10-25-2012

Campbell v. Kvamme Respondent's Brief Dckt. 39650

IN THE SUPREME COURT OF THE STATE OF IDAHO

V. LEO CAMPBELL and KATHLEEN CAMPBELL, Plaintiffs, Appellants, and Cross-respondents, vs. JAMES C. KVAMME and DEBRA KVAMME, Defendants, Respondents, and Cross-appellants,	)	Supreme Court Docket No. 39650-2012 *Case No. CV 10-3879, Bonneville County, Idaho*

RESPONDENTS' BRIEF

Appeal from the District Court of the Seventh Judicial District
in and for Bonneville County, Idaho
Honorable Jon J. Shindurling, District Judge, Presiding

Attorney for Plaintiffs, Appellants, and Cross-respondents:

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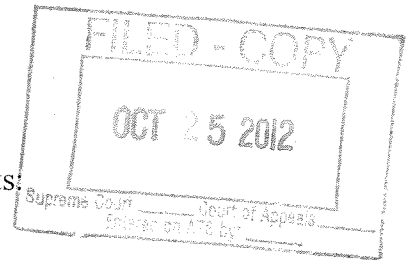

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INTRODUCTION

I.

V. Leo Campbell and Kathleen Campbell are the Plaintiffs/Appellants/Cross-respondents in this case. This brief will hereinafter refer to them as the "Plaintiffs."

James C. Kvamme and Debra Kvamme are the Defendants/Respondents/Cross-appellants in this case. This brief will hereinafter refer to them as the "Defendants."

II.

The APPELLANTS' BRIEF includes a statement of the case; however, contrary to the requirements of I.A.R. 35(a)(3), it does not adequately explain the "nature of the case," it does not fairly cover the "course of proceedings in the trial or the hearing below," and it does not contain an accurate "statement of the facts."

Therefore, the Defendants "disagree with the statement of the case." The Defendants will hereinafter set forth their own statement of the case in accordance with I.A.R. 35(b)(3).

III.

This case is a simple boundary dispute, involving a sliver of farm ground that is 15 feet wide. After extensive litigation, the trial court ruled in favor of the Defendants and entered a JUDGMENT AND DECREE OF QUIET TITLE on November 3, 2011. R. Vol. IV, p. 608.

The Plaintiffs thereafter filed a MOTION FOR RECONSIDERATION on November 15, 2011. R. Vol. IV, p. 664. According to the Plaintiffs, both before the trial court and on appeal,

the trial court "***must*** consider new evidence" and it is "***obligated*** to consider such new evidence." See APPELLANTS' BRIEF, p. 11.

Contrary to the Plaintiffs' ***argument***, a motion for reconsideration is discretionary, ***not*** mandatory:

> The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court.

Jordan v. Beeks, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001).

In addition, a motion for reconsideration is ***not*** a subversive stratagem or clever end run–that is, I.R.C.P. 11(a)(2)(B) is ***not*** a scheme or maneuver to prolong a case, to increase the cost of litigation, to ignore the rules of evidence, to disregard the rules of civil procedure, to violate the rules of discovery, to snub the orders of the court, to manipulate the outcome of a motion for summary judgment, or to engage in endless litigation. In this regard, please recall the ***first*** rule of civil procedure:

> . . . These rules [***including I.R.C.P. 11(a)(2)(B)***] shall be liberally construed to secure the just, speedy, and inexpensive determination of every action and proceeding.

See I.R.C.P. 1(a).

STATEMENT OF THE CASE

I.

NATURE OF THE CASE

The Plaintiffs own a parcel of real property, located in the NE1/4 of Section 17, Township 3 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho.

The Defendants, too, own a parcel of real property, located in the NE1/4 of Section 17, Township 3 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho.

The foregoing parcels of real property are contiguous–to wit, the north boundary of the Plaintiffs' parcel of real property is contiguous with the south boundary of the Defendants' parcel of real property.

The Plaintiffs filed the complaint in this case on June 30, 2010. The Plaintiffs ***alleged*** the following:

> On its northern boundary, the Subject Property abuts the Kvammes' real property . . . and the purpose of this action is to quiet title to the Subject Property in the name of the Campbells against any and all persons with adverse claims, interests, encumbrances, easements, liens, or rights.

R. Vol. I, p. 12, ¶ 5.

The Defendants duly acknowledged that the Plaintiffs' parcel of real property "abuts" their parcel of real property; however, the Defendants denied that the Plaintiffs have the right to quiet title to the real property that lies north of the fence that runs between their respective parcels of real property. R. Vol. I, pp. 20-21, ¶ 5.

In this regard, please note that a fence runs across the middle of the NE1/4 of Section 17. The fence is approximately one-half mile long and runs across the entire NE1/4 of Section 17.

The Plaintiffs ***alleged*** that the fence does not sit on the boundary between the parties' respective parcels of real property; instead, the Plaintiffs ***alleged*** that the fence sits on their parcel

of real property and is off by 15 feet. The Defendants denied that the fence sits on the Plaintiffs' parcel of real property.

The Plaintiffs filed a motion for summary judgment on May 17, 2011. R. Vol. 1, p. 68. The Defendants filed a cross-motion for summary judgment on June 7, 2011. R. Vol. I, p. 143.

The cross-motions for summary judgment addressed the following three issues: The true and correct location of the fence, the doctrine of adverse possession, and the doctrine of boundary by agreement or acquiescence.

The foregoing three issues are separate and stand alone. They have different burdens of proof, they have different elements of proof, and they have different facts in support thereof.

Thus, any one of the foregoing three issues is a sufficient and proper basis for the disposition of this case, whether before the trial court or on appeal.

II.

TRUE AND CORRECT LOCATION OF THE FENCE

This issue was a watershed issue. According to the Plaintiffs, the fence does not sit on the boundary between the parties' respective parcels of real property; instead, the Plaintiffs ***alleged*** that the fence sits on their parcel of real property and is off by 15 feet. ***The Plaintiffs bore the burden of proof on this issue***.

III.

KIPP L. MANWARING

In an attempt to carry their burden of proof, the Plaintiffs filed an AFFIDAVIT OF COUNSEL of Kipp L. Manwaring, dated May 17, 2011. R. Vol. I, p. 81.

In this regard, please note that Mr. Manwaring simply attached a copy of a RECORD OF SURVEY to his affidavit. R. Vol. I, p. 116.

Mr. Manwaring is a lawyer. He is not a professional land surveyor. He is not licensed to practice professional land surveying.

In addition, he did not prepare the RECORD OF SURVEY, he could not identify it, he could not authenticate it, he could not lay a proper foundation for it, it was not based on his personal knowledge, he was not competent to testify regarding it, and his arguments regarding it were speculative, based on hearsay, and conclusory. R. Vol. II, p. 385.

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

See I.R.C.P. 56(e).

Thus, the RECORD OF SURVEY was not admissible; nonetheless, the Plaintiffs persisted and argued that the RECORD OF SURVEY "confirms that the disputed fence lies within the Campbells' property." R. Vol. I, p. 73.

IV.

KIM LEAVITT

The Defendants flatly disagreed with the Plaintiffs; however, rather than merely argue with them, the Defendants filed the AFFIDAVIT OF KIM LEAVITT, dated June 7, 2011. R. Vol. II, p. 314.

Mr. Leavitt is a professional land surveyor. He is licensed to practice professional land surveying in the state of Idaho. R. Vol. II, p. 314, ¶ 2.

In addition, he has the education, knowledge, skill, experience, and training to determine the true and correct boundaries of real property, including, without limitation, the true and correct location of fences and other improvements thereon. R. Vol. II, p. 315, ¶ 4.

Thus, Mr. Leavitt was competent to testify regarding the true and correct location of the fence in this case. See I.R.E. 702.

The AFFIDAVIT OF KIM LEAVITT duly evidenced that the fence does ***not*** sit on the Plaintiffs' parcel of real property and it is ***not*** off by 15 feet; instead, the fence sits on the boundary between the Plaintiffs' parcel of real property and the Defendants' parcel of real property and it marks the boundary between them.

Thus, the Plaintiffs did ***not*** carry their burden of proof on this issue; allegations in pleadings and arguments of counsel are ***not*** sufficient:

> . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment . . . shall be entered against him.

See I.R.C.P. 56(e).

The trial court agreed:

> Pursuant to Rule 56(e) of the Idaho Rules of Civil Procedure, the RECORD OF SURVEY, submitted as an exhibit to Plaintiffs' counsel's affidavit, lacks a proper foundation and is not properly before the court. Therefore, ***the Plaintiffs have failed to "set forth specific facts showing that there is a genuine issue for trial." As such, and based on the evidence properly before the court, it appears that the fence is the boundary line between the parcels owned by Plaintiffs and Defendants***.

R. Vol. III, p. 606 (emphasis added).

V.

THE BOTTOM LINE

The "failure" of the Plaintiffs to "set forth specific facts showing that there was a genuine issue for trial," coupled with the "evidence properly before the court"–that is, the AFFIDAVIT OF KIM LEAVITT–was decisive. The trial court was correct.

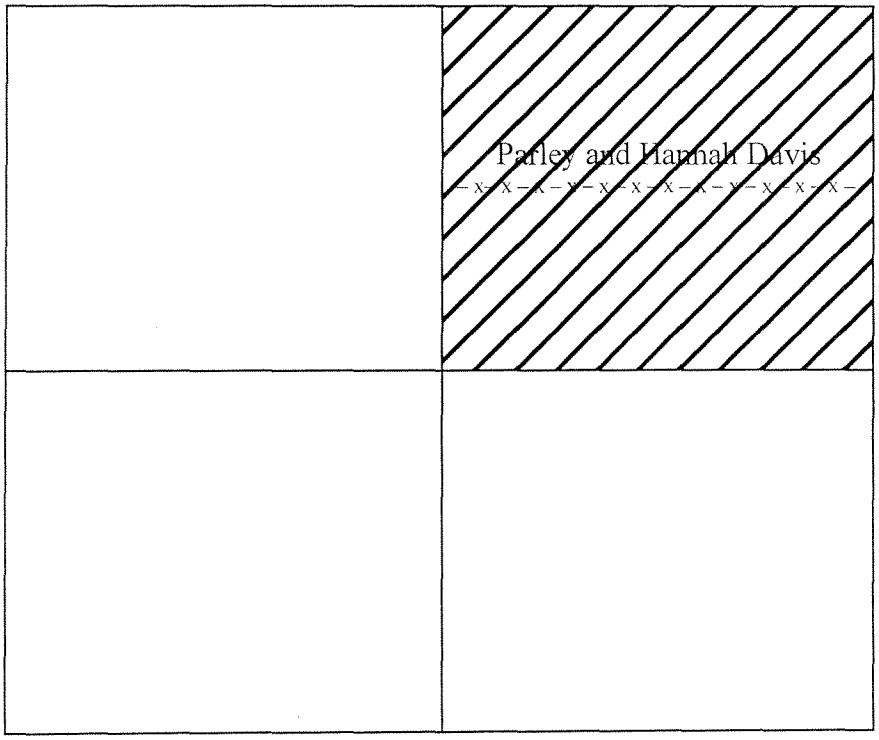
VI.

NE1/4 OF SECTION 17

As previously stated, the fence runs across the middle of the NE1/4 of Section 17. It has been there since time immemorial. R. Vol. I, p. 170, ¶ 39, and p. 171, ¶¶ 45-48.

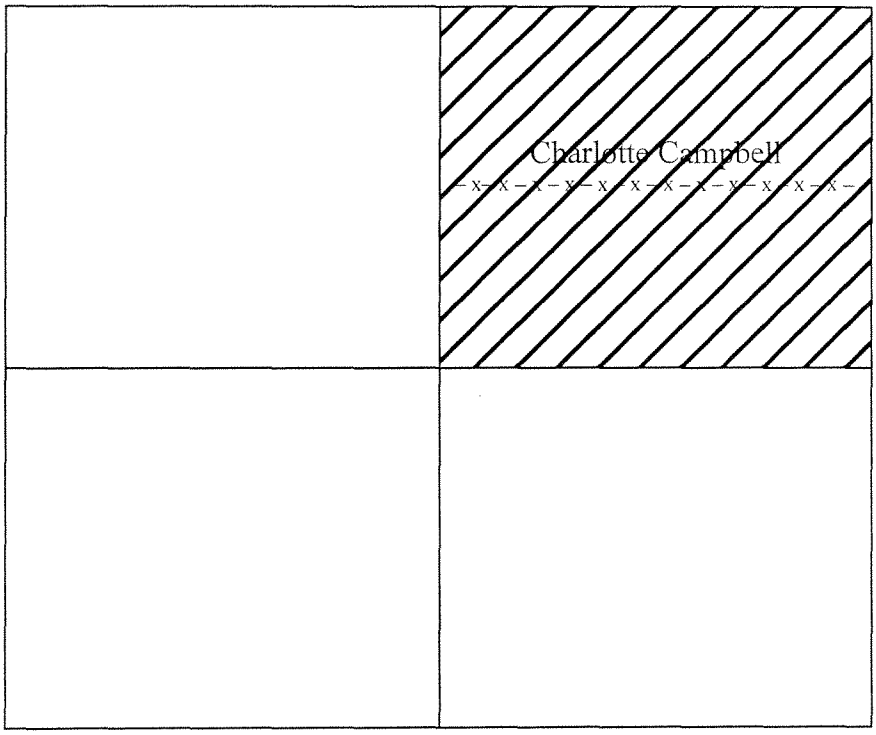
According to the Plaintiffs, the fence was there "***before*** the Davises bought the property." R. Vol. II, p. 287 (emphasis added).

Parley Davis and Hannah Davis bought the NE1/4 of Section 17 on ***March 3, 1919***. R. Vol. I, p. 171, ¶ 46.



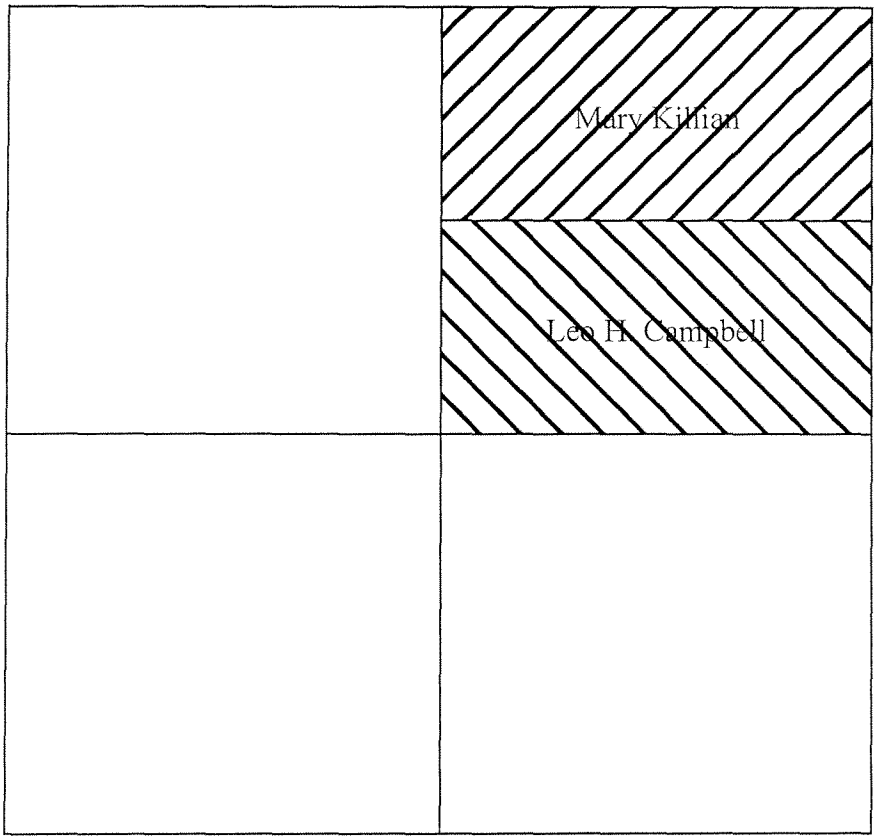
Parley Davis and Hannah Davis have long since passed away. R. Vol. I, p. 166, ¶ 23.

In 1937, Hannah Davis transferred the NE1/4 of Section 17 to Charlotte Campbell. R. Vol. I, p. 166, ¶¶ 22-23.



Charlotte Campbell has also long since passed away. R. Vol. I, p. 167, ¶ 25.

In 1950, Charlotte Campbell transferred the N1/2 of the NE1/4 to her daughter, Mary Killian, and the S1/2 of the NE1/4 to her son, Leo H. Campbell. R. Vol. I, p. 167, ¶ 26.

