

No. 36736-0-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

ROGER C. NISBET, Respondent

vs.

LEE GREELEY, Appellant

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DIVISION II
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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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A. INTRODUCTION

Trial of this case was for equitable distribution of respective interests of two unmarried parties in a parcel of real estate.

Appellant Lee Greeley and Respondent Roger Nisbet will hereafter be identified by name.

All material facts of the case were essentially undisputed, particularly as to the respective contributions of the parties to the asset.

The trial court, urged by both parties to provide an equitable remedy, entered Findings of Fact, Conclusions of Law, and Judgment, equally apportioning the \$35,000 net value of the asset, and providing that Roger Nisbet could satisfy the Judgment by paying Lee Greeley \$17,500.

He did so even before Judgment was entered, she accepted it in August, 2007, and he has since been in occupation of the property.

Lee Greeley's appeal, of a judgment on which she has accepted the benefit of payment, challenges the trial court's exercise of discretion in application of the underlying facts in concluding that the parties were equal owners of the property and in crafting an equitable remedy.

She has broadly assigned error to any findings which disagree with her argument of how the court should have apportioned the asset.

She did not provide the trial court with a formula or proposal for how it should have equitably distributed the asset (except to "do equity").

She asks this Court to vacate the trial court's Judgment, but leaves it unclear whether this Court should then substitute its own equitable discretion in the crafting of a judgment acceptable to her, or whether it should remand to the trial court with instructions to apply a "tenable equitable framework" (App. Br. p. 16, without citation of authority nor a definition provided) to its crafting of an equitable outcome more to her satisfaction.

Appellant's Brief contains several flaws which should lead this Court to conclude that the appeal is frivolous, both on her factual and legal arguments. The trial court should be solidly affirmed, and Roger Nisbet should be awarded attorney's fees and costs per RAP 18.1 and 18.9.

B. STATEMENT OF THE CASE:

The Statement of the Case at Appellant's Brief pages 1-7 is acceptable, but for further clarity, we would add the following facts from the record below:

Roger had worked as a boatbuilder in the Port Townsend area for 32 years (RP 7, *et. seq.*), and had used and rented the boat shed in issue since 1985 (RP 90) next to a boatyard dating back to about 1890 (RP 10).

The structure was uniquely suited to Roger's needs as the only available property in the vicinity with a marine railway on the adjacent waterfront property. (RP 16) It is in a commercial area and Roger

testified the subject property is zoned commercial. (RP 81; RP 133-134).

By the time of trial, Lee Greeley was using the subject property , for residence and an art studio, “maybe half the time”, and traveling or doing odd jobs at various places the rest of the time. (RP 211)

Between 1985 and 1997, Roger had converted an open-sided pole shed covered with tarps (RP 13), into a rough but enclosed structure with siding (RP 13), a floor (RP 92), walls (RP 96), doors (RP 98) and wiring (RP 98), at a cost of \$12,000 - \$15,000 (RP 45).

The structure as improved by Roger was a starting point for the parties’ later improvements for residential purposes; the trial court found those improvements and use of the property were a contribution by Roger in its Findings of Fact (CP 31). Appellant has not challenged that Finding.

The property was designated non-residential in The Landing Condominium in 1997 (RP 142), before these parties acquired it. The Landing Condominium Association had given notice that it was going to enforce that provision from and after Feb. 5, 2005 (Ex. 7).

Lee Greeley believed that if the property was subject to such restrictions, it would reduce its value (RP 232).

In 1999 the parties did not have a plan for the property, which was “shop space” (RP 214) in Lee’s words, and in use for business purposes in a commercial area from at least 1985 until 2002 (RP 178-179).

Lee Greeley drafted the handwritten Quitclaim Deed (Ex. 4) by which the parties obtained the property (RP 212) as co-owners in 1999.

Roger testified that at the time of acquisition, the parties agreed that his prior improvements and use, and Lee's contribution of the purchase price, resulted in agreement that their ownership was "even" or 50-50 and remained so even after he later quitclaimed his interest to her in 2002 (RP 48 lines 2-4; RP 59 lines 2-19; RP 63 lines 8-18; and RP 108 lines 12-22).

The parties worked together on improvements including labor and materials equally for a time, according to Lee Greeley (RP 173, RP 179-181) until perhaps 2002 (RP 183), after which it is undisputed that most further improvements were paid for by her.

Roger testified that in 2002, believing he needed cardiac surgery and without medical insurance, Lee convinced him he should transfer his interest to her so that they would not lose the boat shed to governmental care costs, and he transferred it only for that purpose, believing she was just holding his half for him until some later time. (RP 64 line 4 to RP 61, line 5).

Lee Greeley prepared the September, 2002, Quitclaim Deed (Ex. 5) for Roger's signature, without consideration (RP 184).

Lee Greeley testified on direct that the transfer was only required

because Roger could not afford health insurance, and that if he had such insurance the conveyance would not have happened, and the parties would have continued to own the property 50/50. (RP 185)

The trial court held that the 2002 Quitclaim Deed (Ex. 5) was based on errors of law initiated by Lee Greeley, without donative intent by Roger Nisbet to make a completed gift of his interest (RP 31, lines 18-19). Appellant has not challenged that Finding, nor the Conclusion of Law that the deed did not divest him of equal interest (CP 32, lines 1-3).

