6-14-2012

Armand v. Opportunity Management Co., Inc. Respondent's Brief 1 Dckt. 39445

IN THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT SIEGWARTH and SHARRI SIEGWARTH, Supreme Court No. 39445-2011
Plaintiffs/Appellants/Cross-Respondents

and

GUIDO ARMAND and SANDRA ARMAND,
Plaintiffs/Cross-Respondents

v.

EDWARD FELSING and LINDA FELSING, EDWARD BLANCHETTE and DEBRA BLANCHETTE, and MICHAEL SCHADEL and ROSEMARY SCHADEL,
Defendants/Respondents/Cross-Appellants

and

OPPORTUNITY MANAGEMENT CO., INC.
Defendant/Respondent

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County, Honorable Charles W. Hosack and Lansing L. Haynes, District Judges, Presiding.

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I. STATEMENT OF THE CASE

A. Nature of Case

Respondents/Cross-Appellants, Michael Schadel, Rosemary Schadel, Edward Blanchette, Debra Blanchette ("Shadels, Blanchettes"), Edward Felsing, and Linda Felsing ("Felsings") own property in a Kootenai County, Idaho, subdivision platted as Berven Bay Terrace II ("BBT II"). In July 2002, the Appellants/Cross-Respondents, Robert Siegwarth and Sharri Siegwarth ("Siegwarths"), and Cross-Respondents, Guido Armand and Sandra Armand (Armands), initiated this action to assert ownership rights in certain portions of the Respondents' residential properties in a subdivision plated as BBT II and an undeveloped lot, Lot 10[1] in Berven Bay Terrace ("BBT I") owned in common by the Respondents. Respondent, Opportunity Management Co., Inc. ("Opportunity"), is the immediate predecessor-in-interest in title to the BBT II properties owned by Schadels, Blanchettes and Felsings. When this action was commenced, Opportunity was fully divested of title to the subject property.

B. Course of Proceedings

This case originally came before this Court in *Armand v. Opportunity Management Co., Inc.*, 141 Idaho 709, 117 P.3d 123 (2005) ("*Armand I*") upon Siegwarths' and Armands' appeal of a summary judgment granted by the district court (Hon. John Mitchell presiding) to Felsings, Schadels, Blanchettes, and Opportunity dismissing each of the Armands' and Siegwarths' claims with prejudice. On appeal, this Court vacated the trial court's entry of summary judgment and remanded the case for a trial on the merits.

Following remand, a five (5) day court trial beginning February 5, 2007, was held on the real property claims of Siegwarths and Armands (Hon. Charles Hosack presiding). In its *Memorandum Decision* filed June 22, 2007, the trial court quieted title to the BBT II properties to Schadels, Blanchettes, and Felsing, respectively subject to an access easement declared to be appurtenant to the Appellants' and Armands' respective properties for "lake access." (Aug. R. at

[1] Lot 10, BBT I, is also known and referenced as Lot 8, BBT II, and Parcel A, BBT II. (Aug. R at 6).

88-137)[2]. In its June 2007 decision, the trial court did not fix the location or scope of the declared easement.

Subsequently, the trial court granted the Respondents' motion to amend the trial court's findings of fact, and scheduled an evidentiary hearing for May 28, 2008 for the sole purpose of determining the scope and location of the declared easement. Following this evidentiary hearing, the trial court issued its *Supplemental Memorandum Decision* in which it generally defined the scope of the easement but did not fully determine its location over Respondents' properties. (Aug. R. at 138-60).

On May 28, 2009, the Siegwarths filed their second appeal in this action. (R. at 158-77). On May 11, 2010, this Court entered an *Order* dismissing the appeal as being premature "until such time as a judgment defining the location of the easement benefitting lots 3 and 5 is entered by the trial court."

In accordance with its *Supplemental Decision*, on September 24, 2010 the trial court (Hon. Benjamin R. Simpson presiding) issued an order appointing a Master for the purpose of defining the location of the access easement. On June 30, 2011, an *Amended Judgment* was entered adopting the legal description of the access easement as proposed by the court-appointed Master. (39445-2011 R at 107-47) (Hon. Lansing Haynes presiding). On November 29, 2011 Siegwarths file a third notice of appeal. (39445-2011 R. at 443-50). In response, the Respondents have cross-appealed the trial courts' award of an access easement.

