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Lattin v. Adams County Respondent's Brief Dckt. 35768

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I. STATEMENT OF THE CASE

A. Nature of the Case

This brief is filed by Plaintiffs-Respondents Dale and Kathleen Latin, Tyler and Kathy Chase, and Kenneth and Taffy Stone (“Respondents”). This appeal concerns a roadway dispute between Defendant/Appellant Adams County and Adams County Commissioners Bill Brown, Joe Holmes, and Mike Paradis (“Appellants”) and Respondents. The dispute arose between the Appellants and Respondents when the Appellants attempted to make Burch Lane (“Burch Lane”), formerly known as Old Sawmill Road, a public road. Respondents filed a quiet title action in the district court, to declare that Burch Lane was a private road, for their use and benefit only. The Appellants brought the present appeal to reverse the trial court’s determination that Burch Lane was a private road.

B. Course of Proceedings

Respondents filed their original Complaint on February 29, 2008, seeking declaratory relief as to the private status of Burch Lane, injunctive relief to enjoin Appellants from entering onto, attempting to maintain and/or attempting to control Burch Lane, and quiet title to Burch Lane. (R., Vol. I, pp. 3-12).

Appellants filed an Answer on April 8, 2008 admitting some and denying the remainder of Respondent’s facts and requests for relief. (R., Vol. I, pp. 13-14).

Approximately three months later, on July 15, 2008, Respondents filed a Motion for Summary Judgment. (R., Vol. I, pp. 15-16). The motion was supported by the Affidavit of Tyler Chase (R., Vol. 1, pp. 30-43), and the Memorandum in Support of Motion for Summary

Judgment. (R., Vol. 1, pp. 17-29). Appellants responded by filing their Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment on August 15, 2008. (R., Vol. I, pp. 44-

47). Accompanying their opposition, Appellants also filed the Affidavits of Maxine Nichols (R., Vol. 1, pp. 48-49), Steve Shumway (R., Vol. 1, pp. 50-52), Paul E. Nichols (R., Vol. 1, pp. 53-54), Nelma Green (R., Vol. 1, pp. 55-59), and Don Horton (R., Vol. 1, pp. 60-73). Upon receipt of the Affidavits, Respondents immediately filed a Motion to Strike various portions of the affidavits filed by Appellants because they contained inadmissible evidence. (R., Vol. 1, p. 75-91). Although a motion for order shortening time was filed with the district court to address the motion to strike, the district court did not hear the motion before entering summary judgment in favor of Respondents. (R., Vol. 1, pp. 92-95).

Respondents also filed their Reply Memorandum with the district court on August 26, 2008. (R., Vol. 1, pp. 96-101). Along with the Reply Memorandum, Respondents also submitted additional affidavits of Christy Ward (R., Vol. 1, pp. 102-105), Kathy Chase (R., Vol. 1, pp. 106-109). No objections were filed or made with regard to the additional affidavits by Appellants or the district court.

A hearing was held on September 2, 2008, and at that hearing, the district court granted Respondent's Motion for Summary Judgment. (Tr., Vol. 1, p. 3). An Order Granting Summary Judgment was filed on September 9, 2008, (R., Vol. 1, pp. 110-111) and on September 30, 2008, Judgment was entered and filed by the district court, adjudging and decreeing that Burch Lane was not a public road. (R., Vol. I, pp. 112-114)

Appellants timely filed a Notice of Appeal on October 14, 2008. (R., Vol. I, pp. 115-116).

C. Concise Statement of Facts

Respondents are all real property owners in the Reico Subdivision in Adams County,

Idaho. Access to their property is obtained via Burch Lane, formerly known as Old Sawmill

Road, which is located on Respondents' property. From its creation to the present time, Burch Lane has been a private road. (R., Vol. 1, p. 31, ll. 13-14).

Historically, Reico Subdivision was part of a 250 acre parcel of property owned by a local rancher, Ms. Anna M. Thompson. (R., Vol. 1, p. 32, ll. 4-5). She acquired the property on April 27, 1922 from the United States Government. (R., Vol. 1, p. 32, ll. 5-6). At that time, Burch Lane did not exist. Burch Lane (or its predecessor) did not come into existence until after Thompson acquired the property. (R., Vol. 1, ll. 7-9). During her ownership of the property, she permitted a local logger to construct temporary roads on the property for logging purposes. These logging roads were never opened to the public. (R., Vol. 1, ll. 10-12). Ms. Thompson, then known as Anna M. Johnson, passed the property to Ira F. Mink on November 3, 1930. He subsequently conveyed it to Lawrence Stover on June 17, 1942. (R. Vol. 1, ll. 13-15).