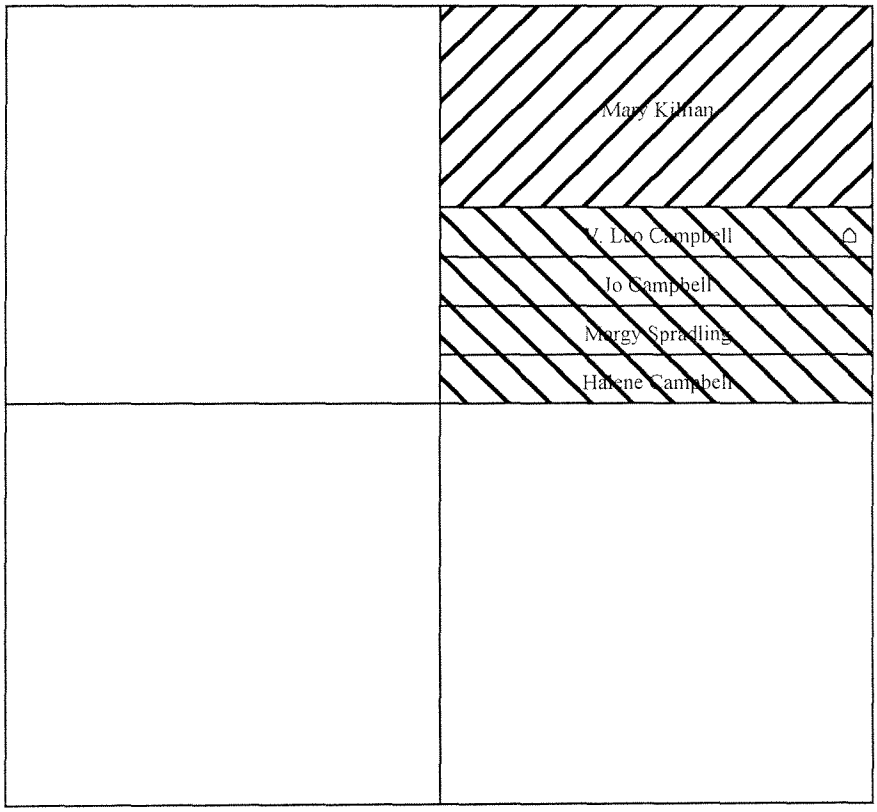


Mary Killian has also long since passed away. R. Vol. I, p. 167, ¶ 29.

In addition, Leo H. Campbell has also long since passed away. R. Vol. I, p. 167, ¶ 29. He was the father of V. Leo Campbell, the Plaintiff in this case. R. Vol. I, p. 167, ¶ 27.

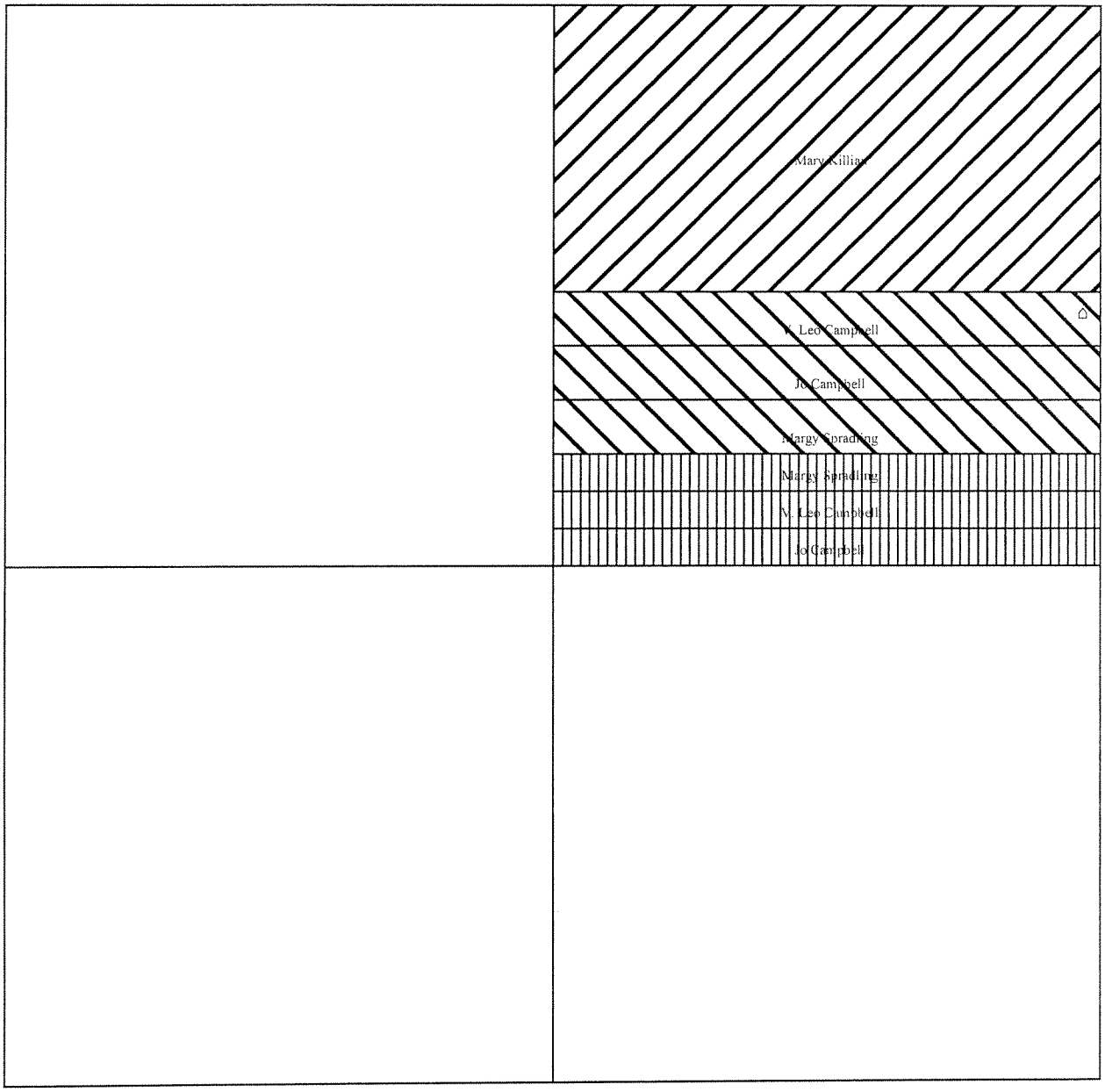
In 1981, Leo H. Campbell transferred approximately one acre of the S1/2 of the NE1/4 to his son, V. Leo Campbell, the Plaintiff in this case. The Plaintiffs then moved a home onto this acre and they live there to this day, 31 years later.

In 1989, Leo H. Campbell split the S1/2 of the NE1/4 into four parcels of real property. He then transferred one parcel of real property to each of his four children–namely, the Plaintiff, Jo Campbell, Margy Spradling, and Halene Campbell:

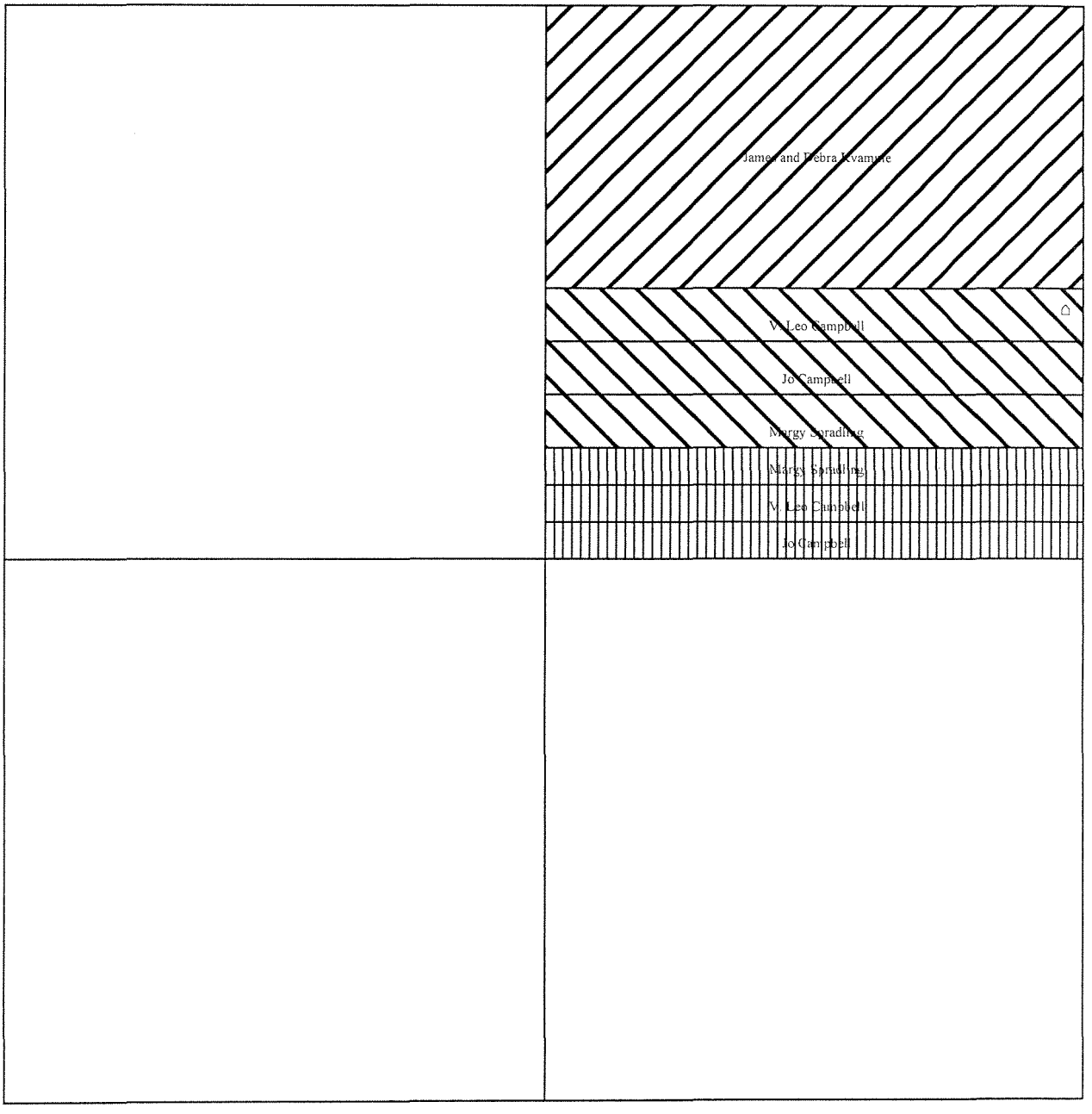


Leo H. Campbell transferred the foregoing parcels of real property to his children by DEED OF GIFT, ***not*** by warranty deed. R. Vol. II, p. 236, p. 240, p. 244, and p. 248.

In 1996, Halene Campbell passed away. Her estate split her parcel of real property into three smaller parcels of real property. Her estate then transferred one small parcel of real property to each of her three siblings–to wit, the Plaintiff, Jo Campbell, and Margy Spradling. R. Vol. II, p. 329, ¶49.



In 2003, the estate of Mary Killian transferred the N1/2 of the NE1/4 to the Defendants. R. Vol. I, p. 169, ¶ 35.



VII.

REVENGE RUN AMOK

As previously stated, the Plaintiffs, Margy Spradling, and Jo Campbell own contiguous parcels of real property in the S1/2 of the NE1/4. R. Vol. II, pp. 328-29, ¶¶ 47-49, and p. 376. They collectively attempted to sell them in 2008. In this regard, Rowdy Construction made an offer to purchase to them. R. Vol. II, pp. 273-74.

The offer to purchase was subject to two conditions: (1) Rowdy Construction "intended to use the property as a gravel pit" and the offer to purchase was "contingent upon County approval of the gravel pit"; and (2) The Plaintiffs agreed to survey the real property in order to exclude "1 acre around and including [their] personal residence."

With respect to the "intended use of the property as a gravel pit," Rowdy Construction submitted an application to the Planning and Zoning Commission of Bonneville County. R. Vol. II, p. 274.

With respect to the "survey," the Plaintiffs retained the services of Kevin L. Thompson. R. Vol. II, p. 286.

The Planning and Zoning Commission conducted a public hearing; however, it denied the application. As a result, Rowdy Construction did not purchase the real properties. R. Vol. II, p. 274.

The Plaintiffs blamed, and continue to blame, the Defendants for the outcome of the public hearing–that is, the denial of the application:

> . . . And on the morning of the mediation, we showed up at Al Stephens' office. Alan Stephens was the mediator in this matter. And as I was pulling into the parking lot, the Plaintiff was sitting in his car smoking. I went into the building and they came in later. We started the mediation, and Al Stephens came in, and he was quite frankly puzzled. He said, "The Plaintiffs really aren't focused on trying to settle this case. They're upset because, in their minds, [the Defendants] caused them to lose their application to sell their property to a gravel company so the gravel company could use it as a gravel pit." He said, "It's like a vendetta right now."

T. p. 106, LL. 11-23.

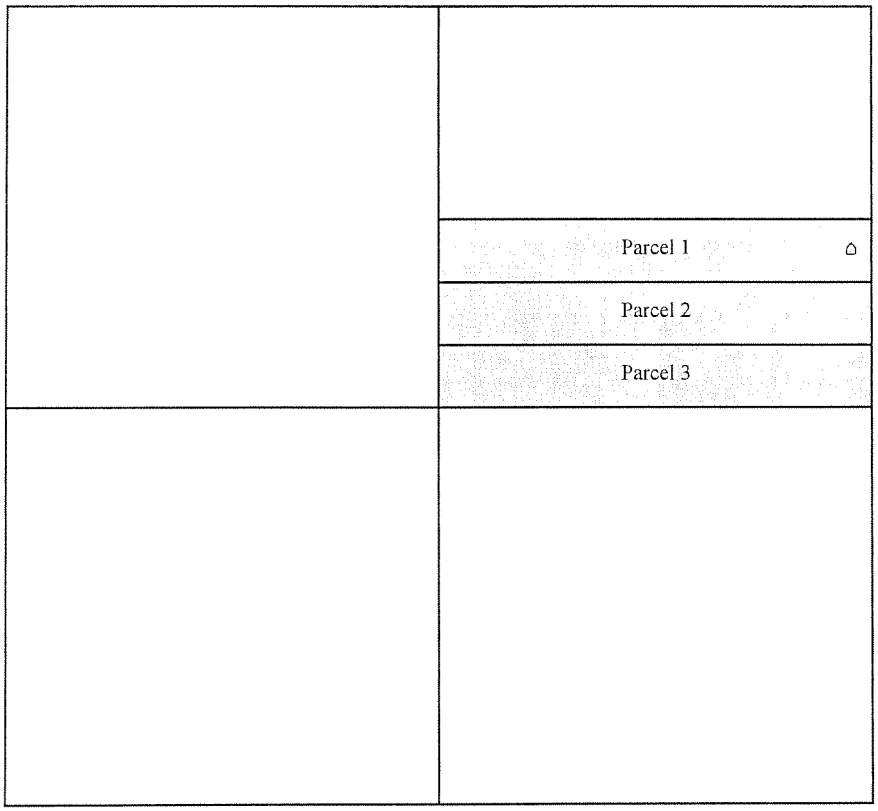
Their shot at revenge was literally right around the corner. In this regard, Mr. Thompson finalized his survey in 2009, after the public hearing. Again, he surveyed the real properties of the Plaintiffs, Margy Spradling, and Jo Campbell. He then prepared a RECORD OF SURVEY.

The purpose of the RECORD OF SURVEY was ***not*** to determine if the fence sits on the boundary between the parties' respective parcels of real property; instead, the purpose of the RECORD OF SURVEY was to ***illustrate*** the ***possible*** "combining" of six deeds–specifically, the real properties of the Plaintiffs, Margy Spradling, and Jo Campbell:

> Kevin Thompson meet with Leo Campbell and onsite on September 8, 2009. Leo asked that Kevin combine 6 deeds as described in Instrument Numbers 924841, 1202459, 847849, 774872, and 1189866 into 3 parcels of land as shown on this Record of Survey.

R. Vol. I, p. 116; see also, R. Vol. II, p. 316, ¶ 11, and p. 346.

In other words, the Plaintiffs simply retained the services of Mr. Thompson to illustrate the possible "combining of 6 deeds . . . into 3 parcels of land ***as shown***":



Please note that Bonneville County, Idaho, has ***not*** approved or otherwise authorized the "combining" of the foregoing parcels of real property. R. Vol. II, p. 330, ¶ 52.

In addition, the Plaintiffs, Jo Campbell, and Margy Spradling have ***not*** executed and recorded the necessary and requisite deeds to effectuate the "combining" of the foregoing parcels of real property. R. Vol. II, p. 330, ¶ 53. As a result, the Plaintiffs do ***not***, in fact, own Parcel 1, notwithstanding their ***allegation*** to the contrary. R. Vol. I, p. 11, ¶ 1, and p. 15.

Nonetheless, with the RECORD OF SURVEY in hand, revenge was afoot. In this regard, the Plaintiffs now claimed, ***for the first time ever***, that the fence sits on their parcel of real property and is off by 15 feet. In their minds, the RECORD OF SURVEY "confirmed" it. R. Vol. I, p. 73.

Suddenly, and that is not too strong of a word, the dead could speak, time warped, childhood memories stirred, history rewrote itself into a new history, a better history, and family members, both near and far, somehow "knew" that the fence was a "convenience fence," not the boundary.

