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Jefferson County Cause No. 16-2-00055-9

IN THE COURT OF APPEALS, DIVISION II

FOR THE STATE OF WASHINGTON

ANDREW OLIVAS and WENDY OLIVAS,
Appellant

vs.

DOUG MEKALSEN and DIANNE MEKALSEN
Respondents

Appellants' Opening Brief

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A. INTRODUCTION

The Trial Court erred by deciding to reform a 2003 deed *sua sponte* post-trial based on a scrivener's error, despite no clear, cogent and convincing evidence to justify. This adjusted the apparent boundary at an existing road between the Respondent Mekalsen property to the north and the Appellant Olivas property to the south. Prior to trial Olivas prepared "Case A," showing a common grantor set a boundary and attacking the legal operative effect of Mekalsen's 2003 deed, defending against trespass and adverse possession, as pled. During trial Olivas inquired of the Trial Court, due to issues raised, and were assured the case was not about a deed reformation, hereafter referred to as "Case B". In violation of basic fundamental fairness, due process and notice, the deed was reformed anyway, post-trial, with no meaningful opportunity to respond. The Trial Court erred deciding "Case B" after hearing "Case A."

The Trial Court erred by denying Olivas's claim that the existing road, that closely matched the E/W centerline shown on a 1978 survey, and nearly matching Mekalsen's 1997 PR deed was the already established common boundary created by a common grantor, and other equitable theories, like paying taxes up to that line, that would leave the boundary at the existing road, thus keeping the *status quo*.

The easement road was originally installed by Doug Mekalsen and his father Peter Mekalsen when both properties were owned by a common grantor (RP 295, 323, 327-328). There is a 1984 survey depicting the easement was the intended dividing boundary between the subject parcels. A common grantor set the apparent boundary at the actual road (RP 324, 327, 348-349). A triangular portion of property south of the existing road was not part of Olivas legal description (RP 113, 123-124), even though Olivas and prior owners paid 24 years of taxes up to the E/W centerline (EX 66). Mekalsen decided in 2014 to claim this triangular area.

B. Assignment of Errors.

1. The trial court erred by rejecting the boundary being established at the E/W centerline which transects the existing road, based upon theories of common grantor establishing a boundary, taxes paid for 24 years, and Mekalsen's legal description conveying only to the E/W centerline.
2. The trial court erred by *sua sponte* post-trial amending Mekalsen claim to a deed reformation claim and awarding the disputed property to Mekalsen.
3. The trial court erred by finding Mekalsen the prevailing party and ordering Olivas to pay fees and costs.

C. Issues pertaining to Assignment of Errors

1. A common grantor may establish a boundary that differs from the legally described boundary by performing acts upon the ground that puts a party on notice that a road is the desired boundary. Did the trial court abuse its discretion by ignoring the quantum of evidence before it demonstrating this theory- notably when it stated, “plaintiffs have absolutely no theory whatsoever to get that strip of land, and whether or not this case was properly pleaded, well, okay, too bad,” and making findings of fact that were not supported by the evidence? Findings No. 6, in part, No. 9 in part, No. 10, No. 11 in part, No. 12, No. 13 in part, No. 15 in part, No. 16, No. 20 in part, No. 22, No. 23, No. 24, No 25 (both), No. 26, No. 27, No. 28, No. 29, No. 30, No. 31 in part, No. 32, No. 33 in part, No. 34 in part, are all not supported by the actual evidence and are simply adoptions of Mekalsen’s legal arguments. (Error 1).
2. Cases pled under RCW 7.28.120 require parties to set forth in their complaint the nature of their estate, claim, or title to the property, and the Court hears the case in equity. However, may a trial court, in equity, ignore precedential common law to reach a desired result (Error 1 and 2)?

3. Both the Trial Court and Mekalsen stated, reassured even, that this case was not about a deed reformation. May a trial court, *sua sponte* post trial, per CR 15, reform a deed without giving Olivas a meaningful opportunity to respond (Error 2)?
4. Adequate notice is a basic requirement of due process to avoid trial by surprise. Olivas prepared “Case A” based on Mekalsen’s stated facts and legal theory prior to trial, which argued the strength of Mekalsen’s deeds, and offered several equitable theories to quiet title in Olivas’ favor. May a court, sitting in equity, decide a controversy before it on unpled facts and legal theory, i.e. “Case B” without giving an opportunity to respond (Error 2)?
5. An Order in Limine was granted and never reversed or overruled by the Trial Court before or during trial, holding that “Case A” will be decided on certain evidence and per the language of the deed. May a court, post-trial, without opportunity to respond, decide the controversy on an entirely different set of facts and theories, “Case B” (Error 2)?
6. Under accepted *Rules of Surveying*, a caption limits the property conveyed. May a trial court ignore this rule and expert testimony so as to decide the case on an unpled theory, “Case B” (Error 2)?
7. Deed reformation must be proven by clear, cogent and convincing evidence. May a trial court reform a deed based upon the speculation

and conjecture of witnesses who had no personal knowledge of whom drafted the deeds or of the original party's intent (Error 2)?

8. To be a prevailing party, one must substantially prevail. May a trial court determine a party is "prevailing," ordering fees and costs against the non-prevailing party, when the theory and facts are not ones that were pled or raised prior to trial and are in direct contradiction of a previous Order in Limine (Error 3)?

D. STATEMENT OF CASE

1. Property Background

There are two properties in this case. Andrew Olivas and Wendy Olivas (herein Olivas), Parcel No. 601273023, referred to herein as Tax 38 or Olivas parcel (Ex 20). Douglas Mekalsen (herein Mekalsen), Parcel No. 601273001, referred to as Mekalsen's parcel (Ex 12). Standing on the county road looking east down the existing actual easement road, and after looking at a recorded 1978 and 1984 survey of the subject parcels, (Ex 23) Olivas reasonably concluded the land to the left (north) belongs to Mekalsen and everything to the right (south) belonged to the parcel they were buying (RP 109, 131, 187). This is due to the fact that the centerline of the road on the 1984 survey is depicted as the boundary between the

parcels (Ex 23, CP 106, RP 247¹). Nothing is visible to show otherwise (RP 108-110, 317 In 12-18). In 2014 Doug Mekalsen claimed he owned a triangle approximately 20-25 feet south of the actual road, wanting Olivas to keep off (RP 104, 106-107).

