

FILED
Court of Appeals
Division II
State of Washington
10/4/2018 11:29 AM

No. 51887-5-II

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
Appellants

vs.

DOUG MEKALSEN and DIANNE MEKALSEN
Respondents.

Respondents' Brief on Appeal

W.C. Henry
WSBA 4642

Henry & Allen, Attorneys
2000 Water Street
Port Townsend, WA 98368
360-385-2229
chenrypt@qwestoffice.net

CONTENTS

A. INTRODUCTION ----- 1

B. RESPONSE TO ASSIGNMENTS OF ERROR ----- 2

C. ISSUES ON ASSIGNMENTS OF ERROR ----- 3

1. Was there a preponderance of evidence that a common grantor established a boundary different from the recorded description, by installing an 8-10 driveway within a 60' easement through unimproved woods, thus putting anyone on notice that was the desired boundary?--- 3

2. Was there substantial evidence at trial to support challenged Findings of Fact, to support the trial court's Conclusions of Law, and Judgment? ----- 3

3. In equity under RCW 7.28.010 and .120, did the trial court exercise sound judicial discretion to formulate a remedy to quiet title, by reforming a recorded legal description in accordance with common law precedence? -- 3

4. Did Mekalsens sufficiently affirm that their claim was for equitable quiet title to the metes and bounds decision in the recorded 2003 deed, under the statutes, to avoid trial surprise to the Plaintiffs below? ----- 4

5. Did the trial court have sufficient evidence on which to base a sound decision to equitably reform the deed, as a remedy, where Olivas had not shown grounds for title superior to over Mekalsens' defective 2003 deed? ----	4
6. Did Olivas base their case for quiet title on a legal defect in Mekalsens' deed, as a perceived weakness of Mekalsens' claim, rather than on the strength of their claim? -----	4
7. Was Mekalsen the prevailing party, when the trial court found that Olivas had no superior legal or equitable theory to justify claiming the disputed property? -----	4
8. Did the trial court properly award Mekalsen their statutory attorney's fees and costs? -----	4
D. STATEMENT OF THE CASE -----	4
History of the property -----	6
<u>History of the case</u> -----	12
E. ARGUMENT AND AUTHORITIES -----	19
Assignment of Error 1: (a) Driveway as a boundary -----	19
Assignment of Error 1: (b) Payment of taxes -----	27
Assignment of Error 1: (c) Quiet title to Mekalsen -----	30
Assignment of Error 2: <i>Sua sponte</i> reformation. -----	36

Assignment of Error 3: Prevailing party -----	42
F. CONCLUSIONS -----	44

TABLE OF AUTHORITIES

Cases

<u>Brodsky v. Nelson</u> , 57 Wash. 671, 107 P. 840 (1910) -----	16, 17, 34
<u>Blair v. Wash.St. Univ.</u> , 108 Wn.2d 558, 564, 740 P.2d 1379 (1987) -----	39
<u>Camping Comm'n of Pac.NW. Conference of Methodist</u>	
<u>Church v. Ocean View Land, Inc.</u> , 70 Wn.2d 12, at 15, 4 21 P.2d 1021 (1966) -----	23
<u>Chaplin v. Sanders</u> , 100 Wn.2d 853, 676 P.2d 431 (1984) -----	35
<u>Columbia State Bank v. Invicta Law Group, PLLC.</u>	
199 Wn.App. 306, 319, 402 P.3d 330 (2017). -----	26
<u>In re Foreclosure of Liens</u> , 123 Wn.2d 1979, 204, 867 P.2d 605 (1994)	
<u>Matthews v. Parker</u> , 163 Wash. 10, 14-15, 299 Pac. 354 (1931) --	23
<u>Orwell v. City of Seattle</u> , 103 Wn.2d 249, 692 P.2d 793 (1984) --	40
<u>Pendergast v. Matichuk</u> , 186 Wn.2d 556, 379 P.3d 96 (2016) -----	20
<u>Strom v. Arcorace</u> , 27 Wn.2d 478, 481, 178 P. 2d 959 (1947) ---	21
<u>Turner v. Rowland</u> , 2 Wn.App. 566, 468 P.2d 702, (1970 Rev. Den.; overruled on other grounds, -----	35

Wilhelm v. Beyersdorf, 100 Wn.2d 836, 999 P.2d 54

(2000) ----- 37, 39, 41

Winans v. Ross, 35 Wash.App. 238, 666 P.2d 908 (1983) ----- 20

Statutes

RCW 7.28.010 ----- 1, 4, 34, 36, ATTACHMENT A

RCW 7.28.120 ----- 1, 4, 34, 36, ATTACHMENT A

RCW 58.04.020 ----- 14, 15, 16, 32, 33

Court Rules

RAP 18.1 (a) and (b) ----- 43

A. INTRODUCTION:

Appellants Olivas failed on a variety of legal theories to quiet title to the disputed property, a narrow triangular strip of unenclosed, lightly wooded land which was excluded from their metes and bounds legal description when sold in 1992 to their ancestors in title by Defendant Doug Mekalsen's mother. The description of the strip has never been in their chain of title. It contains a 8-10' wide driveway installed in 1987, within an originally-60' wide mutual easement created in 1984.

Their case at trial, and here, relies on the weakness of Mekalsens' recorded 2003 deed with an accurate metes and bounds description including the disputed property, but an error in the caption consisting of an extra "N½", accepted by the trial court as a scrivener's error, would exclude the disputed strip in the "S½" under strict legal construction.

When both parties claimed for quiet title under RCW 7.28.010 and 7.28.120, the trial court elected to quiet title to Mekalsen by *sua sponte* ordering reformation of his 2003 deed to remove the surplusage "N½". Appellants Olivas complain that caused them prejudicial surprise by granting relief on a defense theory not pleaded.

Mekalsens did not plead for reformation of the deed, but made a record that they were proceeding on the equitable remedy in the court's discretion, asserting that their equitable title to the metes and bounds

description in the defective deed was superior to any of the claims pressed by Olivas.

In the trial court's Memorandum Opinion CP77, the court held, and Findings of Fact support, that Olivas failed to produce evidence or a viable theory on any of their claims, most of which were based on their unilateral mistaken assumptions of the facts and no fault of the Mekalsens.

Appellants have sent up the entire Verbatim Report of Proceedings and exhibits, and substantial portions of the record below, and ask this Court to reverse the trial court's equitable resolution of the dispute, and to quiet title in their favor based on theories for which the trial court found no evidence or legal basis in law or fact.

They ask for attorney's fees and costs on appeal, because they do not accept Mekalsens' theory that his defective 2003 deed, on all the evidence, gave them a superior equitable case over their claims, and a right to quiet title to the metes and bound description in it.

The Court should affirm the trial court, on this frivolous case brought by Plaintiffs Olivas over title to easement-burdened woodland.

B. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not err in rejecting Olivas' claim that a common grantor established a boundary at the "E/W" line, nor in rejecting the claim that Olivas should have quiet title because of having unwittingly paid

taxes up the “E/W centerline” based on an unknown and unauthorized alteration of the Assessor’s cadastral map in 1994, nor that Mekalsen could have quiet title to the disputed strip.

2. The trial court did not err in *sua sponte* ordering reformation of the 2003 Mekalsen deed to quiet title in equity to the disputed parcel, between the Olivas legally-described Northern boundary and the “E/W line”.

3. The trial court did not err in finding Mekalsen to be the prevailing party and ordering Olivas to pay fees and costs below.

