

FILED
Court of Appeals
Division II
State of Washington
11/1/2018 3:57 PM
No. 51877-5-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
Appellant

vs.

DOUG MEKALSEN and DIANNE MEKALSEN
Respondents

Appellants' Reply Brief

Shane Seaman
WSBA #35350

Cross Sound Law Group
18887 Hwy 305, Suite 1000
Poulsbo, WA 98370
360-598-2350
Shane@crosssoundlaw.com

Contents

A.	REPLY INTRODUCTION.....	3
B.	ARGUMENT.....	5
1.	Equitable proceeding does not equal free for all.	5
2.	Common grantor applies, and in equity should have set the boundary at the road.....	7
a)	Recognition and Acquiescence are not elements of common grantor.....	7
b)	What exists on the ground is evidence of intent to set a boundary. 8	
c)	Every subsequent grantee of Tax 38 took title with reference to the line that is the centerline of the road shown on the 1984 survey. 12	
d)	Mekalsen concedes the intent was to install the road at the boundary/centerline shown on the 1984 survey. However, exactly where that line was set by the survey is unclear.....	12
e)	Because the Trial Court lacked a factual or legal reason to set the boundary where Mekalsen claimed based upon the Dunphy survey Ex 69, the common grantor doctrine should have been applied.	14
3.	Paying taxes to E/W centerline balances the equities in the case in Olivas' favor and the Assessor's testimony supported Olivas theory of superior title.....	15
4.	Argument that Norbut prepared 2003 deed is speculation. There was no evidence the disputed triangle remained in the estate of Peter Mekalsen and then was conveyed by the 2003 Correction Deed and finding No. 26 is based upon unsupported conclusions.	16

5. Mekalsen repeatedly assured they intended to rely upon the “metes and bounds description in the 2003 deed”. Did they make that representation in bad faith?	18
6. Attorney fees should be awarded.	23
C. CONCLUSION.....	24

TABLE OF AUTHORITIES

Cases

<u>Brodsky v. Nelson</u> , 57 Wash. 671, 672, 107 P. 840, 841 (1910).....	7
<u>Green v. Hooper</u> , 149 Wn. App. 627, 205 P.3d 134 (2009)	21
<u>Harding v. Will</u> , 81 Wn.2d 132, 137, 500 P.2d 91, 96 (1972).....	22
<u>Jensen v. Ledgett</u> , 15 Wn. App. 552, 555, 550 P.2d 1175, 1177 (1976),. 21	
<u>Key Design Inc. v. Moser</u> , 138 Wn.2d 875, 882, 983 P.2d 653, 658 (1999), amended, 993 P.2d 900 (Wash. 1999)	20
<u>Kramarevcky v. Dep't of Soc. & Health Servs.</u> , 122 Wn.2d 738, 863 P.2d 535 (1993).....	6
<u>Longenecker v. Brommer</u> , 59 Wn.2d 552, 563, 368 P.2d 900, 907 (1962)	21
<u>Martin v. Seigel</u> , 35 Wn.2d 223, 229, 212 P.2d 107, 110 (1949).....	20
<u>Pendergrast v. Matichuk</u> , 186 Wn.2d 556, 379 P.3d 96 (2016).....	8
<u>Strom v. Arcorace</u> , 27 Wn.2d 478, 481, 178 P.2d 959, 961 (1947)	9
<u>Thompson v. Bain</u> , 28 Wn.2d 590, 593, 183 P.2d 785, 787 (1947)	8
<u>Winans v. Ross</u> , 35 Wn. App. 238, 242, 666 P.2d 908, 912 (1983).....	8

Statutes

RCW 7.28.120	6
--------------------	---

Treatises

The Surveying Handbook by Russell C. Brinker, Roy Minnick- Chapter 32
Dennis J. Mouland 15
*Wattles Writing Legal Descriptions In Conjunction with Survey Boundary
Control* by Gurdon H. Wattles..... 15

A. REPLY INTRODUCTION

Respondent Mekalsen’s position that the Trial Court, under its equitable powers, has the discretion to reform the 2003 correction deed as it did, fails to adequately rebut the errors raised in the appeal. (1) Did the Trial Court have the authority to *sua sponte* amend the pleadings without notice to decide the case on an unpled theory? (2) Did the Trial Court inappropriately reform the deed when there wasn’t clear, cogent, convincing evidence? (3) Did the Trial Court err by not finding a common grantor, setting the boundary and not looking at the equity of paying taxes to the E/W centerline? Mekalsen’s position is that precedential law is irrelevant, that equity prevails in contravention of law.