- a) A Common Grantor owned all properties and had a survey recorded in 1984.

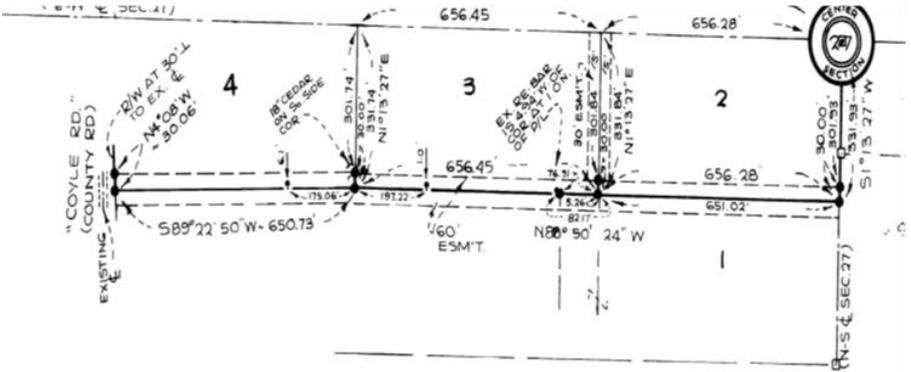
The Olivas parcel and the Mekalsen parcel were originally owned by the Mekalsen family when Alyce Mekalsen was deeded the N 1/2 of the N 1/2 of the SW 1/4 by her father, Paul Schechert, recorded July 13, 1962 under Jefferson County records Vol 158, page 532. Alyce Mekalsen, married to Peter Mekalsen, had common ownership.

- b) The evidence shows the 1984 Survey easement's centerline was likely intended as the legally described boundary, but the actual installed road by the common grantor is farther north.

A survey was recorded in 1984 by Roats Engineering of the "Mekalsen Short Plat" (Ex 23). The purpose of the survey is not stated on the face (RP 245). The Mekalsen short plat was never created (RP 214). The 1984 survey depicts the centerline of a 60- foot wide easement (Ex

¹ Mekalsen pled, CP 106, and called a witness to testify, RP 247 that the centerline of the easement was "intended" to be the boundary separating the parcels.

23). The centerline was intended to be the boundary. Olivas northern boundary metes and bounds description matches the centerline of the easement on the 1984 survey (Ex 20). The survey in part looks like this (Ex 23):



The 1984 survey did not set western boundaries for depicted Lots 4 and 1, (partly now the Olivas parcel aka “Tax 38”). Distance calls for the northern boundary of Lot 4 are not depicted and metes and bounds description for the western boundary are not stated. Alyce Mekalsen, her husband Peter, and son Doug Mekalsen, established a road. That road was intended to match the centerline on the 1984 survey, and that same centerline was intended to be the common boundary between Tax 38 and Doug Mekalsen’s parcel (RP 214, RP 247. Dunphy testimony², (RP 295,

² Q. ...But that line seems to transect, I guess—it says, 60-foot easement, correct?
 A. Correct. It goes down the middle. The easement is 30 feet each side of that description.

323, 327-328 RP 345). Olivas' claim matched the facts in Mekalsen pleadings, thus the evidence wasn't substantially disputed. (CP 106-107).

Doug Mekalsen testified he installed the actual road with Peter Mekalsen (RP 295-296, 323-325). The intent was to follow the survey markers established by Roats from the 1984 survey. The only intentional deviation is from Mekalsen making the unilateral decision not to remove a large maple³ (RP 324, 327, 348-349). Because the 1984 survey does not give a distance call on the western boundary, Mekalsen testified he didn't really know if he had deviated from the centerline shown on the 1984 survey (RP 329). In 2009, Mekalsen had a power pole installed at the northern edge of the actual road (RP 330). Regarding this action, Mekalsen asked the Court to move the existing road to correct his "deviation" from his original intent (RP 331-332).

Q. So as I understand what you're saying on this exhibit here, this line coincides with that they—I guess you're saying was supposed to be a boundary separating those properties?

A. Correct.

(RP 247)

³ Q. So the intent was to follow the path that Roats had marked as a centerline?

A. That was the intent until we go farther out.

***(maple and culvert)

Q. But if I'm to understand correctly, the intent at that time was to follow the survey markers set by Roats?

A. Yes.

Q. And the reason it doesn't is because you deviated from it?

A. Yes.

2. Boundary becomes established at road.

- b) Common Grantor began dividing and selling the properties referring in the legal description to the easement centerline shown on the 1984 survey but it differed from the actual road.

On July 16, 1992, after the road established the common boundary, Alyce Mekalsen divided the property and sold the Olivas parcel aka Tax 38 to Moore, (Ex 4). This parcel is referred to as “Tax 38” on assessor quarter section maps (Ex 27,28, 30). It is unknown how the exact legal description was created although Mekalsen’s expert witness Mike Dunphy offered speculation (RP 225). Mekalsen pled similar facts (CP 106-107). The County Assessor adjusted its cadastral maps, showing the northern boundary of Tax 38 as the E/W centerline separating the N ½ from the S ½ (EX 27, 28, 66). On April 18, 1994, Alyce Mekalsen conveyed to her community the remaining property. (Ex 5).

- c) County changes the taxable acreage for the Olivas parcel Tax 38, adjusting the northern boundary to the E/W centerline. It closely matches the existing road.

Jefferson County Assessor Jeff Chapman testified through stipulated testimony that in 1993 the cadastral map was redrawn by the assessor’s office cartographer (Ex. 66). The north line of Tax 38 (Olivas parcel,) was

changed to be a straight line out to the county road, following the E/W centerline dividing the N ½ from the S ½, as shown on the 1978 survey. This closely matches the existing road. Assessed acreage for Tax 38 is approximately 9.29 acres, prior to the 1994 quit claim deed (Ex. 5) being assessed to the E/W centerline for 24 years (RP 123-124, Ex 66).

3. Mekalsen theory of the case is proven incorrect.

- d) The legal descriptions found admissible at trial show Mekalsen's correct legally described title is North of the E/W centerline, ending within the existing road and apparent boundary. The Trial Court disregarded the expert's testimony and rules of surveying.