Lee Greeley testified that she put more money into improvements than the property increased in value as a result, but had no idea what the property would sell for (RP 228).

In final argument, Lee's trial counsel argued that there was no legal basis to give value to Roger's prior improvements to the structure, although his testimony of the nature, extent and cost of his improvements had not been challenged, so that only Lee's substantially greater monetary contributions should be considered. (RP 253 lines 9-15).

In final argument, Lee's trial counsel argued that the trial court could find the parties to have been in an implied partnership, so that it should look to the relative contributions of the parties (RP 253 lines 1-5), and that the court could say that it was an implied partnership and that the parties took title as tenants in common, and look to the

contributions of both of them (RP 256 lines 5-8, and lines 12-15).

In final argument, Lee's trial counsel, in colloquy with the trial court, offered no opinion or argument as to the value of the converted boat shed, other than: "It is what it is", a barely habitable structure (RP 260 line 1 - 261 line 3).

In final argument, asked by the trial court to propose an award between the parties, Lee's trial counsel opined that Roger should receive no more "than the value of his contribution", but declined to suggest what that was because: "You know, this - We're sitting in a court of equity. I don't know." (RP 264, lines 13-20).

After the trial court's oral ruling of June 29, 2007 (RP 269-274), the trial court directed Roger Nisbet's counsel to prepare proposed Findings, Conclusions and Judgment (RP 274).

On August 1, 2007, Lee Greeley filed Objections to the Proposed Findings of Fact and Conclusions of Law (CP 37-38) challenging two proposed paragraphs (at p. 2, line 27 *et. seq.*, and at page 3, line 8). Both paragraphs were modified in the final documents (CP 29 and 33).

No other objections to Findings or Conclusions, or to the form of the Judgment, were entered.

Also on August 1, 2007, Roger Nisbet's counsel delivered to Lee Greeley's counsel payment of \$17,500.00 in full satisfaction of the

Judgment (CP 33), which had not yet been entered.

Findings and Conclusions were entered on August 10, 2007 (CP 29-32), and a Judgment on August 22, 2007 (CP 33-34).

Lee Greeley's appeal to this Court was filed on September 10, 2007.

There is no record that Lee Greeley rejected payment in full on the Judgment, or that she sought to stay the 30 day limitation on her residency on the subject premises (per the Judgment, CP 34) pending appeal.

C. ARGUMENT AND AUTHORITIES:

This appeal is clearly without merit. The issues are clearly controlled by settled law as briefed to the trial court. Lee Greeley's challenges to findings are factual, but the findings are supported by substantial, and essentially undisputed, evidence. Findings of Fact and Conclusions of Law which Appellant has not challenged support the Judgment. Challenges to the trial court's judicial discretion are clearly on issues which were within the trial court's sound discretion.

1: Appellant's Assignment of Error 1 alleges that: "The trial court erred in finding that the parties were in an implied partnership or joint venture".

1(a): Identification of challenged findings: Lee Greeley has not identified the finding(s) she challenges regarding implied partnership or

joint venture (App. Br. p. 1 and pp. 7-11).

A separate assignment of error for each finding of fact a party contends was improperly made must be included in the appellate brief with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto. RAP 10.3(g)

Cf. in State v Goodman, 150 Wn.2d 774 at 781, 83 P.3d 410

(2004), that provision was applied where defendant/appellant attempted to raise three objections to findings of fact without assigning specific error to any of them by number; the assignments were not considered on appeal.

A blanket assignment of error, challenging the trial court's written findings of fact and conclusions of law generally, in disregard of RAP 10.3(g), is insufficient and the trial court's findings become the established facts of the case. The trial court's task is then limited to determining whether the findings of fact support the conclusions of law and judgment. State v. Roggenkamp, 115 Wn.App. 927, 943-944, 64 P.3d 92 (2003).

This Court should decline to review this Assignment of Error on this ground alone.

1.(b): The trial court did not make a Finding of Fact of an implied partnership or joint venture: The trial court did not find an implied partnership or joint venture as a fact in its Findings of Fact (CP 29-31) . Those terms appear only in the Conclusions of Law (CP 32, line 4) in

relation to the framing of an equitable remedy, by analogy to recognized property relationships.

That Conclusion, applying equitable rules such as in dissolution of an implied partnership or joint venture to the case before it, was clearly in line with the remedy argued by Lee's counsel in final argument (invited error is discussed below).

We will return to analysis of the Findings of Fact, and their effect, below, in response to the second assignment of error.

1(c): This argument is first presented on appeal: At Appellant's Brief, pages 7-11, Lee advances the theory that an implied partnership, or joint venture, require a finding, as a matter of law, of a "business relationship" or "for-profit" enterprise. This theory appears in the record for the first time in her appellate Brief.

She did not brief this theory in her Trial Memorandum (CP 22-28). The cases she now cites on this issue, at Appellant's Brief pages 9-11, do not appear in her Trial Memorandum for any "business relationship" or "for-profit enterprise" requirement for an implied partnership.

She did not argue it to the trial court (RP 251-264).

Roger's Trial Memorandum (CP 5-21) referred to some of the same cases Lee briefed for the trial court, including some which happen to have involved business relationships, but did not brief Lee's present

alleged requirement that a business relationship or for-profit enterprise is the only basis for an implied partnership, because Lee did not advance that theory below.

