009).

To the extent that the Fergusons argue we are not bound by the trial court's findings because they are contrary to the photographic evidence, they misapprehend *Bering*. Our Supreme Court, relying on *State v. Rowe*, 93 Wn.2d 277, 609 P.2d 1348 (1980), stated, "Although this court is not necessarily bound by the trial court's findings when based *solely* upon written or graphic evidence, the trial court in this case also considered considerable live testimony during a day-long show cause hearing." *Bering*, 106 Wn.2d at 220 (internal citation omitted).

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.

B. Septic System Permit Application

The Fergusons argue that the trial court's findings 13, 14, and 15, regarding the septic system permit application, are not supported by substantial evidence. The McKenzies argue that the findings are supported by Slye's testimony and the fact that D. Norman admitted in his deposition he received the septic permit application and plat maps that accurately depicted the legal boundary line, even though, at trial he testified that he only received the first page. The McKenzies argue that D. Norman was impeached at trial by his deposition testimony, "in which he acknowledged receiving from Slye during the sale process a 6–page document that included the septic permit application and the two plat maps showing the property boundaries." Br. of Resp't at 25.

***9** Finding 16 supports the McKenzies' argument. The Fergusons did not challenge this specific finding, but it elaborates on the other findings regarding the septic system permit application. The trial court determined:

> Slye is more credible on this issue in light of the provision of the application for the septic system permit. This is important as the septic system permit application contains a plat map showing the legal description of the property itself. The Fergusons are less credible on this issue given the inconsistencies about when they became aware of the septic system permit application.

CP at 544. Findings 13, 14, and 15 were based on the trial court weighing the credibility of the witnesses' testimony. Substantial evidence supports each of these findings.

C. Condition of the Disputed Strip in 1987

The Fergusons argue that finding 18, regarding the condition of the disputed strip in 1987 after Slye's construction of the house, is not supported by substantial evidence.

The trial court's entire finding turns on its assessment of credibility of the witnesses. The trial court clearly stated it accepted the credibility of Jane's testimony regarding her interactions with Slye during the construction period. The

trial court also made clear that it did not find credible the Fergusons' version about the condition of the disputed strip in 1987 to 1994. The trial court stated that "[i]t defies reason to accept the Fergusons' claim." CP at 545. The trial court made its determination by weighing the credibility of witnesses. It found Slye's and Jane's version more credible. Substantial evidence supports finding 18.

D. Condition of the Disputed Strip in 1994

The Fergusons argue that findings 18, 20, and 22, regarding the condition of the disputed strip when D. Norman purchased the property in 1994, are not supported by substantial evidence.

The Fergusons argue that based on the photographic evidence presented at trial, "no reasonable person would conclude that there was re-grown vegetation obscuring the view across the [d]isputed [s]trip," and that "[n]o effort was made to rebut any of this evidence." Br. of Appellant at 30. However, evidence presented at trial rebutted the Fergusons' testimony and the photographs. Slye testified regarding the condition of the disputed strip prior to his sale of the property to D. Norman in 1994.

Here, again, the Fergusons ask us to reweigh and reinterpret evidence and to substitute our judgment for that of the trial court. They argue that "no rational fair minded person would accept [Slye's] testimony." Br. of Appellant at 31. But the trial court determined that the photographs presented at trial were not dispositive and they were "ambiguous as to angle and depth and of limited value in drawing definitive and reliable conclusions." CP at 546. In addition, in finding 22, the trial court stated that the photograph could support both parties' assertions, but it is "impossible to tell from the picture, specifically as it relates to angle and depth, how much shrubbery has been cleared [in] ... the area purported to be cleared and cultivated." CP at 546. Substantial evidence supports these findings.

E. Findings of Fact Related to Events Post–2004

***10** The Fergusons argue that the trial court's findings 23–29, regarding events that took place post–2004, should not bear on whether adverse possession occurred and it is unclear to them why the trial court made these findings since the trial court stated this evidence would not be considered for substantive purposes.

The findings related to post–2004 events are only relevant to support the trial court's other findings that the Fergusons were not credible. The Fergusons do not claim substantial evidence did not support the trial court's findings 23–29.

II. ADMISSION OF POST–2004 EVIDENCE

The Fergusons argue that the trial court erred in admitting evidence related to the time period after 2004.

A. Standard of Review

A trial court has broad discretion in admitting evidence. *Hayes v. Wieber Enter., Inc.*, 105 Wn.App. 611, 617, 20 P.3d 496 (2001). We review a trial court's admission of evidence for an abuse of discretion. *McCoy v. Kent Nursery, Inc.*, 163 Wn.App. 744, 758, 260 P.3d 967 (2011). "A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *McCoy*, 163 Wn.App. at 758.

All relevant evidence is admissible. ER 402. "Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is relevant evidence." *Hayes*, 105 Wn.App. at 617. Therefore, a trial court has broad discretion in admitting testimony that would disprove the testimony of an adversary. *See Hayes*, 105 Wn.App. at 617.

B. The Trial Court Did Not Abuse Its Discretion In Admitting Evidence

The trial court admitted evidence related to post–2004 events solely for the purpose of assessing credibility. At trial, the Fergusons objected, based on relevancy, to the admission of this evidence. The McKenzies argued that the Fergusons' conduct post–2004 was relevant because it "shows the Fergusons' true motivation here." 1 Report of Proceedings (RP) at 160. Furthermore, the McKenzies argued the evidence was relevant because it impacted D. Norman's credibility in that he

> claimed he has always believed this property to be his, always believed he owned the entire disputed strip. And yet he's making representations to the City representatives in recordings that actually show his property 5.5 feet from the boundary line and nine feet from the boundary line that's the

> 70 to 100 feet he claims is from the boundary.