Mekalsen received two deeds conveying property from Peter Mekalsen's Estate; one in 1995 and one 1997. Mekalsen never received a deed from Alyce's estate who died March 30, 1999 (Ex 78). The 1997 deed's purpose was to correct an error on the 1995 deed, because the PR's for the estate included the Olivas parcel, and the Assessor on review made a note to exclude "Tax 38" from the legal (Ex. 10, 66 par. 16). The PR had the opportunity, if it indeed had been intended by Alyce or Peter, to modify the description for Mekalsen parcel to match the description for the northern boundary of Tax 38. It did not happen, and Mekalsen only offered speculation as to why. The 1997 deed southern boundary is the

E/W centerline and is controlling. In 2003 Mekalsen executed, with his siblings Donna Postma and Wayne Mekalsen, a quit claim deed dubbed the “2003 correction deed.” Mekalsen reason was he ought to have received from the Estate the disputed triangle and he was trying to pick it up in his legal description. (Ex. 15). The legal description is:

“That portion of the North half of the North half or the North half of the Southwest quarter...”⁴

which then describes by a mete and bounds description, property in the S ½ of the N ½, the disputed triangle which Olivas parcel owners paid taxes up to the E/W centerline. Olivas hired an expert surveyor Jim Wengler. He testified that when you read a legal description you must determine where the limits of the property exist, and here, the caption “N ½ of the N ½ of the N ½” did not convey property to Mekalsen south of the E/W centerline in the 1997 deed or the 2003 deed (RP 43-44, 61-62, 76-78, 82-83).

Wengler’s conclusion is based upon his expertise, and per an accepted treatise in surveying titled, “*Wattles Writing Legal Descriptions In Conjunction with Survey Boundary Control*” by Gurdon H. Wattles, Chpt. 3, page 3.2 (Ex 65). The relevant section states:

A caption possesses the inherent function of limiting the title within which it, and/or the detailed description following it, may

⁴ It contains three N ½’s. There is no evidence it was a mistake to do so and Mekalsen never pled it was prior to trial.

operate. Thus, “that portion of Lot 2...Described as follows:” or “That portion of the southeast quarter of the southwest quarter of Section 13...Described as follows:” prevents any part of the detailed metes and bounds which may be outside of the confines of the caption from carrying any transfer of title with it.”

This rule is also set forth in the *The Surveying Handbook* by Russell C.

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“the caption is a type of introduction and ‘specific-purpose statement’ that sets the stage for a complete description. Basic background information in certain parameters are given; any calls in the body that conflict with the caption are nullified. For example, if a description reads ‘a parcel of land lying within the Southwest Quarter of section 10,’ then no portion of the ensuing content can go beyond that limiting factor. Statements within the description might erroneously guide the reader outside the Southwest Quarter of section 10, but no title is passed on those portions beyond the limits given in the caption.”

Both treatises were presented to the Trial Court as reason why Mekalsens 2003 deed did not convey him title to the triangle, and even Mekalsen’s surveyor, Mike Dunphy, could not disagree with this conclusion (RP 285, 289). The Trial Court appeared to determine early on it was a mistake to have an “extra” N ½ in the caption, wanting to “ignore” *Wattles’* rule.⁵

⁵ THE COURT: Okay. So on your drawing[Wengler], --- let’s ignore the caption for a minute, and let’s ignore what the description of the what the survey purports to be. On your map, for example, if you just took the Mekalsen deed—like I say, ignoring the caption—where would the south boundary of the Mekalsen property be?

A. If I ignored the caption, which would not be prudent to do for a professional surveyor—

THE COURT: I understand that.

A. --it would be on the blue line to the south. (RP 76)

(RP 83, 238-289). Olivas showed the legal impact of the 2003 deed was it failed to convey property south of the E/W centerline, “Case A.”

- a) Court granted Olivas Motion in Limine that Mekalsen’s title to the disputed area is derived from recorded deeds and legal descriptions found admissible. Yet the Court decided the case on other theories.

Olivas believed the Trial Court’s previous ruling on a Motion in Limine was in effect and the record does not show that the Trial Court reversed itself. Mekalsen started making a new unpled claim the disputed

THE COURT:…My question is, is the problem with the caption that there’s one to many north halves written in the caption?

THE WITNESS [Wengler]: I don’t believe so. There’s a previous survey that shows that property as the north half of the north half of the north half with monuments set along it. (RP 83) (Ex. 22)

THE COURT: Let me ask a question, and it will apply very soon. Let’s ignore the caption for a minute, the north half of the north half of the north half. Okay.

A. THE WITNESS: [Dunphy] Okay.

THE COURT: Ignoring that caption just for a minute. The metes and bounds description that’s actually written, regardless of what the caption said, does that metes and bounds description describe the property that you surveyed on that survey?

A. THE WITNESS [Dunphy] Yes. (RP 283)

Q. (By Mr. Seaman): Can you just ignore the caption? Is there any rule of surveying anywhere that says you can ignore the caption.

(Objection by Mr. Henry, overruled)

Q. Is there any rule that says you can ignore the caption?

A. No, there’s no rule. (RP 285)

Q. (By Mr. Seaman) Do you know of any authority that you relied upon that disagrees with the conclusion Mr. Wengler relied upon by citing Wattles?

A. [Dunphy] No. (289)

THE COURT: And Mr. Henry, the 2003 deed, the plaintiff is saying its defective because it goes beyond the limitations in the caption. Is there any authority that suggests that it can be ignored?

Mr. Henry: Yes. (RP 392-393) [no case law was provided]

triangle “remains unconveyed,” i.e. remaining in Alyce or Peter’s estate (CP 93-94). That had not been originally pled by Mekalsen (CP 9-19). Olivas wanted to know Mekalsen’s theory and engage in discovery. The Court granted the Motion in Limine, precluding Mekalsen from presenting evidence and arguing at trial theories and facts not pled. Id. Olivas was granted permission under CR 15 and filed an amended complaint (CP 95-97). Mekalsen filed an amended answer and amended counterclaim (CP 98-111). Mekalsen did not obtain an order under CR 15 to amend the counterclaims but regardless, there is no claim stated that the 2003 deed contained a scrivener’s error in the original or amended counterclaims. The only mention of a “scrivener’s error” by Mekalsen (CP 17, 109 V.14) is to categorically deny a claim made early on by Olivas that the deed for Tax 38 may itself contain a scrivener’s error (CP 4)⁶.