If this issue had been presented to the trial court, undisputed facts are that the parties bought a commercial boat shed in a boatyard area, unsuited for residential purposes, with no original plan of what they intended to do with the property, together with the inferences the trial court could draw from that.

An unchallenged finding of fact, based on undisputed evidence, (CP 30 lines 23-24) holds that the property is non-residential in The Landing Condominium, which Lee Greeley acknowledges would affect its value (RP 232). So the argument that there would no basis for a “business relationship” or “for profit” partnership is factually unsound.

Based on those facts, the trial court might have found an original business purpose, but the issue was not presented.

An appellate court need not address a contention that was neither argued nor briefed to the trial court. Bohn v. Cody, 119 Wn.2d 357, 832 P.2d 71 (1992) (attorney unsuccessfully argued that a claim against him should be dismissed because violation of the disciplinary rules are not a basis for malpractice liability; it had not been presented to the trial court below).

Appellate courts will not reverse a trial court for failing to follow a legal theory which was not called to its attention and that is not directly on point. State v. Sondergaard, 86 Wn.App. 656 at 663, 938 P.2d 351 (1997).

1(d): Invited Error/Inconsistent arguments: In final argument, opposing counsel expressly contended that the trial court should “look to an implied partnership or a tenancy in common, in which case you would look to the contributions of both of the parties” (RP 256) and referred to unjust enrichment of Roger if it found “anything other than an implied partnership” (RP 259).

That may have been a trial tactic, to persuade the court away from a meretricious relationship theory, and to focus on respective contributions rather than ownership reflected in the Deed, but it contradicts Appellant’s present argument on appeal.

The appellate court should decline to review an argument which is inconsistent with a party’s position below. Cosmo. Eng’g v Ondeo Degremont, 128 Wn.App. 885, 117 P.3d 1147 (2005).

The Washington Supreme Court has concluded that counsel may not set up an error and then complain of it on appeal. In Re K.R., 128 Wn.2d 129 at 147, 904 P.2d 1132 (1995) (the doctrine of invited error).

An issue might be preserved for review if omitted from the party’s trial brief (as here) if the facts relevant to the issue were alleged (as they

were here) and the issue was argued on the record in the trial court (but it was not). Firearm Rights of Nelson, 120 Wn.App. 470, 85 P.2d 912 (2003).

1(e): Error, if any, not preserved for appeal: First, there was no error below. However, as more fully briefed below on the issue regarding “equal” ownership, Lee Greeley did not preserve this issue for review on appeal.

In the trial court (see her Objections to Findings, CP 37-38), she objected to only one Finding of Fact to which she now assigns error (the “equal” language in the Finding on CP 30 lines 1-3). That Finding did not mention implied partnership or joint venture.

She did not object to the proposed, now final, Conclusion of Law at CP 32 lines 4-5 which refer to those concepts as a basis for crafting a remedy for this case.

If her Assignment of Error #1, here, to a “finding” regarding an implied partnership or joint venture is intended to assign error to that Conclusion of Law (which we submit is the only place in the document where those terms appear), she was required to object and assign error to that Conclusion in the trial court. RAP 2.5(a).

She did not do so, and now cannot assign nor argue error related to that Conclusions of Law. Hoflin v. City of Ocean Shores, 121 Wn.2d

113, 130-31, 847 P.2d 428 (1993).

The reason she did not do so, in the trial court, may be inferred from her having argued to the trial court that it should consider implied partnership as an applicable concept, as noted above in Section C.1(d).

This assignment of error is: submitted without specific identity of the challenged Findings; submitted in the absence of a challenged Finding related to the assigned error; based on argument and authority not presented to the trial court (implied partnership requires a business purpose); inconsistent with Lee's argument to the trial court and invited error (if any) regarding application of partnership dissolution; without having been preserved for appeal by objection in the trial court; and is frivolous and must be denied.

2. Appellant's Assignment of Error 2 alleges that: "The trial court erred in finding that Roger had an equal interest in the boat shed".

2(a): Identification of challenged finding(s): Again, Lee Greeley does not specifically identify the Finding(s) to which she objects, as required by RAP 10.3(g), cf. State v Goodman, supra, 150 Wn.2d 774.

This Court is entitled to decline to review this assignment of error. Cf. State v. Roggenkamp, supra, 115 Wn.App. 927, 943-944.

However, it is not difficult to identify the issue (CP 31 lines 1-3) if the Court elects to consider it, which we will discuss immediately below.

2(b): Scope of review: In her “Respondent’s Objections to Proposed Findings of Fact and Conclusions of Law” (CP 37-38), Lee Greeley interposed her only objections to the trial court against Roger’s proposed set. At CP 37 lines 16-22, she objected to the proposed Finding which, as entered by the trial court is now at CP 30 line 27 to CP 31. Her objection was to the language of Roger’s equal interest in the boat shed, whether the parties had agreed to equal ownership, and her contention that “- - - there was no evidence, oral or otherwise, to support this finding of fact” (CP 37 line 22).

(She also objected (CP 38 lines 1-4) to Roger’s proposed finding which is now, in the trial court’s Findings, at CP 31, lines 9-13. Her proposed language was adopted *verbatim*; she has not assigned error to it; and it appears not to be involved on this appeal except as an unchallenged Finding of Fact among several others.)