In April of 1974, the property was subdivided and the developers entered into real estate purchase and sale contracts with various individuals for the sale of the subdivided lots. (R., Vol. 1, ll. 16-17). The property was not properly platted by the original developers so the Adams County Recorder involuntarily recorded the plat to finalize the subdivision. The involuntary plat was signed by the Adams County Recorder on September 26, 1983. (R., Vol. 32, ll. 21-23, pp. 38-39). The plat was signed by the Reico Subdivision original developers, but at that time, they had already sold some or all of the lots in Reico Subdivision to third party purchasers.

Despite the fact that the developers did not own all of the property in the subdivision, they purportedly certified, "that any right, title and interest that we may have in the road rights-of-way as shown on this plat of REICO SUBDIVISION is hereby dedicated to the use of the

public.” (R., Vol. 1, p. 39) (emphasis added). The easements and road rights-of-way on the plat are depicted in the Legend as “- - - - -,” while other roads are depicted with a centerline depiction according to the Legend as “_____”. (R., Vol. 1, p. 38). Furthermore, the easements and rights-of-way are clearly marked on the plat with language such as “EXISTING ACCESS EASEMENT” and “R.O.W. BOUNDARY COUNTY ROAD.” (R., Vol. 1, p. 38). Burch Lane does not have an easement or right-of-way designation identifying it, but merely a centerline depiction of its location within the subdivision.

When the Reico Subdivision was platted, the temporary logging roads created during Ms. Thompson’s ownership were no longer in use (R., Vol. 1, p. 32, ll. 19-20) and were not listed on the plat as easements or rights-of-way. The plat indicated two roads that were “easements” but the plat was silent as to the characterization of Burch Lane.

Up until the mid 1980s, Burch Lane was a jeep trail with large trees in the roadway. (R., Vol. 1, p. 103, ll. 16-17, p. 107, ll. 16-17). Respondent Lattin’s predecessor, Christy Ward, and Respondents Chase, relocated a portion of the road and improvements in order to access their properties. (R., Vol. 1, p. 103, l. 11).

In 1984, Idaho Power installed utility lines and improved Burch Lane at the expense of Chase and Ward. Idaho Power then constructed a power substation on the adjacent forest service property. In 2002, Idaho Power obtained an easement from Respondents and their predecessors to drive over Burch Lane to maintain its substation to the north of Respondents’ property in the Payette National Forest. (R., Vol. 1, p. 33, ll. 2-9). Since 1984, Burch Lane has been maintained exclusively by the Respondents, their predecessors and Idaho Power. (R., Vol. 1, p. 33, ll. 10-11).

Eventually, Respondents began having trouble with unauthorized use of Burch Lane by the general public. Thus, they installed signs on their property indicating the private nature of the road as well as a Burch Lane sign. (R., Vol. 1, p. 33, ll. 17-18). In July of 2007, the Appellants sent a letter to Respondents, demanding the removal of the signs. In order to avoid problems with the County, the signs designating the road as Burch Lane and a private drive were removed. (R., Vol. 1, p. 33, ll. 19-22, pp. 41-42).

On or about December 17, 2007, the Commissioners sent a letter to Respondents, asserting that Burch Lane was a public road pursuant to R.S. 2477 and/or by prescription. (R., Vol. 1, p.34, ll. 1-3, p. 43). The County did not historically maintain Burch Lane. In January of 2008 the Commissioners directed the County Highway District to begin maintaining Burch Lane. Respondents objected to the maintenance by the County Highway District. Respondents have and will continue to maintain Burch Lane as a private road, as it has been since it was constructed. (R., Vol. 1, p. 34, ll. 4-9).

At no time between 1979 to the time of the filing of Respondents' lawsuit, did the Respondents pursue validation proceedings or condemnation proceedings regarding Burch Lane. (R., Vol. 1, p. 103, ll. 21-22, p. 104, ll. 1-3). Furthermore, Adams County never made any improvements or repairs to or did any maintenance on Burch Lane from 1979 to present. (R., Vol. 1, p. 33, ll. 10-11).

III. ISSUE PRESENTED ON APPEAL

Did the District Court err when it granted summary judgment, quieting title to the access road located on Respondent's property, finding that it was a private road?