Mekalsen’s theory to the disputed triangle south of the E/W centerline was “there is a deed, and at trial we will continue to rely on the deed executed by the co-personal representatives of Mr. Mekalsen’s parent estates...” Mekalsen stated that “Defendants stand on their title including the 2003 recorded deed” (CP 52-53). *Declaration of Chuck Henry*. “I will

⁶ Correctly realizing the high burden of proof required, Olivas abandoned the claim in the amended complaint that the 313.07 vs. the 331.81 calls on the west and east boundaries of Tax 38 may be due to a “scrivener error.” That was the “mistake” Olivas originally raised, not that the 2003 deed contained a “scriveners error.”

stand on my title.” (CP 56 line 20). The court partially granted Olivas’s Motion in Limine, but did not sign the order presented by Olivas (CP 61-62), rather the trial court adopted Mekalsen’s proposed order (CP 93-94):

“Granted to the extent that Defendants Mekalsen have agreed that they will not argue new claims not originally pleaded in the Answer to the Complaint and Counterclaim for Quiet Title and will not offer evidence that the disputed property is “unclaimed” or “unconveyed” property which would still be in the Estate of Peter Mekalsen or Alyce Mekalsen... Defendant Mekalsen are limited to evidence that supports their theory that Defendant Mekalsen’s title to the disputed area is derived from recorded deeds executed by the heirs and/or co-personal representatives of Mr. Mekalsen’s parents or their estate....Defendant’s title to the disputed property as conveyed to him, shall be determined by the court according to legal description or descriptions found admissible at trial by the court...Motion to join the Estates of Peter Mekalsen and Alyce Mekalsen is hereby DENIED.”

(CP 93-94). The ruling was unambiguous, yet the Trial Court allowed Mekalsen to raise scrivener error in trial, and then decided in Mekalsen’s favor by a post-trial *sua sponte* amendment of the pleadings and a reformation of the deed, “Case B.” Mekalsen did not “stand on his title,” “Case A,” now claiming that the three N ½’s in the caption were a mistake and that the court ought to award him the triangle because it was what his parents intended. Olivas argued the three “N ½’s” in the caption limited the conveyance as testified by Wengler. The 2003 deed did not give him title to the disputed triangle, the 1997 deed from the Estate was

controlling, and the E/W centerline was the southern boundary, matching the road established by the common grantor and the line taxes were paid.

The Trial Court held that Dunphy testified the captions containing the three “N ½” were scrivener errors based upon records and files since 1980 (CP 182). Dunphy doesn’t know who wrote the legal description for the deed from Alyce to Moore’s (RP 225). The legal description for the 1995 Deed did not come from Dunphy or his predecessor (RP 227). Dunphy doesn’t know who wrote the 1997 deed (RP 228-229). He has no idea who created the legal descriptions for the 2003 deed (RP 237-238). Dunphy never interviewed any of the original grantors, Peter or Alyce Mekalsen, and he never even spoke to Wayne Mekalsen or Donna Postma, who conveyed the property from the Estate in 1997 or in 2003 as tenants in common (RP 280-282). The Trial Court sustained an objection when Mekalsen attempted to introduce testimony by Dunphy concerning what Peter Mekalsen intended in 1980, as Dunphy did not have personal knowledge of, and his information was based upon his review of records from Roats engineering after reviewing a hearsay statement, and this information was never disclosed in discovery.⁷ On cross, Dunphy

⁷ Mr. Seaman: I asked for this information in discovery...

Mr. Henry: I didn’t intend to produce it at trial. The witness is an expert capable of testifying to his own records.

Mr. Seaman: And I entitled to know what those records are. That’s why we have discovery, so I know what he’s basing his opinion on.

conceded that the Mekalsen Short Plat was never created, there were no legal descriptions for Lot 1 (Olivas) or Lot 4(Mekalsen) from the 1984 survey, and all he knew is someone may have drafted legal descriptions in 1980, but never actually went out and marked corners for the subject properties (RP 238-241). Dunphy conceded he didn't actually know the purpose of the 1984 survey (RP 245). Dunphy ended up stating that the 2003 deed didn't match legal descriptions that Roats prepared, not because it contained three "N ½" but because the original just said "southwest quarter." (RP 220). Mekalsen attempted again to introduce evidence of Roat's actions in the 1980's to support the "scrivener's error" claim, and again the Trial Court sustained the objection (RP 275-277). Yet the Trial Court concluded the 1997 deed needed to be corrected and that that was the purpose for the 2003 deed, based solely upon Mekalsen testimony, and nothing else (CP 181). Doug Mekalsen testified he didn't even know the 1997 deed was erroneous at the time, thus it could not have been a "mistake"⁸ and he never called any other witness with personal

(RP 212)

The Court: Originally it was hearsay objection. Now it's an objection because it wasn't disclosed as part of discovery. Okay. So for the moment I'll sustain the objection.

RP 213

⁸ Q. Okay. Then in 1997, you received a deed from Mr. Norbut, correct?

A. Yes.

Q. And that was property in the north half, of the north half of the north half?

A. That's what I hear.

Q. And did you believe at that time it was a mistake?

A. No.

knowledge to support his theory (RP 339). Olivas was assured this case was not about reforming the deed, but the argument developing at trial by Mekalsen was for “Case B.”

b) Court finds Mekalsen is prevailing party over objection.

The Trial Court determined post trial in a written memorandum opinion there was no evidence to support Olivas theories “Case A” (CP 180), even though Mekalsen had pled facts for a common grantor (CP 106-107), and Doug Mekalsen’s testimony supported it (RP 325-327, 348). The Court determined there was no evidence of a boundary established by a common grantor, and the “8-10 foot driveway” was placed where it was out of convenience (CP 181). The Trial Court determined it did not matter what was pled by Mekalsen prior to trial⁹ or what was stated in a pre-trial Order on a Motion in Limine that Olivas relied upon, “Case A”, and the Trial Court, sitting in equity, *sua sponte* amended Defendants claim post trial, finding the 2003 deed contained a scrivener’s error, and that Doug Mekalsen’s parents intended him to get the disputed triangle, “Case B” (CP 185-193).

Conclusions of law No. 10 states:

⁹ THE COURT: The plaintiffs have absolutely no theory whatsoever to get that strip of land, and whether or not this case was properly pleaded, well, okay, too bad. CP 11 , Jan 5, 2018 hearing.