C. ISSUES ON ASSIGNMENTS OF ERROR

1. Was there a preponderance of evidence that a common grantor established a boundary different from the recorded description, by installing an 8-10 driveway within a 60' easement through unimproved woods, putting anyone on notice that was the desired boundary?

2. Was there substantial evidence at trial to support challenged Findings of Fact, to support the trial court’s Conclusions of Law, and Judgment?

3. In equity under RCW 7.28.010 and .120, did the trial court exercise sound judicial discretion to formulate a remedy to quiet title, by reforming a recorded legal description in accordance with common precedent?

4. Did Mekalsens sufficiently affirm that their claim was for equitable quiet title to the metes and bounds decision in the recorded 2003 deed,

under the statutes, to avoid trial surprise to the Plaintiffs below?

5. Did the trial court have sufficient evidence on which to base a sound decision to equitably reform the deed, where Olivas had not shown grounds for any superior title over Mekalsens' defective 2003 deed?

6. Did Olivas base their case for quiet title largely on the known legal defect in Mekalsens' title, as a perceived weakness of the opponent's claim, rather than on the strength of their own claim?

7. Was Mekalsen the prevailing party, when the trial court found that Olivas had no legal or equitable theory to justify claiming the disputed property but simply wanted to expand the property they purchased?

8. Did the trial court properly award Mekalsen their statutory attorney's fees and costs?

D. STATEMENT OF THE CASE

For quick reference, we have attached copies of RCW 7.18.010 and RCW 7.28.120 as "Attachment A", for reference throughout the Brief.

Also for advance simplification, there are at least three "centerlines" in this case, to be distinguished, as we contend:

The "E/W centerline", referred to by the Appellants, is the line dividing the N. $\frac{1}{2}$ from the S. $\frac{1}{2}$, (of the N. $\frac{1}{2}$ of the N. $\frac{1}{2}$) of the relevant Section as illustrated by a 1978 survey (Ex. 22); it is not mentioned in either party's recorded legal descriptions.

The “1984 centerline” is the surveyed center of a mutual easement for both parties based on a 1984 survey (Ex. 33). It is also the recorded Northerly boundary of Olivas’ “Tax 38” (Ex. 20), and the Southerly boundary of the disputed parcel claimed by Doug Mekalsen by quiet title (Ex. 15). That easement was reduced from 60’ to 30’ by all users in 2003 (Ex.14) with no change to the centerline description.

The “driveway centerline” refers to an existing 8-10’ mutual-use driveway installed in about 1987 by the Mekalsen family, which Doug Mekalsen describes as having been installed within the 60’ easement with approximate reliance on survey stakes for the 1984 survey with some deviations (VRP pp. 295, 297, 310, 323-326, 327, 338 and 348). When the recorded easement was reduced to 30’, the existing driveway now deviates outside the easement in places not in issue here. (VRP 310; EX. 65).

Olivas’s Complaint sought to quiet title to the centerline of that existing 8-10’ driveway (for which no legal description is in the record), or in the alternative to claiming to the E/W centerline (CP 52 p. 091).

Except for Olivas’ alleged errors to certain Findings of Fact, to be addressed below, the unchallenged Findings of Fact (CP 86) are verities on appeal for purposes of this summary and provide a fair summary of the history of the land and the case.

History of the property:

Both parties' present parcels descended from Alyce Mekalsen, Doug's mother, who inherited a larger parcel in 1962 (Ex. 1). Both parcels were long held in common ownership by members of the Scheckert-Mekalsen family. Undisputed Finding of Fact (FF) 2.

In 1978 a survey for Alyce and husband Peter Mekalsen set out the "E-W" line dividing the N.½ from the S.½. Undisputed FF #4; Ex. 22.

In 1984, a survey by Roats Engineering was recorded, purportedly for a "Mekalsen Short Plat" which was never completed; the survey laid out the centerline for a 60' mutual ingress, egress and utility easement (without reference to the "E/W line"). Parcels numbered on the putative Plat were not fully developed with dimensions, etc.. Ex. 22; FF # 5.

In about 1987, Peter Mekalsen and Doug Mekalsen opened and graded a graveled driveway 8-10' wide within the 1984 easement right of way; the legal description, centerline and location of that driveway have never been referred to as a boundary in any recorded document. FF #6.

(Note: In 1987, the entire property was titled to Alyce Mekalsen, a married woman as her separate estate (Ex. 1); the actual driveway was actually not created by a common grantor under Olivas' pleadings).

In July, 1992, Alyce Mekalsen conveyed "Tax 38" to one Moore, entirely in the S ½ of the N ½ N ½, with a metes and bounds description

with a northerly boundary matching the surveyed centerline of the 1984 easement, with no reference to the "E/W" line and no reference to any existing road or driveway. Ex. 4; FF # 7.

The "Tax 38" deed created the trapezoidal disputed area between the North line of "Tax 38" and the "E/W" line. FF. # 8.

Prior to the "Tax 38" deed, in February, 1992 the County Assessor's cadastral map (Ex. 25) correctly showed Tax Parcel 601273001, the entire N $\frac{1}{2}$ N $\frac{1}{2}$ in common ownership (by Alyce Mekalsen), with no "E/W" dividing line between the N $\frac{1}{2}$ from the S $\frac{1}{2}$.

On September 11, 1992, after the Mekalsen-Moore sale in July, the Assessor's cadastral map (Ex. 26) was updated showing the new "Tax 38" with its distinctively bent Northern boundary, consistent with the new metes and bounds description matching the 1984 easement centerline.

Again, in April, 1993, the Assessor's cadastral map correctly showed the bent Northern boundary of "Tax 38" consistent with its metes and bounds description and the 1984 easement centerline survey. Ex. 27.

Then, in August, 1993, with no intervening recorded change in the legal description, the Assessor's cadastral map was altered to show the North line of "Tax 38" as a straight line at the "E/W line". Ex. 28.

For the next 24 years, during which the cadastral maps incorrectly showed the E/W line as the boundary of Tax 38, Moore and descendants in

title down to Olivas, paid some amount of extra taxes on the disputed parcel, until 2016 when the map was changed back to reflect the true North boundary of Tax 38. Ex. 29 - 32.

At trial, the current County Assessor who had worked there since 1994, had not found a record or explanation of why the cadastral map, and the taxes based on it, were changed in August 1993, as there was no recorded document to cause the map to reflect the “E/W” line, and the maps are supposed to be based on correct recorded legal descriptions.

The change, the Assessor testified, may have been related to the digitization of the old files in that time period, but no party affected by the change had ever been given notice of it by that office.

In 1994, Alyce Mekalsen conveyed a community property interest in her remaining land North of Tax 38, to herself and her husband Peter. Ex. 5 and 6.

Peter Mekalsen died in 1994 (note: the year in FF #10 incorrectly said it was 1995) and his will was admitted to probate. Ex. 74. His widow Alyce waived her right to administer his estate (Ex. 75), and their three children Doug, Wayne and Donna were appointed as executors (Ex. 76). All of these documents were witnessed and presented by Poulsbo attorney Greg Norbut, the family attorney for many years. VRP 301.

Administering the Estate, the co-personal representatives on July

14, 1995, executed a "Personal Representatives Special Warranty Deed" to Doug Mekalsen of the N ½ of the N ½ (Ex. 8), a document prepared and to be returned to the office of Attorney Norbut. The document inadvertently purported to convey not only Doug Mekalsen's present parcel, but also the entire Tax 38 parcel previously conveyed to Moore.