IV. ARGUMENT

A. Standard of Review

When the appellate court reviews the district court's ruling on a motion for summary judgment, it employs the same standard as district court's original ruling on the motion. *Farrell v. Bd. of Comm'rs. Of Lemhi County*, 138 Idaho 378, 64 P.3d 304 (2002); *King v. Lang*, 136 Idaho 905, 42 P.2d 698 (2002). A motion for summary judgment is properly granted if no genuine issue of material fact exists. I.R.C.P. 56(c); *Orthman v. Idaho Power Co.*, 130 Idaho 597, 600, 944 P.2d 1360, 1363 (1997). The Court liberally construes the record in the light most favorable to the non-moving party, drawing all reasonable inferences and conclusions in that party's favor. *Stafford v. Klosterman*, 134 Idaho 205, 998 P.2d 1118 (2002). When the court sits as the trier of fact, however, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment. Rather the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.*; *Riverside Development Co. v. Richie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982).

A "material fact" for summary judgment purposes is one upon which the outcome of the case may be different. *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998). Raising doubts as to a material fact is not sufficient because the nonmoving party must produce substantial evidence that demonstrates a material fact is in dispute, a mere scintilla of evidence is not sufficient. *Ambrose v. Buhl Joint School District #412*, 126 Idaho 581, 583, 887 P.2d 1088, 1091 (Ct. App. 1994).

In their brief, Appellants incorrectly direct this Court to *Hughes v. Fisher*, 142 Idaho 474, 129 P.3d 1223 (2006), regarding the standard of review for appealing trial court findings of fact and conclusions of law. In this case, there was no trial and the district court properly declined to make any findings of fact or conclusions of law when it granted Respondents' motion for summary judgment. Appellants have a misunderstanding of the status of this case, the judgment that was entered, and how this Court should review the district court's limited decision in this case. The district court made a determination that Appellants failed to establish a genuine issue of material fact upon a motion for summary judgment and the district court entered judgment *as a matter of law*.¹ Thus, this Court does not have to determine if the "district court's findings of fact are supported by substantial and competent, though conflicting evidence" as alleged by Appellants.² There were no such findings or conclusions that would prompt this alternate standard of review.

B. The Reico Subdivision Plat Does Not Dedicate Burch Lane

Burch Lane is a private road providing ingress and egress to the properties along Burch Lane in Reico Subdivision. The subdivision plat for Reico Subdivision excludes Burch Lane from the "easements and rights-of-way" of the subdivision, thus the County cannot *accept* Burch Lane as a public road.

i. Idaho Code § 50-1309 Dedications

Appellants correctly refer to Idaho Code Section 50-1309 as the relevant statute regarding

¹ The district court held, "[Adams County] has to follow certain statutory protocols in order to accomplish that, and I'm satisfied that, based upon the affidavits submitted and the supporting instruments and the pleadings of the parties in union with argument, that Adams County has not followed the statutory protocols for acceptance or validation of what's now commonly known as Burch Lane, and simply *as a matter of law*, I'm going to grant summary judgment to the petitioners herein." (Tr., Vol. 1, p. 20, ll. 14-23) (emphasis added).

² See Appellants' Brief, p. 2.

plats; however, they incorrectly assert that Burch Lane was dedicated in the subdivision plat pursuant to that statute. When a plat is recorded, it must include an express dedication of the roadways therein. Idaho Code Section 50-1309 states as follows:

1. **The owner or owners** of the land included in said plat shall make a certificate containing the correct legal description of the land, with the statement as to their intentions to include the same in the plat, and **make a dedication of all public streets and rights-of-way shown on said plat**, which certificate shall be acknowledged before an officer duly authorized to take acknowledgments and shall be indorsed on the plat. The professional land surveyor making the survey shall certify the correctness of said plat and he shall place his seal, signature and date on the plat.

2. No dedication or transfer of a private road to the public can be made without the specific approval of the appropriate public highway agency accepting such private road.