The Court should adjudicate such issues which are tried by implied consent when all interested parties are before the Court, even upon a theory not presented by the parties when the evidence relevant to the same is admitted without objection.¹⁰

(CP 192). But Olivas did object to the evidence (RP 300-306). Mekalsen didn't actually prevail on a theory pled prior to trial (RP 4-5 Jan 5, 2018). The Court erroneously awarded fees and costs, including expert fees.

E. ARGUMENT

4. The evidence supported a common grantor established the boundary at the road.

Olivas asks for reversal because Olivas pled and proved by a preponderance of the evidence, "Case A," that there was a boundary line established by a common grantor, the road and under the law set forth in Strom v. Arcorace, 27 Wn.2d 478, 481, 178 P.2d 959 (1947) the practical location of the dividing line set by a common grantor is binding on grantees. Not the surveyed line, the actual line as it exists on the ground. Winans v. Ross, 35 Wash. App. 238, 666 P.2d 908 (1983). The common grantor doctrine has been recognized in this state since at least 1910. Pendergrast v. Matichuk, 186 Wn.2d 556, 565, 379 P.3d 96, 100 (2016).

¹⁰ Evidence supporting Mekalsen's claim concerning what his parents intended EX 74, 75, 76, and 77, was admitted over objection.

The Washington Supreme court noted that in several cases, a boundary by common grantor was found without proof of an active and purposeful change made with full knowledge and recognition of the original grantee. Id. at 566. The rule is controlling and is the law that equity cannot ignore.

The Court made findings No., 4, 5, 6 and 7 that supported “Case A.” (CP 186). Summed up they show a 1978 survey set the E/W centerline, the 1984 survey showed the centerline of the 60-foot easement, that Peter Mekalsen created the road in 1987 within the 60-foot easement, and then in 1992 Alyce conveyed Tax 38 with a legal description that referred to the centerline of the easement shown on the 1984 survey. Yet, the Court contradicted itself in finding No. 32:

The Court finds that the locations of the “30-foot easement centerline” as the Southern boundary of Defendant’s property is credible and accepts that determination; **Plaintiff presented no evidence of any alternative** [emphasis added].

Mekalsen pled the facts that would support a common grantor theory (CP 106-107). Courses and distances in a legal description must yield to natural and ascertained objects, Camping Comm'n of Pac. Nw. Conference of Methodist Church v. Ocean View Land, Inc., 70 Wn.2d 12, 15, 421 P.2d 1021, 1023 (1966), such as the road here that was intended to follow the 1984 survey. See also Matthews v. Parker, 163 Wash. 10, 14–15, 299

P. 354, 355 (1931) (the well-settled general rule is that the monuments will control the courses and distances if they be inconsistent with the monument calls.) Man-made monuments, because of the certainty of location, visibility, stability and permanence, are considered equal in rank. Although the 2003 deed didn't call out the road as a monument, the same general rule applies. If the 1984 survey shows a road as the centerline, the western boundaries on that survey are not described, then the existing road, as installed by the common grantor, must be the boundary. This is the *status quo* and was evident to a bona-fide purchaser for value. See also § 13.4. Boundaries—In general, 18 Wash. Prac., Real Estate § 13.4 (2d ed.). The Court erred by concluding that because none of the legal descriptions in the deed referred to any road or driveway (finding 7, CP 186) that Olivas has no legal or equitable theories (conclusion 11 and 13, CP 192). This incorrectly applies findings 4-6 CP 186.

Mekalsen's arguments are substantially the same as made Pendergrast, *infra*, where Appellant Matichuck contended he was entitled to prevail because "there is absolutely no evidence that the common grantor ever established a boundary line different from, the deeded boundary," "no evidence of any formal or specific agreement about the boundary," and "[no] evidence that the parties acted in a way after the sale to suggest, that they agreed that the fence was the boundary" (186 Wn.2d at 562).

Mekalsen claims Alyce intended the boundary to be the metes and bounds description (CP 165, 166) by arguing, “we believe the centerline of that 1984 road is the common boundary legally recorded in the deed of both parties, (RP 31 line 10-12), “since that time the titles have always come down with reference to that metes and bounds legal description.”(RP 31 line 17-19)... “subsequent deeds did not refer to the existing road as a boundary or anything at all.”(RP 367, line 1-2)... “the legal description of that centerline of the easement...was picked up in all the deeds”(RP 367, line 11-13). Mekalsen focused on the “metes and bounds” and ignored the location of the actual road established by the common grantor.

Our Supreme Court in Pendergrast soundly rejected Matichuck’s substantially similar arguments, and the Trial Court erred by not rejecting Mekalsen’s, erroneously concluding “there is no evidence of a boundary established by a common grantor, and the “8-10 foot driveway” was placed where it was out of convenience. CP 181. The centerline of the road shown on the 1984 survey was intended to be the boundary, but for Doug and Peter Mekalsen’s unilateral mistake moving it north. Mekalsen established a road, that road was intended to match the centerline on the 1984 survey, and that same centerline was intended to be the common boundary between Tax 38 and Doug Mekalsen’s parcel. (RP 214, 247, 295-296, 323-325, 327, 348-349.) Subsequent metes and bounds

descriptions referred to a certain line, but the actual centerline of the road is where Doug Mekalsen put it. Mekalsen should not benefit from his mistake. Under Pendergrast, Strom, the Trial Court erred. To assert equity, one must not be the party who created the need for it in the first place.

5. The Trial Court Erred and violated due process by deciding the case on a theory never pled with no opportunity to respond.

An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law Mayer v. Sto Indus., Inc., 156 Wash.2d 677, 684, 132 P.3d 115 (2006).

Olivas should have won “Case A,” and there was no need for “Case B.”

c) Purpose of Notice Pleading is for a fair trial and opportunity to respond. Sua sponte amending post-trial violates purpose.