Mekalsen had the burden to prove that the strength of their 2003 “correction” deed gives them superior title based upon the legal description contained therein. Mekalsen failed in that burden, meaning the 1997 deed was the only valid deed in hand. Appellant Olivas’ burden was to show superior title to Mekalsen’s pled claims concerning the 2003 “correction”

deed. Olivas met their burden, demonstrating the 2003 deed did not convey the property South of the E/W centerline, and offered evidence of common grantor and taxes up to the road. Olivas prevailed in trying “Case A”.

Mekalsen concedes they knew they could have pled and tried a deed reformation claim, “Case B”, but admit that they didn’t have clear, cogent, convincing evidence of a mutual mistake and could not advance a unilateral mistake with inequitable conduct. Mekalsen blames Olivas that Mekalsen pleading their case correctly would been unreliable¹ and so they contend because it’s an equitable proceeding, the Trial Judge could fashion any remedy that gave them relief, ignoring precedential law. What is so egregious in Mekalsen’s conduct is that when Olivas began to realize on the second day of trial that it appeared they were arguing deed reformation, “Case B”, Olivas was assured that NO, the case was not a deed reformation claim. The result Mekalsen got was what they claimed was “fair.” The disputed property should to go to them. The process of getting there did not matter, even if it violated basic rules of notice pleading and fundamental fairness and due process, and the claim was not supported by clear, cogent and convincing evidence.

¹ Mekalsen position is “*Under the circumstances of the case, it would have been a tactical trap of Olivas making for Mekalsen to plead unilateral mistake coupled with inequitable conduct, and attempt to prove it by clear, cogent and convincing evidence as a reliable argument for reformation.*” (Respondent Brief page 45)

B. ARGUMENT

1. Equitable proceeding does not equal free for all.

Olivas briefed the Trial Court on the limits of equity (CP 169-174). Mekalsen changed the legal theory of the case at trial by taking the position that the 2003 deed contained a mistake (never pled), and the court in equity could simply award the property south of the E/W centerline that was not conveyed because it was intended by Alyce Mekalsen to belong to the heirs. There is not sufficient admissible evidence to support this proposition.

Thus, even though a proceeding under RCW 7.28.120 (superior title, whether legal or equitable, shall prevail) employs both equitable and legal theories, it does not mean “equity” can ignore rules of law. First, for Mekalsen to assert equity, they must not be the party who created the need for it in the first place, yet we know the road is in its present location because of Doug Mekalsen and Peter Mekalsen’s actions. Kramarevcky v. Dep’t of Soc. & Health Servs., 122 Wn.2d 738, 863 P.2d 535 (1993). Olivas had nothing to do with the drafting of that 2003 deed or installing the road. When the 60 foot easement was narrowed to 30 feet in 2003, there was never any notations that the road was in the wrong place (Ex 14, RP 310²), yet

² (Mekalsen Testimony) Q. The 30-foot easement, was that established on the same centerline as the 1984 one?

A. Yes.

Q. Was there a reason for this?

Mekalsen could have cleared things up then and failed to do so, again. Mekalsen wants the Court to rectify his mistakes or his family's mistakes.

Mekalsen fails to comprehend the result in Brodsky v. Nelson, 57 Wash. 671, 672, 107 P. 840, 841 (1910). The person alleging equitable title got a chance to try his case after a dismissal was overturned. Brodsky does not hold that just because one claims equitable title one shall prevail. Mekalsen never actually held equitable title to the disputed triangle under any recognizable equitable theory. Rather, Mekalsen only could claim that the property ought to be his because the “deed history³” supported his claim. Mekalsen never had anything that would suggest superior title going into trial because the 2003 deed's caption limited the conveyance as a matter of law to the E/W centerline. Olivas defeated Mekalsen's claim and only by reforming the deed in equity could Mekalsen prevail. Thus, the Trial Court erred because there was no basis to award Mekalsen the disputed triangle.

A. We just shrank it up. Yes, we wanted to use the same easement. That way nothing changing, everything was staying the same. (RP 310)

³ The “deed history” was based upon Dunphy's speculation, and his review of some records created by Roats and ADA engineering that were never filed. He never spoke with any of the original grantors, thus he has no clue what the intent was. (RP 275-277, 282).