3. **Highway districts shall not have jurisdiction over private roads designated as such on subdivision plats and shall assume no responsibility for the design, inspection, construction, maintenance and/or repair of private roads.**

I.C. § 50-1309 (emphasis added). In this case, Reico Subdivision was not properly platted and had to be involuntarily recorded by the Adams County Recorder's Office. The property owners in the subdivision did not designate any roads as public rights-of-way, nor did the owners dedicate any private roads for public use. Two roads are labeled on the plat at "existing access easement" and one road is identified as "R.O.W." or right-of-way. Burch Lane has no such designation. Thus, there is no interpretation for the characterization of Burch Lane for anything other than a private road. Accordingly, Adams County has no jurisdiction over Burch Lane according to the relevant statute.

ii. **The Reico Subdivision Plat is Not Ambiguous**

Appellants contend that the Reico Subdivision Plat is ambiguous because it does not define Burch Lane as an easement or right-of-way. They then incorrectly cite *Arreguin v.*

Farmers Insurance Company, 145 Idaho 459, 180 P.3d 498 (2008), and *Newgen v. OK Livestock*

Exchange, 117 Idaho 445 (1990), to suggest that interpreting plats with ambiguities presents a question of fact.³ Appellants acknowledge that a plat is not a contract, but assert that the general rules of contract apply. Appellants' assertion is incorrect.

Dedication is the setting aside of real property for the use or ownership of others. *Sun Valley Land and Minerals, Inc. v. Kelsey*, 138 Idaho 543, 66 P.3d 798 (2003). Dedication can be made by recording or filing a subdivision plat; however, there has to be a clear and unequivocal indication the owner intends to dedicate the land as depicted. *Id.* at 548, 66 P.3d at 803. In determining whether the owner intended to offer the land for dedication, the court must examine the plat, as well as surrounding circumstances and conditions of the development and sale of lots. *Id.*, (citing *Dunham v. Hackney Airpark, Inc.*, 133 Idaho 613, 616, 990 P.2d 1224, 1226 (Ct. App. 1999)). The depiction of a road on a plat, without designation, does not, of itself, indicate an intent to dedicate the road. *Dunham*, 133 Idaho at 618, 990 P.2d at 1228.

The district court held as a matter of law that Appellants had not established that Adams County went through the proper protocols in validating or accepting Burch Lane as a public road. The district court did not make any factual findings, as suggested by Appellants, regarding the Reico Subdivision plat.⁴ As stated previously, it is not the role of the district court to make findings of fact and conclusions of law on a motion for summary judgment, but to determine if there are any genuine issues of material fact which would preclude the entry of judgment as a matter of law. It is the responsibility of the non-moving party to present any genuine issues of material fact to preclude summary judgment. Appellants failed to present any facts that would raise an issue relating to the subdivision plat.

³ See Appellants' Brief, p. 5.

⁴ See Appellant's Brief, p. 5, stating, "The district court simply did not find enough facts to warrant summary judgment."

Respondents, on the other hand, set forth undisputed facts that the lots in Reico Subdivision were being sold in the 1970s, yet the plat was not recorded until January 4, 1984, after several lots were already sold. The plat clearly identifies two roads as “easements” and another road as a “right-of-way” but it does not identify Burch Lane as either an easement or a right-of-way. To the contrary, the plat is silent as to Burch Lane. If the developers of the Reico Subdivision, or the owners of the property when the plat was recorded in 1984, wanted Burch Lane to be dedicated, the plat would have indicated accordingly. Following the direct case law on point, *Dunham and Sun Valley Land and Minerals*, silence as to the characterization does not amount to a dedication. To the contrary, the owners and developers of Reico Subdivision were required to “clearly and unequivocally” dedicate the road in the plat. Because the plat is clear and unambiguous, there is no doubt that Burch Lane is not depicted as an easement or right-of-way which could be dedicated pursuant to Idaho Code Section 50-1309.

There are no genuine issues of material fact regarding the plat for Reico Subdivision and the fact that Burch Lane was not dedicated to the public for public use. Accordingly, this Court should affirm the district court’s order granting summary judgment in favor of Respondents.

C. Appellants Did Not Comply With Idaho’s Road Creation Statute

In Idaho, counties and highway districts can only declare public roadways on private land according to the restrictions set forth in the Idaho Code. A “highway” is defined in the Idaho Code as:

“Highways” means roads, streets, alleys and bridges laid out or recorded for the public or dedicated or abandoned to the public. . . . Roads laid out and recorded as highways, by order of the commissioners, and all roads used as such for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways.

I.C. § 40-109(5).⁵ In Idaho, it is not enough for Commissioners to simply “declare” a road to be public if it lies on private property. To the contrary, the county *must* initiate validation proceedings on roads that are not part of the historical highway system.

i. Validation Proceedings

The road creation statute requires the county or highway district to comply with Idaho Code Section 40-203(A) when attempting to validate a public road. The statute reads as follows:

(1) Any resident or property holder within a county or highway district system, including the state of Idaho or any of its subdivisions, or any agency of the federal government, **may petition the board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, to initiate public proceedings to validate a highway or public right-of-way . . .**

...