The purpose of a notice pleading is to “facilitate a proper decision on the merits.” Caruso v. Local Union No. 690 of Int’l Bhd. of Teamsters, 100 Wash.2d 343, 349, 670 P.2d 240 (1983). The purposes of Rule 15 are to “facilitate a proper decision on the merits” providing each party with adequate notice of the basis of the claims or defenses asserted against him. Herron v. Tribune Pub. Co., Inc., 108 Wn.2d 162, 165, 736 P.2d 249, 253 (1987). The trial court considers several factors to determine whether to

grant leave to amend, including undue delay, juror confusion, and unfair surprise. Watson v. Emard, 165 Wn. App. 691, 697, 267 P.3d 1048, 1051 (2011) The touchstone is the prejudice such amendment will cause the nonmoving party. Id. At 699. A court considers the possible undue delay, unfair surprise, and the futility of amendment. Id. Although a claim may have merit, the trial court may reasonably determine the delay in bringing the claim would be unfairly prejudicial. Haselwood v. Bremerton Ice Arena, Inc., 137 Wn. App. 872, 890, 155 P.3d 952, 961 (2007), aff'd sub nom. Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 210 P.3d 308 (2009). The trial court should have considered whether amendment could have been timely made earlier in the litigation. Id.

The trial court relied upon the language in CR 15(b) and Jensen v. Ledgett, 15 Wn. App. 552, 555, 550 P.2d 1175, 1177 (1976) (evidence raising issues beyond the scope of the pleadings is admitted without objection, the pleadings will be deemed amended to conform to the proof.). This is not Jensen. There the case turned on upholding the decision of the trial court because the complaining party didn't object to the evidence showing mutual mistake. Here, quite differently, Mekalsen kept misdirecting Olivas that this was "Case A" not "Case B." Further, there wasn't "implied consent" like in Longenecker v. Brommer, 59 Wn.2d 552, 563, 368 P.2d 900, 907 (1962) or O'Kelley v. Sali, 67 Wn.2d

296, 299, 407 P.2d 467, 469 (1965)¹¹ The trial court’s reliance on these cases is erroneous. As noted in Kirby v. City of Tacoma, 124 Wn. App. 454, 98 P.3d 827 (2004), it is possible to try an unpleaded claim by implication. But in determining whether the parties impliedly tried an issue, an appellate court will consider the record as a whole, including whether the issue was mentioned before the trial and in opening arguments. *Id.* The Court will consider the evidence on the issue admitted at the trial, and the legal and factual support for the trial court's conclusions regarding the issue. *Id.*

d) Olivas inquired and was assured the case was not about a deed reformation. Olivas even asked to brief the court and contending it would be a different trial if reforming the deed. Mekalsen stated they were not reforming the deed. There was no “implied consent”

The Due Process Clause entitles a person to an impartial and disinterested tribunal. Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980) Here, Mekalsen assured Olivas this

¹¹ Mr. Seaman: “To come in here and say that, “oh, we argued this all along.” its infuriating because I kept trying during closing, during opening, to pin down the theory upon which they asked this Court to make a decision. I did it in the motion in limine. I asked to narrow the issues so that we knew what we were arguing at trial. (RP 9-10, Jan 5, 2018 hearing)

case was not about a deed reformation after Olivas objected to Mekalsen's late trial brief.¹² Olivas didn't know what theories Mekalsen was proceeding with at the start of trial (RP 22-23).

At the beginning of trial:

Mr. Henry: I will ask the Court to go back and review the Motion in Limine...it has always been our position that Doug Mekalsen holds a valid deed to the disputed property and has since 2003. That's the theory we need to make....which should be of no surprise to Mr. Seaman...RP 26-27).

Mekalsen argued the 2003 deed was valid, not erroneous, ("I will stand on my title"), but Jim Wengler quickly destroyed that theory.

At the close of trial:

Mr. Seaman: --but I'm curious to what's going to be said in closing—is asking the Court to reform a defective deed. That's an entirely different legal standard which hasn't been briefed, it hasn't been brought before the Court, and the case law is just not there. So I'm sticking with what the Court ruled earlier, which is the law of the case, the disputed property as conveyed is determined by the legal descriptions found admissible. RP 355

Mekalsen pled his 2003 deed properly conveyed the property and initially said the pled theories were not changing. Olivas raised in the Motion in

¹² Mekalsen filed a motion in limine and their trial brief untimely. Even at that late hour, Mekalsen was still arguing "Case A" and had never raised scrivener error "Case B."

Limine that Mekalsen appeared to be saying that their legal description is what it says it is (CP 39), but Mekalsen also appeared to be changing their theories about the property coming from the estate (CP 42). Olivas requested that Mekalsen's statement about his title, that it "is what it says it is", should be admitted at trial (CP 044). Mekalsen contended in the motion on limine hearing that the original pled legal theories were not changing. Mekalsen's title to the disputed area would be derived from recorded deeds and the court would have to rule based upon the legal descriptions found admissible at trial. Thus it was very frustrating to Olivas to find in trial that scrivener's error and deed reformation had suddenly popped up in the testimony. The colloquy on the record, at close of trial:

Mr. Henry: Mike Dunphy called what happened in the 2003 a scrivener error... It was a scrivener's error. That's the honest explanation of what it was because there is no other factual explanation for why that third north half was in there¹³ (RP 375).

Mr. Henry: So we ask the Court to define judgment in this case granting quiet title to Doug Mekalsen to the property defined by the metes and bounds description of the 2003 deed (RP 377).

¹³ There always was a reasonable inference, but the Court rejected it. That is, the third N ½ was intentional so that it matched the E/W centerline, matching the existing road and consistent with the taxable boundary for Tax 38. The theory and evidence were present to support Olivas theory from the beginning.

Right before the initial trial date Mekalsen hired Dunphy. (Ex 69). Olivas then hired Wengler, asking for a continuance of trial (CP 71-75)¹⁴ Wengler's purpose was to demonstrate that the 2003 deed was legally inoperative; it could not convey property south of the E/W centerline based upon *Wattles*, because of the three N ½'s in the caption, thus the boundary at the road and what Tax 38 paid taxes on was correct. Mekalsen couldn't prevail on his "valid" deed claim. Continuing at the close of trial:

Mr. Seaman: They've also—and, again, this wasn't briefed. And I guess they're arguing it's a scrivener's error. But I don't think they're asking you to reform the deed, because if they're asking you to reform the deed, that is an entirely different case and an entirely different legal standard. And if we were reforming the deed, we would be doing something different (RP 382).

THE COURT: I realize there's no claim for reformation and so on (RP 387, line 16-17).

Mr. Seaman: Would you accept a supplemental brief? The one matter I am concerned about. Two things that the Court is considering, is what the standard is for reformation of a deed—if that's something the Court is considering, I'd like to brief you on that (RP 397).