The Plaintiffs refused to provide a copy of the RECORD OF SURVEY to the Defendants, but that did not stop them or even deter them from filing this case to "quiet title to the Subject Property"–that is, the 15 feet of farm ground that lies north of the fence. R. Vol. I, p. 12, ¶ 5.

VIII.

THE PIVOT

"Common sense," according to one comic hero, "is so rare that it's a super power." By all accounts, the 15 feet of farm ground, in and of itself, is not worth the cost of litigation. But there is more to the story.

Again, the Defendants purchased the N1/2 of the NE1/4 in 2003. R. Vol. I, p. 169, ¶ 35. They farm it. R. Vol. I, p. 172, ¶ 54.

Shortly thereafter, the Defendants rented the S1/2 of the NE1/4 from the Plaintiffs, Margy Spradling, and Jo Campbell. R. Vol. II, p. 284. They farmed it until 2008–specifically, until the Plaintiffs, Margy Spradling, and Jo Campbell "had an opportunity to sell the land." Again, Rowdy Construction made an offer to purchase to them in 2008. R. Vol. II, pp. 273-74.

Before Rowdy Construction made the offer to purchase, however, the Defendants installed a center irrigation pivot on the N1/2 of the NE1/4. R. Vol. I, p. 175, ¶ 63. The pivot sits on the north side of the fence. It includes a pump, an underground mainline, a riser, and a concrete anchor pad. R. Vol. I, p. 174, and Vol. II, pp. 257-64.

The pivot was designed and engineered to cover ***both*** the N1/2 of the NE1/4 ***and*** the S1/2 of the NE1/4. Again, the Defendants were farming ***both*** halves at the time. R. Vol. II, p. 284, and p. 391.

The Plaintiffs knew about the pivot from the get-go, including its location–that is, on the north side of the fence. The Plaintiffs and the Defendants discussed the location of the pump, which is close to the Plaintiffs' house, the possibility of noise, the placement of panels in the Plaintiffs' fences, which enable the pivot to rotate through the S1/2 of the NE1/4, and the placement of backstops on the Plaintiffs' real property.

Q. With reference to Mr. Kvamme's use and occupancy since 2003, you likewise admit that it has been open and plainly visible, correct?

A. Correct.

Q. And that, again, would include all of the ground north of the fence?

A. Correct.

Q. In fact, he has installed a pivot, pump, and motor on that ground north of the fence, hasn't he?

A. Yes, he has.

Q. And, again, that was plainly and openly visible?

A. Yup.

Q. And you had knowledge of it and you've known about his open use since 2003?

A. Yes.

R. Vol. I, pp. 179-80, and Vol. II, p. 283.

The installation of the pivot took weeks and the Plaintiffs watched it, literally from the comfort of their own home; nonetheless, the Plaintiffs ***never*** said a word to the Defendants about the fence, whether it sits on their parcel of real property, or whether it is off by 15 feet:

Q. Do you allege or claim that you ever told Mr. Kvamme that you claimed an interest in the land north of the fence?

A. I attempted to.

Q. Do you allege or claim that you ever told Mr. Kvamme that you claim an interest in the land north of the fence, yes or no.

A. No.

R. Vol. I, p. 181, and Vol. II, p. 284.

IX.

TURNING THE CARDS FACE UP

Notwithstanding the foregoing, the RECORD OF SURVEY marked the dawn of a new day, the chance for revenge. Again, Mr. Thompson finalized it in 2009. Just before the Plaintiffs filed the complaint in this case, they disclosed their dark, but true motive in a letter to the Defendants, dated May 27, 2010:

> . . . Further, in the event such personal property [i.e. pump, anchor pad, and mainline] is determined to be a fixture, it remains as part of the real property and title to all such property is quieted in the names of the owners of the real property.

R. Vol. II, p. 391.

In short, the Plaintiffs' goal in this case is to take the Defendants' pivot, if not in whole, then at least in part–that is, the "pump, anchor pad, and mainline." Again, the pivot was designed and engineered to irrigate ***both*** halves of the NE1/4, including their half.

X.

COURSE OF PROCEEDINGS

As previously stated, the Plaintiffs refused to provide a copy of the RECORD OF SURVEY to the Defendants; nonetheless, the Plaintiffs filed the complaint in this case on June 30, 2010.

On September 6, 2010, the Defendants served interrogatories and requests for production on the Plaintiffs. R. Vol. I, p. 34.

The interrogatories and requests for production were straightforward. For example, the interrogatories specifically and expressly asked the Plaintiffs to disclose the following information in accordance with I.R.C.P. 26(b)(4):

> INTERROGATORY NO. 1: Please state the name, address, and telephone number of each and every expert "expected to testify" in this case, whether "acquired or developed in anticipation of litigation or for trial." See I.R.C.P. 26(b)(4).
>
> INTERROGATORY NO. 2: In connection with INTERROGATORY NO. 1, above, please provide a full and complete "statement of all opinions to be expressed and the basis and reasons therefor." See I.R.C.P. 26(b)(4)(A)(I).

INTERROGATORY NO. 3: In connection with INTERROGATORY NO. 1, above, please provide a full and complete statement of "any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years." See I.R.C.P. 26(b)(4)(A)(I).

INTERROGATORY NO. 4: In connection with INTERROGATORY NO. 1, above, please provide a full and complete disclosure of "the compensation to be paid for the testimony." See I.R.C.P. 26(b)(4)(A)(I).

INTERROGATORY NO. 5: In connection with INTERROGATORY NO. 1, above, please provide a full and complete "listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." See I.R.C.P. 26(b)(4)(A)(i).

R. Vol. IV, pp. 704-05.

In addition, the requests for production specifically and expressly asked the Plaintiffs to disclose the following documents:

REQUEST FOR PRODUCTION NO. 1: Please produce the resume of each and every expert "expected to testify" in this case, whether "acquired or developed in anticipation of litigation or for trial." See I.R.C.P. 26(b)(4).

REQUEST FOR PRODUCTION NO. 2: Please produce the curriculum vitae of each and every expert "expected to testify" in this case, whether "acquired or developed in anticipation of litigation or for trial." See I.R.C.P. 26(b)(4).

REQUEST FOR PRODUCTION NO. 3: Please produce the report of each and every expert "expected to testify" in this case, whether "acquired or developed in anticipation of litigation or for trial." See I.R.C.P. 26(b)(4).

REQUEST FOR PRODUCTION NO. 4: Please produce the entire file of each and every expert "expected to testify" in this case, whether "acquired or developed in anticipation of litigation or for trial," including, without limitation, any and all correspondence, notes, records, and other documents. See I.R.C.P. 26(b)(4).

REQUEST FOR PRODUCTION NO. 5: In connection with REQUESTS FOR PRODUCTION NOS. 1 through 4, above, please produce any and all "data and

other information considered by the witness in forming the opinions." See I.R.C.P. 26(b)(4)(A)(I).

REQUEST FOR PRODUCTION NO. 6: In connection with REQUESTS FOR PRODUCTION NOS. 1 through 4, above, please produce any and all "exhibits to be used as a summary of or support for the opinions." See I.R.C.P. 26(b)(4)(A)(i).

R. Vol. IV, p. 711.

On September 30, 2010, the Plaintiffs answered the interrogatories and responded to the requests for production ***and they did so under oath***. R. Vol. IV, p. 733. However, notwithstanding their knowledge of Mr. Thompson and the key importance of the RECORD OF SURVEY in this case, the Plaintiffs did ***not*** answer and respond to the foregoing interrogatories and requests for production regarding expert witnesses. "***None***" was their sole, repeated response. R. Vol. IV, pp. 719-20 and 725-26.

As before, the Plaintiffs did ***not*** produce or otherwise provide a copy of the RECORD OF SURVEY to the Defendants:

. . . [A]n evasive or incomplete answer is to be treated as a failure to answer.

See I.R.C.P. 37(a)(3).

The litigation continued. Of course, the Plaintiffs were then under a ***duty*** to supplement their answers and responses:

A party who has responded to a request for discovery with a response that was complete when made is under to duty to supplement his response to include information thereafter acquired, ***except as follows***:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to:

. . .

> (B) The identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

See I.R.C.P. 26(e)(1)(B).

On October 11, 2010, the trial court conducted a status conference in this case. The court set this case for trial on April 25, 2011, and duly entered an ORDER SETTING PRE-TRIAL CONFERENCE AND JURY TRIAL. R. Vol. I, p. 40.

On November 23, 2010, the Plaintiffs supplemented their answers and responses, but ***not*** with respect to the interrogatories and requests for production regarding expert witnesses; in other words, their supplemental answers and responses related to ***other*** interrogatories and ***other*** requests for production. R. Vol. I, p. 50.

On December 14, 2010, the Plaintiffs, ***for the second time***, supplemented their answers and responses, but ***not*** with respect to the interrogatories and requests for production regarding expert witnesses; in other words, their supplemental answers and responses related to ***other*** interrogatories and ***other*** requests for production. R. Vol. I, p. 59.

In the ORDER SETTING PRE-TRIAL CONFERENCE AND JURY TRIAL, above, the trial court ordered the parties to disclose their respective expert witnesses 90 days before trial–that is, on or before January 25, 2011:

> No later than 90 days before the date set for trial, counsel shall disclose the names, addresses, and telephone numbers of expert witnesses that may be called to testify at trial.

R. Vol. I, p. 40, Section I, Paragraph 2.

In accordance with the trial court's order, the Defendants duly filed a DISCLOSURE OF EXPERT WITNESSES on January 25, 2011. R. Vol. I, p. 63. In this regard, please note that the Defendants duly disclosed their expert witness, Mr. Leavitt. R. Vol. I, p. 64. However, notwithstanding their knowledge of Mr. Thompson and the importance of the RECORD OF SURVEY in this case, the Plaintiffs did ***not*** file a DISCLOSURE OF EXPERT WITNESSES.

In addition, in the ORDER SETTING PRE-TRIAL CONFERENCE AND JURY TRIAL, the trial court also ordered the parties to "complete" their discovery "70 days before trial." R. Vol. I, p. 40, Section I, Paragraph 4.

In accordance with the trial court's order, the Defendants duly served a final, supplemental interrogatory and a final, supplemental request for production on the Plaintiffs:

> A duty to supplement responses may be imposed by order of the court, agreement of the parties, ***or at any time prior to trial through new requests for supplementation of prior responses***.

See I.R.C.P. 26(e)(3) (emphasis added).

The supplemental interrogatory and the supplemental request for production were straightforward:

> INTERROGATORY NO. 19: If applicable, please supplement your answers to INTERROGATORY NOS. 1 through 18, dated September 30, 2010, in accordance

with I.R.C.P. 26(e)(3). In this regard, please make sure that your answers are not "evasive or incomplete" in violation of I.R.C.P. 37(a)(3).

R. Vol. IV, p. 755.

> REQUEST FOR PRODUCTION NO. 28: If applicable, please supplement your responses to REQUESTS FOR PRODUCTION NOS. 1 through 27, dated September 30, 2010, in accordance with I.R.C.P. 26(e)(3). In this regard, please make sure that your answers are not "evasive or incomplete" in violation of I.R.C.P. 37(a)(3).

R. Vol. IV, p. 759.

On January 24, 2011, the Plaintiffs answered the supplemental interrogatory and responded to the supplemental request for production. R. Vol. I, p. 62. However, notwithstanding their knowledge of Mr. Thompson and the importance of the RECORD OF SURVEY in this case, the Plaintiffs, ***for the third time***, did ***not*** supplement their answers and responses with respect to the interrogatories and requests for production regarding expert witnesses.

At that point, the Defendants were ready for trial; however, on the eve of trial, the Plaintiffs filed a MOTION TO CONTINUE. According to the Plaintiffs, the "added stress of trial could be fatal to Mr. Campbell." R. Vol. I, p. 65. The court granted the motion and moved the trial from April 25, 2011, to March 5, 2012.

Immediately thereafter, the Plaintiffs filed a motion for summary judgment on May 17, 2011. R. Vol. I, p. 68. However, notwithstanding their knowledge of Mr. Thompson and the importance of the RECORD OF SURVEY in this case, the Plaintiffs did ***not*** file an affidavit from Mr. Thompson in support of their motion for summary judgment; instead, they filed the AFFIDAVIT

OF COUNSEL of Kipp L. Manwaring. As previously stated, Mr. Manwaring simply attached a copy of the RECORD OF SURVEY to his affidavit.

Again, Mr. Manwaring is a lawyer. He was ***not*** an expert witness in this case. He did ***not*** prepare the RECORD OF SURVEY, he could ***not*** identify it, he could ***not*** authenticate it, he could ***not*** lay a proper foundation for it, it was ***not*** based on his personal knowledge, he was ***not*** competent to testify regarding it, and his arguments regarding it were speculative, based on hearsay, and conclusory. In short, the RECORD OF SURVEY was ***not*** admissible.

As a result, the Defendants filed an OBJECTION TO RECORD OF SURVEY on June 21, 2011, and duly moved the court to strike the AFFIDAVIT OF COUNSEL and the RECORD OF SURVEY in accordance with I.R.C.P. 56(e), I.R.E. 701, I.R.E. 702, I.R.E. 901, and I.R.E. 103(a)(1). R. Vol. II, p. 385.

In addition, the Defendants filed a cross-motion for summary judgment, including an affidavit in support thereof from their expert witness, Mr. Leavitt. R. Vol. I, p. 143. However, notwithstanding their knowledge of Mr. Thompson and the importance of the RECORD OF SURVEY in this case, the Plaintiffs did ***not*** file an affidavit from Mr. Thompson in opposition to the Defendants' cross-motion for summary judgment; moreover, they did ***not*** file a motion for a "continuance to permit affidavits to be obtained" or to cure or otherwise remedy the foregoing evidentiary issues in accordance with I.R.C.P. 56(f); instead, they simply forged ahead with full knowledge of the foregoing evidentiary issues and full knowledge of the requirement upon them to survive the cross-motions for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment . . . shall be entered against him.

See I.R.C.P. 56(e).

The hearing of the cross-motions for summary judgment was set for July 5, 2011. Just before the hearing, the Plaintiffs filed a MOTION FOR EXTENSION OF TIME. The Plaintiffs moved the trial court for an extension of time "to respond to the Kvammes' motion for summary judgment." R. Vol. II, p. 383. The trial court granted the motion and moved the hearing of the cross-motions for summary judgment from July 5, 2011, to September 12, 2011. R. Vol. III, p. 473.

The Plaintiffs then deposed Mr. Leavitt on July 27, 2011, well in advance of the hearing. The Plaintiffs thereafter filed a memorandum in opposition to the Defendants' cross-motion for summary judgment on August 26, 2011. R. Vol. III, p. 474. However, notwithstanding their knowledge of Mr. Thompson and the importance of the RECORD OF SURVEY in this case, the Plaintiffs ***still*** did not file an affidavit from Mr. Thompson in support of their motion for summary judgment, they ***still*** did not file an affidavit from Mr. Thompson in opposition to the Defendants' cross-motion for summary judgment, and they ***still*** did not file a motion for a "continuance to permit affidavits to be obtained" or to cure or otherwise remedy the foregoing evidentiary issues in accordance with I.R.C.P. 56(f).

Instead, the Plaintiffs filed a ***second*** AFFIDAVIT OF COUNSEL of Kipp L. Manwaring. R. Vol. III, p. 478. Once again, the Plaintiffs forged ahead with full knowledge of the foregoing evidentiary issues and full knowledge of the requirement upon them to survive the cross-motions for summary judgment.

The Defendants thereafter filed a reply memorandum to the cross-motions for summary judgment. R. Vol. III, p. 489. In addition, the Defendants filed a reply affidavit from Mr. Leavitt. In it, he carefully addressed and disposed of Mr. Manwaring's ***arguments***. R. Vol. III, pp. 500-10. Again, allegations in pleadings and arguments of counsel are not sufficient.

At the hearing, the trial court truly "interrogated counsel" in accordance with I.R.C.P. 56(d). T. pp. 5-69. During the colloquy, the trial court alerted or otherwise forewarned the Plaintiffs about the foregoing evidentiary issues:

> Mr. Seamons: So my answer to that, your Honor, is: If we do not follow what Mr. Leavitt has done–and, again, I want to emphasize he has followed the law. He has followed the Manual of Surveying. He has performed his professional services in accordance with it. He has laid that out without dispute from them. There is no counter-affidavit here that says Mr. Leavitt didn't do this correctly, he didn't make the measurements, he didn't take the history correctly.
>
> My point is this: If we throw Mr. Leavitt's [opinion] out the door, what do you have in front of you to say that's not the boundary? Their burden in this case is to show that there is a dispute here about a boundary, and that this piece of property is not where it is supposed to be. What do you have? Nothing.
>
> . . .

Mr. Seamons	Is this conversation any different for the survey that was stapled to Kipp's affidavit?
Court:	Oh no. I have questions about the survey that was stapled to Kipp's affidavit.