C. Statement of Facts

This Court's decision in *Armand I* arose from an appeal of summary judgment granted to the Respondents. When it decided *Armand I*, this Court did not have a complete factual or real property/title record before it. The evidentiary proceedings subsequently conducted by the trial court have developed a factual record that is essential to the proper and just disposition of this case. To the extent they disagree with the statement of facts cited by the Siegwarths, Respondents direct this Court to the following:

[2] Unless otherwise specified, references to the Clerk's Record shall refer to that previously prepared in Supreme Court No. 36557-2009.

1. On August 10, 1980, Avondale on Hayden, Inc. conveyed a parcel of real property lying "south and east of the existing county road" in Section 7, Township 51 North, Range 3 West Boise Meridian, Kootenai County, Idaho, ("Section 7 property") to Kermit D. Petersen and Katherine M. Petersen, husband and wife, Donald H. Klages and Violet Klages, husband and wife ("Petersens and Klages"). (Ex. P; Tr. p. 883-84);

2. On June 22, 1981, North Idaho Properties, Inc. conveyed Lot 35, Wright's Park, Book of Plats C, Page 71, Records of Kootenai County, Idaho, ("Lot 35") to Michael Smith and Gwen Smith, husband and wife ("Smiths"). (Ex. Q);

3. Petersens and Klages recorded a forfeiture of an option granted to Smiths to acquire the Section 7 property in May 1984. (Ex. W);

4. The Smiths recorded a plat of the real property described in Exhibits P and Q as the Berven Bay Terrace ("BBT I") on September 7, 1984. (Ex. 79.2; Tr. pp. 615-18). A portion of the description of the real property in the "Owners [sic] Certification" on the BBT I plat states:

> Description: Lot 35 of Wright's Park Addition, Section 18, T51N, R3W B.M. [hereafter "Lot 35"] **and that portion of the SW1/4 SE1/4 SE1/4 Section 7, T51N, R3W,B.M. that lies south of the public roadway knows as Lakeview Drive** and further described as follows: . . . (Emphasis added).

The North Line of Lot 35 is depicted on the BBT I plat running through the circular designation of Lot 8 thereon.

5. Smiths never acquired title to the Section 7 property described in Exhibit P included in BBT I. (Tr. at pp. 876-877, Lns. 19-20; 880-888; Exs. A-P, W);

6. The vested owners of the Section 7 property at the time the BBT I plat (Exhibit 79.2) was recorded, Klages and Petersens, or their successors-in-interest, did not sign, acknowledge or consent to the BBT I plat. (Tr. at p. 286);

7. Lot 10, BBT I (Lot 8, BBT II), was not designated as a "common area" on the BBT I plat. (Ex. 79.2);

8. Smiths granted deeds of trust on two parcels of Lot 35 in May 1981 which became Lots 1 and 2 of BBT I. (Exhibits R, U, V, S, T, Z; Tr. Pp. 633-635). The beneficiary, The Idaho First National Bank ("Bank"), of these deeds of trust ultimately foreclosed on them and acquired title to these parcels. (Exhibits R-U);

9. In March 1985, Smiths quitclaimed their remaining title to Lot 35 to Petersens and Klages. (Exhibit 79.5, EE);

10. Petersens and Klages recorded the Berven Bay Terrace II ("BBT II") plat on August 21, 1985. (Exs. 75.6). It included the Section 7 property and the remainder of Smiths' Lot 35 property;

11. In June 1984, Smiths conveyed a parcel in what was to be the BBT I property to John Schafhausen Trust ("Schafhausen Deed"). It contained a carefully drafted, restricted statement granting use to owners of BBT I of only the "Lake Frontage" of Lot 10 of the proposed BBT I subdivision for access to the lake, but no dedication of Lot 10, BBT I, as a common area. (Ex. 79.3) (Emphasis added);

12. Mark Schafhausen, acquired title from the Bank to what became Lot 2, BBT I in July 1984 and subsequently consented to the BBT I plat in 1991. (Exs. 75.4, S, T, Z, VVVVV; Tr. p. 635);

13. Knut Eie acquired title from the Bank to what became Lot 1 of BBT I in May 1984. (Exhibits R, U, V, 11.7; Trans. 633-635);