In 1997, the above error having been identified, a correction deed entitled "Personal Representatives Special Warranty Deed" (Ex. 12) was also prepared by the office of Attorney Norbut, and executed by the three sibling co-personal representatives, to remove the Tax 38 parcel from Doug Mekalsen's 1995 metes and bounds legal description, by purporting to convey only the N ½ N ½ N 1/2; that left the disputed portion between Tax 38 and the E/W line unconveyed, effectively leaving it in the Estate of Peter Mekalsen.

Alyce Mekalsen died in 1999, Ex. 78, and her estate was not probated for reasons not resolved in the trial court; there was testimony that she had wanted her property to go, like that of her late husband, to the three children.

In 2002, all parties to the 1984 mutual road easement including the Moores and brothers Doug and Wayne Mekalsen relinquished the 60' mutual easement (Ex. 67) and simultaneously executed a new 30' easement (Ex. 68) using the metes and bounds of the 1984 Roats easement

centerline survey (Ex. 23). Both documents were prepared by A.D.A. Engineering, the direct successor of Roats Engineering and the direct ancestor of the present DC Surveying, and with which surveyor Mike Dunphy, a surveyor for 40 years, had worked for 28 years at the time of trial. VRP 203-204.

A second copy of the 2002 "Establishment of Easement" for the 30' easement was recorded in 2003 with additional signators on a document also returnable to A.D.A. Engineering and again signed by the Mekalsen siblings Doug and Wayne, and the Moores. Ex. 14.

Surveyor Dunphy testified that the 8-10' gravel driveway installed in 1987 had originally been within the 1984 60' easement, but upon the narrowing of the driveway to 30' the driveway extended outside the new easement somewhat.

At the same date as Ex. 14 was recorded, a new "Quitclaim Deed", perhaps prepared by the Norbut Law firm but changed as returnable to Doug Mekalsen, was recorded conveying from Wayne Mekalsen and Donna Postma, Doug's siblings, as tenants in common, to Doug Mekalsen the "N ½ N ½ N ½" in the caption, followed by a metes and bounds description which purported to convey to Doug Mekalsen the property in the 1997 deed North of the E/W line, plus the disputed property in the S ½ of the N ½ N ½. The metes and bounds portion of the southern boundary,

following the caption, matches both the 1984 Roats easement centerline survey Ex. 23), and the metes and bounds of the northerly boundary of the Moore parcel, Tax 38 (Ex. 4).

Respondents Mekalsen testified at trial that no one knows who prepared the 2003 Quitclaim Deed, as Attorney Norbut had not admitted doing so, the current survey firm DC Engineering via surveyor Dunphy did not think so, and Doug Mekalsen denied having known how to draft it.

In May, 2007, the Moores sold Tax 38 to Hartman (Ex. 19), who sold it to Olivas (Ex. 20), who remained the owner of Tax 38 at the time of trial, and none of them had never had a survey done of their property.

Starting in about 2014, Olivas began to challenge the location of the 8-10" gravel driveway, and had counsel write a letter to the Mekalsen family attorney Norbut. Ex. 70. The Olivas contention was that Mekalsen wanted to move the existing driveway to its proper centerline, as when the 60' easement was narrowed to 30' feet, portions of the driveway were then outside the remaining easement and Mekalsen contended its location was at variance with the recorded easement, which was in the deeds to all properties affected. Olivas objected to moving the driveway to its record easement description, and threatened action based upon: common grantor, prescriptive use, express grant of an easement (twice), and estoppel.

Mekalsen's attorney responded by letter (Ex. 71) to the effect that

location of a prescriptive easement was a good idea, which would require a survey which should be obtained by the Olivases, and further that Olivas was disputing Mekalsen's right to clear his property and cut trees, which he had a right to do so long as it did not impair Olivas' right to use the road.

History of the case:

After the exchange of letters between counsel in 2014, the matter rested with increasing tension until Olivas filed their complaint against Mekalsen alleging, variously: adverse possession; color of title; payment of taxes; "reformation of deed due to scrivener error" and "any other legal theory supported by currently known facts". CP 1, page 007.

In their Amended Complaint filed April 28, 2017, CP 52, they added prayers for: quiet title up to the E/W dividing line; or alternatively for quiet title to the centerline of the existing road as a recognized boundary line for over ten years established by common grantor; quiet title to property in the S ½ N ½ N ½ OR South of the centerline of the existing road; payment of taxes for over 24 years; and such other and further relief as may be just and equitable. CP 52, p. 091.

Mekalsens answered the original Complaint with a prayer for quiet title against the claims and trespasses of Olivas, by relief legal or equitable (CP 10, p. 18). Their Answer/Counterclaims to Olivas' Amended

Complaint included a prayer for quiet title to “the real property described in his 2003 recorded deed” against the claims and trespasses of Plaintiffs Olivas, for injunctive relief, and for such other relief legal or equitable as the Court deemed just and proper.

In February 27, 2017, Olivas moved *in limine* to limit Mekalsen from arguing new claims “not originally pled in their complaint” based on their contention that we were arguing the disputed property was still in the estate of the late parents, and that we should join those estates. CP 22, p. 036. They argued that Mekalsen intended to claim quiet title, not on the strength of his 2003 deed (nor on adverse possession, which we never pleaded), but what Olivas construed as a claim for fee simple on condition subsequent, or fee simple as a remainderman of the residuary clause in a will, theories we had not pleaded, so that we should be required to join the estates as necessary parties. CP 22, p. 043.

Mekalsens’ March 7, 2017 (C(24) gave notice that Mekalsen relied on the description in the 2003 Deed, and did not intend to raise Olivas’ alleged new theories. Mekalsens did not claim there was an un-conveyed strip still in the parent’s estates, but only that Olivas had over-reacted to a comment from defense counsel that Olivases ought to get a survey of their property, or for their claimed prescriptive easement for which they had never provided a legal description. That was in response

to their contention for an RCW 58.04.020 setting of an uncertain boundary, which does not apply in a case where Plaintiffs have alleged adverse possession. The demand was not repeated, and was not tried.

Mekalsens intended in their response to put Olivas on notice that they relied on the metes and bounds legal description in the 2003 deed, and that at trial they would “continue to rely on the deed executed by the co-personal representatives of Mr. Mekalsen’s parent’s estates in defense of our claim to quiet title against Plaintiff’s unsupported demands”. CP 24, pp. 048-049; CP 25, p.052-054.

Mr. Mekalsen’s Declaration put it clearly: “I have a deed, and Plaintiff’s don’t. - - - As my attorney and I have said from the beginning, I will stand on my title.” CP 26 p. 056

Two months later, in Mekalsen’s Motion for Shortened Notice for Hearing, in response to Olivas’ motions to Amend the Complaint, for Continuance and to order Mediation, we noted that Olivas contended the pleadings should be amended to reflect that Mekalsens had changed their theory of the case. We declared:

“Plaintiffs simply do not accept that Defendants rely on a recorded deed in 2003, which includes a triangular ‘disputed’ portion of property which has never been in Plaintiffs’ legal description, and that Defendants are prepared at trial to rely on that recorded deed, for the court to equitably balance against the Plaintiffs’ unsubstantiated claim that they have been paying taxes on it under the mistaken belief that they owned what their legal description

does not include. We have not changed our theory, - - - ." CP 44 p. 081. [Emphasis added.]