She did not assign error to any of the other Findings of Fact, nor to any of the Conclusions of Law, to the trial court as required by RAP 2.5(a) if error was to be assigned to them. She has not shown any entitlement to an exception to that rule, may not now assign error to other Findings or Conclusions, and is limited on review to the challenge only to the Finding of Fact at CP 31 lines 1-3. Hoflin v. City of Ocean Shores, *supra*, 121 Wn.2d 113, 130-31.

The record on review does not include a VRP of hearing on the entry of Findings and Conclusions, so this Court may review only the submitted trial VRP and written record on review on this issue, if it elects to do so..

2(c): The trial court's findings are supported by substantial evidence, and unchallenged related findings: The trial court found that: the parties took title in both names, on a 1999 deed [Ex.4, which had been prepared by Lee (RP 212)], with a cash payment of \$15,000 (CP 30 lines 25-26); that the cash came from Lee (CP 39 line 27); that the parties had agreed that Roger had an equal equity based on his improvements and prior use and work in the structure, and that his interest based on improvements and use was in addition to the ownership interest reflected in the deed (CP 30 line 27 - CP 31 line 3). It also found that, after some further improvements had been made, largely with Lee's money, a quitclaim deed executed by Roger to Lee, without consideration, was based on an error of law initiated by Lee without intent by Roger to make a completed gift of his interest in the property (CP 31 lines 9-19).

The challenged finding, that the parties agreed to an equal ownership in addition to the language in the original deed of acquisition (Ex. 4), was based on disputed testimony.

As noted in our Statement of the Case, and partially acknowledged

in Lee's Statement of the Case, Roger testified at some length to the cost of improvements he had made to the property, his use of the property and his relationship to the sellers, before the relationship with Lee began, in an amount approximately equal to Lee's purchase price. He testified that there was an agreement that the parties went in as equals, and remained equal even after he quitclaimed his half interest to Lee for what turned out to be a mistaken (if not misleading) reason initiated by Lee. Lee, of course, denied such an agreement, despite the 1999 deed she had prepared.

The finding of fact that the parties were equal in ownership, based on substantial if sometimes disputed evidence set out in the Statement of the Case, and on the trial court's view of the credibility of witnesses, was in the discretion of the trial court and cannot be reviewed on appeal.

Boeing v. Heidy, 147 Wn.2d 78, 87, 51 P.3d 793 (2002).

Lee has not challenged other Findings of Fact (CP 31 lines 14 - 21) that a 2002 Quitclaim Deed (Ex. 5), also prepared by Lee (RP 184) conveying the property to her from Roger without consideration, was based on errors of law initiated by Lee and that Roger had no intent to make a completed gift to her of his interest in the property, or that Roger had a present greater need for the property than Lee.

Those unchallenged Findings support the finding of an agreement to equal ownership (CP 31 lines 1-3). Findings of Fact to which error is

not assigned are verities on appeal. Henderson Homes v. Bothell, 124 Wn.2d 240, 243-244, 877 P.2d 176 (1994).

Findings of Fact are presumed to be supported by substantial evidence, and the party challenging them has the burden of proving to the contrary. Thor v. McDearmid, 63 Wn.App. 193,205, 817 P.2d 1380 (1991). Lee has not overcome that presumption, or met that burden, as to the “equal equity” finding she challenges..

Lee has not shown a lack of substantial evidence that Roger’s contributions of prior use, his improvements and serving as the source of the purchase, were of equitably equal value to her contributions of money in acquiring title as equal owners, or of equal value to her overall cash contributions which did not increase the fair market value in an amount equal to her investment (according to Lee)..

Findings of fact which are supported by substantial evidence are verities on appeal. Sparks v. Douglas County, 127 Wn.2d 901, 904 P.2d 738 (1995).

Appellate review of findings of fact is limited to determining whether they are supported by substantial evidence and, if so, whether they support the conclusions of law. When reviewing findings of fact, an appellate court will not substitute its judgment for that of the trial court, even if it might have resolved the factual dispute differently. Mairs v.

DOL, 70 Wn.App. 541 at 545, 854 P.2d 665 (1993).

Review of the findings is therefore limited to examining the record to establish whether there is substantial evidence to support each challenged finding. Miller v. City of Tacoma, 138 Wn2d 318 at 329, 979 P.2d 429 (1999).

Substantial evidence exists when there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. In reviewing a challenged finding of fact, a reviewing court views the evidence in the record in the light most favorable to the prevailing party. The reviewing court accepts the trial court's views regarding credibility of witnesses and the weight accorded to reasonable but competing inferences. Pilcher v. Dep't of Revenue, 112 Wn.App. 428, 435, 49 P.3d 947 (2002).

The evidence in the trial court, as summarized in the Statements of the Case, of an equal ownership in the boat shed property, is substantial and the trial court properly exercised its discretion in evaluating and applying it.

2.(d): An unchallenged Conclusion of Law is fatal to Appellant's second Assignment of Error: Lee Greeley has failed to challenge the trial court's Conclusion of Law (CP 32 lines 1-3) in which the trial court concluded that Roger Nisbet had an equal interest in the property, of which

the 2002 Quitclaim Deed had not deprived him

She did not challenge it to the trial court in her Objections to Findings of Fact and Conclusions of Law (CP 37-38), and she has not challenged it here (unless her assignment of error inartfully intends to challenge a Conclusion as a “small-f” finding).