14. Petersens and Klages conveyed certain lots in BBT II to Klages in 1986. (Exs. GG, HH);

15. Klages and Petersens conveyed portions of BBT II to Petersens and James Hedberg and Margie Hedberg in July 1989. (Exhibits LL, MM, II – KK);

16. Then in July 1989 Hedbergs and Petersens conveyed their titles to certain parcels in BBT II to Larry Blankenship. (Exhibits NN, OO);

17. In 1990, Klages conveyed their remaining lots in BBT II to Blankenship. (Ex. QQ);

18. Lot 2 of BBT I was conveyed by Mark G. Schafhausen to Cross-Respondents Armands in 1991. (Ex. RR);

19. Lot 1 of BBT I was conveyed by Eie to Siegwarths, recorded January 24, 1990. (Ex. 11.8);

20. In 1996, Blankenship conveyed an 85% interest in his title to the BBT II property to Opportunity Management Co., Inc. ("Opportunity"). (Ex. VV);

21. In 1997, Blankenship and Opportunity terminated the easements on the BBT II plat. (Exs. XX and YY);

22. In 1997, Respondents Schadel acquired title to their BBT II property from Blankenship and Opportunity. (Ex. ZZ; Tr. P. 641). Exhibit ZZ includes an undivided interest in Lot 8, BBT II;

23. In 1999, Blankenship conveyed his interest in the remaining BBT II property to Opportunity. (Ex. BBB);

24. In 1999, Respondents Blanchette acquired title to one of their two BBT II parcels from Opportunity. (Ex. CCC). Exhibit CCC includes an undivided interest in Lot 8, BBT II;

25. In 1999, Respondents Felsing acquired title to their BBT II parcel from Opportunity. Ex. DDD, Tr. P. 652). Exhibit DDD includes an undivided interest in Lot 8, BBT II;

26. In 2001, Respondents Blanchette acquired title to their second BBT II parcel from Opportunity. (Ex. EEE, Tr. Pp. 641-643). Exhibit EEE includes an undivided interest in Lot 8, BBT II;

27. At all times, Schadels, Blanchettes, and Felsings have owned and been assessed property taxes by Kootenai County for the properties they own in BBT II, including Lot 8, BBT II. (Tr. pp. 249-268; 951-968; Exs. OOO, QQQ);

28. On November 2, 1998, judgment was entered in the US District Court for Utah, Case No. 2:96 CR 0256-006, convicting Michael Smith of felonies for conspiracy, mail fraud, and wire fraud crimes. (Ex. 79.7);

29. There is no evidence that the Siegwarths were assessed or paid taxes on Schadels', Blanchettes', or Felsings' properties in BBT I. (Tr. pp. 249-268; 951-968) (Exs. OOO, PPP, QQQ);

30. Siegwarths (the current Appellant) and Armands did not purchase Lots 1 and 2 in BBT I (their initial lots) from Smiths or John Schahausen;

31. No evidence was presented at trial regarding any discussions, contacts, requests, or statements made by or attributable to Knute Eie, for any purposes or inferences. Siegwarths' claim on page 7 of their Brief that "Eie was not asked to execute a consent", is not supported by the record, nor do Siegwarths cite the record for this statement. No evidence was presented at trial regarding any reliance by Eie on any statement or representations made by Michael Smith, or anyone, and there were no "documents of record" when Eie purchased what became Lot 1 of BBT I. Knute Eie did not testify at trial;

32. No evidence was presented at trial regarding Klages' knowledge of BBT I or Mr. Smith's intentions for the same. There is no evidence Mr. Smith had any discussions with the Klages. (Tr. p. 290).

33. Respondents Blanchette, Schadel, and Felsing, provided evidence of title to the properties quieted to them in the Judgment. (Tr. pp. 640-643, 653; Exs. ZZ, YYY, CCC, DDD, EEE);

34. Until Respondents made improvements to Lot 8, BBT II, it was wild and unimproved. (Tr. pp. 364, ls. 4-15; pp. 506-507, 779-781, 791-792, 905-906);

35. Siegwarths produced no clear, satisfactory, and convincing evidence that they acquired title to Lot 10, BBT or any of Schadels', Blanchettes, or Felsings' properties; and

36. Siegwarths filed a claim on their title insurance policy for loss of their interest in the "common areas" of BBT I within BBT II and received a post-trial arbitration award in December 2007 for their "loss." (Tr. pp. 178-195).