2. Common grantor applies, and in equity should have set the boundary at the road.

a) Recognition and Acquiescence are not elements of common grantor.

Mekalsen installed the road and the road was intended to match the centerline of an easement depicted on the 1984 survey.⁴ Tax 38 (Olivas) described a northerly boundary matching the centerline of the 1984 survey road. The actual road installed is the boundary. That is the common grantor doctrine. Equity should not “ignore” the common grantor doctrine.

Mekalsen does not correctly apply Pendergrast v. Matichuk, 186 Wn.2d 556, 379 P.3d 96 (2016). Mekalsen specifically claims that there must be evidence of both “recognition” of the new boundary and “acquiescence” by the adjoining landowners (i.e. “knowledge and recognition”). However, in Pendergrast, the Supreme Court noted that although a common grantor did not actively and purposefully change the boundary of the properties, such evidence was not necessary for application of the common grantor doctrine. Id. at 564. Pendergrast holds that “knowledge and recognition” although helpful, are not required elements.

⁴ Mekalsen now insinuates that Doug Mekalsen and Peter Mekalsen are not the common grantor, but (a) that theory and objection was never raised to the Trial Court and (b) if it had been, under an agency theory, it would have been shown they were acting on behalf of Alyce. But like so many things in this case, Olivas doesn’t become aware of the objection/issue until well past the time that Olivas could have proven Mekalsen wrong.

Rather, looking at the holdings in Winans v. Ross, 35 Wn. App. 238, 242, 666 P.2d 908, 912 (1983) and Thompson v. Bain, 28 Wn.2d 590, 593, 183 P.2d 785, 787 (1947)(no agreement was made to abide the result of a survey) the Pendergrast Court rejected “knowledge and recognition” as a dispositive element. “Time and recognition” are not requirements because it “does not rest on acquiescence in an erroneous boundary, but on the fact that the true location was made, and the conveyance in reference to it.” Strom v. Arcorace, 27 Wn.2d 478, 481, 178 P.2d 959, 961 (1947). If the Trial Court’s reasoning is as Mekalsen advocates, it is an error.

b) What exists on the ground is evidence of intent to set a boundary.

Mekalsen misses the point in citing Camping Comm’n of Pac. Nw. Conference of Methodist Church v. Ocean View Land, Inc., 70 Wn.2d 12, 13, 421 P.2d 1021, 1022 (1966). In that case, the problem was whether the courses and distances given on the plat governed the west line, or whether the reference to the mean high tide line controlled. In our case, the problem is whether the courses and distance for the north boundary in Tax 38 deeds govern (as shown on Dunphy’s unreliable survey), **or whether prior to Tax 38 conveyance the actual road installed, intending to match the course and distance, govern over the conflicting written legal description.** The Camping case is instructive. The Trial Court should have given weight to

what exists on the ground, not rule there were NO facts. Dunphy admitted what was on the ground controls (CP 252-253). Applying Pendergrast and the line of cases it relies upon, prior owners of Tax 38 seeing what exists on the ground and then seeing the 1984 survey leads them to only one conclusion: the actual boundary is the road.

Even if this Court were to need some evidence, there is recognition of the road as the boundary manifested by acts of ownership after the original sale by Alyce Mekalsen. Winans 35 Wn. App. at 241. When Alyce Mekalsen created the first deed to Moore, she apparently described by metes and bounds Tax 38, but the northern boundary directional and distance call comes from the described centerline of a road on the 1984 survey. There is no evidence to show how the western boundary description for Tax 38 was created. Mekalsen asks the Court to ignore his testimony that he relied upon the 1984 survey to show the dividing line between the properties (RP 329)⁵. That survey did not set the western calls for the depicted parcels; thus he had no basis to claim the road was in the wrong spot, based upon the survey. Mekalsen wants to the Court to ignore the legal consequence that he and his

⁵ Q. So prior to 2015, what information did you have that told you the road was in the wrong location?

A. The previous, the one you just showed me.

Q. The 1984 Survey?

A. 1984.

Q. The 1984 survey that does not give any distance calls on the western boundary, period. So you don't know what those distances were, correct?