An appellate court will not review a Conclusion of Law to which no error has been assigned. Kershaw Sunnyside v. Yakima Interurban, 121 Wn.App. 714, 91 P.3d 104 (2004) (appellant had challenged certain of the findings of fact, but not the conclusion of law that a railroad right-of-way had been abandoned; thus, that conclusion would not be reviewed).

However, if she intends to argue that her assignment of error is, in fact, to that Conclusion of Law, she cannot show an exception to the requirement of RAP 2.5 that she must have presented the objection to the trial court, too. See our argument in Section C.2(b) above.

So, whether Lee Greeley here challenges the “equal” Finding of Fact on CP 31, lines 1-3, or the “equal” Conclusion of Law on CP 32, lines 1-3, or both, she failed to preserve any alleged error in the Conclusion for review. The trial court’s Conclusion of Law is the law of the case. State v. Moore, 73 Wn.App. 805, 811, 871 P.2d 1086 (1994).

This subsection should be conclusive on the issue of equal ownership, and equal distribution of the asset, alone.

2(e): Appellant presents new authority presented on appeal: Based on cases cited in her Brief, Lee Greeley argues the trial court should have awarded her over 98% of the value in the property, and less than 2% to Roger (App.Br. 13 -14), based on their respective monetary contributions (thus disregarding any prior or contemporaneous contribution of Roger's improvements and usage, on which the trial court relied in part) rather than the 50-50 distribution awarded by the trial court.

She starts (App.Br. p. 12-13) with brief analysis of West v. Knowles, 50 Wn.2d 311, 311 P.2d 689 (1957) as authority that Lee and Roger were not partners, but co-tenants, so their respective interests have to be traced to their respective contributions, calling the facts of that case "virtually indistinguishable from the facts here".

That case was not cited in her Trial Memorandum (CP 22-28), was not argued in her final argument (RP 251-264), and thus could be disregarded by this court as an argument not presented to the trial court. Cf. Bohn v. Cody, supra, 119 Wn.2d 357; and State v. Sondergaard, supra, 86 Wn.App. 656 at 663.

Of the cases Lee Greeley cites on tracing rules in a co-tenancy at App.Br. 13-14, Iredell v. Iredell, 49 Wn.2d 627, 305 P.2d 805 (1957), was neither briefed nor argued to the trial court (CP 22-28; RP 251-264), and is a meretricious relationship case.

Lee Greeley successfully convinced the trial court this is not a meretricious relationship case. This court should disregard this citation, if for no reason other than failure to present it below.

She also now relies on Shull v. Shepherd, 63 Wn.2d 503, 387 P.2d 767 (1967) for a rule on apportionment in a co-tenancy, based on respective contributions (App.Br. page 14). Again, the case was not briefed nor argued to the trial court.

Appellant fails to note that the Shull case resulted in a ruling that, where parties hold property in a co-tenancy, they are presumed to hold equally, and that if there is uncertainty of the specific value of their respective contributions, they should share its value equally. Shull v. Shepherd, supra, 63 Wn.2d at 507.

The case does not support Lee's present argument, supports the trial court's decision, and should be disregarded for her contended theory.

2(f): The trial court was supported by established law: The trial court credited Roger with undisputed evidence of his prior improvements at a cost of \$12,000-\$15,000, and the fact that it was only his exceptionally good relationship with the owners of the Condominium that these parties were able to buy the property at all.

Lee Greeley does not distinguish, but just ignores, non-monetary contributions in determining respective interests in an implied partnership

or joint venture, or joint ownership as here. She argued to the trial court that Roger's contributions had no value (RP 253, ll. 11-15; RP 255 l. 22-23) but provided no authority that such contributions cannot be considered by a court in equity.

Appellate courts do not decide a challenge to findings of fact, when the challenge is not supported by citation to authorities. Mairs v. DOL, 70 Wn.App. 541 at 544-545, 854 P.2d 665 (1993).

Roger Nisbet adequately briefed to the trial court (Memorandum of Authority, at CP 13-15) settled case law that courts may consider a party's contribution of property, labor, skill and experience as well as monetary investment, to a valid implied partnership or joint venture; and that absent tracing of values (such as fair market valuation of Roger's prior improvements, and the parties'), the parties are presumed to share equally.

Relevant portions of that research are inserted here, from our Trial Memorandum, CP 13-15, which was intended to support equitable distribution based on respective contributions:

“Long before In Re Marriage of Lindsey, supra, over-turning the long-standing Creasman presumption (property acquired during a meretricious relationship was presumed to belong to the party in whose name was acquired, absent any evidence to the contrary, based on a presumption as a matter of law that the parties intended to dispose of the property exactly as they did dispose of it; Creasman v. Boyle, 31 Wn.2d 345, 196 P.2d 835 (1948)), the courts applied a variety of equitable doctrines to overcome the otherwise inequitable results.

Implied partnership or joint venture: When a party to a meretricious relationship seeks to establish an interest in property which is ostensibly owned by the other party to the relationship, by proving the existence of a partnership or joint venture by showing the surrounding circumstances and acts of the couple, there is no need to prove an express contract, nor is there a need to overcome the presumption that the property belongs to the party in whose name title stands, as there is when one of the parties who acquired property while living in a meretricious relationship seeks to share in that property as if it were community property. In Re Estate of Thornton, 81 Wn.2d 72, 499 P.2d 864 (1972) (where the appellant was not claiming under a meretricious relationship theory despite 17 years of living together, joint efforts on farm, bearing and rearing children, but successfully argued the facts to preserve her right to present a case of equitable relief).