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

Q. Whether the trial court properly granted and located easements to Cross-Respondents Armand and Siegwarth over Lot 8, Berven Bay Terrace II.

R. Whether Siegwarths are judicially estopped from asserting claims to the "common areas" of Berven Bay Terrace I within Berven Bay Terrace II.

S. Whether the Respondents are entitled to an award of their costs and fees pursuant to Idaho Appellate Rules 40 and 41, Idaho Code §§ 12-107 and 12-121.

III. ARGUMENT[3]

A. Standard of Review

Most recently, this Court restated that a trial court's findings of fact are to be reviewed under a "clearly erroneous" standard. *Carpenter v. Turrell*, 148 Idaho 645, 648-49, 227 P.3d 575, 578-79 (2010). In doing so, this Court stated:

> When a bench trial has been conducted, the court's findings of fact should not be disturbed unless they are clearly erroneous. In determining whether a finding is clearly erroneous this Court does not weigh the evidence as the district court did. The Court inquires whether the findings of fact are supported by substantial and competent evidence. This Court will not substitute its view of the facts for the view of the district judge. Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact had been proven.

Id., (citations omitted). This deferential standard of review is based upon the policy that "it is the province of the trier of fact to weigh conflicting evidence and testimony and to judge the credibility of witnesses." *Ervin Construction Co. v. Van Orden,* 125 Idaho 695, 699, 874 P.2d 506, 510 (1993). With this in mind, "the trial court's findings of fact will be liberally construed in favor of the judgment entered." *Id.* Accordingly, this Court has reminded our appellate courts not to substitute their view of the facts for that of the trial court. *Justad v. Ward,* 147 Idaho 509, 511, 211 P.3d 118, 120 (2009). In the absence of genuine issues of fact, strict questions of law are freely reviewed. *Carpenter*, 148 Idaho at 649, 227 P.3d at 579.

[3] Respondents note that the Issues Presented on Appeal as outlined in Siegwarths' Brief does not match or track those issues addressed in the Argument section. For the sake of clarify, Respondents will address the issues raised by Siegwarths in the same order as they are addressed in their Argument Section.

Throughout Siegwarths' brief, they mischaracterize and misapply the standard of review on questions of fact. This Court's decision to reverse or affirm does not depend on whether Siegwarths can select evidence from the record that may support their positions on questions of fact. Rather, it was incumbent upon the Siegwarths to demonstrate that there was **not** substantial and competent evidence in the record to support the trial court's decision, or that the factual evidence before the trial court was so lacking in persuasive value that a "reasonable mind" could not accept that evidence "as adequate to support the district court's conclusions." For instance, in the trial court's memorandum decision, it carefully and painstakingly analyzed and discussed the conflicting evidence, and made findings based upon its consideration of all the facts. In their brief, Siegwarths merely point out conflicting evidence presented at trial, ask this Court to reweigh it, and then come to a different conclusion.

B. The "Law of the Case" Doctrine did not Bar the Trial Court From Conducting a Full Trial on the Merits.

Siegwarths contend that *Armand I* conclusively established that they were vested with title to the "common areas" of the BBT I plat. Relying on the "law of the case doctrine," they assert the trial court committed error by ignoring this authority. These comments were not necessary to this Court's previous decision and therefore can only serve as dictum. Further, these comments were derived from an undeveloped factual record, and therefore should yield to the trial court's findings founded on a developed factual record.

The "law of the case" doctrine provides when "the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal. *Taylor v. Maile*, 146 Idaho 705, 709; 201 P.3d 1282, 1286 (2009) (emphasis added). The doctrine is only limited to the appellate court's legal pronouncements and holdings necessary to decide the particular issue presented. *See Suitts v. First Security Bank of Idaho, N.A.*, 110 Idaho 15, 21-22, 713 P.2d 1374, 1381-82 (1985). It is similar to the doctrine of stare decisis, which requires that a statement of law be necessary to the *ultimate disposition of the case* in order to be binding on the lower courts. *See Petersen v.*

State, 87 Idaho 361, 393 P.2d 585 (1964); *see also City of Weippe v. Yarno,* 96 Idaho 319 528 P.2d 201 (1974). Statements of law which were not necessary to decide the particular issue are merely dictum.