T. p. 46, LL. 6-25, p. 47, L. 1, and p. 51, LL. 12-16.

At the close of the hearing, the trial court allowed both parties to "augment" or otherwise supplement the record. The Plaintiffs augmented the record on September 23, 2011. However, notwithstanding their knowledge of Mr. Thompson and the importance of the RECORD OF SURVEY in this case, the Plaintiffs ***still*** did not file an affidavit from Mr. Thompson in support of their motion for summary judgment, they ***still*** did not file an affidavit from Mr. Thompson in opposition to the Defendants' cross-motion for summary judgment, and they ***still*** did not file a motion for a "continuance to permit affidavits to be obtained" or to cure or otherwise remedy the foregoing evidentiary issues in accordance with I.R.C.P. 56(f).

Instead, the Plaintiffs filed an "augmented memorandum" and a ***third*** affidavit of counsel of Kipp L. Manwaring–to wit, the AUGMENTED AFFIDAVIT OF COUNSEL IN SUPPORT OF CAMPBELLS' MOTION FOR SUMMARY JUDGMENT. R. Vol. III, p. 557. Once again, the Plaintiffs forged ahead with full knowledge of the foregoing evidentiary issues and full knowledge of the requirement upon them to survive the cross-motions for summary judgment.

As before, Mr. Manwaring attached a copy of the RECORD OF SURVEY to his augmented affidavit. R. Vol. III, p. 567. In addition, he attached five pages from the Manual of Surveying to his augmented affidavit. R. Vol. III, pp. 560-64.

As a result, the Defendants filed an objection to the augmented affidavit of Mr. Manwaring and duly moved the court to strike it in accordance with I.R.C.P. 56(e), I.R.E. 701, I.R.E. 702, I.R.E. 901, and I.R.E. 103(a)(1). R. Vol. III, p. 568.

In addition, the Defendants filed an objection to the augmented memorandum and duly moved the court to strike it. R. Vol. III, p. 592.

Finally, the Defendants also augmented the record. In this regard, the Defendants filed an augmented affidavit from Mr. Leavitt. R. Vol. III, p. 572. In it, he once again addressed and disposed of Mr. Manwaring's ***arguments***. R. Vol. III, p. 572.

Those three documents–specifically, (1) the objection to the augmented affidavit of Mr. Manwaring, (2) the objection to the augmented memorandum, and (3) the augmented affidavit of Mr. Leavitt–are must-read documents for the proper disposition of this case on appeal.

The Plaintiffs did ***not*** thereafter file an affidavit from Mr. Thompson in support of their motion for summary judgment, they did ***not*** thereafter file an affidavit from Mr. Thompson in opposition to the Defendants' cross-motion for summary judgment, and they did ***not*** thereafter file a motion for a "continuance to permit affidavits to be obtained" or to cure or otherwise remedy the foregoing evidentiary issues in accordance with I.R.C.P. 56(f). Once again, the Plaintiffs forged ahead with full knowledge of the foregoing evidentiary issues and full knowledge of the requirement upon them to survive the cross-motions for summary judgment.

XI.

OPINION AND ORDER

The record was now complete. One month later, the trial court entered its OPINION AND ORDER on October 28, 2011. The trial court cut straight to the chase:

> Pursuant to Rule 56(e) of the Idaho Rules of Civil Procedure, the RECORD OF SURVEY, submitted as an exhibit to Plaintiffs' counsel's affidavit, lacks a proper foundation and is not properly before the court. Therefore, the Plaintiffs have failed to "set forth specific facts showing that there is a genuine issue for trial." As such, and based on the evidence properly before the court, it appears that the fence is the boundary line between the parcels owned by Plaintiffs and Defendants.

R. Vol. III, p. 606 (emphasis added).

XII.

MOTION FOR RECONSIDERATION

The Plaintiffs lost. They did not carry their burden of proof. Therefore, the trial court ruled in favor of the Defendants and entered a JUDGMENT AND DECREE OF QUIET TITLE on November 3, 2011. R. Vol. IV, p. 608.

Twelve days later, the Plaintiffs filed a motion for reconsideration pursuant to I.R.C.P. 11(a)(2)(B). R. Vol. IV, p. 664.

Amazingly, after months of exhaustive briefing, a lengthy continuance, an intervening deposition, grueling oral argument, and a full and free opportunity to augment or otherwise supplement the record, the Plaintiffs finally, ***finally***, filed an affidavit from Mr. Thompson, dated November 15, 2011. R. Vol. IV, p. 667.

After having failed to answer and respond to the foregoing interrogatories and requests for production regarding expert witnesses, ***after*** having failed to disclose Mr. Thompson in accordance with the court's ORDER SETTING PRE-TRIAL CONFERENCE AND JURY TRIAL, ***after*** having failed to supplement their answers and responses in accordance with I.R.C.P. 26(e)(1)(B), ***after*** having failed to supplement their answers and responses in accordance with I.R.C.P. 26(e)(3), ***after*** having failed to file an affidavit from Mr. Thompson in support of their motion for summary judgment, ***after*** having failed to file an affidavit from Mr. Thompson in opposition to the Defendants' cross-motion for summary judgment, ***after*** having failed to file a motion for a "continuance to permit affidavits to be obtained," ***after*** having knowingly forged ahead with full knowledge of the foregoing evidentiary issues and the requirement upon them to survive the cross-motions for summary judgment, and ***after*** having lost, the Plaintiffs now wanted the trial court to let them take a mulligan, to go back to square one, to have a do-over.

That is not fair, that is not right, and that is not the law.

ISSUE ON APPEAL

Did the district court abuse its discretion in disregarding the affidavit of Kevin Thompson and denying the Campbells' motion for reconsideration?

See APPELLANTS' BRIEF, p. 9.

ARGUMENT

First, the trial court did ***not*** "disregard" Mr. Thompson's affidavit. Second, the trial court did ***not*** abuse its discretion.

The following case is dispositive of the issue herein. The procedural history is very similar, if not the same, and the ruling of the Idaho Supreme Court is right on point:

> . . . The court found that plaintiffs had failed to disclose Bidstrup as an expert witness in violation of the court's scheduling order.
>
> . . .
>
> . . . Even after the defendants filed motions for summary judgment, arguing that Bidstrup had not been disclosed as an expert witness, and filed motions to strike Bidstrup's second affidavit for lack of qualification and improper rendering of opinions on questions of law, appellants made no effort to remedy the situation. Citing I.R.C.P. 26(b)(4), the district court did not allow Bidstrup's testimony in the form of his second affidavit.
>
> The district court's decision striking Bidstrup's second affidavit is affirmed.
>
> . . . The appellants had ample notice of the hearing and knew what was required of them to survive the summary judgment motions. Appellants did not establish that a genuine issue of material fact existed. The grants of summary judgment are affirmed.
>
> . . .
>
> "The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court." *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001).
>
> The district court did not abuse its discretion in denying appellants' motion for reconsideration. The court exercised reason in reaching its decision that the appellants had been given numerous opportunities to prepare their case. They were aware of the defendants' motions for summary judgment and motions to strike Bidstrup's second affidavit. They made no effort to request an extension of time before the hearing, nor did they address or correct the deficiencies in the affidavit. Instead, after the court issued its order, they requested a time extension to submit additional affidavits or retain another expert. The court found that the appellants had been given several opportunities to remedy the issues raised by the defendants in

their motions. Based on the record before the district court, it did not abuse its discretion in denying appellants' motion for reconsideration.

Carnell v. Barker Management, Inc., 137 Idaho 322, 48 P.3d 651 (2002).

THE SPIN ZONE

According to the Plaintiffs, the trial court "applied the wrong legal standard" to their motion for reconsideration:

> Consequently, the district court incorrectly focused on the newly discovered evidence standard of I.R.C.P. 60(b)(2) and the timing requirement of I.R.C.P. 56(c). The district court glossed over I.R.C.P. 11(a)(2)(B) by merely treating that rule as pertaining to an exclusively limited set of circumstances.
>
> Instead of properly considering Rule 11(a)(2)(B), the district court narrowed its scope of reconsideration to newly discovered evidence that fell outside the strict time limitations for summary judgment. Indeed, the district court opined that, if additional evidence could be presented in a motion for reconsideration, then summary judgments would never achieve finality.
>
> Thus, the district court not only applied the wrong legal standard, but it also reached an incorrect conclusion on the purpose and effect of motions for reconsideration.

See APPELLANTS' BRIEF, p. 13.

Hogwash. If we do not get anything else right on this appeal, let's at least get this right: Judge Shindurling is a veteran judge; he is the Administrative Judge of the Seventh Judicial District; he is likely the most senior District Judge in the state of Idaho; he knows his way around the courtroom and he does not bump into the furniture.

In order to spin their argument, the Plaintiffs carefully excised and quoted ***one*** paragraph from the transcript of the oral argument: ***One***!

The following five points are dispositive:

1. The transcript of the oral argument is 28 pages long. T. pp. 70-98. Please read it. No one, including Judge Shindurling, was confused about the standard. As previously stated, a motion for reconsideration is discretionary, not mandatory:

> The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court.

Jordan v. Beeks, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001).

2. The paragraph, which the Plaintiffs so carefully excised and quoted, was actually a question to Mr. Manwaring, who had just stated the following:

> Mr. Manwaring: And it is an abuse of discretion not to consider ***new evidence*** that changes the judgment and reconsider that judgment in light of that evidence. So we would ask the court to grant the motion.
>
> The Court: So, Mr. Manwaring, what authority do you have that it's an abuse of discretion not to consider new evidence when it doesn't comply with 60(b)(2)?

T. p. 89, LL. 11-18 (emphasis added).

In response, Mr. Manwaring confessed and ultimately admitted that Mr. Thompson's affidavit was ***not*** "new evidence"; instead, it was a belated attempt to cure the foregoing evidentiary issues, the very foundational issues that the Plaintiffs had so steadfastly chosen to ignore:

> We're ***not*** telling the court, by the way, we have a brand new survey that changes everything. It's the same Record of Survey. It's the same item of evidence relied upon by both parties, but the foundation issue that the court addressed as it

> relates to the Affidavit of Counsel is now satisfied by the affidavit of Kevin Thompson. I think that is appropriate in a motion to reconsider.

T. p. 92, LL. 11-18 (emphasis added).

3. The fact that Judge Shindurling and Mr. Manwaring discussed I.R.C.P. 60(b)(2) at oral argument is, quite frankly, a red herring: They are ***both*** subject to the same standard–that is, ***both*** I.R.C.P. 11(a)(2)(B) ***and*** I.R.C.P. 60(b)(2) are discretionary, not mandatory.

4. More importantly, the fact that Judge Shindurling and Mr. Manwaring discussed I.R.C.P. 60(b)(2) at oral argument is not relevant. Judge Shindurling took the motion for reconsideration under advisement. T. p. 98, LL. 8-10. He thereafter entered an OPINION AND ORDER ON PLAINTIFFS' MOTION FOR RECONSIDERATION. R. Vol. IV, p. 771. Of course, the OPINION AND ORDER is the key, ***not*** oral argument.

In other words, Judge Shindurling and Mr. Manwaring could have discussed anything at oral argument, ranging from I.R.C.P. 60(b)(2) to religion to politics to the law of gravity. Oral argument is oral argument; nothing more, nothing less.

The OPINION AND ORDER, however, is different. It is relevant. In it, Judge Shindurling recited the history of the case, he set forth the standard of review, he explained his analysis, and he made a decision:

> In its October 28, 2011, Opinion and Order, this court found that, "[p]ursuant to Rule 56(e) of the Idaho Rules of Civil Procedure, the Record of Survey submitted as an exhibit to Plaintiffs' counsel's affidavit lacks a proper foundation and is not properly before the court." Although Plaintiffs request this court to reconsider its opinion in light of the new evidence supplied with their motion, there is no new evidence with their motion. The evidence is the same Record of Survey performed

> by Kevin Thompson that was not properly before the court in the previous motions. The Plaintiffs have now submitted an Affidavit of Kevin Thompson to lay the proper foundation for the survey, but the evidence is not new. While Plaintiffs are not required to present new evidence in a Rule 11(a)(2)(B) motion for reconsideration, their motion is based on the court now considering the Record of Survey that was not properly before the court on the previous motions. This evidence was known to the Plaintiffs in May of 2011 when they filed for summary judgment and was known to them when the complaint was filed in this case in June of 2010. Based on Rule 56(c) of the Idaho Rules of Civil Procedure and also on the court's Scheduling Order, the affidavit of Kevin Thompson should have been submitted months ago. Therefore, as the decision to grant or deny a motion for reconsideration rests in this court's discretion, this court finds that it is too late to now submit an affidavit that could have, and should have, been submitted months ago. To decide otherwise would essentially allow Plaintiffs to not comply with the rules of civil procedure and the court's Scheduling Order and roll the dice with a motion for summary judgment. If they lose on that motion, under the same rules of civil procedure not complied with originally, they would then be allowed to file endless restructured motions on the same subject matter.

R. Vol. IV, pp. 772-73.

Judge Shindurling denied the motion. He "correctly perceived the issue as one of discretion," he "acted within the ***outer*** boundaries of [his] discretion," and he "reached a decision by an exercise of reason." Carnell v. Barker Management, Inc., 137 Idaho at 329, 48 P.3d at 659 (emphasis added).

Equally important, Judge Shindurling did not apply I.R.C.P. 60(b)(2), he did not use it, and he did not rely on it. In fact, from top to bottom and from front to back, his OPINION AND ORDER does not cite it, refer to it, or even include the words I.R.C.P. 60(b)(2).

5. Finally, and perhaps most importantly, Mr. Manwaring knew better. He is a seasoned litigator; he has been practicing law since 1988; he is a member of the National Order of Barristers and American Inns of Court; he is past member and President of the Idaho Prosecuting Attorneys

Association; he is a past elected Bonneville County Prosecuting Attorney from 1996 to 2001; and he is a member of the Idaho Supreme Court Rules of Evidence Advisory Committee:

> Mr. Seamons: Your Honor, [the Plaintiffs'] motion for summary judgment was only supported by a single affidavit from Mr. Manwaring. And everybody in this courtroom would have to agree that I have made a strenuous and repeated effort to state these two concepts throughout this battle on motions for summary judgment:
>
> Number one: They have not presented admissible evidence to you. Mr. Marwaring's affidavit does not do that. He is an attorney. He is not an expert witness, and that is not the proper way to present that kind of evidence.
>
> Number two: I repeatedly emphasized that they have a burden of proof in this case, and that burden of proof is upon them to show the court that there is a boundary in dispute, and here is where they claim is the correct boundary. They've got a burden to meet here.
>
> . . .
>
> Notwithstanding these cross-motions for summary judgment, your Honor, they forged ahead knowing that they did not have proper evidence before the court and that their burden of proof was now directly in jeopardy.
>
> Your Honor, I want to stress [that] I am not dealing in this case with *pro se* litigants. And I realize that even *pro se* litigants are supposed to follow the same rules and obey the same procedures, but we all know that we give them the benefit of the doubt when they are novices, when they're *pro se* litigants. I'm dealing here with a seasoned attorney. I am dealing here with evidentiary issues that were taught to us in law school in Evidence 101. I am dealing here with expert witness testimony that could have been and should have been provided to me in 2009, that was systematically not produced, that was systematically not supplemented, that was systematically not given to me or the court until after they fight and lose the cross-motions for summary judgment.

. . .

> If they had simply filed that singular affidavit back on May 17th, I could have avoided mountains of briefing, mountains of motions, motions to strike affidavits of counsel. Your Honor, my clients could have saved literally thousands of dollars if they had just done this the way Rule 56(e) requires them to do it, but they didn't. So, if the court is going to entertain their motion to reconsider, under Rule 56, we would ask the court to require them to reimburse us for those costs and fees. And that seems not only fair, but logical.

T. p. 78, LL. 9-25, p. 79, LL. 7-25, p. 80, L. 1, p. 84, LL. 22-25, and p. 85, LL. 1-8.

COSTS ON APPEAL

The Defendants hereby claim costs on appeal in accordance with I.A.R. 40(a).

ATTORNEY'S FEES ON APPEAL

The Defendants hereby claim attorney's fees on appeal in accordance with I.A.R. 35(b)(5), I.A.R. 41(a), I.A.R. 11.2, and Idaho Code Section 12-121. The trial court did ***not*** "apply the wrong legal standard" to the Plaintiffs' motion for reconsideration.

The Plaintiffs' ***argument***, based on ***one*** paragraph from oral argument, that the trial court "incorrectly" applied I.R.C.P. 60(b)(2) and "glossed over" I.R.C.P. 11(a)(2)(B) is spin. It is also frivolous, unreasonable, and without foundation.

Again, the trial court did not apply I.R.C.P. 60(b)(2), it did not use it, and it did not rely on it. Again, from top to bottom and from front to back, the OPINION AND ORDER does not cite it, refer to it, or even include the words I.R.C.P. 60(b)(2).

CONCLUSION

The trial court duly and properly denied the Plaintiffs' motion for reconsideration. It "correctly perceived the issue as one of discretion," it "acted within the outer boundaries of its discretion," and it "reached a decision by an exercise of reason." Carnell v. Barker Management, Inc., 137 Idaho at 329, 48 P.3d at 659. The end.

However, if this court reverses the trial court, the Plaintiffs, in all fairness, need to reimburse the Defendants for the reasonable costs and attorney's fees that they incurred as a result of the Plaintiffs' course of action. R. Vol. IV, pp. 698-701.