A. That's correct...(RP 329)

father, Peter Mekalsen, installed the road as Alyce Mekalsen's agents and they specifically intended to follow the dividing line between the lots on the 1984 survey as the centerline of the road (RP 295-296, 323-325). Mekalsen concedes they put the road there, but in equity the Court ought to excuse their "mistake." Consider the 2009 power pole installed at Mekalsen's request on the northern boundary of the existing road, which is evidence to show the road is a boundary, yet Mekalsen wants that to be overlooked (RP 330-331). The power company's access to the pole is on the actual road, not south in the easement shown on Dunphy's survey. There is evidence showing the actual installed road is the boundary on the 1984 survey.

Dunphy confirmed that there is no legal description for Lot 1 and Lot 4 on the 1984 survey (RP 239-240). Olivas testified that Mekalsen was confused and didn't actually know where his western boundaries were years later in 2014, giving different locations to her at different times (RP 113-115). Mekalsen confirmed in his testimony that he couldn't locate the survey markers where he thought they should be in 2014 (RP 328-330)⁶. Given the 1984 survey was all that existed prior to this dispute, it's no wonder Mekalsen didn't know exactly where his boundaries were.

⁶ Per Dunphy no one from Roats or ADA Engineering actually went out and marked corners for the subject properties (RP 238-241).

Olivas testified that they always assumed that the road was the dividing line and it wasn't until Mekalsen started claiming in April 2014 it wasn't the line that Olivas had contrary information (RP 108). She then looked at county records and found the 1984 survey (CP 108). She saw the centerline of the road on the 1984 survey was not perfectly straight, it veered slightly south, and when she physically stood on her road, the road as it lay appeared to match the centerline of the depicted easement (RP 109-110). Exhibit 35 was admitted showing the line Olivas believed was the E/W centerline, location of the power pole and the road veering slightly south. The 1984 survey, with no distance calls on the western boundary, would lead any reasonable person to conclude the actual boundary was the centerline of the actual road matching what was depicted on the 1984 survey.

Mekalsen made an issue at trial that Olivas didn't get a survey to disprove his unsubstantiated claims, but there was no legal requirement to do so and why would Olivas get a survey when the 1984 survey and the actual road appeared to match. See (RP 124-128, 131, 157,178). The 1978 survey shows the E/W centerline, Mekalsen had a deed in his name from 1997 putting the southern boundary at the E/W centerline and the 2003 deed caption limited Mekalsen's conveyance to the E/W centerline. All evidence

that would leave the status quo. Yet, in equity, Mekalsen claims that Olivas' claimed boundary is not superior because they should have had a survey.

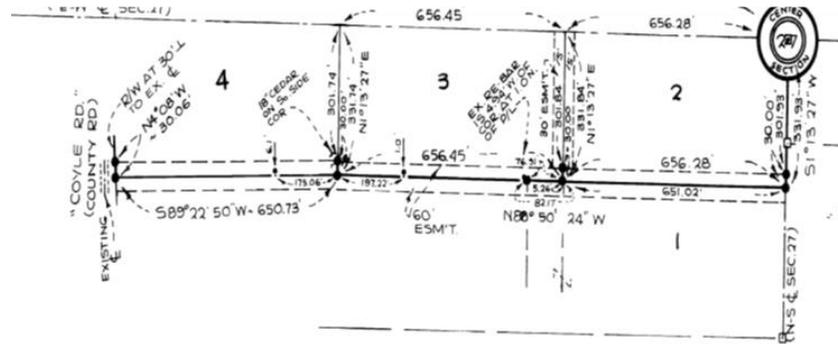
- c) Every subsequent grantee of Tax 38 took title with reference to the line that is the centerline of the road shown on the 1984 survey.

It is not necessary that every grantee, from the time the boundary is determined, should himself agree that that was the boundary line. Thompson 28 Wn.2d at 592. To claim no grantee took title with reference to the actual road as the boundary ignores the facts. Mekalsen is hung up on the fact that Tax 38 described northern line doesn't state "road" or "driveway" in the description, but that misses the issue. Every conveyance from Alyce Mekalsen and eventually to Olivas was consistent in describing the centerline of the 1984 survey as the northerly boundary. At trial the evidence showed the Grantee (Olivas) purchased believing the indicated line is the true line, and the indicated line is physically visible on the ground. Pendergrast 186 Wn.2d 565.

- d) Mekalsen concedes the intent was to install the road at the boundary/centerline shown on the 1984 survey. However, exactly where that line was set by the survey is unclear.