The Order entered April 28, 2017 granting Plaintiffs' Motion in Limine (in part), recited that Mekalsens would not argue new claims not pleaded, and would not offer evidence that the disputed strip was "unclaimed" or "un-conveyed" from the Mekalsen parents' estates, which did not need to be joined as necessary parties. Defendants Mekalsen would be limited to evidence to support their theory that their 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." And" "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." CP 53, p. 093-094. The motion to join the estates of the late parents was denied. Defendants Mekalsen approved that order, and complied with it.

A second order entered April 28, 2017 on Olivas' motion, permitted their amendment of the pleadings to add "several theories in equity, including location of a an uncertain boundary per RCW 58.04.020" [CP 36 p. 072], although it denied Olivas' motion for mediation under that statute. CP 54 p. 95-97.

In a May 19, 2017 Answer to Amended Complaint, Mekalsen

asked for “a judgment quieting title to the real property described in his 2003 recorded deed against the claims and trespasses of Plaintiffs Olivas - - .” CP 58 p. 110. Counterclaim pleading V.14, at CP 58, p. 109, stated that the 2003 Quitclaim Deed granted “the full corrected legal description of Mekalsens’ parcel APN 601273001, by metes and bounds description which refers to Volume 6 of Surveys, page 131.” (Ed: Emphasis added; referring to the 1984 easement survey centerline))

That was intended to clearly provide notice to Olivas that Mekalsens were standing, in equity, on the “metes and bounds” of the 2003 deed legal description, against their legal and equitable claims.

Mekalsen’s July 31, 2017 Trial Brief also laid out a theory of the case for equitable quiet title to the legal description in the 2003 Deed, including citation to Brodsky v. Nelson, 57 Wash. 671, 107 P. 840 (1910) (citing RCW 7.28.010 and RCW 7.28.120). It stated that under the authority of Brodsky, supra, a party may claim superior title despite having a defective deed if he has a superior equitable title. CP 70, p. 153.

At CP 70, p. 159, the Brief clearly stated that Mekalsen was claiming the legal description, the “metes and bounds of the 2003 Deed”, in equity, based on the family and deed history.

Olivas was aware of that line of authority, as they also cited the Brodsky case, and the citation of authority for quiet title on a defective

deed, as they also briefed it at CP67 p. 127, in their Amended Trial Brief, but have omitted to brief it here in the Appellant's Opening Brief.

At trial on July 31, 2017, Olivas called a recently-hired surveyor Wengler who testified (VRP Vol. 1 pp. 33-89) that the caption of the 2003 Quitclaim Deed (Ex. 15) citing the "N ½ N ½ N ½" invalidated any conveyance of the disputed strip by metes and bounds in the "S ½ N ½ N/12" based on a review of surveying authorities. He had not conducted a survey, but testified to alleged flaws and omissions in the recorded DC Surveying survey (Ex. 69) which Mr. Dunphy had prepared for Mekalsens' legal description in the 2003 Deed. He had prepared his own illustration to show Olivas' theory that the E/W line should be the legal basis for quiet title to Olivas of the disputed strip. Ex. 65.

Mr. Wengler agreed that, ignoring the incorrect caption (the extra "N ½" in Mekalsen's 2003 Quitclaim Deed), Mekalsens' metes and bounds South boundary line would be the 30 foot easement centerline (the same as Olivas' North line per their recorded deed). CP 77 p. 6

Wendy Olivas testified for the plaintiffs (Vol. 1 pp. 91-194) for the remainder of Day 1 of the Trial.

On Day 2, surveyor Michael Dunphy, employee of DC Surveying and formerly of Roats Engineering and A.D.A. Engineering for about 28 years, testified to the firm's past survey work for the Mekalsen family,

including the 1984 easement centerline survey and reviews of the boundary for Doug Mekalsen in preparation for this dispute. He explained his recent survey (Ex. 69) of Mekalsen's legal description for trial based on the 2003 Deed, including location of the 8-10' gravel driveway mostly within the disputed strip, and entirely within the 1984 60' mutual road easement, and that Mekalsen's South line matched Olivas' North line per their deed, and also the 1984 easement centerline survey description in metes and bounds. In his opinion, it was the intent of the deed to convey to Doug Mekalsen the land in the metes and bounds description, and the erroneous extra "N ½" in the caption of the deed was a scrivener's error.

VRP 232

After trial, the court entered its Memorandum Opinion on September 13, 2017, CP 77, holding that Olivas had failed to produce evidence or legal authority to support any of their theories for quiet title, and that Mekalsen had established a right to equitable title to the legal description in the 2003 Deed. And, that the obvious scrivener's error in the caption of the 2003 deed testified to by Mr. Dunphy justified reforming the deed to remove the erroneous N ½, leaving the metes and bounds description. The trial court said: "The "equities" clearly favor Defendant in this case." CP 77 p. 184.

Judgment was entered on Findings of Fact and Conclusions of Law

(CP 86), and a Judgment and Decree of Quiet Title to the disputed strip to Mekalsen was entered, together with an award of costs and statutory attorney's fees as a prevailing party, on Jan. 5, 2018.

Appellants Olivas timely filed their Notice of Appeal herein.

E. ARGUMENT AND AUTHORITIES

Assignment of Error 1: (a) Did the Mekalsens establish a boundary at the "E/W line" or transecting the existing 8-10' driveway?; or (b) should Olivas have quiet title because of unwittingly having paid taxes up to the "E/W" centerline based on the unknown and unauthorized alteration of the Assessor's cadastral map in 1994?; or (c) did the trial court err in ordering the Mekalsen should have quiet title to the disputed strip North of the Olivas' legal boundary?

1.(a): The Mekalsens did not establish a boundary differing from the legal description by installing an 8-10" wide gravel driveway somewhere within the original 60' easement surveyed in 1984.

The rule proposed by Olivas would have the irrational effect that any common grantor who placed a narrow driveway anywhere within a much wider easement, with no shown intent to mark a boundary binding on itself and future grantees, and without the knowledge of the future grantees, would *de facto* establish a new boundary for a mistaken grantee.

Appellants Olivas cite cases for the proposition that the Mekalsens' installation of the 8-10' gravel driveway in 1987, somewhere within the then-60' easement per the 1984 survey, established a new binding boundary different from the legal boundary at the surveyed centerline of

the wider easement. Their argument is based on headnote briefing without analyzing the rule, which sounds in Recognition and Acquiescence.

Pendergast v. Matichuk, 186 Wn.2d 556, 379 P.3d 96 (2016) confirms the “common grantor” rule that location of a boundary line between properties by a common grantor, different from the true boundary, is binding on grantees if the land is bought and sold with reference to the line and there is a meeting of the minds as to the identical tract of land to be transferred by the sale. Such meeting of the minds may be shown by the parties’ subsequent manifestations of ownership with reference to the line.

Olivas argue (App.Br. Page 27) that Mekalsens’ arguments are substantially the same as in Pendergast, supra; it is not so. There is no evidence in this case that any of the parties, from the beginning, agreed between them that the driveway was a boundary (Wendy Olivas had never met any of the Mekalsens prior to 2005: VRP 99 line 11), or acted in a way to indicate that it was, prior to 2014 when Olivas’ claims arose.