Again, the Plaintiffs did not answer and respond to the foregoing interrogatories and requests for production regarding expert witnesses in accordance with I.R.C.P. 26(b)(4); they did not disclose Mr. Thompson in accordance with the court's ORDER SETTING PRE-TRIAL CONFERENCE AND JURY TRIAL; they did not supplement their answers and responses in accordance with I.R.C.P. 26(e)(1)(B); they did not supplement their answers and responses in accordance with I.R.C.P. 26(e)(3); they did not file an affidavit from Mr. Thompson in support of their motion for summary judgment in accordance with I.R.C.P. 56(e); they did not to file an affidavit from Mr. Thompson in opposition to the Defendants' cross-motion for summary judgment in accordance with I.R.C.P. 56(e); they did not file a motion for a "continuance to permit affidavits to be obtained" or to cure or otherwise remedy the foregoing evidentiary issues in accordance with I.R.C.P. 56(f); instead, they simply forged ahead with full knowledge of the foregoing evidentiary issues and the requirement upon them to survive the cross-motions for summary judgment.

Thus, if this court reverses the trial court, this court should direct or otherwise order the trial court to award reasonable costs and attorney's fees to the Defendants. R. Vol. IV, pp. 698-701; see also, Vol. III, p. 612 and Vol. IV, p. 638. The following statute and rules of civil procedure provide a basis therefor.

1. Idaho Code Section 1-1603:

> Every court has power:
>
> . . .
>
> (2) To enforce order in the proceedings before it . . . .
>
> (3) To provide for the orderly conduct of proceedings before it or its officers.
>
> (4) To compel obedience to its judgments, orders, and process . . . .
>
> . . .
>
> (8) To amend and control its process and orders so as to make them conformable to law and justice.

2. I.R.C.P. 1(a):

> . . . These rules shall be liberally construed to secure the just, speedy, and inexpensive determination of every action and proceeding.

3. I.R.C.P. 11(a)(1):

> . . . The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion, or other paper; that, to the best of the signer's knowledge, information, and belief after reasonable inquiry, it is well grounded in fact ***and is warranted by existing law*** . . . and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed

in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

4. I.R.C.P. 26(e)(4):

If a party fails to seasonably supplement the responses as required in this Rule 26(e), the trial court may exclude the testimony of witnesses or the admission of evidence not disclosed by a required supplementation of the responses of the party.

5. I.R.C.P. 37(e):

In addition to the sanctions above under this rule for violation of discovery procedures, any court may in its discretion impose sanctions or conditions, as assess attorney's fees, costs, or expenses against a party or the party's attorney for failure to obey an order of the court made pursuant to these rules.

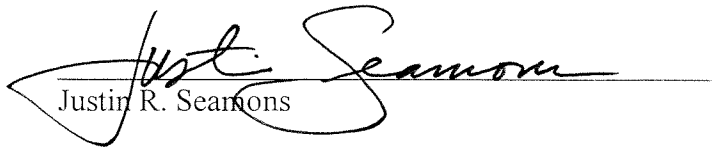
6. I.R.C.P. 56(c):

. . . The court may alter . . . the time periods and requirements of this rule for good cause shown, may continue the hearing, and may impose costs, attorney's fees, and sanctions against a party or his attorney, or both.

7. I.R.C.P. 56(g):

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Dated October 24, 2012.



Justin R. Seamons

CERTIFICATE OF SERVICE

I served a copy of the foregoing RESPONDENTS' BRIEF on the following people on October 24, 2012:

Just Law Office
Attn: Charles C. Just and Kipp L. Manwaring
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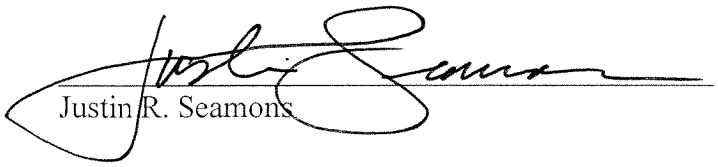

Justin R. Seamons

IN THE SUPREME COURT OF THE STATE OF IDAHO

V. LEO CAMPBELL and KATHLEEN CAMPBELL, Plaintiffs, Appellants, and Cross-respondents, vs. JAMES C. KVAMME and DEBRA KVAMME, Defendants, Respondents, and Cross-appellants,	Supreme Court Docket No. 39650-2012 *Case No. CV 10-3879, Bonneville County, Idaho*

CROSS-APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District
in and for Bonneville County, Idaho
Honorable Jon J. Shindurling, District Judge, Presiding

Attorney for Plaintiffs, Appellants, and Cross-respondents:

Just Law Office
Attn: Charles C. Just and Kipp L. Manwaring
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INTRODUCTION

V. Leo Campbell and Kathleen Campbell are the Plaintiffs/Appellants/Cross-respondents in this case. This brief will hereinafter refer to them as the "Plaintiffs."

James C. Kvamme and Debra Kvamme are the Defendants/Respondents/Cross-appellants in this case. This brief will hereinafter refer to them as the "Defendants."

STATEMENT OF THE CASE

I.

NATURE OF THE CASE

The Plaintiffs own a parcel of real property, located in the NE1/4 of Section 17, Township 3 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho.

The Defendants also own a parcel of real property, located in the NE1/4 of Section 17, Township 3 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho.

The foregoing parcels of real property are contiguous–to wit, the north boundary of the Plaintiffs' parcel is contiguous with the south boundary of the Defendants' parcel.

The Plaintiffs filed the complaint in this case on June 30, 2010. The Plaintiffs alleged the following:

> On its northern boundary, the Subject Property abuts the Kvammes' real property . . . and the purpose of this action is to quiet title to the Subject Property in the name of the Campbells against any and all persons with adverse claims, interests, encumbrances, easements, liens, or rights.

R. Vol. I, p. 12, ¶ 5.

The Defendants duly acknowledged that the Plaintiffs' parcel of real property "abuts" their parcel of real property; however, the Defendants denied that the Plaintiffs have the right to quiet title to the real property that lies north of the fence that runs between their respective parcels of real property. R. Vol. I, pp. 20-21, ¶ 5.

In this regard, please note that a fence runs across the middle of the NE1/4 of Section 17. The fence is approximately one-half mile long and runs across the entire NE1/4 of Section 17.

According to the Plaintiffs, the fence does not sit on the boundary between the parties' respective parcels of real property; instead, it sits on their parcel of real property and is off by 15 feet.

In other words, this case is a simple boundary dispute, involving a sliver of farm ground that is 15 feet wide.

The Defendants filed an answer and counterclaim on July 27, 2010. The Defendants alleged that they own the real property that lies north of the fence, based on the doctrines of adverse possession and/or boundary by agreement or acquiescence. R. Vol. I, p. 26, ¶ (f) and p. 27, ¶ (h).

The Plaintiffs filed a motion for summary judgment on May 17, 2011. R. Vol. I, p. 68. The Defendants filed a cross-motion for summary judgment on June 7, 2011. R. Vol. I, p. 143.

The cross-motions for summary judgment addressed the following three issues:

1. The true and correct location of the fence;
2. The doctrine of adverse possession;
3. The doctrine of boundary by agreement or acquiescence.

The foregoing three issues are separate and stand alone. They have different burdens of proof, they have different elements of proof, and they have different facts in support thereof.

Thus, any one of the foregoing three issues is a sufficient and proper basis for the disposition of this case, whether before the trial court or on appeal.

II.

TRUE AND CORRECT LOCATION OF THE FENCE

As previously stated, according to the Plaintiffs, the fence does not sit on the boundary between the parties' respective parcels of real property; instead, it sits on their parcel of real property and is off by 15 feet. ***The Plaintiffs bore the burden of proof on this issue***.

In an attempt to carry their burden of proof, the Plaintiffs filed an AFFIDAVIT OF COUNSEL of Kipp L. Manwaring, dated May 17, 2011. In this regard, please note that Mr. Manwaring simply attached a copy of a RECORD OF SURVEY to his affidavit. R. Vol. I, p. 116.

Mr. Manwaring is a lawyer. He is not a professional land surveyor. Moreover, he did not prepare the RECORD OF SURVEY, he could not identify it, he could not authenticate it, he could not lay a proper foundation for it, it was not based on his personal knowledge, he was not competent to testify regarding it, and his arguments regarding it were speculative, based on hearsay, and conclusory. R. Vol. II, p. 385.

Thus, the RECORD OF SURVEY was not admissible.

The Defendants disagreed with the Plaintiffs; however, rather than merely argue with them, the Defendants filed the AFFIDAVIT OF KIM LEAVITT, dated June 7, 2011. R. Vol. II, p. 314.

Mr. Leavitt is a professional land surveyor. He has the education, knowledge, skill, experience, and training to determine the true and correct boundaries of real property, including, without limitation, the true and correct location of fences and other improvements thereon. R. Vol. II, pp. 314-15, ¶¶ 2-5.

Unlike Mr. Manwaring, Mr. Leavitt was competent to testify regarding the true and correct location of the fence in this case. See I.R.E. 702.

The AFFIDAVIT OF KIM LEAVITT duly evidenced that the fence does ***not*** sit on the Plaintiffs' parcel of real property and it is ***not*** off by 15 feet; instead, it sits on the boundary between the Plaintiffs' parcel of real property and the Defendants' parcel of real property and it marks the boundary between them.

Thus, the Plaintiffs did ***not*** carry their burden of proof on this issue; allegations in pleadings and arguments of counsel are ***not*** sufficient:

> . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment . . . shall be entered against him.

See I.R.C.P. 56(e).

The trial court agreed:

> Pursuant to Rule 56(e) of the Idaho Rules of Civil Procedure, the RECORD OF SURVEY, submitted as an exhibit to Plaintiffs' counsel's affidavit, lacks a proper foundation and is not properly before the court. Therefore, ***the Plaintiffs have failed to "set forth specific facts showing that there is a genuine issue for trial." As such, and based on the evidence properly before the court, it appears that the fence is the boundary line between the parcels owned by Plaintiffs and Defendants***.

R. Vol. III, p. 606 (emphasis added).

III.

MOTION FOR RECONSIDERATION

The "failure" of the Plaintiffs to "set forth specific facts showing that there was a genuine issue for trial," coupled with the "evidence properly before the court"–that is, the AFFIDAVIT OF KIM LEAVITT–was decisive.

Therefore, the trial court ruled in favor of the Defendants and entered a JUDGMENT AND DECREE OF QUIET TITLE on November 3, 2011. R. Vol. IV, p. 608.

Twelve days later, the Plaintiffs filed a motion for reconsideration pursuant to I.R.C.P. 11(a)(2)(B). R. Vol. IV, p. 664.

The trial court denied the Plaintiffs' motion for reconsideration on December 21, 2011:

> In its October 28, 2011, Opinion and Order, this court found that, "[p]ursuant to Rule 56(e) of the Idaho Rules of Civil Procedure, the Record of Survey submitted as an exhibit to Plaintiffs' counsel's affidavit lacks a proper foundation and is not properly before the court." Although Plaintiffs request this court to reconsider its opinion in light of the new evidence supplied with their motion, there is no new evidence with their motion. The evidence is the same Record of Survey performed by Kevin Thompson that was not properly before the court in the previous motions.

> The Plaintiffs have now submitted an Affidavit of Kevin Thompson to lay the proper foundation for the survey, but the evidence is not new. While Plaintiffs are not required to present new evidence in a Rule 11(a)(2)(B) motion for reconsideration, their motion is based on the court now considering the Record of Survey that was not properly before the court on the previous motions. This evidence was known to the Plaintiffs in May of 2011 when they filed for summary judgment and was known to them when the complaint was filed in this case in June of 2010. Based on Rule 56(c) of the Idaho Rules of Civil Procedure and also on the court's Scheduling Order, the affidavit of Kevin Thompson should have been submitted months ago. Therefore, as the decision to grant or deny a motion for reconsideration rests in this court's discretion, this court finds that it is too late to now submit an affidavit that could have, and should have, been submitted months ago. To decide otherwise would essentially allow Plaintiffs to not comply with the rules of civil procedure and the court's Scheduling Order and roll the dice with a motion for summary judgment. If they lose on that motion, under the same rules of civil procedure not complied with originally, they would then be allowed to file endless restructured motions on the same subject matter.

R. Vol. IV, pp. 772-73.

The Plaintiffs filed a NOTICE OF APPEAL on January 30, 2012. R. Vol. IV, p. 791. According to the Plaintiffs, the trial court "applied the wrong legal standard" to their motion for reconsideration. See APPELLANTS' BRIEF, p. 13.

The APPELLANTS' BRIEF and the RESPONDENTS' BRIEF address the foregoing issue–that is, whether the trial court "applied the wrong legal standard." Thus, the Defendants will not address the foregoing issue in this brief.

IV.

LEFT HANGING

As previously stated, the cross-motions for summary judgment addressed the following three issues:

1. The true and correct location of the fence;

2. The doctrine of adverse possession;

3. The doctrine of boundary by agreement or acquiescence.

The trial court duly and properly disposed of the first issue; again, it ruled in favor of the Defendants and entered a JUDGMENT AND DECREE OF QUIET TITLE on November 3, 2011. R. Vol. IV, p. 608.

However, the trial court did not dispose of the second and third issues–namely, the doctrines of adverse possession and boundary by agreement or acquiescence:

> . . . ***The remaining issues argued by counsel regarding adverse possession and boundary by acquiescence do not need to be addressed***.

R. Vol. III, p. 606 (emphasis added).

In light of the fact that the Plaintiffs filed a motion for reconsideration regarding the first issue, the Defendants filed a cross-motion for reconsideration regarding the second and third issues:

> Because of the Plaintiffs' MOTION FOR RECONSIDERATION, the Defendants hereby move the court to address the "remaining issues"–to wit, the doctrine of adverse possession and the doctrine of boundary by acquiescence.

R. Vol. IV, p. 676.

The trial court duly and properly disposed of the Plaintiffs' motion for reconsideration; again, the trial court denied it. R. Vol. IV, p. 771.

However, the trial court did not dispose of the Defendants' cross-motion for reconsideration. As a result, the second and third issues are still extant. In this regard, please note the following five points:

1. The doctrines of adverse possession and boundary by agreement or acquiescence were duly and properly "framed by the pleadings." R. Vol. I, p. 19, p. 24, p. 26, ¶ (f), and p. 27, ¶ (h); see also R. Vol. I, p. 30, ¶ 3.

2. The Plaintiffs specifically and expressly raised the doctrines of adverse possession and boundary by agreement or acquiescence in their motion for summary judgment. R. Vol. I, p. 70 (pp. 75-78).

3. The Defendants specifically and expressly raised the doctrines of adverse possession and boundary by agreement or acquiescence in their cross-motion for summary judgment. R. Vol. I, p. 143 (pp. 147-160).

4. The parties filed affidavits, exhibits, and excerpts from the deposition of V. Leo Campbell, the Plaintiff in this case, to address the doctrines of adverse possession and boundary by agreement or acquiescence, and they exhaustively briefed them in their respective memoranda.

5. Finally, the parties fully and thoroughly argued the doctrines of adverse possession and boundary by agreement or acquiescence at oral argument.

Notwithstanding the foregoing, the trial court did not dispose of the second and third issues. The reason is simple, if not mundane: The Plaintiffs "***failed to set forth specific facts showing that there was a genuine issue for trial***" regarding the first issue–that is, the true and correct location of the fence. Therefore, "***based on the evidence properly before the court***"–that is, the AFFIDAVIT OF KIM LEAVITT, the trial court ruled in favor of the Defendants and entered a JUDGMENT AND DECREE OF QUIET TITLE on November 3, 2011.

In other words, the trial court did not dispose of the second and third issues because, in its mind, it did not "***need***" to dispose of them:

> . . . The remaining issues argued by counsel regarding adverse possession and boundary by acquiescence do not ***need*** to be addressed.

R. Vol. III, p. 606 (emphasis added).

The first issue, in and of itself, was a sufficient and proper basis for the disposition of this case.

V.

RIGHT RESULT-WRONG THEORY

The second and third issues are perfect issues for application of the appellate doctrine of right result-wrong theory:

> . . . [The doctrine of right result-wrong theory] applies to issues where an alternative rule of law can be applied to a given body of facts, yielding the same legally correct answer.

Agrodyne, Inc. v. Beard, 114 Idaho 342, 348, 757 P.2d 205, 211 (Idaho App. 1988).

Thus, ***assuming for purposes of argument***:

1. That the trial court "applied the wrong legal standard" to the Plaintiffs' motion for reconsideration; and/or

2. That the trial court, for some other unknown reason, should have granted the Plaintiffs' motion for reconsideration:

The second and third issues, or either of them, are still sufficient and proper bases for the disposition of this case.

In other words, this court does ***not*** need to determine whether the trial court "applied the wrong legal standard" to the Plaintiffs' motion for reconsideration or whether the trial court, for some other unknown reason, should have granted the Plaintiffs' motion for reconsideration. The reason: ***The trial court got the right result***. The doctrines of adverse possession and boundary by agreement or acquiescence, or either of them, "***yield the same legally correct answer***."