Mekalsen concedes the intent to follow Roats survey markers depicting the boundary/centerline when they installed the road for the

common grantor. (Respondent Brief, page 24). Mekalsen is wrong that this does not create a different boundary than the 1984 survey.



However, where exactly that boundary is set on the 1984 survey was challenged by expert testimony and the Trial Court appears to have ignored it. Wengler's testimony showed Dunphy's survey (Ex 69), based upon the above 1984 survey (Ex 23), was so lacking in information necessary to locate a boundary that it was unreliable, violating basic requirements of the Survey Recording Act (RP 38-39, 51-52). Wengler found the 1984 survey also lacking (RP 40). Dunphy was cross examined quite extensively about all the information lacking on his survey (EX 69), directly challenging it (CP 239-245, 249-250, 256, 266-268)⁷. Dunphy conceded he didn't know the purpose of the 1984 survey (RP 245) (App.Brief 23). Dunphy conceded

⁷ Dunphy was examined about the numerous other surveys, documents and information he should have put on his Exhibit 69. He repeatedly conceded he could have given better information for the intelligent interpretation of the survey, admitting to other surveys of the area he was familiar with and saw, but did not include in his. Wengler's testimony, as an expert, challenged the reliability and accuracy of Exhibit 69.

the Mekalsen Short Plat was never created, no legal descriptions for Lot 1 (Olivas) or Lot 4 (Mekalsen) are created from the 1984 survey, and all he knew is someone may have drafted legal descriptions in 1980 but no one from Roats or ADA Engineering actually went out and marked corners for the subject properties (RP 238-241) (See App.Brief 23). The Trial Court's F

inding No. 5 concerns the 1984 survey (Ex 23), but the Trial Court never stated it was reliable or accurate. Should the Trial Court ignore this evidence when Mekalsen concedes the intent in building the road was to follow the centerline on the 1984 survey?

- e) Because the Trial Court lacked a factual or legal reason to set the boundary where Mekalsen claimed based upon the Dunphy survey Ex 69, the common grantor doctrine should have been applied.

The Trial Court did not reject Wengler's testimony, instead it ignored the evidence that supported Olivas' theory. The Trial Court asked Wengler the impact of simply ignoring the rules of surveying, and Wengler testified it was not prudent to do so (RP 76). Mekalsen does not show why the rule in *The Surveying Handbook* by Russell C. Brinker, Roy Minnick-Chapter 32, Dennis J. Mouland, and *Wattles Writing Legal Descriptions In Conjunction with Survey Boundary Control* by Gurdon H. Wattles doesn't

apply to limiting the conveyance to the E/W centerline and Olivas urges this court to find they apply. Applying the rule would negate “Case B”, and for the intelligent interpretation of boundaries, give a clear standard on how to correctly read a deed and both surveyors agreed on the rule.

The Trial Court made Findings Nos., 4, 5, 6 and 7 that supported “Case A” common grantor once Olivas showed the deed caption limited the conveyance (CP 186). Mekalsen erroneously contends the centerline of the actual existing road must have been legally described or referred to as a boundary in the deeds (Respondent Brief, page 26). This negates the need for the common grantor doctrine. The Trial Court erred reaching for equity “Case B” to reach a result that Mekalsen could not prove on the case he presented when common grantor resolved the dispute.

3. Paying taxes to E/W centerline balances the equities in the case in Olivas’ favor and the Assessor’s testimony supported Olivas’ theory of superior title.

Payment of taxes for 24 years up to the E/W centerline, which transected the actual road was good reason, given the totality of the evidence to leave the road as the actual boundary. It was not claimed taxes alone that gave Olivas superior title. Amended Complaint (CP 67, 123).

The Assessor's office, for unknown reasons in 1993, changed that taxable boundary to the E/W centerline. Why this happened isn't exactly relevant, rather the salient point was that it occurred. When Mekalsen filed his 2003 "correction" deed, the Assessor's office didn't change the line from the E/W centerline (EX 66, par. 22), even though "It's important we are taxing the right people, so for this purpose, we maintain records of ownership. My office determines boundaries for taxable purposes based upon Real Estate Excise Tax Affidavits filed with a deed" (Ex 66, par 3- Testimony of Jeff Chapman). It's unclear why Mekalsen dedicates so much of the brief to addressing the Assessor's testimony when it doesn't rebut the errors raised, but it does show that the Trial Court ignored evidence in "Case A" equity of payment of taxes, finding in equity "Case B", deed reformation. The Trial Court's Finding No. 22 is based upon a faulty premise that Olivas argued the payment of taxes alone upon the disputed strip caused title to ripen. The amount paid, which the Trial Court deemed insignificant, wasn't relevant, it was the fact it was paid based upon the cadastral maps up the E/W centerline which matched the apparent boundary at the road.