Winans v. Ross, 35 Wash.App. 238, 666 P.2d 908 (1983) held: “The practical location of the dividing line set by a common grantor is binding on grantees.” But, the rule of that case is that if a common grantor established a line as a common boundary, it is binding on subsequent grantees if the grantor and first grantee agreed that the line marked the

boundary and a visual inspection of the property would indicate to subsequent grantees that the deed line was no longer functioning as the true boundary. Another Recognition and Acquiescence situation.

Olivas' older citation, Strom v. Arcorace, 27 Wn.2d 478, 481, 178 P. 2d 959 (1947), is cited to the effect that a common grantor can create a boundary binding on the grantee by practical acts differing from the true line, setting a new line differing from the surveyed line.

In that case, the common grantor built a line fence between two residential lots 1.5 - 2 feet from the true line, with full knowledge and observation of the eventual grantee of the shorted lot, who saw and knew the conditions as they existed and did not protest; the grantee later found their lot too narrow, and even rebuilt the front part of the fence on the same erroneous line. The grantee later tried to recover the 1.5 - 2 feet from a subsequent buyer of the other lot. The Court held that the rule applies to a common grantor creating a boundary with a grantee who takes with reference to the erroneous boundary, and the land has to be sold and purchased with reference to the erroneous line, with a meeting of the minds as to the identical tract of land to be transferred. It is again similar to an estoppel situation, or Recognition and Acquiescence.

All those cases cited are distinguishable as follows: No subsequent grantee here observed the common grantor's creation of the driveway, nor

took title with reference to the driveway as a boundary; the land was never sold and purchased with reference to the erroneous line (either the centerline of the driveway or the E/W line); there was no meeting of the minds, and there were no subsequent acts of ownership or control of the disputed strip until the Olivases came to their unsupported assumption some thirty years later, on their own.

The theory fails here. Findings of Fact 4, 5 and 6 are fully supported by the trial record, including the point that the E/W line has never been legally described nor referred to as a boundary of any parcel of property.

Olivas challenge Finding of Fact 32, that the location of the “30 foot easement centerline” as the Southern boundary of [Mekalsens’] property is credible and accepts that determination; Plaintiff presented no evidence of any alternative.”

Olivas had no plausible explanation for the matching metes and bounds centerline of the easement in the 1984 Survey (Ex. 23) and the metes and bounds of the 1992 description of Moore’s 1992 Northern boundary (Ex. 4), which is entirely consistent with the trial court’s finding, and entirely inconsistent with the Mekalsens’ having installed the driveway as a boundary, where Moore took title on a deed prepared by a title company.

Olivas make another leap in logic in citing Camping Comm'n of Pac.NW. Conference of Methodist Church v. Ocean View Land, Inc., 70 Wn.2d 12, at 15, 421 P.2d 1021 (1966) for the rule that courses and distances in a legal description must yield to natural and ascertained objects. The rule is inapplicable here; they fail to distinguish between facts in that case involving the citation in a plat to "Ordinary or Mean High Water Line" (the natural constantly changing mean high tide line), and a narrow driveway somewhere within a much wider mutual easement - - - which is not natural.

They also cite Matthews v. Parker, 163 Wash. 10, 14-15, 299 Pac. 354 (1931), for the same proposition that courses and distances in a legal description (whether they refer to the metes and bounds in their legal description or Mekalsens' is not clear) must yield to ascertainable monuments (whether they refer to the E/W line or the driveway is not clear). The facts of the case are entirely inapplicable; there, a plat called out a reference point as the centerline of a section but provided a distance call of the wrong length; as the Court noted at 163 Wash. 10, the correct distance could be mathematically calculated from the monuments at the section corners and corrected, as the reference was clearly intended to be the center of the section, not a driveway somewhere near the metes and bounds centerline of the wider easement.

In response to Olivas' contending that the Mekalsens intended to create a new boundary centerline, it is correct (App.Br. 14) that Doug Mekalsen and his father installed the existing road in 1987 and intended to "follow the survey markers established by Roats from the 1984 survey" (VP 295-296, 348-349).

It does not follow that they intended to follow the Northerly edge of the 1984 easement with the 1987 driveway (App.Br. P. 14), if they infer that the Mekalsens created a new boundary and mis-led Moore, Hartman and the Olivases. The Mekalsens had a 60' swath of woods to work with, and a bulldozer; in fact the driveway does not follow the E/W line, as Olivas' surveyor's trial illustration shows. Ex. 65.

And, as the E/W line does not show on the 1984 Survey (Ex. 23), the Mekalsens could not have been intending to follow it.

With the unrebutted (and plausible) testimony of Doug Mekalsen that he and his father intended to install a a narrow gravel driveway within the 60' easement, set off to the side from the easement's survey markers (VRP 323-328) and within the easement (i.e. "following the easement"), there is nothing to Olivas' unsupported argument that a monument was created nor evidence of any alternative to the trial court's Finding of Fact # 32. There was no intent shown to replace the 1984 centerline with a new 1987 one.

Surveyor Dunphy clarified that the 8-10' driveway lies within the original 60' easement and mostly within the current 30' easement, ending several feet North of the true boundary and centerline of the easement, and has nothing to do with the boundary. VRP 208, lines 12-25.

The Moore-Hartman-Olivas deeds have a Western boundary much shorter than the Eastern one (Ex. 4, 19 and 20), but none of them ever surveyed or investigated the differences. Olivas assumed without verifying that the driveway might be the Northern boundary, lying several feet North of their true boundary (Ex. 66). The trial court heard undisputed testimony that the survey marking the boundary, the centerline of the 1984 easement and the West end of Olivas' legal boundary, was buried below the surface until Mekalsen and his surveyors found it again in 2014 in response to Wendy Olivas' claims, at which time she knew that if she had a survey of her legal description, she would know before suing that she was wrong. VRP 328-330.

Olivas challenges Conclusions 11 and 13, CP 192 (that Olivas had no legal or equitable theories) based on Finding 7, CP 186 (none of the legal descriptions in the deeds referred to any road or driveway as a boundary of any parcel of property, which is correct), and contend the trial court misapplied Findings 4-6 CP 186.

As to Finding 7, which is correct, if any legal description had

referred to the road or driveway as a boundary, that might have been a monument differing from the legal description, but there is no evidence of such a reference by or to anyone. And the E/W line was not mentioned in the 1984 easement survey nor the deed to Moore, so there is no conflicting call to mathematically calculate, if that is their intended legal point.

A Finding of Fact supported by substantial evidence will not be overturned on appeal. Appellate courts must determine whether substantial evidence supports the court's findings and whether those findings support the trial court's conclusions of law. Substantial evidence is the quantum of evidence sufficient to persuade a rational fact finder of the truth of fact. The court will view all evidence and reasonable inferences in the light most favorable to the prevailing party. Columbia State Bank v. Invicta Law Group, PLLC, 199 Wn.App. 306, 319, 402 P.3d 330 (2017).

The Court must find that there is substantial evidence that the centerline of the existing driveway has never been legally described nor referred to as a boundary of any parcel of property. There is absolutely no evidence that the common grantors' installed road was intended to match the 1984 easement centerline. Appellant's challenge to Finding of Fact 6 is misplaced, and contrary to fact.

Those Findings and Conclusions are correct and there is no error.

1.(b) Should Olivas have quiet title because of having unwittingly paid taxes up to the “E/W centerline” based on an unknown and unauthorized alteration of the Assessor’s cadastral map in 1994?