Again, the doctrines of adverse possession and boundary by agreement or acquiescence were duly and properly "framed by the pleadings." The Plaintiffs raised them in their motion for summary judgment. The Defendants raised them in their cross-motion for summary judgment. The parties filed affidavits, exhibits, and deposition excerpts to address them, they exhaustively briefed them, and they fully and thoroughly argued them at oral argument.

The following case supports the application of the doctrine of right result-wrong theory to this case. The ruling of the Idaho Supreme Court is right on point:

> It is unnecessary to determine whether the Mussells are liable based upon a breach of their duty under Idaho Code Section 55-310 to provide lateral support because they are liable for unreasonably interfering with the Irrigation District's easement. Where the lower court reaches the correct result by an erroneous theory, this court will affirm the order on the correct theory. *Row v. State*, 135 Idaho 573, 21 P.3d 895 (2001). Even if the theory adopted by the district court was erroneous, the Mussells are liable based upon the theory, ***alleged by the Irrigation District in its amended complaint***, that the Mussells unreasonably interfered with the Irrigation District's easement.

Nampa & Meridian Irrigation District v. Mussell, 139 Idaho 28, 33, 72 P.3d 868, 873 (2003) (emphasis added).

Thus, based on the doctrine of right result-wrong theory, the Defendants respectfully raise the doctrine of adverse possession and the doctrine of boundary by agreement or acquiescence as "additional issues presented on appeal" in accordance with I.A.R. 35(b)(4).[1]

---

[1]Please note that the doctrine of right result-wrong theory is consistent with the ***first*** rule of civil procedure:

> ... These rules shall be liberally construed to secure the just, speedy, and inexpensive determination of every action and proceeding.

See I.R.C.P. 1(a).

Of course, if this court does not want to apply the doctrine of right result-wrong theory to dispose of the second and third issues, this court may–indeed, should–remand them to the trial court in accordance with I.A.R. 13.3(a).

ADDITIONAL ISSUES ON APPEAL

1. Based on the doctrine of right result-wrong theory, is the doctrine of adverse possession a sufficient and proper basis for the disposition of this case?

2. Based on the doctrine of right result-wrong theory, is the doctrine of boundary by agreement or acquiescence a sufficient and proper basis for the disposition of this case?

ADVERSE POSSESSION

Idaho Code Section 5-210 sets forth the elements of adverse possession:

> For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:
>
> **(1)** Where it has been protected by a substantial enclosure.
>
> **(2)** Where it has been usually cultivated or improved.
>
> Provided, however, that in no case shall adverse possession be considered established under the provisions of any sections of this code **[3]** unless it shall be shown that the land has been occupied and claimed for the period of 20 years continuously, and **[4]** the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land according to law. Provided, further, that adverse possession shall not be considered established under the provisions of any sections of this code if **[5]** a written instrument has been recorded in the real estate records kept by the county recorder of the county in which the property is located and such written instrument declares that it was not the intent of a party to such instrument, by permitting possession or occupation of real property, to thereby define property boundaries or ownership. (Emphasis added.)

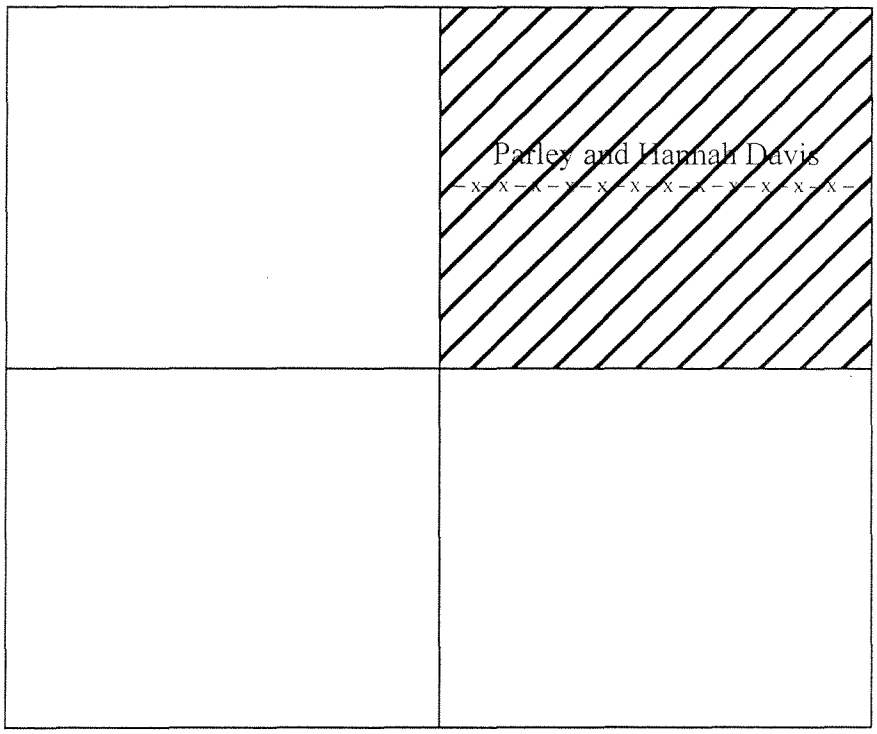
ARGUMENT

I.

NE1/4 OF SECTION 17

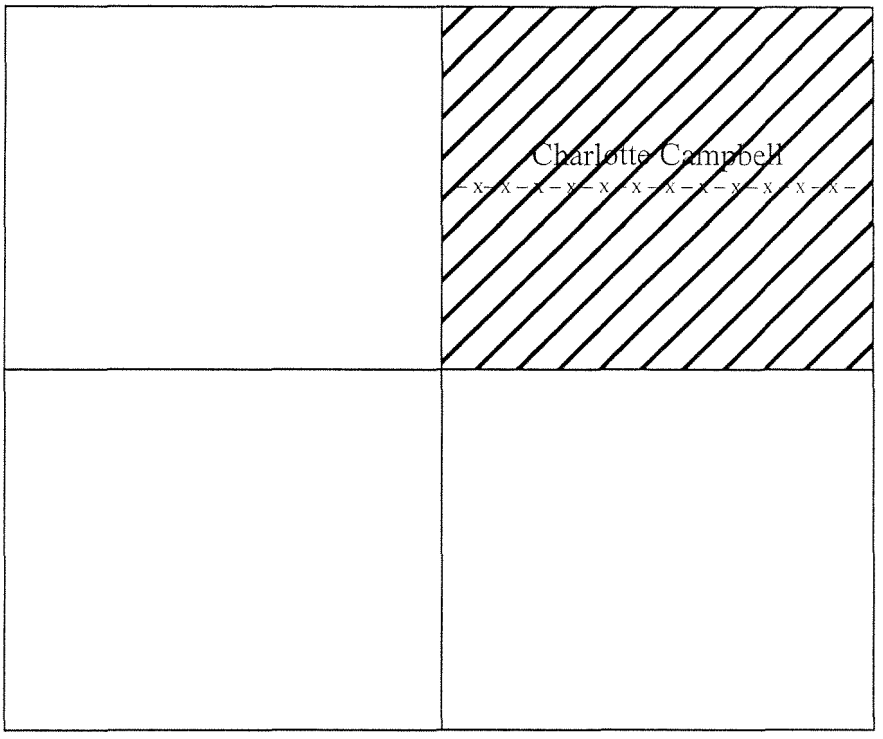
As previously stated, the fence runs across the middle of the NE1/4 of Section 17. According to the Plaintiffs, the fence was there "***before*** the Davises bought the property." R. Vol. II, p. 287 (emphasis added).

Parley Davis and Hannah Davis bought the NE1/4 of Section 17 on ***March 3, 1919***. R. Vol. I, p. 171, ¶ 46.



Parley Davis and Hannah Davis have long since passed away. R. Vol. I, p. 166, ¶ 23.

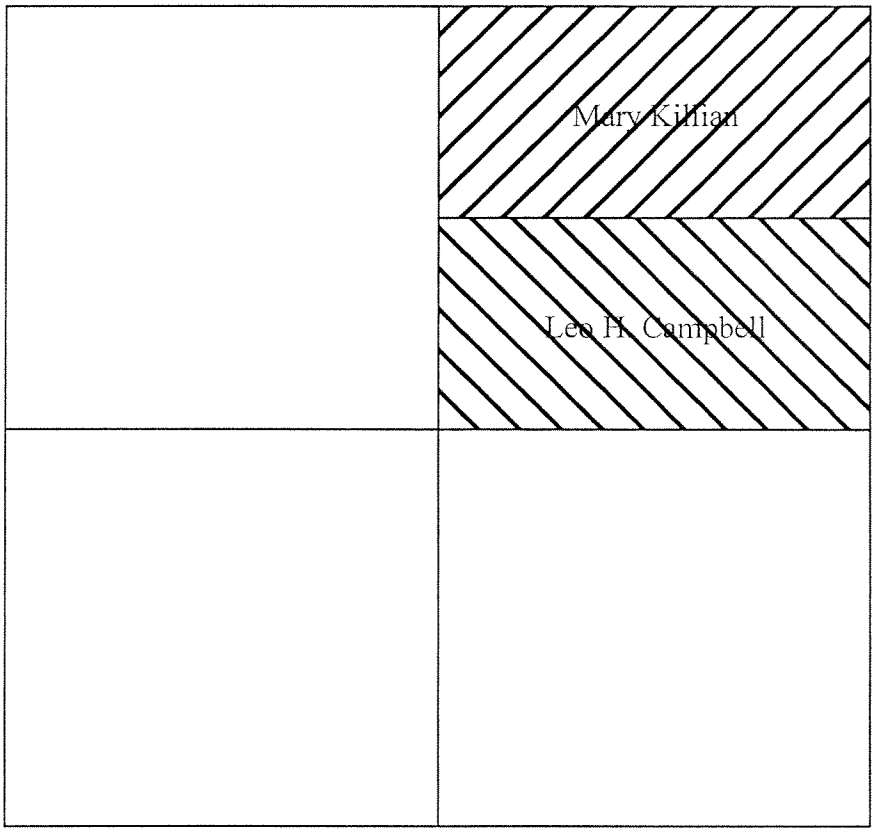
In 1937, Hannah Davis transferred the NE1/4 of Section 17 to Charlotte Campbell. R. Vol. I, p. 166, ¶¶ 22-23.



Charlotte Campbell was thereafter "in actual possession of, farmed, and paid the taxes on the above-described property"–that is, the NE1/4 of Section 17. R. Vol. I, p. 166, ¶ 24.

Charlotte Campbell has also long since passed away. R. Vol. I, p. 167, ¶ 25.

In 1950, Charlotte Campbell transferred the N1/2 of the NE1/4 to her daughter, Mary Killian, and the S1/2 of the NE1/4 to her son, Leo H. Campbell. R. Vol. I, p. 167, ¶ 26.



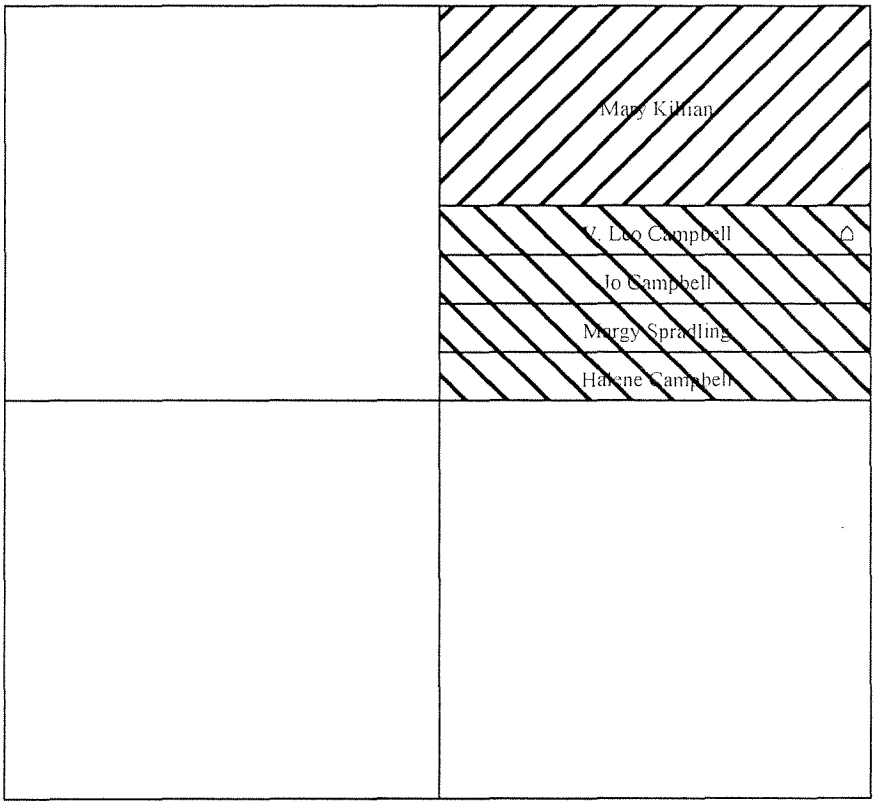
Mary Killian thereafter possessed and occupied the N1/2 of the NE1/4 and Leo H. Campbell thereafter possessed and occupied the S1/2 of the NE1/4. R. Vol. I, p. 167, ¶ 28.

Mary Killian and Leo H. Campbell have also long since passed away. R. Vol. I, p. 167, ¶ 29.

Leo H. Campbell was the father of V. Leo Campbell, the Plaintiff in this case. R. Vol. I, p. 167, ¶ 27.

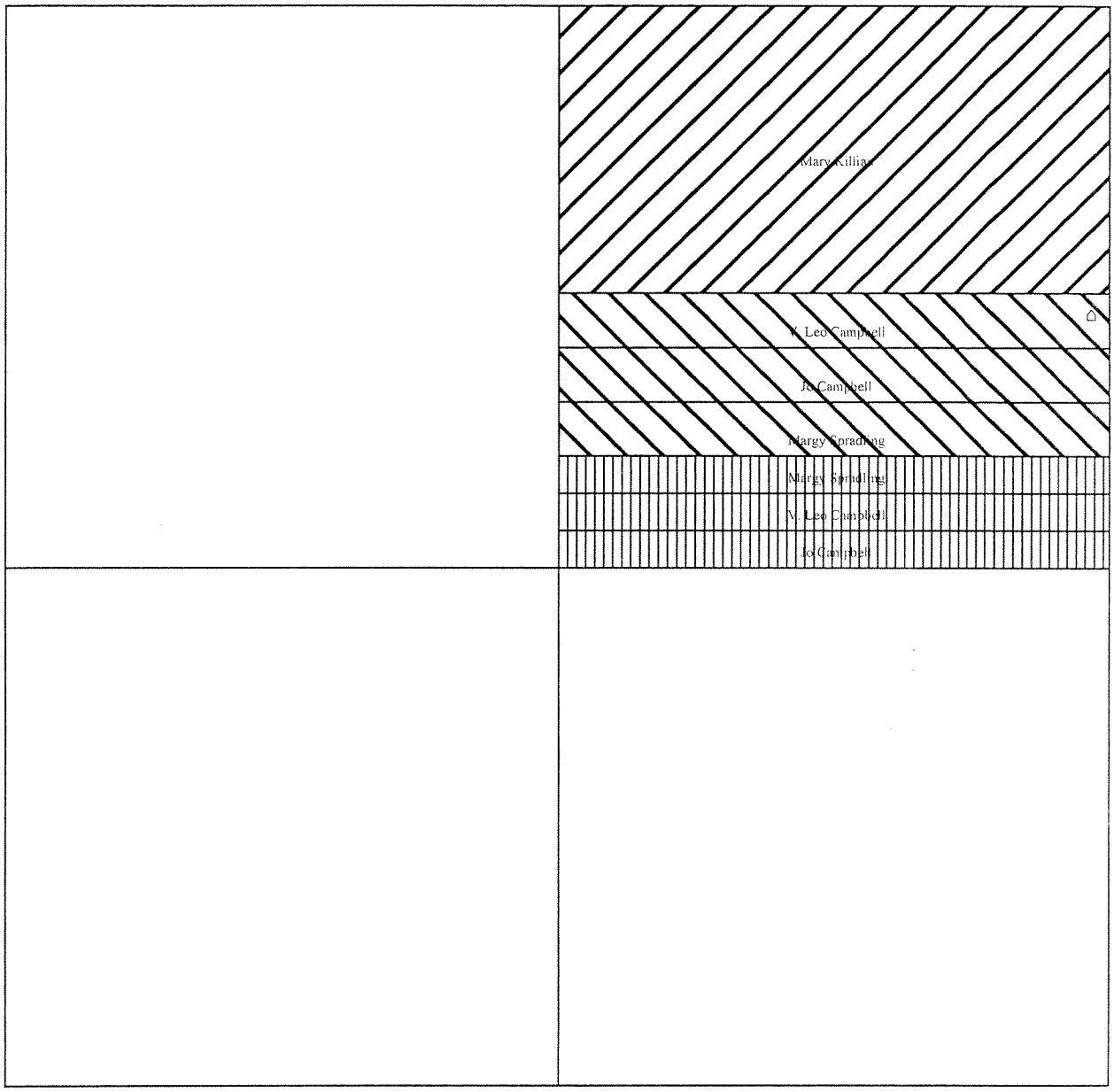
In 1981, Leo H. Campbell transferred approximately one acre of the S1/2 of the NE1/4 to his son, V. Leo Campbell, the Plaintiff in this case. The Plaintiffs then moved a home onto this acre and they live there to this day, 31 years later.