This Court merely reversed the trial court's grant of summary judgment in *Armand I* in favor of the Respondents and then remanded this matter to the trial court for further proceedings - including a trial on the merits. As the record and transcript show, the trial produced many facts that were not in the record in *Armand I.*

In moving for summary judgment, I.R.C.P. 56 imposes no obligation that the movant present all its evidence in support of the motion. Rather, the moving party only bears the initial burden to show that there is no genuine issue of material fact. *Losee v. Idaho Co.,* 148 Idaho 219, 222, 220 P.3d 575, 578 (2009). Consequently, moving parties rarely present every fact and theory upon which it may recover or defend. Further, the factual record is limited to verified pleadings, depositions, admissions and affidavits. I.R.C.P. 56(c) and (e). The record following summary judgment is rarely as developed as that produced following a full trial on the merits. *Cf. Ada County Highway Dist. v. Smith,* 113 Idaho 878, 881, 749 P.2d 497, 500 (Ct. App. 1988) ("The scope of the show cause hearing was limited. ... By upholding the present order we impose no limitations on the trial court to accept further evidence of needed changes or refinements as might be necessary to protect the rights of the parties. ..., the court may take such evidence, make further findings and orders as are necessary to finally resolve this dispute.").

Siegwarths attempt to invoke the "law of the case doctrine" in this instance is not consistent with controlling authority of this Court and other sister jurisdictions. In *Beymeyer v. Monarch,* this Court sustained application of the law of the case doctrine only after a retrial where additional evidence introduced at the second trial was insufficient to change the weight of the evidence presented to the Court in the first appeal. 23 Idaho 292, 129 P. 919 (1913). Similarly, other jurisdictions have held that "law of the case" doctrine on all issues decided throughout subsequent proceedings does not apply if essential facts or issues change, evidence substantially changes, error in first appellate decision renders it manifestly erroneous or unjust, applicable law changes, the first decision is ambiguous or does not actually decide issues, or the

first decision is not on merits. *In re Eaton Enter. to Vacate Northwest 20th Street*, 65 P.3d 277 (Okla. 2003); *Bldg. Indus. Assn. v. City of Oceanside*, 33 Cal.Rptr.2d 137 (1994); *Dancing Sunshines Lounge v. Indus. Com'n of Arizona*, 149 Ariz. 480, 720 P.2d 81 (Ariz. 1986); *Star Rentals v. Seeberg Constr.*, 83 Or.App. 44, 730 P.2d 573 (1986). For these reasons, application of the doctrine is inappropriate in this case.

The substantial and significant factual record developed at trial dispatches any claim of dedication. Recently, this Court held that all owners of property within a subdivision plat must execute the dedication unless ratification by the non-signing owners can otherwise be demonstrated. *Saddlehorn Ranch Landowner's, Inc. v. Dyer*, 146 Idaho 747, 750-751, 203 P.3d 677, 679-680 (2009). More recently, this Court revisited the law of common law dedications. *Asbury Park, LLC v. Greenbriar Estate Homeowner's Ass'n, Inc.*, 152 Idaho 338, 271 P.3d 1194 (2012). In affirming the trial court's entry of summary judgment, the Court repeatedly stated that intent to dedicate must come from the "owners" of the land. *Asbury Park*, 271 P.3d at 1200-01.

In *Armand I*, this Court stated that:

> Thus, the unilateral actions of subsequent property owners re-platting part of the property into BBTII has no effect on the validity of the BBT plat and those areas designated as common areas. Therefore, Armands have a valid interest in the areas that are expressly designated as common areas on the BBT plat.

Armand I, 141 Idaho at 714, 117 P.3d at 128. While the unilateral actions of subsequent property owners re-platting subdivided property may not have any affect on a valid subdivision plat, the lack of Smiths' title to all the property in the BBT I plat does and should have an effect on the validity of that plat. If this Court held that Smiths' failure to comply with Idaho Code § 50-1309 did not prevent Smiths from dedicating common areas, then whatever "valid interest" Armands acquired in the "common areas" designated in the plat must arise from common law dedications, which the Court remanded for determination at trial.