4. Argument that Norbut prepared 2003 deed is speculation. There was no evidence the disputed triangle remained in the estate of

Peter Mekalsen and then was conveyed by the 2003 Correction Deed and Finding No. 26 is based upon unsupported conclusions.

There is no evidence that the 2003 correction deed was prepared by attorney Greg Norbut.⁸ Mekalsen speculates that the legal description for the 2003 “correction” deed must come from historical documents created by Roats Engineering, thus, it comported with Doug Mekalsen’s parent’s intent that he gets the disputed triangle. However, Dunphy could not establish it really was a scrivener error to include the third N ½ on the 2003 deed (RP 282) and if it had been one he acknowledged it should have been on his survey he prepared prior to trial (RP 283). The Trial Court struck the testimony that the property remained unconveyed in the Peter Mekalsen estate (RP 287). The only evidence we have of the Estate’s intent is the 1997 deed, going to only the E/W centerline, when attorney Norbut prepared that deed (EX 12). Mekalsen’s 2003 deed appears to circumvent the Estate.

So, when Mekalsen stands on his assertion that Dunphy’s opinion that the intent of the 2003 deed was to convey Mekalsen the disputed triangle, and it was a mistake for the third N ½ (Respondent Brief, pages

⁸ Mekalsen makes assertions that “Attorney Norbut has not admitted doing so [preparing the 2003 deed]” Respondent’s Brief, page 11. Norbut was not called by any party at trial. Mekalsen 2003 deed metes and bounds goes beyond the E/W centerline, conflicting with the plain language of the 1997 deed, which appears to be Mekalsen trying to take more than the estate intended to give him in 1997.

18, 37-38), the actual evidence before the Court does not support this assertion. Finding No. 26 is not supported by the testimony or evidence.

5. Mekalsen repeatedly assured they intended to rely upon the “metes and bounds description in the 2003 deed.” Did they make that representation in bad faith?

When Mekalsen declares in pretrial and in their briefing to the Court that they will stand on the plain language of their deed, what does that mean? Mekalsen made it clear their trial was “Case A”, about the strength of 2003 deed. It was not about reforming the legal description, because prior to trial, Mekalsen never took the position a mistake existed in the deed.

Mekalsen concedes, emphasizes even, in the response briefing that their claim for superior title would be decided upon the legal descriptions in the 2003 deed (Respondent Brief, pages 32-33).⁹ Construction of a deed generally is a matter of law and particular attention is paid to the intent of the grantor, ascertained from reading the deed as a whole. Harris v. Ski Park Farms, Inc., 62 Wn. App. 371, 375, 814 P.2d 684, 686 (1991), aff'd, 120 Wn.2d 727, 844 P.2d 1006 (1993). When Mekalsen claims his case is being decided on the legal descriptions, he is asking the Trial Court to read the

⁹ “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 quit claim deed. (Respondents Brief 32)

deed as written, not upon evidence of mistake and intent of a prior owner. Mekalsen wasn't asking for an equitable remedy, he was asking for superior title at law based upon the strength of his deed.

The law is clear that a deed containing an inadequate legal description is void. See Martin v. Seigel, 35 Wn.2d 223, 229, 212 P.2d 107, 110 (1949). As noted by Key Design Inc. v. Moser, 138 Wn.2d 875, 882, 983 P.2d 653, 658 (1999), amended, 993 P.2d 900 (Wash. 1999) in upholding the rule in Martin, the Court stated “we endeavor to honor the principle of stare decisis, which ‘promotes the evenhanded, predictable, and consistent development of legal principles, **fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.** (citations to quoted cases omitted)[emphasis added]. A court cannot in equity simply ignore the rule in Martin, yet Mekalsen needed parole evidence (Dunphy testimony) to support his late theory of mistake, and in reality it was speculation by Dunphy the third N ½ was a mistake.