In 1989, Leo H. Campbell split the S1/2 of the NE1/4 into four parcels of real property. He then transferred one parcel of real property to each of his four children–namely, the Plaintiff, Jo Campbell, Margy Spradling, and Halene Campbell:

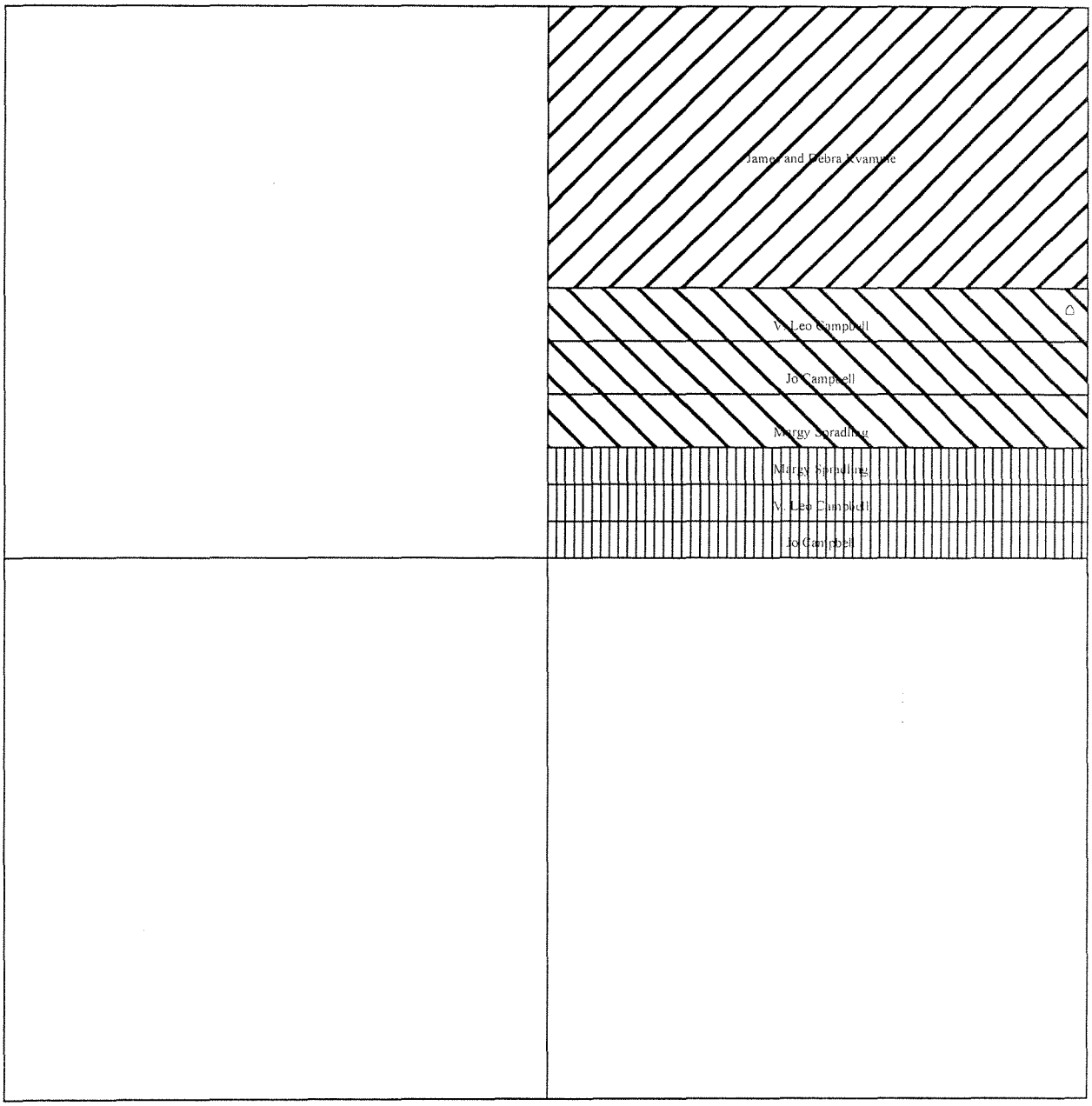


Leo H. Campbell transferred the foregoing parcels of real property to his children by DEED OF GIFT, ***not*** by warranty deed. R. Vol. II, p. 236, p. 240, p. 244, and p. 248.

In 1996, Halene Campbell passed away. Her estate split her parcel of real property into three smaller parcels. Her estate then transferred one small parcel to each of her three siblings–namely, the Plaintiff, Jo Campbell, and Margy Spradling. R. Vol. II, p. 329, ¶49.



In 2003, the estate of Mary Killian transferred the N1/2 of the NE1/4 to the Defendants. R. Vol. I, p. 169, ¶ 35.



Since then–that is, since 2003, the Defendants have possessed and occupied the N1/2 of the NE1/4. R. Vol. I, p. 169, ¶ 36.

II.

ELEMENT NO. 1: "PROTECTED BY A SUBSTANTIAL ENCLOSURE"

The fence was and is a "substantial enclosure." Again, it has been there since time immemorial, whether 1919 or "***before***." In this regard, please note the following:

Before 2003, and going back to at least 1950,[2] the Defendants' predecessor in interest, Mary Killian, grazed cattle and pastured horses on the north side of the fence. The fence enclosed and protected the real property on the north side of the fence; for example, it contained the cattle and horses and stopped them from drifting or straying or roaming at large, including onto the Plaintiffs' parcel of real property. R. Vol. I, p. 173, ¶ 60(a).

In addition, the Plaintiffs pasture horses on the south side of the fence; so, too, did their predecessor in interest, Leo H. Campbell. Again, the fence encloses and protects the real property on the south side of the fence; for example, it contains the Plaintiffs' horses and stops them from drifting or straying or roaming at large, including onto the Defendants' parcel of real property. R. Vol. I, p. 173, ¶ 60(b).

Thus, from at least 1950 to the present, the fence has protected the real property on the both sides of the fence; and, with specific reference to the north side of the fence, which is the

---

[2]Again, Charlotte Campbell transferred the N1/2 of the NE1/4 to her daughter, Mary Killian, and the S1/2 of the NE1/4 to her son, Leo H. Campbell, in 1950.

Defendants' side of the fence, the fence has protected the real property by stopping outside cattle and horses from drifting or straying or roaming at large onto the real property, as well as stopping trespassers and other third parties from coming onto the real property, including the Plaintiffs and their horses. R. Vol. I, p. 173, ¶ 60(c).

The fence is sturdy and strong. It includes metal posts, solid steel T-bars, wooden posts, and five strands of barbed wire. It is approximately 4.5 feet high and the bottom wire is less than 20 inches above the ground. The posts are less than 24 feet apart, evenly spaced, and solidly set in the ground. The barbed wire is reasonably tight, well-stretched, and securely fastened to the posts. R. Vol. I, p. 174, ¶ 60(e).

Since 2003, the Defendants have personally maintained the fence; so, too, have the Plaintiffs. In addition, before 2003, and going back to at least 1950, the Defendants' predecessor in interest maintained the fence; so, too, did the Plaintiffs and their predecessor interest. R. Vol. I, p. 175, ¶ 60(f).

III.

ELEMENT NO 2: "USUALLY CULTIVATED OR IMPROVED"

The N1/2 of the NE1/4 is not in native condition; it is not high plateau desert or growing indigenous plants, such as sagebrush and bitter brush. R. Vol. I, p. 175, ¶ 61.

The N1/2 of the NE1/4 has been "usually cultivated or improved" since time immemorial; for example, it has been farmed, used for pasture, in production, and under irrigation since at least 1937.[3] R. Vol. I, p. 175, ¶ 62.

For their part, the Defendants have cultivated or improved it since 2003; in fact, they installed a pivot on it in 2008, which further improved it. R. Vol. I, p. 175, ¶ 63.

Before 2003, and going back to at least 1950, the Defendants' predecessor in interest, Mary Killian, cultivated or improved it. R. Vol. I, p. 175, ¶ 64.

Thus, the N1/2 of the NE1/4 has been farmed, used for pasture, in production, and under irrigation since at least 1937.

IV.

ELEMENT NO. 3: "20 YEARS" OF ADVERSE POSSESSION

As previously stated, Idaho Code Section 5-210 requires 20 years of adverse possession. The following quote explains this element:

> In the case of boundary disputes between contiguous landowners, [a] landowner [must] establish continuous, open, notorious and hostile possession of an adjoining strip of his neighbor's land . . . .

Standall v. Teater, 96 Idaho 152, 156, 525 P.2d 347, 351 (1974); see also Scott v. Gubler, 95 Idaho 441, 511 P.2d 258 (1973).

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[3]Again, Hannah Davis transferred the NE1/4 of Section 17 to Charlotte Campbell in 1937. Charlotte Campbell was thereafter "in actual possession of, farmed, and paid the taxes on the above-described property."

This case is a "boundary dispute between contiguous landowners." Again, the north boundary of the Plaintiffs' parcel is contiguous with the south boundary of the Defendants' parcel.

Since 2003, the Defendants have "possessed an adjoining strip of their neighbor's land"–specifically, the Defendants have possessed the 15 feet of farm ground that lies north of the fence that runs between the parties' respective parcels of real property. They have done so "continuously, openly, notoriously, and hostilely." R. Vol. I, p. 176, ¶ 67.

Before 2003, and going back to at least 1950, the Defendants' predecessor in interest, Mary Killian, possessed the 15 feet of farm ground that lies north of the fence that runs between the parties' respective parcels of real property. She, too, did so "continuously, openly, notoriously, and hostilely." R. Vol. I, p. 176, ¶ 68.

During his deposition, V. Leo Campbell, the Plaintiff in this case, agreed and candidly admitted this element:

> Q. On Wednesday, we reviewed the chain of title on this property and learned that [Delbert H. Killian and Mary C. Killian] received the deed in 1950 to the north half of the northeast quarter, correct?
>
> A. Correct.
>
> Q. And, again, you don't dispute that they acquired the north half of the property, do you?
>
> A. No.
>
> Q. In terms of a chain of title, we also reviewed a deed to their mother – well, to Mary's mother, Charlotte, in 1937, correct?

A. Yes.

Q. And, again, you don't dispute that Charlotte acquired the property, all of the northeast quarter, in 1937, do you?

A. No.

Q. Since 2003, you acknowledge and admit that Craig has continuously occupied the north half of the northeast quarter, don't you?

A. Yes.

Q. And even with reference to the property north of the fence, you acknowledge and agree that he has continuously occupied even that land –

A. Yes.

Q. – since 2003, correct?

A. Yes.

Q. You don't allege that Craig has ever abandoned the property, true?

A. True.

Q. You don't allege that he's ever vacated the property, true?

A. True.

Q. You don't allege that his occupancy has otherwise been interrupted, there's been no seizure or forfeiture or eviction?

A. Not to my knowledge, huh-uh.

Q. With reference to his grantor and predecessor in title, and that is Delbert Henry Killian and Mary C. Killian, you acknowledge and

agree that they continuously occupied the north half of the northeast quarter before Mr. Kvamme, don't you?

A. Yes, I do.

Q. And that would also include the ground north of the fence that is in dispute in this case, correct?

A. Correct.

Q. And, again, you don't allege that they abandoned any of the property?

A. No.

Q. You agree that they didn't vacate and their occupancy wasn't interrupted, true?

A. True.

Q. And there's no allegation here that they were evicted or that the property was seized and taken away from them at any time, correct?

A. Correct.

Q. With reference to Mr. Kvamme's use and occupancy since 2003, you likewise admit that it has been open and plainly visible, correct?

A. Correct.

Q. And that, again, would include all of the ground north of the fence?

A. Correct.

Q. In fact, he has installed a pivot, pump, and motor on that ground north of the fence, hasn't he?

A. Yes, he has.

Q. And, again, that was plainly and openly visible?

A. Yup.

Q. And you had knowledge of it and you've known about his open use since 2003?

A. Yes.

Q. And, again, with reference to his predecessors in title, that is Delbert Henry Killian and Mary C. Killian, again, their occupancy and use of the property was open and plainly visible?

A. Yes.

Q. And that would include the land north of the fence that's in dispute in this case?

A. Yes.

Q. And you knew about their use and occupancy of all of the land, didn't you?

A. Yes, I did.

Q. And prior to your coming onto the property in 1981, your father knew about their use and occupancy of the land north of the fence, didn't he?

A. Yes, he did.

Q. With reference to Craig's use, which, again, began in 2003, you acknowledge and agree that his occupancy of the property has been hostile and adverse to you, correct?

Mr. Manwaring: Objection, you can answer.

A. I don't know that it's been hostile and adverse.

Q. Well, with reference to the north half of the northeast quarter, you do agree that his occupancy of the north half of the northeast quarter has been against any interest you might have in the property and adverse to you, correct?

A. Correct.

Q. And that would include all of the land north of the fence that's in dispute in this case, correct?

Mr. Manwaring: Object to the form. You can answer.

A. I didn't follow you on that one.

Q. Well, with reference to all of the ground north of the fence –

A. Uh-huh.

Q. – Craig has continuously used it.

A. Yes.

Q. Continuously occupied it.

A. Yes.

Q. You've known about that.

A. Yes.

Q. And that has been against what you claim is your interest in the property, true?

Mr. Manwaring: Object to the form. You can answer.

A. I'm not real sure what you're asking me for here.

Q. Well, let me see if I can break it down a bit into simple parts. You've acknowledged and agreed that Craig has occupied the property, including all of the property north of the fence, correct?

A. Correct.

Q. You've agreed and acknowledged that you knew about his occupancy of the property, including all of the property north of the fence?

A. Correct.

Q. And yet you claim the property north of the fence, to some distance, is your property?

A. Correct.

Q. All right. So you would agree, then, that his occupancy and use of the property has been hostile to your claimed interest in that property?

Mr. Manwaring: Object to the form. You can answer.

A. Again, I don't see the hostile.

Q. Well, it's been adverse to your interest or your claimed interest in that property. Would you at least agree with that?

Mr. Manwaring: Objection, same. Go ahead.

A. I really don't know what you want. This is a rather long, convoluted situation that has developed to this point over the last few years.

. . .

Q. Do you allege or claim that you ever told Mr. Kvamme that you claimed an interest in the land north of the fence?

A. I attempted to.

Q. Do you allege or claim that you ever told Mr. Kvamme that you claim an interest in the land north of the fence, yes or no.

A. No.

. . .

Q. Now, let's go back to this common building block. If you never told him that you claimed an interest in the land north of the fence, isn't it equally true that you never gave him permission to use the land north of the fence?

Mr. Manwaring: Object to the form. Go ahead and answer.

A. No. I didn't give him permission to use the land.

Q. Okay. And isn't it also true that you never gave him consent to use the land north of the fence?

A. True.

Q. And you never gave him any other form of authorization to use the land north of the fence, correct?

Mr. Manwaring: Objection. Go ahead and answer.

A. No.

. . .

Q. Again, with reference to his predecessor and grantor in title, and that is Delbert H. Killian and Mary C. Killian, you likewise never granted permission to them to use and occupy the land north of the fence, did you?

A. No.

Q. And you never gave them consent to use and occupy the land north of the fence?

A. No.

Q. You never gave them any other form of authorization to use and occupy the land north of the fence?

A. No.

. . .

Q. We talked earlier about Mr. Kvamme, and I'll go through the list one by one, but, again, you never notified him that you claimed an ownership interest in any of the land north of the fence, did you?

A. No.

Q. Have you ever notified Flat Rock Ranches that you claim an ownership interest in any of the land north of the fence?

A. No.

Q. Have you ever notified Flat Rock Ranches that you allege the fence is not the true and correct boundary between the properties?

A. No.

Q. Did you ever notify Mike Smith?

A. No.

Q. Did you ever notify Mark Berry?

A. No.

Q. Did you ever notify Don Mickelson?

A. I did tell him that I thought the property line was on the far side of the fence.[4]

Q. And that conversation is what precipitated his letter to my client right before this litigation began, correct?

A. I don't know what that letter was.

Q. Oh, all right.

A. So I can't tell you.

Q. I guess a different point of reference, then, would be that the conversation with Mr. Mickelson occurred ***after*** you got the survey from Kevin Thompson, correct?

A. Yes.[5]

Q. All right. Did you ever tell Rowdy Construction or notify them that you claimed an ownership interest in the property north of the fence?

A. No.

Q. Or that, in your allegation in this case, that the fence does not mark the true and correct boundary between the properties?

A. No. Never went that far.

---

[4]Don Mickelson is a real estate agent. The Plaintiffs, Jo Campbell, and Margy Spradling retained his services in 2008 in an attempt to sell the S1/2 of the NE1/4 to Rowdy Construction. R. Vol. II, p. 274.