1 RP at 161. The trial court admitted this testimony for the very limited purpose of determining credibility, and not for substantive purposes. Because the evidence was relevant to determine credibility, the trial court did not err.

III. ATTORNEY FEES

The McKenzies argue that we should award them attorney fees under RAP 18.9 because the Fergusons' appeal is frivolous when it "challenges findings plainly supported by substantial evidence, and fails to even argue the only other assignment of error identified." Br. of Resp't at 46. In addition, the McKenzies also requested appellate costs as the prevailing party under RAP 14.2.

*11 RAP 18.9(a) provides:

> The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or authorized transcriptionist preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

"[A]n 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 the appeal is so devoid of merit that there is no possibility of reversal." *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010). "All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant." *Advocates for Responsible Dev.*, 170 Wn.2d at 580.

The McKenzies adequately address the issue of attorney fees in their brief pursuant to RAP 18.1(b). The McKenzies cite *Streater v. White*, 26 Wn.App. 430, 434–35, 613 P.2d 187 (1980), arguing that an appeal is frivolous if the appeal is factual, the findings are supported by the evidence, and the findings support the legal conclusions because there are no debatable issues on appeal when the court may not substitute its judgment for that of the trial court on factual issues.

First, the Fergusons failed to comply with court rules because they did not specifically identify the findings of fact they were challenging in their assignments of error. Second, the findings challenged were prefaced on the Fergusons request that we reweigh the evidence and reevaluate the credibility of witnesses. As we have previously stated, we do not substitute our judgment for that of the trial court's regarding witness credibility or the weight of the evidence. *See Quinn*, 153 Wn.App. at 717. Third, the findings are supported by substantial evidence. The Fergusons' arguments are without merit. Finally, the Fergusons failed to adequately argue their second assignment of error in their brief.

We agree that the Fergusons' appeal is frivolous because the appeal presented no debatable issues upon which reasonable minds could differ, and each argument the Fergusons presented was so devoid of merit that there is no possibility for reversal. Based on the foregoing, and pursuant to RAP 14.2, the McKenzies are the prevailing party. We grant the McKenzies' attorney fees and costs.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

I concur: SUTTON, J.

BJORGEN, A.C.J. (dissenting).

*11 Although I agree with the majority to affirm the merits of the trial court's decision, I cannot agree that the Fergusons' appeal presents "no debatable issues upon which reasonable minds might differ, and [that the appeal] is so totally devoid of merit that there [is] no reasonable possibility of reversal." *Tiffany Family Tr. Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005). Therefore, I dissent from the award of attorney fees to the McKenzies on appeal.

All Citations

Not Reported in P.3d, 2016 WL 900921

Footnotes

1 To avoid confusion, we will refer to the parties by their first names. We intend no disrespect.

2 Slye was a named party, but was granted summary judgment and dismissal. None of the parties has appealed from this trial court action.

3 The Fergusons do not challenge findings of fact 30–34. These findings are verities on appeal, but are important in considering the trial court's analysis.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

D. NORMAN FERGUSON and KAREN FERGUSON,

Appellants.

v.

ALLEN MCKENZIE and JANE MCKENZIE, husband and wife,

Respondents.

No. 46774-7-II

ORDER DENYING MOTION FOR RECONSIDERATION

Appellants, D. Norman and Karen Ferguson, moved this court to reconsider its March 1, 2016 unpublished opinion. After review of the records herein, we deny the motion.

It is so ordered.

Dated this 24th day of March, 2016.

Melnick, J.

Melnick, J.

Sutton, J.

Because I filed a dissent to the majority opinion, I respectfully dissent in denying the Appellant's motion for reconsideration.

Bjorgen, A.C.J.

Bjorgen, A.C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

D. NORMAN FERGUSON and KAREN FERGUSON,

Appellants,

v.

ALLEN McKENZIE and JANE McKENZIE,

Respondents.

No. 46774-7-II

RULING AWARDING ATTORNEY FEES AND COSTS

In its unpublished opinion filed on March 1, 2016, this court awarded Respondents Allan McKenzie and Jane McKenzie their attorney fees and costs on appeal. They request $32,992.19 in attorney fees and $317.17 in costs. Appellants D. Norman Ferguson and Karen Ferguson did not file a response or objection. This court finds that the amounts requested are reasonable. Accordingly, it is hereby

ORDERED that Respondents Allan McKenzie and Jane McKenzie are awarded $32,992.19 in attorney fees and $317.17 in costs against Appellants D. Norman Ferguson and Karen Ferguson.

DATED this 1ST day of April, 2016.

E B Schmidt

Eric B. Schmidt
Court Commissioner

cc: Joseph A. Grube
Cynthia B. Jones
Paul Brain
Gary T. Chrey
Kenneth W. Masters
Shelby R. Frost Lemmel

CERTIFICATE OF SERVICE

I, Joseph A. Grube, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein. My business address is that of Breneman Grube Orehoski, PLLC, 1200 Fifth Avenue, Suite 625, 98101. On April 25, 2016, I caused a copy of the foregoing PETITION FOR REVIEW and APPENDIX to be served on the following parties:

Via email and U.S. Mail

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Dated this 25th day of April, 2016.

Joseph A. Grube, WSBA No. 26476