The fully developed factual record introduced at trial on remand disclosed no factual basis to support a common law dedication. Rather, the evidence is clear that the Klages and Petersens, the prior owners of the Section 7 property, did not sign the BBT I plat, and they never

executed deeds with reference to the BBT I plat or otherwise ratified the BBT I plat. For this simple and fundamental reason, the Siegwarths' complaint that the trial court erred in refusing to give effect to the law of the case is ill-placed. It is well established that the law favors the full adjudication of parties' disputes.[4] Consequently, the trial court should not be faulted for adjudicating the parties' rights from a full and complete record, rather than blindly deferring to a putative "law of the case" premised on a limited and undeveloped factual record.

C. Smiths' Dedication of "Common Areas" in the BBT I Plat Was Ineffective.

The trial court's determination that Smiths' attempts to dedicate the land in Section 7 was defective was supported by substantial evidence. This can be readily demonstrated by the vast differences between the limited record before this Court in *Armand I* and the present trial record.

First Appeal	Trial Record
"In 1980, Michael and Gwen Smith were the owners of a large parcel of land near Hayden Lake, Idaho, described as Lot 35 of Wright's Park Addition. Smiths desired to develop the property into a subdivision called Berven Bay Terrace (BBT)." *Armand I.*, 141 Idaho at 712.	There is no evidence that the Smiths ever acquired title to the Section 7 property contained in the BBT I plat. (Tr. at pp. 876-877; Exs. A-P, W). Smiths only held title to Lot 35 in the BBT I subdivision. - Section 7 contains the "statutory dedication" areas.
"Moreover, none of the lot owners within the plat at the time it was recorded have ever expressed any disagreement with the plat and in fact, fully supported the plat of BBT as it was recorded in 1984." *Armand I*, 141 Idaho at 714.	At the time the BBT I plat was recorded, Section 7 was owned by the Klages and Petersens. (Tr. at pp. 876-877; Exs. A-P, W). There no evidence of their agreement or support for the plat. Once Smiths' option lapsed and they received a deed of Smiths' remaining interest in Lot 35, they proceeded to replat the property as BBT II. (Ex. 75.6)

In Idaho, each owner desiring to create a subdivision must comply with the platting requirements contained in chapter 13, title 50, Idaho Code. I.C. § 50-1302 provides:

> Duty to file – Every owner creating a subdivision . . . shall cause . . . a plat made thereof which shall particularly and accurately describe and set forth all the

[4] The trial court considered Siegwarths' "law of the case" argument on a number of occasions: in oral argument on motions for summary judgment (Tr. p. 130); in a written order denying summary judgment; and throughout its memorandum decision (Aug R. at 88-137).

> streets, easements, public grounds, blocks, lots, and other essential information, and shall record said plat. This section is not intended to prevent the filing of other survey maps or plats. . .

(emphasis added). "Owner" is defined as "the proprietor of land, (having legal title)." I.C. § 50-1301(5). The BBT I plat was only executed by the Smiths. At no point in time have the Smiths held title to the Section 7 property described in the BBT I plat. (Tr. at pp. 876-877; 880-888). For that fundamental reason, the BBT I plat did not comply with Idaho Code § 50-1302.

Respondents urge this Court to revisit *Armand I* to the extent it stands for the proposition a common law dedication may be effective despite signatures from each of the affected lot owners. As discussed in *Armand I*, I.C. § 50-1309(1) requires that all landowners sign the plat to perfect a statutory dedication:

> 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.

(Emphasis added). Because a dedication of land is the creation of an interest in land, it is essential that the dedicator have title to the dedicated property under either the statutory or common law dedication theories.

Siegwarths fail to appreciate that they did not properly meet their burden at trial and demonstrate a prima facie case of a common law dedication. As aptly noted in *Armand I*, common law dedication requires: (1) an **offer by the owner** clearly and unequivocally indicating an intent to dedicate the land and (2) an acceptance of the offer. *Armand I,* 141 Idaho at 714-715, 117 P.3d 128-129 (emphasis added). Since Smiths did **not** own the Section 7 property, it follows that they could not effectively dedicate common areas in the Section 7 portion of BBT I. *Ashbury Park,* (supra), *Saddlehorn Ranch Landowner's, Inc.*, (supra); *Farrell v. Board of Com'rs, Lemhi County*, 138 Idaho 378, 384-385, 64 P.3d 304, 310-311 (2002) (Miners had no ownership interest in the unreserved federal land. Therefore their petition for dedication and quitclaim deed

did not create a valid common law dedication.) (Attorney fee application portion of decision overruled in *City of Osburn v. Randel*, 2012 WL 1434339 (Idaho Apr 26, 2012)).