Believing the representation made by Mekalsen, Olivas prepared by relying on established legal principles the 2003 “correction” deed did not actually convey what Mekalsen wanted. The *Order in Limine* limited the evidence to that issue, the strength of the deed. Wengler showed that the deed, when read in its entirety and correctly, did not convey property south of the E/W centerline because of the caption limiting the conveyance and

Dunphy did not rebut. Reviewing the admissible “legal descriptions” the Trial Court could not find superior legal title south of the road in Mekalsen’s favor and we were not trying a deed reformation claim. Thus Olivas position was not only the weakness of Mekalsen’s 2003 deed, it was about the fact that the 2003 deed only conveyed to the E/W centerline like the 1997 deed.

The Trial Court should have considered the other options presented to it in equity in “Case A”, instead of deciding “Case B”, post-trial and without notice and without sufficient evidence. Mekalsen’s 1997 deed was valid and correct, and the 2003 “correction” deed failed to convey south of the E/W centerline. The Assessor’s testimony the 2003 deed did not change the cadastral map, leaving the taxable line at the E/W centerline. Equity supported finding the road as the boundary set by the common grantor. Mekalsen could not prevail as a matter of law and employing equitable principles and the law correctly on the case as presented the long accepted boundary at the road would not change.

Mekalsen does not address Green v. Hooper, 149 Wn. App. 627, 205 P.3d 134 (2009) filed as a supplemental authority after the initial brief was filed. Mekalsen does not mention Jensen v. Ledgett, 15 Wn. App. 552, 555, 550 P.2d 1175, 1177 (1976), which the Trial Court erroneously relied upon or talked about Longenecker v. Brommer, 59 Wn.2d 552, 563, 368 P.2d 900, 907 (1962) and whether Olivas “impliedly” consented to try a

reformation case. Mekalsen appears to argue the Trial Court has unfettered discretion to fashion an equitable remedy in contravention of the law.

Amendment under CR 15(b) cannot be allowed if actual notice of the unpleaded issue is not given, if there is no adequate opportunity to cure the surprise that might result from the change in the pleadings, or if the issues have not in fact been litigated with the consent of the parties. Green, 149 Wn. App. at 636, citing to Harding v. Will, 81 Wn.2d 132, 137, 500 P.2d 91, 96 (1972). Yet, Mekalsen contends in equity, and the Trial Court can amend a pleading post trial without notice under these facts.

Mekalsen admits they could have amended their pre-trial pleadings claiming a mistake with the third N ½, but they knew the standard of clear, cogent and convincing was too high on their facts (Respondent Brief, page 36). Mekalsen conceded there was no evidence of mutual mistake.

They concede that they could not plea reformation of the deed under a unilateral mistake with inequitable conduct because it would have been fatal for them to do so for lack of evidence. Further, this is between the grantor and grantee, Mekalsen and the Estate, and the inequitable conduct they allude to is Olivas, a third party. Stranger still, Mekalsen argues it was Olivas' burden to prove whether anyone in the Mekalsen chain of title had knowledge or an explanation for the alleged "mistake" in the 2003 "correction" deed (Respondent Brief, page 37). This argument is not

supported by the record and is completely irrelevant to the issue, the Trial Court's ability to sua sponte, post-trial amend the pleadings without notice to equitably reform a deed without clear cogent and convincing evidence.

Like in the Green case, Olivas objected when it appeared Mekalsen first suggested that they were advancing a new theory and therefore Olivas made the motion in limine (CP 93-94). Like Green, Olivas objected to any evidence being introduced for purposes of proving that the family history showed the disputed triangle ought to go to him based upon documents from the Estate. (Exhibit 74-77)(RP 300-306). See Green, 149 Wn. App. at 637.

Amending a pleading under CR 15(b) to conform with the evidence must meet certain requirements of consent, notice and no prejudice. Green, 149 Wn. App. at 637. Olivas does not contest the Trial Court's authority on its own motion to amend pleadings to reflect issues tried with the implied or express consent of the parties, Jensen, 15 Wn. App. 552, so long as any objecting party is allowed sufficient time to prepare his case on the new issues, Green, 149 Wn. App. at 638. Olivas does object that under the law a CR 15(b) amendment may not unfairly prejudice a party's ability to present a defense, Id. and since both the Trial Court and Mekalsen clearly assured this was not a deed reformation case, Olivas was prejudiced.