(2) If proceedings for validation of a highway or public right-of-way are initiated, the commissioners **shall follow the procedure set forth in section 40-203, Idaho Code . . .**

(3) Upon completion of the proceedings, the commissioners **shall determine whether validation of the highway or public right-of-way is in the public interest and shall enter an order validating the highway or public right-of-way as public or declaring it not to be public.**

...

(5) When a board of commissioners validates a highway or public right-of-way, it **shall cause the order validating the highway or public right-of-way**, and if surveyed, cause the survey to be recorded in the county records and shall amend the official highway system map of the respective county or highway district.

...

(7) This section does not apply to the validation of any highway, public street or public right-of-way which is to be accepted as part of a platted subdivision pursuant to chapter 13, title 50, Idaho Code.

I.C. § 40-203A (emphasis added).

The Idaho legislature made it abundantly clear that the commissioners were obligated to follow the procedures set forth in Idaho Code Section 40-203. The “shall” language in the

⁵ Appellants incorrectly direct this Court to antiquated and long since repealed law, the 1893 statute relating to road creation, asserting that “Idaho’s road creation statute has been largely unchanged since 1893.” See Appellant’s Brief, p. 7. To the contrary, the road creation statute has been completely overhauled and the relevant provisions of the Idaho Code are very specific regarding how roads can be created. See I.C. § 40-201 et seq.

statute is mandatory, and cannot be waived simply because county commissioners feel strongly about the status of the road. In this case, Appellants never initiated validation proceedings for Burch Lane and never laid it out on a county map or recorded its existence. To the contrary, Burch Lane went completely ignored by the Appellants until 2008 when Respondents changed the name from Old Sawmill Road to Burch Lane. There was simply no evidence presented to oppose Respondent's motion for summary judgment that would have raised any issues of fact regarding what attempts Appellants made to validate Burch Lane. Thus summary judgment was appropriate.

ii. Requirements for Proper Validation

Even if Appellants had attempted to validate Burch Lane, the validation would have been improper. In order to meet the requirements to validate a road as a public road, the statute requires that the petitioning party (county or highway district) to establish that the road was either (1) laid out and recorded; (2) located and recorded; or (3) used by the public for five years and maintained at the public expense. The code provides:

(1) The initial selection of the county highway system and highway district system may be accomplished in the following manner:

...
(3) Highways laid out, recorded and opened as described in subsection (2) of this section, by order of a board of commissioners, and all highways **used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners**, are highways. If a highway created in accordance with the provisions of this subsection is not opened as described in subsection (2) of this section, there shall be no duty to maintain that highway, nor shall there be any liability for any injury or damage for failure to maintain it or any highway signs, until the highway is designated as a part of the county or highway district system and opened to public travel as a highway.

(4) When a public right-of-way **is created in accordance with the provisions of subsection (2) of this section, or section 40-203 or 40-203A, Idaho Code**, there shall be no duty to maintain that public right-of-way, nor shall there be any liability for any injury or damage for failure to maintain it or any highway signs.

...

I.C. § 40-202 (emphasis added).

Although the statute contemplates that a road is public if it is “used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public”, the Idaho case law narrowly construes the statute and imposes stricter requirements for use and maintenance prior to allowing validation of a road as public.

In order to determine whether a road is deemed to be a public road pursuant to Idaho Code Section 40-202(3), the commissioners must consider the following: (1) the frequency of the public use; (2) the nature of the use; (3) the quality of the use; (4) whether the use was more than casual and desultory; (5) whether or not permission was granted for use; and (6) whether or not the use and maintenance was by agreement. *Roberts v. Swim*, 117 Idaho 9, 784 P.2d 339 (Ct. App. 1989). The burden is on the petitioner to establish that the road is a public road. *Cox v. Cox*, 84 Idaho 513, 519, 373 P.3d 929, 932 (1962).

In *Cox v. Cox*, an access road existed taking off from a county road. Where the access road left the county road, a gate and cattle guards had been maintained for several years, restricting access over the road. The plaintiffs brought an action against the defendant for trespass, and the defendant counterclaimed that the access road was public, or that she had a prescriptive right to use the access road. The trial court determined that the road was not a public road because the maintenance was sporadic and the gate limited access by the public, and the Supreme Court affirmed that finding.