Malnar v. Carlson, 128 Wn.2d 521, 910 P.2d 455 (1996), noted that the existence of a partnership depends upon the intention of the parties. That intention must be ascertained from all of the facts and circumstances and the actions and conduct of the parties. While a contract of partnership, either expressed or implied, is essential to the creation of the partnership relation, it is not necessary that the contract be established by direct evidence. A partnership may be found to exist even though title to the alleged partnership property is held in the name of but one of the alleged partners. Where, from all the competent evidence, it appears the parties have entered into a business relation combining their property, labor, skill and experience, or some of these elements on the one side and some on the other, for the purpose of joint profits, a partnership will be deemed established. E.g., In re Thornton, 81 Wn.2d at 79 (citing Nicholson v. Kilbury, 83 Wn. 196, 202, 145 P. 189 (1915)); Kintz v. Read, 28 Wn. App. 731, 734, 626 P.2d 52 (1981); see also Goeres v. Ortquist, 34 Wn. App. 19, 22, 658 P.2d 1277 (where no express agreement exists, whether the parties have entered into a joint venture is a question of fact), review denied, 99 Wn.2d 1017 (1983); Ocean View Land, Inc. v. Wineberg, 65 Wn.2d 952, 400 P.2d 319 (1965) (whether there existed an oral agreement of partnership or joint venture involved factual dispute).

A joint venture requires a common purpose and intention to act as joint venturers; a community of interest; and an equal right to a

voice accompanied by an equal right of control. Douglass v. Stanger, 101 Wn. App. 243, 249, 2 P.3d 998 (2000). The purpose of a joint venture is similar to a partnership but it is limited to a particular transaction or project. Pietz v. Indermuehle, 89 Wn. App. 503, 510, 949 P.2d 449 (1998). There must be proof that the parties contracted to carry out a single enterprise, and they must have a common purpose and community of interest in that enterprise as well as equal rights of control. Goeres v. Ortquist, 34 Wn. App. 19, 20-21, 658 P.2d 1277 (1983).

Tracing: Where evidence is sufficient that both parties contributed to acquisition and improvement of property while living in a meretricious relationship, the intent of the parties controls and overcomes the presumption that they intended it to be held only in the name of the one in whose name title stands, held as tenants in common. It will be presumed that they intended to share the property in proportion to the amount contributed where it can be traced, otherwise they share equally. West v. Knowles, 50 Wn.2d 311, 311 P.2d 689 (1957).”

Those authorities, from cases offered as sources of equitable justice where parties have entered into property relationships without marriage but inequity would result from blind application of status of title for distribution of property interests, are actually similar in result to cases Lee Greeley cites for distribution of assets held in co-tenancy, but she chooses to ignore anything other than bare cash contributions to the case at hand.

In summary of this subsection:

(a) Lee Greeley has failed to comply with RAP 10.3(g) requiring specific identification of findings to which error is assigned by numbers;

(b) If she intends, here, to challenge the Finding of Fact that Roger had an equal equity in the property, she did not assign error to any

of the other Findings of Fact or Conclusions of Law to the trial court, and cannot do so here pursuant to RAP 2.5(a);

(c) The trial court finding of equal equity in the property was supported by substantial evidence, and by other unchallenged related findings of fact which would support the Conclusions of Law anyway;

(d) Her failure to challenge the equitable “equal interest” Conclusion of Law to the trial court renders that Conclusion the law of the case, binding on the parties and this Court, and is fatal to her challenge to the undefined assignment of error;

(e) She presents new authority on appeal, not presented to the trial court; and

(f) The trial court was supported by settled law in determining that the parties had equal equities based on essentially undisputed respective monetary, and non-monetary, contributions.

Even the trial court’s unchallenged Findings of Fact and Conclusions of Law would support the Judgment, which has already been satisfied.

Lee Greeley’s second Assignment of Error is submitted to be frivolous, and the trial court should be affirmed on this issue.

3. Appellant’s Assignment of Error 3 alleges that: “The trial court’s order allowing Roger to purchase the boat shed from Lee for half

its fair market value was an abuse of discretion resulting in a windfall to Roger and a manifest injustice to Lee.

The question is whether the trial court's discretion was exercised on clearly untenable grounds or for manifestly untenable reasons, considering the purposes of the trial court's discretion. Coggle v. Snow, 56 Wn. App. 499, 505, 784 P.2d 554 (1990).

In the present case, both parties requested the court to apply an equitable remedy, and it resulted that the outcome was closer to that which Roger proposed, than to the outcome Lee requested.

The appellant bears the burden of proving that the trial court abused its discretion. Childs v. Allen, 125 Wn. App. 50, 58, 105 P.3d 411 (2004), review denied, 155 Wn.2d 1005 (2005).

She does not provide citation of authorities of why the trial court's remedy, set out in the Conclusions of Law (CP 32) and Judgment (CP 33-34) results in a *prima facie* injustice.

Appellate review of a trial court's findings of fact and conclusions of law for abuse of discretion is limited to determining whether the trial court's findings are supported by substantial evidence and, if so, whether the conclusions of law are supported by those finding of fact. Scott v. Trans-System Inc., 148 Wn.2d 701, 707-709, 64 P.3d 1 (2003).