THE COURT: I think the issue the defendant is raising, and Mr. Henry can correct me, he's not actually asking for reformation as

¹⁴ The parties agreed to continue the original trial so that Mekalsen could get Dunphy's survey, but then Mekalsen objected to a second continuance and the properly set Motion for Continuance, obtaining an improper ex-parte order CP 83-84. Olivas needed Wengler to point out the significant errors on Dunphy's late survey and show why the caption limited the conveyance to north of the E/W centerline.

such. He's basically saying this is an equitable proceeding under the statute to set a boundary line and so on and the quiet title. And in equity, I think the defendant is basically asking me to just recognize there was an error, there was an error in this deed. And in equity, I should basically ignore one of the north one halves and recognize that the deed then includes something south of the east-west line all in equity, but not technically as a claim or suit in reformation. Is that accurate?

Mr. Henry. It is (RP 397-398).

After this colloquy, the court permitted supplemental briefing on the "equities" of the claim, with Olivas still believing the decision would be based upon theories pled, "Case A." (CP 169-173). Olivas did not brief deed reformation, instead taking the Trial Court's invitation to brief why equity should follow the law. Instead the Court ruled in the memo opinion, deciding on "Case B" concerning the deed reformation:

"Plaintiff had notice that it could be an issue and was not prejudiced; Plaintiff could easily anticipate a reformation claim. As such the Court would also find that Defendant is entitled to reformation of the 2003 deed" (CP 184).

Olivas did not "anticipate" a deed reformation claim, "Case B" and did not impliedly consent to try it. Rather Olivas worried that the Trial Court was unexpectedly considering reforming the deed, while both Mekalsen and the Trial Court were assuring Olivas they were not. This is why Jensen is

not applicable and is different. Did the Trial Court pre-judge the outcome of the proceedings early on by ignoring Wengler's expert opinion? It certainly appeared that way by the nature of the questions asked by the Trial Court. Olivas had taken Mekalsen's theory that the 2003 deed was "valid" and showed why that was not true, prevailing on "Case A." Why look for a different theory to give Mekalsen relief? Jensen should not apply so liberally that a litigant is left guessing at trial, otherwise why have "notice pleadings." Contrary to what may be argued a "point and grunt" standard really doesn't give a party notice. Further, O'Kelly and Longenecker doesn't mean the wild west rules, but Olivas is not contending Mekalsen had to conform to a hypertechanical pleading standard. That has been rejected. What Olivas argues is had the actual trial been about reforming the deed, "Case B", then Olivas would have inquired differently and called different witnesses. Olivas would have put on a different case, and was denied the opportunity to do so. Deed reformation must be proven by clear, cogent and convincing evidence, and Olivas would have briefed the court correctly on the law, had Olivas known the case was actually about reforming a deed, "Case B". Olivas would have sought estate documents, to see if there was evidence of intent that didn't match the plain language on the deed, and would have called Donna Postma and Wayne Mekalsen. Olivas would have shown the Court

that title from Alyce's estate had never been traced. A party should not be required to guess against which claims they will have to defend. Kirby, 124 Wn. App. at 470. A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests. Id. at 470. A party should not be penalized for arguing against a claim for which it was ill prepared as a result of the opposing parties procedural failures. Id. at 471. The Trial Court certainly erred amending the pleadings in favor of Mekalsen, *sua sponte*, without notice and opportunity to respond.

6. The evidence did not support a deed reformation. There is no evidence that the three N ½'s was a mistake.

- e) Standard to reform is clear, cogent and convincing evidence. Mekalsens offered no evidence regarding this matter and therefore did not meet this burden, even if the Court was permitted to amend the pleadings.

The trial court erred because there wasn't a sufficient quantum of evidence to meet the high legal burden for deed reformation. The Court reviews challenged findings for "substantial evidence," defined as the quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true. Dave Johnson Ins., Inc. v. Wright, 167 Wn. App. 758,

778, 275 P.3d 339, 351 (2012). The review is deferential, viewing the evidence and all reasonable inferences in the light most favorable to the prevailing party. Id. However, the high burden of clear, cogent and convincing evidence applies and no rational fact finder could find evidence to support a mutual mistake supporting deed reformation. Evidence is clear, cogent, and convincing if it shows that the ultimate fact in issue is highly probable. Id. at 774.

A trial court may reform an instrument under its equitable power if there is clear, cogent, and convincing evidence of a mutual mistake or a unilateral mistake coupled with inequitable conduct. Wilhelm v. Beyersdorf, 100 Wn. App. 836, 843–44, 999 P.2d 54, 59 (2000). A deed containing an inadequate legal description may be reformed where the deficiency is due to a mistake by the scrivener. Id. Citing to Saterlie v. Lineberry, 92 Wash.App. 624, 628, 962 P.2d 863 (1998).

Even if Mekalsen had actually pled relief to reform his 2003 deed “Case B”, there is no evidence of inequitable conduct and no evidence of mutual mistake. Dunphy doesn’t know who wrote the 1997 deed (RP 228-229). He has no idea who created the legal descriptions for the 2003 deed (RP 237-238). Dunphy conceded he didn’t actually know the purpose of the 1984 survey (RP 245). Doug Mekalsen testified he didn’t even know the 1997 deed was erroneous at the time (RP 339). The trial court

erroneously concluded (conclusions 3-8, CP 191-192) by finding that there was an intent by Alyce and Peter to convey the disputed triangle and that Dunphy knew it was a mistake. The Court's finding after trial was:

For **reasons unknown**, there was repeated difficulty in **correctly** conveying all of the Mekalsen family property which was **supposed** to be conveyed to Doug Mekalsen, but there was **sufficient evidence** that the late parents...**had agreed** on the various properties to be conveyed to each of them. [emphasis added].

Finding 26, CP 189.

Each bolded item above is not supported by the evidence (See RP 299-307), only argument by counsel, and there isn't a single admissible document to support this finding. The estate documents that were admitted over objection, in violation of the order in limine, that could support the conjecture that Doug Mekalsen was "supposed" to get the disputed triangle because Alyce and Peter had "agreed" to this were exhibits 74, 75, 76, and 77. It may have been in the trial court's discretion to reverse its own order, but Exhibit 74-77 do not support Finding 26 and the Trial Court never informed the parties it was reversing its order. Findings 28, 29 and 30 are not braced by clear, cogent and convincing evidence (CP 190).