The Answer, of course, is “No”

The County mistakenly changed the taxable acreage for the Olivas parcel Tax 38, but it had nothing to do with adjusting the boundary to the E/W line, nor with the existing road/driveway.

Having inconsistently stated (in their App. Br. P. 15, sec. 2.(b)) that the 1987 driveway created the boundary (not the Assessor), they again proceed to the claim (App. Br. P. 15, sec. 2.(c) that the County Assessor adjusted its cadastral maps, showing the northern boundary of Tax 38 as the E/W centerline separating the N½ from the S½ (Citing Ex. 27, 28, 66).

That disingenuously infers that the County Assessor adjusted the cadastral maps to adopt the E/W line as a boundary, and created a legal boundary. It could not be based on the Assessor having adopted the unrecorded location of the existing driveway as the boundary (their alternative theory to the E/W line). That flies in the face of the exhibits and testimony.

As the present Assessor made clear in Stipulated Testimony (Ex 66, p.2-3), having served in that office since 1994, the Feb. 11, 1992 cadastral map of parcel 601273001(EX. 25) correctly showed the entire

N.½ N.½, which contained both parties' present parcels, as undivided before the Moore sale, consistent with the entire N.½ N.½ having been undivided in Mekalsen ownership.

Then, the Assessor's Stipulated Testimony was that the September 11, 1992 (Ex. 26) and April 20, 1993 (Ex. 27) cadastral maps correctly showed the N½ N½ having been divided by the sale of Tax 38, with the new distinctive bent North line of Tax 38 consistent with the deed's metes and bounds description (Ex. 4) after the Moore sale. The Northern line of Tax 38 also appeared to match the centerline of the 1984 easement centerline. See Ex. 66 p. 3. Appellants omit to mention those two updates.

To that point, the Assessor's cartographer had twice applied the recorded deed's legal description for the new Tax 38, until August 6, 1993 when the map was unaccountably altered, and the distinctively bent North line was re-drawn as if straightened out, along the E/W line on which Appellants now base part of their claim.

There had been no recorded document changing the Tax 38 boundary in the meantime, and the E/W line is not mentioned in the chain of title.

As the Assessor explained, the old maps were digitized in the same period as Tax 38 was sold. Since the Northern boundary of Tax 38 was

correctly shown as in the 1984 survey on the old map and in the Mekalsen-Moore Deed (Ex. 4), and as straight in the new August, 1993 map, he did not know the exact sequence of events, as different mappers were working on the project at the time. CP 66 p.4.

In summary, the Assessor did not know why the August, 1993 cadastral map was changed as it was (CP 66 p. 6). His staff had found no record of it (CP 66 p. 4). The maps are supposed to be changed based on correct recorded deeds, for the purpose of sending out tax statements based on valid legal descriptions (CP 66 p. 2). His office does not guarantee the accuracy of its cadastral maps and they should not be used to determine legal boundaries; the purpose is to make judgment calls as to ownerships for tax assessments to the most likely owner (CP 66 p. 3).

It is undisputed that thereafter for 24 years or so, Moore, Hoffman and Olivas paid some (uncalculated) amount of taxes on the disputed property, as the cadastral maps are used by the Assessor to “roughly calculate real property taxes”. No party was notified of the error.

As the Assessor said, they changed the taxing on Tax 38 in 1993, to include the disputed strip “as a result of the new digitized map” (CP 66 p. 4), but there was no valid legal description at that time on which to tax the Olivas parcel to the E/W line.

The trial court properly held that the error was no basis for

equitable quiet title to Olivas, and they had cited no authority that it should. CP 86, p. 192.

Olivas have shown no authority why the trial court's Conclusion should be reversed.

1.c Did the trial court err by deciding the case on a defense theory not pleaded?

The trial court's ruling was based on legal descriptions found admissible at trial, including stipulated Ex. 15, the 2003 deed, with no surprise to Olivas if they had credited the Mekalsens' equitable theory of the case.

In Mekalsens' Answer and Counterclaim (CP 10, page 017) they recited their 2003 Quitclaim Deed (Ex. 15) which granted the "metes and bounds description" of their parcel 601273001 and referenced the 1984 easement centerline in Vol. 6, p. 131 (Ex. 23) and their belief that the 2003 deed corrected the difference from their 1997 Deed (Ex. 11). They prayed for quiet title to the "real property described in this recorded deed". CP 10, page 018.

On February 27, 2017, Olivas moved *in limine* to limit Mekalsen from arguing new claims "not originally pled in their complaint" based on their contention that we were arguing the disputed property was still in the estate of the late parents, and that we should join those estates. CP 22, p.

036.

They argued that Mekalsen intended to claim quiet title, not on the strength of his 2003 “correction deed” (nor on adverse possession, which we never pleaded), but what they construed as a claim for a fee simple on condition subsequent, or fee simple as a remainderman of the residuary clause in a will, also theories we had not pleaded, so that we should be required to join the Mekalsen parents’ estates as necessary parties. CP 22, p. 043.

As far as we know, Olivas never attempted to locate, interview or determine whether siblings Wayne Mekalsen and Donna Postma were available, or could be joined as necessary parties to force re-opening of the Mekalsen Estate (which might have resulted in an immediate issuance of a new Personal Representative’s Special Warranty Deed from them, deleting the extra “N ½” from the caption and putting an end to this issue), but Olivas failed to exercise due diligence to see if they could defeat the 2003 deed with that ploy).

Our March 7, 2017 Response (CP 24) put Olivas on notice that the Mekalsens relied on the legal description in the 2003 Deed to quiet title, and did not intend to raise new theories. Mekalsen did not claim that there was an unconveyed strip arguably still in the parent’s estates, but only that Olivas had over-reacted to a comment from defense counsel that they

ought to get a survey of their claims to the disputed strip (or for their claimed prescriptive easement for which they had never provided a legal description). That was in response to their contention for an RCW 58.04.020 setting of an uncertain boundary, which does not apply in a case where Plaintiffs alleged adverse possession.

As noted above, at page 14, the Mekalsens clearly put Olivas on notice that they relied on the metes and bounds legal description in the 2003 Quitclaim Deed, the deed executed by co-personal representatives of Mr. Mekalsen's parent's estates, in defense of their claim to quiet title against Olivas' unsupported demands". CP 24, pp. 048-049; CP 25, p.052-054.

Two months later, in a Motion for Shortened Notice for Hearing, in response to Olivas' motions to Amend the Complaint, for Continuance and to order Mediation, when Olivas contended the pleadings should be amended to reflect that Mekalsens had changed the theory of the case, the Mekalsens declared:

"Plaintiffs simply do not accept that Defendants rely on a recorded deed in 2003, which includes a triangular 'disputed' portion of property which has never been in Plaintiffs' legal description, and that Defendants are prepared at trial to rely on that recorded deed, for the court to equitably balance against the Plaintiffs' unsubstantiated claim that they have been paying taxes on it under the mistaken belief that they owned what their legal description does not include. We have not changed our theory, - - - ." CP 44 p. 081.

The Order which was entered April 28, 2017 granting Olivas' Motion in Limine (in part), recited that Mekalsens would not argue new claims not pleaded, and would not offer evidence that the disputed strip was "unclaimed" or "unconveyed" from the Mekalsen parents' estates, which did not need to be joined as necessary parties. Rather, the Mekalsens would be limited to evidence to support their theory that their 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." And "Defendant's title to the disputed property as conveyed to him, shall be determined by the Court according to legal description or descriptions (emphasis added) found admissible at trial by the Court." CP 53, p. 093-094.