As noted above, the material underlying facts are essentially

undisputed, as to the parties' respective contributions and the sequence of events; they were before the trial court for its use in exercising its discretion, and it made accurate reference to the facts on which it relied .

Trial courts have broad discretionary power in fashioning equitable remedies, and an equitable remedy fashioned by a trial court will not be disturbed on appeal so long as the trial court does not abuse its discretion in an arbitrary or capricious manner. Niemann v. Vaughn Cmty. Church, 154 Wn.2d 365 at 385, 113 P.3d 463 (2005); (permitting deviation from a written trust was reasonably necessary to effectuate the trust's primary purpose, based on a finding that the trial court carefully considered all the evidence); citing In re Foreclosure of Liens, 123 Wn.2d 197 at 205, 867 P.2d 605 (1994).

In the present case, the essential difference between the positions of the parties is the construction they tend to give the facts. Lee Greeley contends the trial court abused its discretion in not giving her what she wanted at the value she put on it (disregarding any value the court found Roger had contributed), and claims the trial court abused its discretion by not applying the facts to a "tenable equitable framework".

She has provided no authority for what that phrase means to her, other than she does not agree with the trial court. We have not found authority defining such a phrase.

The purpose of equity is to do substantial justice, and it is not an abuse of discretion to attempt to return parties as much as possible to the status quo before an agreement which the trial court elects to rescind and equitably unwind in order to do substantial justice. Hornback v. Wentworth, 132 Wn.App. 504 at 512-513, 132 P.3d 778 (2006).

In this case, Lee was returned a portion of her investment, more than she had paid for the property but less than she spent on materials for improvements, although she acknowledged she did not know the fair market value of the improvements. Roger paid \$17,500 to recover his workplace of many years, ideally suited to his chosen vocation, and Lee had by the time of trial begun to use it about half the time for non-waterfront uses, residing elsewhere the rest of the time. Both had use of the property for a residence for part of the time they were together. Both, then, were somewhat restored to their pre-agreement status, if neither was whole in recovery of all that they had before.

The trial court, and this court, could not know what Lee Greeley means by a “tenable equitable framework”, which she would accept as fair even if the present judgment is set aside, when she:

- Declined, and edged around, the court’s invitation to propose the effect on value of the property’s being non-residential or commercial, in final argument (RP 259-261);

- Declined to argue to the trial court that Roger should recover only \$500 and Lee the rest, or how to apply her analysis of the cost of improvements in a restricted period of the parties' relationship (RP 264 line 13-17);
- Declined to advise the trial court what her position was for an equitable remedy, at all (RP 264, lines 19-20).

Lee's argument that the trial court's remedy resulted in a windfall to Roger and a manifest injustice to her is subjective and emotional, but she has failed to show that the trial court did not consider all the evidence, disputed and undisputed, and the credibility and reasonableness of the parties' positions, in determining the parties' respective equitable interests in the property.

We cannot reconcile Lee Greeley's acceptance of the \$17,500 on August 1, 2007 (when the Findings and Judgment had not yet been entered on the oral ruling), which was tendered as payment in full on the judgment, and her subsequent failure of record to reject the payment, return the money, or seek a stay of the judgment awarding Roger control of the property, pending appeal, with her present argument on appeal of a "manifest injustice".

It might be argued that Lee lost the right to appeal the Judgment, by accepting the benefits of the trial court's decision by receiving and

keeping the money, without offering or posting security for its return if a different outcome follows appeal and remand, leaving Roger as the party who paid the money and entitled to appeal if he complied with the judgment by paying the money but is later deprived of the property following review, but does not receive repayment of his funds. RAP 2.5(b)(1). LaRue v. Harris, 128 Wn.App. 460, 464, 115 P.3d 1077 (2005) That would be inequitable, but there is little cited authority found closely on point to the present situation.

The trial court here considered the factors of contribution including monetary and non-monetary ones, in accordance to settled law cited above.

It must have considered Lee's admission that her money did not produce dollar-for-dollar improvement in value and she did not know what the property would sell for (RP 228).

It did consider that Roger had in fact made the prior improvements he said he had (there is no record of dispute on those facts, nor a challenge to the trial court's Finding that he made them).

It did consider that the parties acquired equal interests in the beginning, based on the fair reading of the 1997 Quitclaim Deed prepared by Lee. (Ex. 4)

It did consider that the 2002 Quitclaim Deed (Ex. 5) prepared by Lee, purporting to convey Roger's one half interest to Lee without

consideration, was based on errors of law initiated by Lee Greeley, without donative intent by Roger Nisbet to make a completed gift of his interest (CP 31, lines 18-19).

Appellant has not challenged that Finding, nor the Conclusion of Law that the deed did not divest him of equal interest (CP 32, lines 1-3).

There is more than substantial evidence that the trial court had reason to treat the property as the major asset of an implied partnership, or a joint venture, or even a co-tenancy, obtained as an asset in equal ownership, and to divide it equitably.

Lee has failed to provide citation of authority, or reasoned analysis of her position presented to the trial court, which demonstrate that the learned trial judge abused discretion, exercised it in an arbitrary or capricious manner, or failed to do substantial justice.

Appellant's attack on the trial court's discretion must fail, is frivolous, and this court must affirm the trial court, on the merits.

