CAUSE NO. 1261

THE JOHN G. and MARIE STELLA KENEDY MEMORIAL FOUNDATION	§	IN THE DISTRICT COURT OF
VS.	§	KENEDY COUNTY, T E X A S
SYLVIA MENCHACA BALLÍ AGUILERA, ET AL.	§	105TH JUDICIAL DISTRICT

MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Counter-Plaintiffs, Defendants/Intervenors, SYLVIA MENCHACA BALLÍ AGUILERA, ET AL., by and through their counsel of record, Hector H. Cárdenas, Jr. and Ramon Garcia; the "Lucia M. Adame Intervenors" by and through their counsel of record Eileen Fowler; the "Jimmy Cardenas Defendants" by and through their counsel of record, George L. Willingham and Michael D. Jones; the "Simona Balli Avila Ochoa Intervenors" by and through their counsel of record, Sofia Arizpe and Jesus Villalobos; the "Anita Almanza Gomez Loya Intervenors" by and through their counsel Fabian Guerrero; the "Andrew Aranda Intervenors" by and through their counsel of record, Harry Olsen and Christopher Jonas; and the "Laura Escamilla Charles Alvarado Intervenors" by and through their counsel of record, Jonathan Preston and Eileen Fowler (collectively referred to hereinafter as "Movants") and pursuant to Rules 320 *et seq.* of the Texas Rules of Civil Procedure, file this their Motion for New Trial and in support thereof, would respectfully show unto the Court as follows:

INTRODUCTION

1. This Motion for New Trial is filed with respect to all adverse rulings against Movants in the Final Judgment rendered in this cause on January 31, 2003. This Motion for New Trial does not challenge the ruling of this Court with regard to the dismissal of Plaintiff's claim for attorneys' fees because attorney's fees are not recoverable in either a Trespass to Try

Title case or in a real property dispute "that is in the nature of a Trespass to Try Title" as a matter of law. *Ely v. Briley,* 959 S.W.2d 723, 727-28 (Tex.App.—Austin 1998, no writ) (string citation omitted); Tex. Prop. Code §22.001(a).

JUSTICE REQUIRES THAT A NEW TRIAL BE GRANTED BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST AS A MATTER OF LAW

2. The filing of a motion of new trial is a matter of right and a new trial should be granted in this cause in the interest of justice. *See Old Republic Ins. Co. v. Scott,* 846 S.W.2d 832, 833 (Tex. 1993) and its progeny.

3. Justice requires that a new trial be granted because the Court erred in granting Plaintiff's Motion to Exclude Evidence in Support of Movant's Response to Motion to Summary Judgment as well as in granting Plaintiff's Rule 166a(i) and Rule 166a(c) Motions for Summary Judgment because said rulings were based upon late filed summary judgment proof. By Order dated November 13, 2002, Plaintiff was to file responsive briefing to Movants' Response to Plaintiff's Motions for Summary Judgment by December 24, 2002. Plaintiff violated both Rule 166a and this Court's Order dated November 13, 2002 by filing more than responsive briefing, affidavits and other late filed evidence. Rule 166a(c) permits the late filing of summary judgment proof upon leave of court. *Benchmark Bank v. Crowder,* 919 S.W.2d 657 (Tex. 1996). Plaintiff did not obtain leave of Court to file late summary judgment proof. Thus, such evidence is not before the Court. *Benchmark Bank,* 919 S.W.2d at 663. Movants preserved error by filing an Objection and Motion to Strike Plaintiff's Late Filed Evidence, which is incorporated for all purposes herein as if set forth at length.

4. Justice requires that a new trial be granted because the Court erred in granting Plaintiff's Motion to Exclude Expert Testimony of Richard Santos and Lynne Perez. The Court is correct that Richard Santos and Lynne Perez cannot determine the issue whether the 1804 deed

complies with Spanish Colonial Law because such questions of pure law may only be decided by the Court. However, the trial Court committed error as a matter of law because the 1804 deed does in fact comply with Spanish Colonial Law in effect circa 1804 and as of March 23, 1804, Plaintiff's predecessors in interest no longer had any legal or equitable interest or title in and to the La Barreta grant (*see* affidavit of Movants' expert, Terry Hogwood, attached as Exhibit "4" to Defendants/Intervenors' Response to Plaintiff's Rule 166a(c) Motion for Summary Judgment). The trial court further erred in excluding the testimony of Lynne Perez with regard to use and occupation of La Barreta by Clemente Ballí and other heirs of Jose Manuel Ballí Villarreal. Movants' incorporate herein their Responses to Plaintiff's Motion to Exclude Expert Testimony and Plaintiff's Motion to Evidence in Support of Movants' Response to Summary Judgment herein for all purposes as if set forth at length.