In *Roberts v. Swim*, *supra*, the Court of Appeals confirmed the requirements in order to establish a public road under Idaho Code Section 40-202 and 40-203. The court held as follows:

The main factual issues subsumed by the question of whether a road may be declared a public roadway are the “frequency, nature and quality of the public’s use and maintenance of the road and the intentions of the landowners and county relevant to the use and maintenance.” **A showing must be made that the public’s use was more than only casual and desultory. Regular maintenance and extensive public use** are sufficient to establish the existence of the public status of the roadway. The maintenance of the road by a public agency and the use by the public must be for a period of five years. Such maintenance need only consist of work and repairs that are reasonably necessary; it need not be performed in each of five consecutive years nor through the entire length of the road. **The intention of the county in maintaining the road must not be merely to provide gratuitous aid to the landowner.**

Roberts v. Swim, 117 Idaho at 16, 784 P.2d at 346 (citations omitted) (emphasis added). In *Roberts*, the court confirmed that no public rights were established in the road in that case.

Furthermore, when dealing with the same validation issues, the court in *Burrup v. Stanger*, 114 Idaho 50, 753 P.2d 261 (Ct. App. 1988) stated as follows:

The remaining factual questions relate to the intentions of the landowners and of the county relevant to use and maintenance. Objective manifestations of intent include designating the road as a public highway by order of the proper public authorities; recording the road as a public highway by order of the board of county commissioners; and the regular maintenance of the road by public expenditure. **The facts must demonstrate that minor maintenance or snow removal, done by the public road crews, was not a mere gratuitous aid to the local landowners or citizens. Likewise, it must be shown that the public agency has not expressly agreed to maintain the roadway while continuing to recognize it as private, in exchange for certain, limited public use, thereby not intending to create or assert rights greater than those allowed in the agreement.** Correspondingly, it must be demonstrated that the public’s use of the road was not merely the result of permission given by the owner, as opposed to acquiescence of the owner. When the facts of use, maintenance and intention satisfy the above principles, the law under I.C. § 40-202 operates to make the road public.

Burrup, 114 Idaho at 53, 753 P.2d at 264 (citations omitted)(emphasis added).

Recently, this Court has held that “public status of a roadway can be established by **proof of regular maintenance and extensive public use**” so long as the elements set forth in *Burrup*

v. Stanger and Roberts v. Swim are met. *Ada County Highway District v. Total Success Investments, LLC*, 145 Idaho 360, 366, 179 P.3d 323, 329 (2008) (emphasis added).

In this case, Appellants failed to establish that Adams County ever maintained Burch Lane. Appellants further failed to establish that Burch Lane had extensive public use. To the contrary, the affidavits filed in opposition to Respondents' motion for summary judgment only establish that a few local landowners used Burch Lane, on occasion, to pick berries or go for walks in the forest. Not one single affidavit was filed to establish that the county had ever maintained Burch Lane and not one single affidavit was filed to rebut Respondents' characterization of Burch Lane.

iii. Maintenance at the Public's Expense is Required

Rather than providing evidence that would create a genuine issue of material fact, Appellants simply urge this Court to adopt a theory that the county need not show that it ever maintained Burch Lane because the case law of Idaho does not require it.⁶ Appellants rely on *State v. Berg*, 28 Idaho 724, 155 P. 968 (1916), to support this allegation. First and foremost, *State v. Berg* is a criminal case and should not be relied upon when determining the status of the law in this road case. (See *Carbon v. Moon*, 68 Idaho 385, 389, 195 P.2d 351, 355 (1948) (the facts in the criminal action did not apply to that particular road case). Moreover, the portion of *State v. Berg* relied upon by Appellants was based on a statute that has been amended several times over. (See *State v. Nesbitt*, 79 Idaho 1, 8, 310 P.2d 787, 794 (1957) ("It therefore follows that the law as it existed in 1893 and prior thereto, as to roads becoming such when so used for the prescriptive period of five years, cannot be applied herein."))

The current requirements for road creation under Idaho law have been set forth in detail above with Idaho Code Sections 40-202 and 203, and the extensive amount of case law that

⁶ See Appellants' Brief, p. 7.

succeeded *State v. Berg*. A board of commissioners only has such powers as are expressly or impliedly conferred upon it by statute. *Floyd v. Brd. of Comm'rs of Bonneville County*, 137 Idaho 718, 723, 52 P.3d 863, 868 (2002).⁷ Appellants proposition that maintenance need not be shown is simply *not* the law of Idaho today. Further, Appellants have failed to give any reasons to this Court why the current law regarding road creation should be reconsidered by this Court.