The motion to join the estates of the late parents was denied. Defendants Mekalsen approved that order, and complied with it.

A second order entered April 28, 2017 on Olivas' motion permitted their amendment of the pleadings to add "several theories in equity, including location of an uncertain boundary per RCW 58.04.020" [CP 36 p. 072], although it denied their motion for mediation under that statute. CP 54 p. 95-97.

In Mekalsens' May 19, 2017 Answer to Amended Complaint and Counterclaims, they prayed for "a judgment quieting title to the real

property described in his 2003 recorded deed against the claims and trespasses of Plaintiffs Olivas - - - .” CP 58 p. 110.

That seemed to provide fair notice to Olivas that the Mekalsens were standing, in equity, on the metes and bounds description in the 2003 deed, against their legal and equitable claims.

In our July 31, 2017 Defendant’s Trial Brief, we laid out our theory of the case for equitable quiet title to the legal description in the 2003 deed, including citation to Brodsky v. Nelson, 57 Wash. 671, 107 P. 840 (1910) (citing RCW 7.28.010 and RCW 7.28.120). And we made it clear that under the authority of Brodsky, supra, a party may claim superior title despite having a defective deed if he has a superior equitable title. CP 70, p. 153.

At CP 70, p. 159, we repeated that Mekalsen was claiming quiet title based on the 2003 Deed which had then been recorded for 13 years, based on the family and deed history.

Appellants Olivas must have been aware of that line of authority, as they also cited the Brodsky case, and the citation of authority for quiet title on a legally defective deed, as they also briefed it at their trial brief (CP 67 p. 127), but have omitted it here in the Appellate’s Opening Brief.

Mekalsen prevailed in the trial court on the theory of the case on which they had relied from the beginning, and Olivas made a tactical

decision to base their case largely on the perceived legal weakness of the Mekalsen deed.

Under Washington law, a party in a quiet title case must succeed on the strength of its case, not on the weakness of the adversary. Turner v. Rowland, 2 Wn.App. 566, 468 P.2d 702, Rev. Den.; overruled on other grounds, the definition of hostility in adverse possession, by Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984).

The trial court heard the testimony of Olivas' surveyor Wengler to the effect that the defective caption in the 2003 deed rendered it legally ineffectual to convey any title to the metes and bounds portion; it had before it the surveyor's authorities for requirements for legal descriptions, and clearly considered them in its Memorandum Opinion CP 77, but had the discretion to determine that Mekalsen's equitable claim to title was stronger than Olivas' legal argument for title.

As surveyor Wengler testified (Appellants note it at their App. Br. P. 19), if one could legally ignore the defective caption in the 2003 deed, with its extra N. ½, the metes and bounds portion matched the legal description remaining in the Mekalsen estate after the conveyance to Moore, provided a 5 acre parcel, and its South border matched both the 1984 survey centerline and Olivas's North boundary,

That narrowed the inquiry to what Mekalsen had been arguing

consistently, while recognizing the legally defective caption in the 2003 deed, but Olivás failed to credit it as the stronger equitable argument under RCW 7.28.010-120.

Assignment of Error 2: Did the trial court err in *sua sponte* ordering reformation of the 2003 deed to quiet title in equity to the disputed strip, based on all the evidence?

As we have explained above, Mekalsens' claim to quiet title was always based in equity on the descent of the disputed parcel described in the metes and bounds language of the recorded 2003 deed, based on the long-term family ownership, the transfer to him of his siblings' inheritance rights, and the matching metes and bounds of the 1984 easement survey and Olivás' North boundary, also matching the 2003 deed language..

Why did Mekalsens not simply amend their pleadings for reformation of the 2003 Deed, to remove the offending "N ½", and present that claim against the pleaded legal and equitable claims of the Olivases?

For one thing, the rules for such a claim is that there must be clear, cogent and convincing evidence of a mutual mistake, or a unilateral mistake coupled with inequitable conduct. Wilhelm v. Beyersdorf, 100 Wn.2d 836, 843-44, 999 P.2d 54, 59 (2000), for instance.

Under that rule, there was no evidence here of a mutual mistake; no other party had been involved in errors in the deed series, nor agreed to accomplish any purpose in the document; no author had been identified to

explain the mistake, and it could not be deemed a mutual mistake.

Unless one assumes *arguendo* that the Olivas claims could reliably be argued as inequitable, which is no certainty prior to trial, it could be a potentially fatal mistake to plead for reformation as a unilateral mistake with inequitable conduct, under that rule, for the following reasons.

Olivas is not known to have located or inquired about, or sought to interview in due diligence: Mekalsen's siblings Wayne and Donna; nor Attorney Norbut who practices in Poulsbo near Olivas' counsel and had been counsel for the Mekalsen parents for some years (VRP p. 301) and prepared other documents in the trial exhibits for the family; or other members of the DC Surveying firm, to determine whether anyone had knowledge or an explanation of a unilateral mistake.

And that is so, even though there is a series of documents in the trial record containing errors, prepared by agencies familiar with the facts and the family history. Cf. Ex. 8, 9, 11, 12, 15, 16, 74, 75, 77 (Attorney Norbut). And Ex. 14, 23, 25, 67, 68, 69 (by Roats/A.D.A. Engineering).

And Doug Mekalsen doesn't know who made it and was not able to identify that, but didn't prepare it himself; he would not know how. (VRP p. 308).

Surveyor Dunphy testified at trial, as Appellants report (App.Br. P. 231) that he thought Attorney Norbut prepared the defective 2003 Deed

because his name was on it, but the same day a changed easement was done by A.D.A. Engineering. He thought, however, that the extra "N ½" in the deed was a scrivener's error, as the only explanation he had as a surveyor. But he opined that a competent surveyor could look at that situation on the ground and come to the conclusion that the metes and bounds describes what was conveyed to Doug Mekalsen. (VRP 231-232.

Under the circumstances of this case, it would have been a tactical trap of Olivas' making for Mekalsen to plead a unilateral mistake coupled with inequitable conduct, and attempt to prove it by clear, cogent and convincing evidence, as a reliable argument for reformation.

Thus, the Mekalsens elected to plead and prove superior equitable quiet title under the statutes, based on the family history of ownership of the disputed parcel, the conveyance of the parents' properties to their three heirs, including the existence of a defective deed with an accurate metes and bounds description, and the matching metes and bounds descriptions of the boundaries and the 1984 easement, to prove a superior claim under all the circumstances to any of Olivas' claims.

Appellants complain (App.Br. P. 33) that in final argument counsel for the Mekalsens said that there was no other factual explanation for why the third "N ½" was in the 2003 deed, other than a scrivener's error. They comment that there was always a reasonable inference, ignored by the trial

court, that the third N ½ was intentional by the common grantors to match the E/W centerline and the existing road, and the accidental taxable boundary for Tax 38.

Elsewhere they argued that their boundary contained a mistaken legal description because of a grantor's intention to convey to the E/W line, not the specific metes and bounds of the 1984 survey. That would require proof of a massive scrivener's error in the 1992 Mekalsen-Moore deed, which Olivas could not establish. To make that case, ironically, they would have had to prove the grantor's intent, and the mistake for reformation, by clear, cogent and convincing evidence, but they recognized that problem and abandoned that theory. Fn. 6, App. Br. P. 20.