4. Further relief requested: This Court should award reasonable attorney's fees and costs on appeal to Roger Nisbet.

The appellate court, on motion of a party, may order a party or counsel who files a frivolous appeal to pay terms or compensatory damages to any other party who has been harmed, or to pay sanctions to the court. RAP 18.9(a).

RAP 8.1 provides for recovery of reasonable attorney's fees and expenses.

Under RAP 18.9(a), whether an appeal is frivolous depends on the following considerations: (1) A civil litigant 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; (3) the record should be considered as a whole; (4) an appeal what is affirmed simply because the arguments are rejected is not frivolous; (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 possibility of reversal.

Hoglund v. Omak Wood Products, 81 Wn.App. 501, 914 P.2d 1197 (1996); Streater v. White, 26 Wn.App. 430, 435, 613 P.2d 187, *rev. den.* 94 Wn.2d 1014 (1980).

Even resolving all doubts in favor of Lee Greeley, this appeal is frivolous, lacking debatable issues upon which reasonable minds might differ, brought in violation of rules requiring fair presentation of issues to the trial court to preserve error if any, and so totally devoid of merit that there is no reasonable possibility on reversal.

In the landmark case of Streater v. White, *supra*, respondents were entitled to fees, where the assignments of error challenged findings of fact amply supported by substantial evidence as well as conclusions of law

which were clearly supported by the findings, and the appellate court was prohibited from substituting its judgment for that of the trial court in factual matters, citing Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 183 (1959).

More recently, it has been held that an appeal is frivolous, and sanctions may be imposed on both appellant and counsel if the arguments in the appellant's brief are unsupported by authority and the claims made by the appellant have no basis in law. Fid. Mortgage v. Seattle Times, 131 Wn.App. 462 at 473-474, 128 P.3d 621 (2005) (respondent awarded attorney's fees for defending a frivolous appeal where there were no "subtle or gross distinctions of law" to support the appeal).

In this appeal, we have identified at least the following issues on which reasonable minds may not differ, illustrating the lack of merit to the appeal. In summary:

She failed to identify the "findings" to which she assigned error in accordance with the Rules (Assignments of Error 1 and 2).

She appears to have relied on blanket assignments of error, which for lack of specificity ought to deprive her of review on those issues.

She assigns error to a "finding" that the court erred in determining the parties were in an implied partnership or joint venture, when there was not such a Finding of Fact; thus, she must be assigning error to a

Conclusion of Law to which she did not object to the trial court, and failed to preserve this issue for review. That Conclusion of Law, providing a means of crafting the equitable remedy of which she now complains, became the law of the case and not subject to review.

She argues on appeal that an implied partnership or joint venture requires a ruling as a matter of law of a “business relationship” or “for profit enterprise”, a theory which (1) she did not brief nor present to the trial court, and (2) had expressly argued to the trial court to consider an implied partnership concept, thus inviting the trial court to do so.

She failed to object, in the trial court, to other findings of fact, and a Conclusion of Law, supporting the trial court’s ruling that there had been “equal” equities in the asset, thus failed to preserve any arguable error. Those facts became verities, and that Conclusion became the law of the case, regarding the “equal” issue.

She bases her appellate argument against any finding that Roger had an equal interest, based on her contentions that valuation should be based on only monetary contributions, disregarding settled case law supporting consideration of non-monetary contributions by a joint owner, on which the trial court was briefed, and which it applied.

She has not shown there was no substantial evidence to support the trial court’s finding that Roger’s contributions of use and improvements,

in addition to his equal interest in the original quitclaim deed, had equal value to Lee's.

Lee challenges the finding that Roger had an equal interest, based on his contribution and title in the original deed, as an abuse of discretion by the trial court, but does not show that the evidence on which the trial court exercised its discretion was materially disputed or insubstantial.

She has not challenged the trial court's findings that the parties entered into equal ownership with the language in the original 1997 Quitclaim Deed, or its findings and conclusion that the 2002 quitclaim deed based on errors of law initiated by Lee was not a gift based on donative intent, so did not deprive Roger of his equal interest.

Lee failed, in the trial court and here, to challenge any of the conclusions of law, which became the law of the case and which clearly supported the judgment.

Lee challenges the trial court's exercise of discretion, without demonstrating that it abused its discretion in construing the credibility and reasonableness of witness' testimony

Lee contends that the trial court abused its discretion in distributing the asset and fashioning a remedy "without a tenable equitable framework", without citation of authority of what that term means in law, and without having presented authorities, argument and a definition of

“tenable equitable framework” to the trial court.

Lee invited error by argument to the trial court that it should exercise its equitable discretion, without proposing how the trial court should apply her contended distribution of value, in the absence of a consistent valuation from her client, or her counsel.

In sum, this appeal is without merit, there are no debatable issues on which reasonable minds might differ, and there must be no reasonable possibility of reversal.

D. CONCLUSION

This Court should affirm the trial court’s Findings of Fact, Conclusions of Law, and Judgment on the merits.

This court should award reasonable attorney’s fees and costs on appeal to Roger Nisbet, against Lee Greeley.

Respectfully submitted March 31, 2008.



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CERTIFICATE OF SERVICE:

I certify that on the 1st day of April, 2008, I caused to be served via U.S. Mail a true and correct copy of this Brief of Respondent on the following:

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