Similar to their argument regarding the plat, Appellants incorrectly assert that the district court “did not make specific findings of fact with regard to the use of the road.”⁸ Again, this appeal stems from an order granting summary judgment to Respondents. The district court was not in a position to make findings of fact and conclusions of law. The role of the district court was simply to determine as whether or not there were any genuine issues of material fact that would preclude summary judgment. For this reason, Appellants’ reliance on *Hodgins v. Sales*, 139 Idaho 225, 229, 76 P.3d 969, 970 (2003) is misplaced.⁹ The Appellants were required to set forth any genuine issue of material fact regarding the status of Burch Lane, its use, or the county’s maintenance through affidavits. (*See* I.R.C.P. 56). Appellants failed to do so. In fact, Appellants failed to produce any affidavits from county officials that the county maintained Burch Lane at any time prior to the filing of this lawsuit. The Appellants failed to produce any admissible evidence at summary judgment that would raise a genuine issue of material fact regarding Burch Lane. Thus, it was appropriate for the district court to enter an order granting judgment as a matter of law to Respondents, and that decision should be affirmed by this Court.

⁷ Appellants correctly recognize *Floyd* as the status of Idaho law, but Appellants fail to acknowledge that the law requires them to maintain Burch Lane in order for it to be properly validated.

⁸ See Appellants’ Brief, p. 8.

⁹ *Hodgins v. Sales* was a case that was tried before the district court, not a summary judgment case.

IV. ATTORNEYS' FEES AND COSTS ON APPEAL

The Idaho Appellate Rules 40 and 41 allow for an award of costs and attorney fees to the prevailing party. Attorney fees on appeal are appropriate under I.A.R. 41 if the appellate court is left without an abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation. *Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990). An award of attorney fees is appropriate if the appeal does no more than simply invite the appellate court to second-guess the trial court on conflicting evidence, or if the law is well settled and the appellant has made no substantial showing that the lower court misapplied the law, or on review of discretion, no cogent challenge is presented with regard to the trial judge's exercise of discretion. *Pass v. Kenny*, 118 Idaho 445, 449, 767 P.2d 153, 157 (Ct. App. 1990); *Blaser v. Cameron*, 121 Idaho 1012, 1018, 829 P.2d 1361, 1367 (Ct. App. 1991).

Furthermore, Appellants failed to provide an adequate record to challenge the district court's order granting summary judgment. Appellants did not provide the necessary affidavits to defeat Respondents' motion for summary judgment, and the affidavits they did file were full of inadmissible evidence.¹⁰ Failure to supply an adequate record on appeal results in an appeal not well grounded in fact. I.A.R. 11.1; *Read v. Harvey*, ___ Idaho ___, 209 P.3d 661,668 (2009).

In the case at bar, Appellants have brought this appeal to second guess the decision of the trial court and evidence presented to the district court in determining that Appellants failed to establish any genuine issues of material fact which would preclude summary judgment. Because Appellants have failed to provide any logical reasons why the district court's decision should be disturbed on appeal, and no relevant Idaho case law or statutes have been provided to support

¹⁰ Respondents filed their Motion to Strike the inadmissible portions of the Appellants' affidavits, however, the district court did not rule on that motion prior to granting summary judgment.

their allegations that the trial court misapplied the Idaho law with respect to this matter, this Court should find that Respondents are the prevailing parties on appeal, and award costs and attorneys' fees to Respondents accordingly.

V. CONCLUSION

The district court did not err when it granted summary judgment in favor of Respondents because there existed no genuine issues of material fact, and the district court properly determined that the access road was a private road as a matter of law.

Thus, Respondents respectfully request that this Court uphold the district court's decision.

RESPECTFULLY SUBMITTED this 13th day of August, 2009.

PICKENS LAW, P.A.

By: 
Terri R. Pickens, of the firm
Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of August, 2009, I caused to be served two true and accurate copies of the foregoing RESPONDENT'S BRIEF by placing the same in the United States mail, First Class, postage prepaid, to the following:

Richard Roats
Adams County Deputy Prosecutor
P.O. Box 9811
Boise, Idaho 83707



Terri R. Pickens