To address the obvious shortfalls caused by Smiths' lack of title, Siegwarths attempt to analogize Smiths' optionee interest to that of a mortgagor[5]. This argument too, however, fails from both a legal and factual standpoint. A mortgagor has both a possessory and legal interest in the real property that is mortgaged. Title is "of record" and held by the mortgagee, subject to the terms of the mortgage. An optionee, however, acquires no interest in the real property until the option is exercised. *Ingle v. Perkins,* 95 Idaho 416, 510 P.2d 480 (1973); *Sutheimur v Stoltenbert* 127 Idaho 81, 85, 896 P.2d 989, 993 (Ct App. 1995). *Chain O'Mines, Inc. v. Williamson et al.*, 101 Colo. 231, 72 P.2d 265 (1937). An option is merely an offer, and does not convey to, nor invest in, the optionee a present estate in the land, until it is exercised. *Groth v. Continental Oil Company*, 84 Idaho 409, 373 P.2d 548 (1962).

The trial court properly found Smiths' option was not of record, nor was there any evidence that it was ever exercised. (Exs. W, 79.5) Additionally, evidence was introduced that the option was forfeited, and the Smiths and Larry Anderson subsequently quitclaimed any interest in the real property to Klages and Petersens. (Exs. DD, 79.4 and 79.5). Thus, Siegwarths' extensive argument that mortgagors can dedicate mortgaged real property must be rejected as irrelevant.

Finally, Siegwarths' argument that the Klages and Petersens should be estopped from asserting title to the Section 7 property should likewise be rejected. To prevail on a quasi-estoppel theory, the claimant must show:

> (1) the offending party took a different position than his or her original position, and (2) either the offending party gained an advantage or caused a disadvantage to the other party, the other party was induced to change positions, or it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.

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[5] Siegwarths also argue Eie, Siegwarths' predecessor-in-interest, purchased Lot 1 before the forfeiture was recorded. *App. Brief*, p. 20. That fact is immaterial as Eie's lot was not in the Section 7 property. Moreover, the property was conveyed to them pursuant to a metes-and-bounds description, rather than reference to the BBT I Plat. At the time of conveyance, the BBT I Plat had not been recorded. Finally, Siegwarths produced no evidence to demonstrate Eie otherwise relied or was aware of the intent to dedicate.

Mortensen v. Stewart Title Guar. Co., 148 Idaho 437, 441, 224 P.3d 499, 508 (2010). In *Thomas v. Arkoosh Produce*, the Supreme Court said:

> Silence generally cannot be relied on to support estoppel. The Court of Appeals has held that quasi-estoppel may arise when a party who has a duty to speak fails to do so and thereby produces an advantage for himself, or a disadvantage for someone else, which is unconscionable.

137 Idaho 352, 358, 48 P.3d 1241, 1247 (2002). Siegwarths' assertion primarily hinges on the conclusory statement by Michael Smith, that the Petersens "may have had actual knowledge" of his development plans. (See pages 20 – 21 of Seigwarths' brief; cf. Tr. 290, 294). The trial court disagreed and, in addition, there was no evidence that Klages (one of the owners of the Section 7 property) knew anything of Smiths' intentions. The trial court weighed and considered the evidence and found a failure of proof. (Aug. R. 103 – 104). Seigwarths' citations to the transcript, pages 286 and 294, do not support their argument. Regardless, this speculative testimony is irrelevant and contradicted by the declaration of forfeiture, Smiths' deed to Klages and Petersens, and replatting of the Section 7 and remaining Lot 35 property subsequently undertaken by the Klages and Petersens. (Exs. W, 79.5, 75.6). Furthermore, Smiths quitclaimed the Section 7 and remaining Lot 35 property to Klages and Petersens thereby extinguishing any possible estoppel claim. (Ex. 79.5). As the trier of fact, the trial court was therefore justified in rejecting Siegwarths' argument for a want of evidence.

D. The Trial Court did not Err in Determining that the Smiths Failed to Dedicate the Remnant Pieces of Common Areas Lying Within Section 18 [Lot 35].