Green is directly on point. Division III reversed because it was an abuse of discretion for the Trial Court to amend under CR 15, especially

when the evidence did not meet the standard of clear, cogent and convincing. The Green Trial Judge did not have unfettered equitable discretion.

Olivas was led to believe that they were trying “Case A”. They objected to evidence from Mekalsen’s parent estate. The *Order in Limine* was clear, the case was being tried based upon the legal description in the 2003 “correction” deed and if that failed, then the 1997 deed. Olivas stated on the record if it was deed reformation, it would be a different standard. Olivas would have called different witnesses. Thus, like Green it was a clear abuse of discretion to decide the case on an entirely new, unpled theory not supported by the evidence. “Case B” should not have ever occurred.

6. Attorney fees should be awarded.

The procedural bad faith move that Mekalsen concedes they engaged in is a basis to award attorney fees on appeal. Mekalsen concedes they could not meet the burden for deed reformation, so they did not plea it, relying upon the judge’s general equitable powers to reform the deed in their favor, without pleading this claim prior to trial. What makes it bad faith is that Olivas did not find out until the second day of trial that Mekalsen, through Dunphy’s testimony claiming a mistake existed, completely turning away from the strength of the deed argument. Mekalsen’s trial brief was

filed late, their motion in limine was filed late, and then when Olivas inquired if this case was about deed reformation, the answer was NO.

C. CONCLUSION

Despite what felt like a very lopsided trial in Mekalsen's favor with numerous evidentiary rulings favoring Mekalsen, violations of the order in limine and Mekalsen being allowed to mislead Olivas concerning what the claim was, Olivas raised only three main issues on appeal. They are (1) the Trial Court's error in rejecting the common grantor and other equitable considerations to leave the boundary at the established road, (2) the Trial Court's error in amending the pleadings *sua sponte*, post-trial, without notice and finding deed reformation without clear, cogent and convincing evidence and (3) finding that Mekalsen prevailed and ordering fees and costs, including surveyor fees, that should not have been allowed.

Mekalsen hasn't truly rebutted the errors and has not correctly distinguished cases like Pendergrast or Green or shown why the rule in *Wattles* doesn't apply. The record is clear, Olivas prepared "Case A" both showing that weakness of Mekalsen's 2003 deed, and the strength of her claim that the caption limited the 2003 deed to the E/W centerline like the 1997 deed, which matched the taxes, which nearly matched the existing road created by a common grantor, and all subsequent deeds for Tax 38

(Olivas) described the same easement centerline intended to be dividing boundary. Mekalsen wants this Court to ignore legal principles and in equity hold the Trial Court was correct. Clear, cogent and convincing evidence isn't needed to reform a deed, and deciding post trial, without notice, is acceptable. Mekalsen wants this Court to condone such behavior as stating the claim is "Case A" but then on the second day arguing "Case B" without giving Olivas notice. Respectfully, Olivas asks that the Trial Court be reversed, and the boundary set where it should be, at the actual road either by the E/W centerline that transects the road, or the centerline of the road installed. Either one leaves the status quo.

Dated this 1st day of November 2018.

CROSS SOUND LAW GROUP



Shane Seaman, WSBA #35350
18887 Hwy 305, Suite 1000
Poulsbo, WA 98370
(360)598-2350
shane@crosssoundlaw.com
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that I directed Appellants' Reply Brief to be served by e-service and mailed first class on November 1, 2018 to the following:

W.C. Henry and S.J. Allen
Chuck Henry
PO Box 576, 2000 Water St.
Port Townsend, WA 98368
chenrypt@qwestoffice.net

Date: November 1, 2018



(S) _____
Shane Seaman
WSBA #35350

Cross Sound Law Group
18887 Hwy 305 NE, Suite 1000
Poulsbo, WA 98370
360-598-2350
Shane@crosssoundlaw.com

CROSS SOUND LAW GROUP

November 01, 2018 - 3:57 PM

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_20181101155549D2920600_7288.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Appellants.Reply.Final.pdf

A copy of the uploaded files will be sent to:

- chenrypt@gmail.com
- chenrypt@qwestoffice.net

Comments:

Sender Name: Shane Seaman - Email: shane@crosssoundlaw.com
Address:
18887 STATE HIGHWAY 305 NE STE 1000
POULSBO, WA, 98370-8065
Phone: 360-598-2350

Note: The Filing Id is 20181101155549D2920600