5. Justice requires that a new trial be granted because the Court erred in granting Plaintiff's Motion to Exclude the 1804 deed as well as the 1949 Lease between the Ballí family and Plaintiff's predecessors in interest. Plaintiff's live pleadings as well as Plaintiff's Motion for Summary Judgment assert that both documents, as well as other documents identified in the Final Judgment are forgeries. The issue presented whether a document is a forgery is generally a question of fact, which should be decided by a jury. In the interest of justice, a jury should determine whether the 1804 deed and the 1949 Lease are forgeries or whether said instruments are in fact genuine.

6. The Court erred in granting Plaintiff's Rule 166a(c) and Rule 166a(i) Motions for Summary Judgment because the Exhibits attached to Movants' Responses on file as well as the Exhibits incorporated by reference establish that genuine issues of material fact exist as a matter of law. Summary Judgment is a very harsh remedy which courts should deny unless the movant establishes a right to summary judgment as a matter of law. *INA of Texas v. Bryant,* 686 S.W.2d

614, 615 (Tex. 1985). The burden of demonstrating lack of a genuine issue of material fact is upon the movant, and all doubts are resolved against the movant. *City of Houston v. Clear Creek Basin Authority,* 589 S.W.2d 671, 678-679 (Tex. 1979). Movants' Response to Plaintiff's Rule 166a(c) and Rule 166a(i) Motions for Summary Judgment establish the existence of genuine issues of material fact as a matter of law and are incorporated by reference herein for all purposes as if set forth at length.

7. The Court also erred in granting Plaintiff's Rule 166a(c) and Rule 166a(i) Motions for Summary Judgment on the theory of adverse possession. The Texas Supreme Court has repeatedly held that "the question of adverse possession normally is a question of fact, so only in rare instances is a court justified in holding that adverse possession has been established as a matter of law." *Rhodes v. Cahill,* 802 S.W.2d 643, 646 (Tex. 1990); *Bywaters v. Gannon,* 686 S.W.2d 593, 595 (Tex. 1985); *Pearson v. Doherty,* 143 Tex. 64, 71, 183 S.W.2d 453, 456 (1944). Plaintiff's "proof" of adverse possession is defective as a matter of law because there is absolutely no evidence that all of the La Barreta grant in issue was fenced and more importantly, whether any of the fences identified by Plaintiffs were erected as "designed enclosures." In Texas, a fence to be a claim on the land must be a "designed enclosure." *Rhodes,* 802 S.W.2d at 646; *Orsborn v. Deep Rock Oil Corp.,* 153 Tex. 281, 287-289, 267 S.W.2d 781, 785-787 (1954); *McDonnold v. Weinacht,* 465 S.W.2d 136, 141 (Tex. 1971). Plaintiff did not, and cannot show a claim to all of La Barreta by fencing all the land because it was just not done. Moreover, Plaintiff failed to offer any evidence of adverse possession of the 25,000 acres of mud flats on the eastern border of La Barreta as a matter of law.

8. The Court further erred in granting Plaintiff's Rule 166a(c) and Rule 166a(i) Motions for Summary Judgment based on the presumed grant doctrine. The presumed grant doctrine, also known to as the "lost deed doctrine" was one of many "red herrings" asserted by

Plaintiff. However, the lost deed doctrine has no application in this case because of the judgment in *State v. Spohn,* 83 S.W. 1135 (Tex. Civ. App.—1904, writ ref'd) and because of the issuance of Patent No. 510 to Jose Francisco Ballí and his legal assigns by the State of Texas on January 18, 1907. None of the cases argued by Plaintiff involve the unique facts of this case, to wit: a lease from the record title holder to the lessee-occupant of the land. In this case there is evidence of a series of leases from the Ballí heirs, which destroys any argument for application of the presumed grant doctrine in this litigation as a matter of law.

WHEREFORE, SYLVIA MENCHACA BALLÍ AGUILERA, ET AL. pray that this Court set aside the Final Judgment dated January 31, 2003 and to order a new trial except with respect to the dismissal of Plaintiff's claim for attorney's fees, and for all such other and further relief, at law or in equity to which Movants may be justly entitled.

Respectfully submitted,

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