[5]Kevin L. Thompson finalized the RECORD OF SURVEY on October 5, 2009. R. Vol. I, p. 116; see also, R. Vol. II, p. 346.

Q. Have you ever enrolled your property in any governmental programs such as CRP, Conservation Reserve Program, any program under the USDA?

A. My pasture is.

Q. What program?

A. I don't remember.

Q. Any other governmental programs of any kind or nature?

A. No.

Q. Do you claim that you have water rights that are appurtenant to your property?

A. Yes, I do.

Q. Are those through an irrigation company?

A. Yes, they are.

Q. Which one?

A. I'm trying to think of what the canal company is. Drawing a blank.

. . .

Q. Okay. That's fine. With reference to the governmental program in which you've got your pasture enrolled, did you ever notify that program that you claimed an interest in any of the land north of the fence?

A. No.

Q. Did you ever notify that program that you alleged that the fence does not mark the true and correct boundary between the properties?

A. No.

Q. How about the canal company? Did you ever notify them?

A. No.

Q. You acknowledge and admit that you have never enclosed the ground north of the fence that you allege is your property in this case, don't you?

A. Yes.

Q. And you likewise agree that you have never cultivated or otherwise improved that land north of the fence that you claim as your property, true?

A. True.

Q. And you likewise agree that you have never pastured or grazed livestock on that ground located north of the fence that you allege is yours, true?

A. True.

. . .

Q. All right. [Y]ou do acknowledge and admit that Mr. Kvamme and his predecessors in title have always cultivated and otherwise improved the land that you claim is your property north of the boundary, correct?

A. Correct.

Q. You likewise acknowledge and admit that you've never irrigated any of the land located north of the fence that you claim as your property?

A. Well, that's debatable, but, okay, I'll agree.

Q. You've never put that ground located north of the fence in production for your purposes, have you?

A. No.

Q. You also acknowledge and agree that you've never leased any of that ground located north of the fence to anybody?

A. I leased it to Mr. Kvamme, I guess.[6]

Q. But you've already acknowledged that you never notified him –

A. No.

Q. – that you claim that ground was yours –

A. No.

Q. – correct?

A. Correct.

---

[6]Again, the Defendants purchased the N1/2 of the NE1/4 in 2003. Shortly thereafter, the Defendants rented the S1/2 of the NE1/4 from the Plaintiffs, Margy Spradling, and Jo Campbell. R. Vol. II, p. 284.

The Defendants farmed the S1/2 of the NE1/4 until 2008–specifically, until the Plaintiffs, Margy Spradling, and Jo Campbell "had an opportunity to sell the land." Again, Rowdy Construction made an offer to purchase to them in 2008. R. Vol. II, pp. 273-74.

Before Rowdy Construction made the offer to purchase, however, the Defendants installed a center irrigation pivot on the N1/2 of the NE1/4. R. Vol. I, p. 175, ¶ 63. The pivot sits on the north side of the fence. It includes a pump, an underground mainline, a riser, and a concrete anchor pad. R. Vol. I, p. 174, and Vol. II, pp. 257-64.

The pivot was designed and engineered to cover ***both*** the N1/2 of the NE1/4 ***and*** the S1/2 of the NE1/4. Again, the Defendants were farming ***both*** halves at the time. R. Vol. II, p. 284, and p. 391.

Q. All right. And you've never received any rental income from any of the ground located north of the fence that you claim as your property in this case, have you.

A. Nope.

Q. And you've never received any kind of a share crop for any of the ground located north of the fence that you claim is your property, correct?

A. Correct.

Q. I do understand that you listed your property for sale with Mr. Mickelson. Did you place a For Sale sign on your property?

A. I did.

Q. Did you place a For Sale sign next to the 15 feet of the property that you claim is your property in this case?

A. No.

R. Vol. II, pp. 282-95.

V.

ELEMENT NO. 4: "PAID ALL THE TAXES"

As previously stated, Idaho Code Section 5-210 requires the "party or persons, their predecessors and grantors, to have paid all the taxes upon such land."

Since 2003, the Defendants have "paid all the taxes" that have been "levied and assessed" against the N1/2 of the NE1/4. R. Vol. I, p. 189, ¶ 71.

The Plaintiffs agreed:

> Q. You do not dispute or contend in this case that Mr. Kvamme has failed to pay all of the taxes that have been levied and assessed against the north half of the northeast quarter, do you?
>
> A. No.

R. Vol. II, p. 285.

Before 2003, and going back to at least 1950, the Defendants' predecessor in interest, Mary Killian, "paid all the taxes" that were "levied and assessed" against the N1/2 of the NE1/4. R. Vol. I, p. 189, ¶ 73.

Again, the Plaintiffs agreed:

> Q. And, in fact, you do not contend or allege in this case that his predecessor and grantor in title, Delbert H. Killian and Mary C. Killian, did not pay all of the taxes that were levied and assessed against the north half of the northeast quarter, do you?
>
> A. No, I don't.

R. Vol. II, p. 285.

Thus, the taxes on the N1/2 of the NE1/4 are current. No taxes are outstanding, past due, or otherwise in default or arrears. R. Vol. I, p. 189, ¶ 76.

Notwithstanding the foregoing, the Plaintiffs ***argued*** that the Defendants have not paid the taxes on the 15 feet of farm ground that lies north of the fence. Their ***argument*** is a clever, albeit disingenuous hop, skip, and jump:

The hop:	According to the Plaintiffs, the fence is off by 15 feet.
The skip:	Hence, the 15 feet of farm ground that lies north of the fence is actually part of the S1/2 of the NE1/4.
The jump:	Hence, Idaho Code Section 5-210 requires the Defendants to have paid all the taxes on the S1/2 of the NE1/4.

In other words, according to the Plaintiffs, the Defendants have not "paid all the taxes" on the 15 feet farm ground that lies north of the fence because "such land" is actually part of the S1/2 of the NE1/4, not the N1/2 of the NE1/4. This was their ***sole*** argument in opposition to the doctrine of adverse possession:

> . . . No part of the tax collections received on the assessment of the Kvammes' real property were applied to the Campbells' real property. The Campbells have paid all taxes assessed on their real property.

R. Vol. I, p. 78.

With all due respect, the Plaintiffs are wrong:

wrong,

wrong,

wrong,

and they are wrong as a matter of law.

The following quote explains this element, and it is dispositive of the issue herein:

> In the case of boundary disputes between contiguous landowners, where one landowner can establish continuous open, notorious and hostile possession of an adjoining strip of his neighbor's land, ***and taxes are assessed by lot number or by government survey designation***, rather than by metes and bounds description, ***payment of taxes on the lot within which the disputed tract is enclosed satisfies the tax payment requirement of the statute***.

Standall v. Teater, 96 Idaho 152, 156, 525 P.2d 347, 351 (1974); see also Scott v. Gubler, 95 Idaho 441, 511 P.2d 258 (1973) (emphasis added).

The legal description of the Defendants' parcel of real property is the N1/2 of the NE1/4. R. Vol. II, p. 252.

The legal description of their parcel of real property is ***not*** a legal description based on metes and bounds–that is, a legal description based on specific calls of directions and distances from a stated point of beginning; instead, it is a legal description based on a standard section of land under the U.S. Public Land Survey System, which nominally contains 640 acres. R. Vol. I, p. 190, ¶ 78; see also R. Vol. II, p. 301, ¶ 12 (pp. 297-306, inclusive); and see also R. Vol. II, pp. 307-13.

Thus, "payment of taxes on the lot within which the disputed tract is enclosed satisfies the tax payment requirement of the statute." See Standall v. Teater, 96 Idaho 152, 156, 525 P.2d 347, 351 (1974). Of course, the "***disputed tract***" in this case is enclosed"***within***" the real property that lies north of the fence, ***which is the Defendants' parcel of real property***.

VI.

ELEMENT NO. 5: NO "WRITTEN INSTRUMENT HAS BEEN RECORDED"

Finally, the Plaintiffs, including their predecessor in interest, Leo H. Campbell, did ***not*** record a "written instrument" in the records of Bonneville County, Idaho, "declaring that it was not the intent of the party to such instrument, by permitting possession or occupancy of real property, to thereby define property boundaries or ownership."

The Plaintiffs agreed:

> Q. And, furthermore, you never recorded a written instrument in the records of Bonneville County claiming that you had an interest in the land north of the fence, did you?
>
> A. No.
>
> Q. Or a written instrument that alleged he was occupying that land with your permission, did you?
>
> A. No.
>
> Q. Or a written instrument stating or declaring that you had an ownership interest in any of the land north of the fence, did you?
>
> A. No.
>
> Q. Again, with reference to his predecessor and grantor in title, and that is Delbert H. Killian and Mary C. Killian, you likewise never granted permission to them to use and occupy the land north of the fence, did you?
>
> A. No.
>
> . . .

Q. And, with reference their use and occupancy, again, you never recorded a written instrument in the records of Bonneville County stating that they were using it with your permission or that you had an interest in it or claim ownership in it, did you?

A. No.

Q. And, in light of the fact that your interest only began in 1981, your father likewise never recorded such an instrument, did he?

A. Not to my knowledge.

R. Vol. II, p. 285.

BOUNDARY BY AGREEMENT OR ACQUIESCENCE

The following quote summarizes the elements of boundary by agreement or acquiescence:

> Boundary by agreement or acquiescence has two elements: (1) There must be an uncertain or disputed boundary, and (2) a subsequent agreement fixing the boundary.... A subsequent agreement may be ***inferred*** from the conduct of parties or their predecessors, including acquiescence to the location and maintenance of a fence for a long period of time.

Weitz v. Green, 148 Idaho 851, 860, 230 P.3d 743, 752 (2010) (emphasis added).

ARGUMENT

I.

ELEMENT NO. 1: "UNCERTAIN OR DISPUTED BOUNDARY"

The Defendants farm the N1/2 of the NE1/4. Nonetheless, they do not know the boundary between their parcel of real property and the Plaintiffs' parcel of real property. The Defendants are

not professional land surveyors.[7] In short, the boundary is "uncertain or disputed." R. Vol. I, p. 192, ¶¶ 87-89.

Likewise, the Plaintiffs do not know the boundary between the parties' respective parcels of real property. Once again, the boundary is "uncertain or disputed":

> Q. Of your own personal knowledge, do you know the boundary, the actual boundary, the true and correct boundary, between the north half of the northeast quarter and the south half of the northeast quarter of Section 17?
>
> A. Not the exact, no.
>
> Q. And when you say not the exact boundary, no, by that you would also agree that you're uncertain as to the true and correct boundary between the north half and the south half of the northeast quarter of Section 17?
>
> A. I agree. I would be uncertain, as would everybody else.
>
> Q. Now, notwithstanding the fact that you are uncertain about that boundary, your contention in this case is that the boundary is in dispute, correct?
>
> A. Correct.

R. Vol. II, p. 286.

---

[7]Again, the Defendants purchased the N1/2 of the NE1/4 in 2003. They paid good and valuable consideration for it. They did so upon the belief and understanding that their predecessor in interest, Mary Killian, had good and marketable title to it; and, with respect to the 15 feet of farm ground that lies north of the fence, they did so upon the belief and understanding that it was part of the N1/2 of the NE1/4. R. Vol. I, p. 191, ¶¶ 83-85. Moreover, the Defendants did not have any notice, whether actual or constructive, that the Plaintiffs claimed any right, title, or interest in the 15 feet of farm ground that lies north of the fence. R. Vol. I, pp. 191-92, ¶ 86.

II.

ELEMENT NO. 2: "SUBSEQUENT AGREEMENT FIXING THE BOUNDARY, WHICH MAY BE *INFERRED* FROM THE CONDUCT OF THE PARTIES OR THEIR PREDECESSORS, INCLUDING ACQUIESCENCE TO THE LOCATION AND MAINTENANCE OF A FENCE FOR A LONG PERIOD OF TIME"

The parties and their predecessors in interest have "acquiesced to the location of the fence for a long period of time." It has been there since time immemorial, whether 1919 of "***before***."[8] The Plaintiffs agreed:

> Q. You would agree with me that the fence has been there for a long period of time.
>
> A. Correct.

R. Vol. II, p. 289.

In addition, the parties and their predecessors in interest have "maintained of the fence for a long period of time." Again, the Plaintiffs agreed:

> Q. All right. Now, with reference to maintenance and repair, name for me every person, to your knowledge, that has ever maintained or otherwise repaired that fence. And by "that fence," I'm specifically talking about the fence that runs east and west across the property. I understand you allege the underlying dirt is yours –
>
> A. Uh-huh.
>
> Q. – but everybody to your knowledge that's maintained or repaired that fence.

---

[8]Again, according to the Plaintiffs, the fence was there "***before*** the Davises bought the property." Parley Davis and Hannah Davis bought the NE1/4 of Section 17 on ***March 3, 1919***.

A. Well, there would have been my dad, my brother, Jo, and I, and Kurt Young and Keith Campbell, my other son. Probably all the Killian boys and Delbert Killian and Mary Killian.

Q. Meaning Delbert, Jr.

A. And Senior.

Q. Right. That's who I assume you meant when you said Delbert. But Delbert, and also his son after Delbert, passed away.

A. Yes. Well –

Q. With reference to – I'm sorry, go ahead.

A. I wouldn't bet Delbert, Jr., was down there working on the fence. He gained quite a bit of weight and was not into doing much fencing.

Q. Okay.

A. That's why my kids wound up over there because they were helping Aunt Mary.

Q. With reference to your father, when did he maintain and repair this fence?

A. When he lived there.

Q. That would be between 1950 and when he passed away?

A. Yes.

. . .

Q. Okay. For purposes of maintaining the fence over that long period of time, what did he do to maintain it?

A. Replaced posts as needed, and installed wire as needed. He did have electrical wire at one time on it.

Q. You previously referenced that sometime in the 1960's?

A. Yes.

Q. Anything else?

A. Not right off the top of my head.

Q. Did your father ever modify the fence?

A. Not to my knowledge.

Q. With reference to the period of time where you have been on this property – and that would be since 1981, correct?

A. Correct.

Q. What repairs and maintenance have you performed on this fence?

A. I've replaced sections of wire. I've replaced posts. Repaired it as needed. Mr. Kvamme also put some time in on the fence.

R. Vol. II, pp. 281-82.

Finally, and perhaps most tellingly, the "conduct of the parties and their predecessors" is decisive:

On the one hand, the Plaintiffs have ***never*** enclosed the 15 feet of farm ground that lies north of the fence; they have ***never*** cultivated it, improved it, used it, irrigated it, or put it in production; they have ***never*** received rental income from it; they have ***never*** received a share crop from it; they have ***never*** posted it for sale; and, ***until this case***, they have ***never*** claimed, asserted a right to it, or

even notified a third party that the fence ***allegedly*** sits on their parcel of real property and is off by 15 feet.

On the other hand, the Defendants have ***always*** enclosed the 15 feet of farm ground that lies north of the fence; they have ***always*** cultivated it, improved it, used it, irrigated it, and put it in production; and they have now installed a center irrigation pivot, pump, underground mainline, riser, and concrete anchor pad on it, which further improved it.

CONCLUSION

The doctrine of adverse possession and the doctrine of boundary by agreement or acquiescence, or either of them, are sufficient and proper bases for the disposition of this case. Based on the appellate doctrine of right result-wrong theory, this court should affirm the trial court.

COSTS ON APPEAL

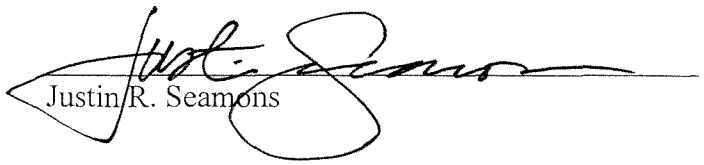
The Defendants hereby claim costs on appeal in accordance with I.A.R. 40(a).

ATTORNEY'S FEES ON APPEAL

The Defendants hereby claim attorney's fees on appeal in accordance with I.A.R. 35(b)(5), I.A.R. 41(a), I.A.R. 11.2, and Idaho Code Section 12-121. The trial court did not "apply the wrong legal standard" to the Plaintiffs' motion for reconsideration.

The Plaintiffs' ***argument***, based on ***one*** paragraph from oral argument, that the trial court "incorrectly" applied I.R.C.P. 60(b)(2) and "glossed over" I.R.C.P. 11(a)(2)(B) is frivolous, unreasonable, or without foundation.

Dated October 24, 2012.

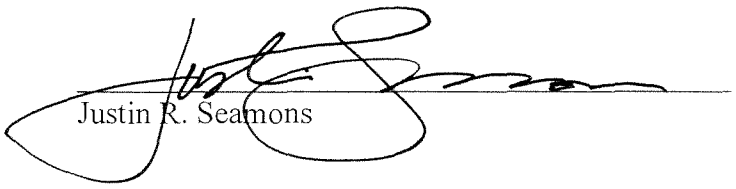


Justin R. Seamons

CERTIFICATE OF SERVICE

I served a copy of the foregoing CROSS-APPELLANTS' BRIEF on the following people on October 24, 2012:

Just Law Office
Attn: Charles C. Just and Kipp L. Manwaring
381 Shoup Avenue
Idaho Falls, ID 83402



Justin R. Seamons