In matters of equity, the trial courts have broad discretionary power to fashion equitable remedies. In re Foreclosure of Liens, 123 Wn.2d 1979, 204, 867 P.2d 605 (1994), and the appellate courts will review the authority of a trial court to fashion equitable remedies under an abuse of discretion standard. Wilhelm v. Beyersdorf, *supra*, 100 Wn.2d at 848; Blair v. Wash.St. Univ., 108 Wn.2d 558, 564, 740 P.2d 1379 (1987). A court will grant equitable relief when there is a party entitled to relief and the remedy at law is inadequate. Orwell v. City of Seattle, 103 Wn.2d 249, 692 P.2d 793 (1984).

Reformation of the 2003 deed, under the circumstances, was the

trial court's equitable remedy to resolve the clear evidence that the single extra "N ½" in the 2003 deed caption was the only problem. Not the intent of the common grantor to create a driveway as a boundary in 1987 within a recently surveyed 60' easement still marked with flags. Not a mistake of the common grantor in giving Plaintiffs a 1992 metes and bounds boundary exactly matching the metes and bounds of the 1984 easement survey. Not the equity of Olivas and ancestors having paid some uncalculated extra property tax based on an unknown cartographer altering a cadastral map without authority some 24 years earlier. And not the failure of the Mekalsens to assume an insurmountable burden of proof to plead for reformation.

The trial court had that discretion, especially where the Olivases had failed to prove any of their various and inconsistent theories.

Again, both surveyors testified that if the erroneous caption in the 2003 deed could be ignored, with its extra "N ½", the metes and bounds portion matched the legal description of the parcel remaining in the Mekalsen estate after the conveyance to Moore, provided an intended 5 acre parcel, and its South border matched both the North border of Olivas' parcel and the centerline of the 1984 easement survey.

Olivas contend that the evidence did not support a deed reformation for the reason that there was no evidence that the three N 1/2's

was a mistake. That is exactly what surveyor Dunphy said it was. VRP 232; and that is evidence. That is the only thing it could be, in reason.

The trial court exercised sound judicial discretion in applying an equitable remedy.

This Court need only review the trial court's fashioning of an equitable remedy for an abuse of discretion. Wilhelm v. Beyersdorf, supra at 847.

Olivas assigns error to numbers of Findings of Fact, and the Conclusions of Law based on them, primarily because it does not credit the trial court's weighing of the credibility of Mekalsens' two witnesses as to the documents and family history.

Findings of Fact supported by substantial evidence support the Conclusions of Law, Wilhelm v. Beyersdorf, supra at 847.

and this Court need only determine whether the trial court's Memorandum Opinion CP 77, and Findings of Fact and Conclusions of Law (CP 86) are based on proper weighing of the evidence and testimony, including credibility, of witnesses, as that seems to be what drives Olivas to challenge the Findings.

There is no reason for this Court to assume the role of a trial court, review the entire record and exhibits, and enter judgment awarding the disputed property to Olivas. The Olivas' request for relief here has no

rational basis in law or fact.

3. Did Mekalsen prevail on theories pleaded at trial, and thus a substantially prevailing party?

Mekalsens obtained equitable relief by an affirmative judgment on the pleadings they filed and notified the Court and opponent they relied upon, for equitable relief of quiet title to the disputed property defined by the metes and bounds of the 2003 deed, which they contended defined a legal conveyance. They did not obtain judgment on trespass or adverse possession, which they pleaded only as defenses against Olivases' claims but dropped those theories when it became clear that Olivases were not claiming adverse possession beyond the 1987 driveway.

They were correct, in equity, that their pleading of quiet title under the defectively captioned, but admitted, 2003 deed was a valid claim based on the metes and bounds of the deed.

The Court may rule on whether the expert costs assessed were proper, as we contend they were, in light of the fact that Mekalsens only had to employ an expert witness when Olivases refused for several years to obtain their own survey to illustrate the claims.

Mekalsens are the substantially prevailing parties and entitled to costs and statutory attorney's fees at trial.

3.(a) Attorney's fees and costs. Pursuant to RAP 18.1 (a) and (b),

Mekalsens request attorney's fees and costs on appeal.

An appeal is frivolous if there are no debatable issues on which reasonable minds can differ and it is so totally devoid of merit that there was no reasonable possibility of reversal. In re Estate of Muller, 197 Wn.App. 477, 389 P.3d 604, (2016); Dave Johnson Ins., Inc. v. Wright, 167 Wn.App. 758, 787, 275 P.3d 339 (2012).

The only thought-provoking issue we find is whether an Assessor's undisclosed and unauthorized alteration of a cadastral map, undisclosed to the property owners taxed thereon, resulting in an overpayment of taxes, has any effect on claims for quiet title based on such over-payment.

We find no authority on that point. The Olivas did not provide any such authority at trial, nor here. If Olivas had confidence in the issue, they must brief it. The issue is so devoid of merit that there is no reasonable possibility of reversal on that point.

The other theories on which Olivases appeal have little or no merit, and they have failed to support any claim in equity to land in which they had no legal claim, and no equitable claim in fact.

The Mekalsens must not be subjected to further costs and attorney's fees awarded to Olivas, who have pursued a nominal parcel of undeveloped woodland they did not own, on a series of obsessive claims, none of which succeeded, and all of which they pursued without having

obtained a survey of their claimed demands over four years ago and since.

This case has from the beginning been brought in bad faith and in a manner designed to drive Mekalsens' costs and frustration up, with no real point.

F. CONCLUSIONS

Based on all the evidence, Mekalsens' equitable title to the parcel conforming to the metes and bounds description in the 2003 deed was held superior to Olivas' legal argument that Mekalsen did not have a perfected legal title. Olivas proved no superior equitable claim, and did not cite authority supporting its legal claims.

The trial court having exercised its judicial discretion in equity, and with Olivas presenting no legal nor equitable claim to the disputed strip, the trial court made the only decision which a reasonable jurist could make under all the circumstances.

This Court should affirm the trial court in all regards.

Respectfully submitted this 3rd day of October, 2018.



W.C. Henry, WSBA 4642
2000 Water Street
Port Townsend WA 98368
(360) 385-2229
chenrypt@qwestoffice.net
Attorney for Respondents

CERTIFICATE OF SERVICE

I certify that I served Respondent's Brief on Appeal by e-service and mailed first class on October 4, 2018 to Shane Seaman, Attorney at Law, Cross Sound Law Group, 18887 Hwy 305, Suite 1000, Poulsbo WA 98370 shane@crosssoundlaw.com. Signed this 4th day of October, 2018.



W.C. Henry, WSBA 4642
Attorney for Respondents.

HENRY & ALLEN

October 04, 2018 - 11:29 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51877-5
Appellate Court Case Title: Andrew Olivas & Wendy Olivas, Appellants v. Doug Mekalsen & Dianne Mekalsen, Respondents
Superior Court Case Number: 16-2-00055-9

The following documents have been uploaded:

- 518775_Briefs_20181004105641D2847330_2785.pdf
This File Contains:
Briefs - Respondents
The Original File Name was BRIEF ON APPEAL FINAL.pdf

A copy of the uploaded files will be sent to:

- nancy@crosssoundlaw.co
- shane@crosssoundlaw.com

Comments:

Sender Name: William Henry - Email: chenrypt@qwestoffice.net
Address:
2000 WATER ST
PORT TOWNSEND, WA, 98368-4600
Phone: 360-385-2229

Note: The Filing Id is 20181004105641D2847330