Remanding for trial is not necessary. There is no probability that Mekalsen could meet the high burden showing his parents intent regarding the disputed triangle. The 1997 deed is controlling and the PR had a

second chance to convey per the Estate's intent when it corrected the original 1995 deed. Yet, the boundary set in 1997 is the E/W centerline. Mekalsen didn't even trace Alyce's interest in the "unconveyed" community property. The Trial Court didn't apply the correct burden to reform the deed, as it is clearly not in the conclusions (CP 191 and 192).

- f) The 2003 deed was legally inoperative. This is not the same as inadequate legal description due to a mistake by the scrivener that fails to meet the Grantor's intent. Mekalsen is not entitled to "equity" for his mistake.

The benefit of the doctrine of balancing the equities, or relative hardships, is reserved for the innocent defendant who proceeds without knowledge that he or she is encroaching on another's property rights. Wilhelm 100 Wn. App. at 847. The Trial Court decided this case in "equity" by ignoring the three "N1/2's" in the caption and ignoring the evidence for "Case A." "An equitable remedy is an extraordinary, not ordinary, form of relief," available "only when there is a showing that a party is entitled to a remedy and the remedy at law is inadequate." Sorenson v. Pyeatt, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006). As noted by this Court in Kave v. McIntosh Ridge Primary Rd. Ass'n, 198 Wn. App. 812, 819, 394 P.3d 446 (2017), a trial court's authority to order

equitable relief is a question of law reviewed de novo. Kave notes a colloquy in the trial court, similar to what occurred here. The case has distinguishable facts, but the ruling is the Trial Court exceeded its equitable powers in relocating an easement. Here the Court exceed its equitable powers deciding “Case B.”

g) The deeds’ caption limited the conveyance.

The Trial Court should not have ignored the rule in *Writing Legal Descriptions In Conjunction with Survey Boundary Control* by Gurdon H. Wattles, or *The Surveying Handbook* by Russell C. Brinker and its rational is consistent with our case law. What is conveyed by a deed is question of law. Kiely v. Graves, 173 Wn.2d 926, 271 P.3d 226 (2012). The 1997 and 2003 deed both limited Mekalsen’s conveyance to the E/W centerline, which nearly matched the existing road, and is the *status quo*. Exhibit 65 and Wengler’s testimony explains that despite the metes and bounds description, the caption limits or controls the words that follow.

Courts examine the four corners of the deeds, in light of the body of case law interpreting similar documents. Hanson Indus., Inc. v. Cty. of Spokane, 114 Wn. App. 523, 527, 58 P.3d 910, 913 (2002). The Court will also look at the circumstances surrounding the deed's execution and the subsequent conduct of the parties. Brown v. State, 130 Wn.2d 430, 438,

924 P.2d 908, 912 (1996). If we “ignore” the caption, then that means the metes and bounds controls and the caption is superfluous. That is not the correct way to read a deed. Mekalsen’s deeds did not convey him property that the Trial Court “in equity” awarded him in reaching its decision in “Case B.” The Washington Supreme Court adheres to the rule requiring people dealing with real estate to properly and adequately describe it. Martin v. Seigel, 35 Wn.2d 223, 212 P.2d 107 (1949)(“We feel that it is fair and just to require people dealing with real estate to properly and adequately describe it, so that courts may not be compelled to resort to extrinsic evidence in order to find out what was in the minds of the contracting parties.” Id. At 228.)

7. Mekalsen didn’t prevail on any theories pled at trial, and thus as a matter of law cannot be a substantially prevailing party.

The Trial Court made an error of law in conclusion 10 (CP 192) As a rule, the prevailing party is one who receives an affirmative judgment in its favor. But if neither party wholly prevails, determining who is the substantially prevailing party depends on the extent of the relief accorded. Dave Johnson Ins., Inc. v. Wright, 167 Wn. App. 758, 783, 275 P.3d 339, 353 (2012). Mekalsen didn’t prevail on the pled claims of trespass,

adverse possession, or a valid 2003 deed. Olivas should not have to pay the expert costs assessed, as they were improper.

8. Attorney fees and Costs on Appeal.

Pursuant to RAP 18.1 (a) and (b), Olivas requests attorney fees and costs on appeal. Walking into trial Olivas thought they were defending a trespass claim, which was abandoned (RP 10), and adverse possession (RCW 7.28.083). Neither is the subject of the appeal, but at trial would have been grounds for Olivas to be awarded attorney fees.

However, procedural bad faith is grounds for attorney fees.

Rogerson Hiller Corp. v. Port of Port Angeles, 96 Wn. App. 918, 928, 982 P.2d 131, 136 (1999). As the Trial Court decided the case in equity, attorney fees may be awarded in equity. Olivas tried what was presented as “Case A” but at the close of trial find they are defending “Case B” a reformation claim that was never pled. Again, Olivas is not contending hypothetical pleadings are required, but to condone such behavior as here, assuring its about the validity of the deed, with Olivas expending substantial expense on Wengler, to find out mid-trial Mekalsen is now arguing “scrivener’s error.” Attorney fees are justified.

F. CONCLUSION

Olivas should have prevailed because they showed the 2003 deed did not convey the triangle south of the E/W centerline. An impartial court would then have to look to what other theories, based upon the evidence would set the boundary. The common grantor did, creating a road that nearly matched the E/W centerline, and then conveying property with the intent the boundaries would be the centerline as shown on a 1984 survey. Olivas parcel, Tax 38 was assessed taxes for 24 years up to that E/W centerline. Mekalsen had a 1997 deed from the Estate that matched that E/W centerline. The evidence and law supported Olivas, that was the *status quo*, leaving the long apparent boundary. It was “Case A.”

That is not what happened. Ignoring the surveyors’ collective testimony that the caption limited the conveyance, and finding that Olivas had “no evidence whatsoever” the Trial Court reached for another theory, finding without clear cogent and convincing evidence that three “N ½’s” in the caption was a mistake, *sua sponte* amending the pleadings post trial, without meaningful opportunity to respond, and reformed the deed. That was “Case B,” and it never should have occurred had Mekalsen and the Trial Court adhered to the Order in Limine and basic rules concerning notice pleading to avoid unfair surprise. Olivas request reversal of the Trial Court and set the boundary at the E/W centerline.

Dated this July 20, 2018



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CERTIFICATE OF SERVICE

I certify that I directed Appellants Opening Brief to be served by e-service and mailed first class on July 20, 2018 to the following:

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