Despite Smiths' lack of title to the Section 7 property, Siegwarths attack the trial court's determination that the remnants of the common areas designated in BBT I lying solely within Section 18 [Lot 35][6] were incorporated into the BBT II plat. (Aug. R. at 117-119). At best,

[6] The vesting deed to Smiths, Exhibit Q, described what would become the sourthern portion of Berven Bay Terrace as "Lot 35 of Wright's Park Addition, Book of Plats C, ...". The reference to said Lot 35 in "Section 18, T51N, R3W B.M." appeared in the BBT I plat, Exhibit 79.2, Siegwarths referred to the subject property as "Section 18." Respondents refer more accurately to the same property as "Lot 35."

Siegwarths' evidence of dedication is equivocal. For this reason, the trial court correctly held the remnants were not properly dedicated.

An offer for dedication of land must be clear and unequivocal, thereby indicating the owner's intent to dedicate the land. *Saddlehorn Ranch Landowner's, Inc.*, supra. The burden of proof is on the party alleging that the landowner's act or omission manifested an intent to dedicate the land for public use. *State ex rel. Haman v. Fox,* 100 Idaho 140, 146, 594 P.2d 1093, 1099 (1979). "The intent of the owner to dedicate his land to public use must be clearly and unequivocally shown and must never be presumed." *Id.* 100 Idaho at 147, 594 P.2d at 1100. "In determining the intent to dedicate, the court must examine the plat, as well as the surrounding circumstances and conditions of the development and sale of lots." *West Wood Investments, Inc. v. Acord,* 141 Idaho 75, 87, 106 P.3d 401, 413 (2005). In *West Wood Investments, Inc.,* this Court noted that "a general referral to [a] potential common area" does not meet "the requirement of a clear and unequivocal intent to dedicate land for a certain use." *Id.*

The failure of Klages and Petersens, the legal owners of record, to join in the dedication in the BBT I plat destroys any basis for dedication of common areas anywhere within that plat under the authority of *Saddlehorn.* If the dedication and owners' certificate in BBT I plat are impeached, as they are by the lack of participation from Klages and Petersens, then the BBT I plat is nothing more than a recorded survey. Even if this Court were to find that the BBT I plat was nevertheless effective to dedicate common areas in the Lot 35 portion of BBT I, the trial court acted properly in considering the locations and purpose of the "common areas" under the *West Wood Investments* and *Saddlehorn* decisions. In sum, the totality of the evidence certainly supports the trial court's conclusion that Siegwarths failed to demonstrate a dedication of these small parcels by clear and unequivocal evidence. (Aug. R. at 118).

Therefore as to the Section 7 property, the BBT I plat is a "wild" instrument to the extent it was recorded by a stranger to title, and did not provide constructive notice to intending purchasers. *Harris v. Reed*, 21 Idaho 364, 121 P. 780 (1912); *Jackson v. Lee*, 47 Idaho 589, 277 P. 548 (1929); *Hunt v. McDonald*, 65 Idaho 610, 149 P.2d 792 (1944).

E. Substantial Evidence Supports the Trial Court's Determination that Siegwarths Failed to Meet their Burden of Demonstrating Prior Use.

As noted at the outset, a review of the trial court's decision following a bench trial will be limited to a determination of whether the evidence supports the trial court's findings of fact, and whether those findings support the conclusions of law. *Oregon Mut. Ins. Co. v. Farm Bureau Mut. Ins. Co. of Idaho*, 148 Idaho 47, 50, 218 P.3d 391, 394 (2009). The trial court's findings of fact must be liberally construed in favor of the judgment entered, as it is within the province of the trial court to weigh conflicting evidence and testimony and judge the credibility of witnesses. *Id.* The mere presence of conflicting testimony is not enough to create reversible error on appeal. *Panike & Sons Farms, Inc. v. Smith*, 147 Idaho 562, 565-66, 212 P.3d 992, 995-996 (2009). Rather, only erroneous findings will be set aside. *Id.*, 147 Idaho at 565, 212 P.3d at 996.

In the present case, the trial court's finding that the Siegwarths did not meet their burden of showing open, notorious, continuous use of Lot 8/10 is supported by the evidence. Siegwarths call the testimony of Respondents' witnesses "conflicting and muddled," yet they cite to no conflicting testimony, and the testimony they selectively cite to is quite clear: the Respondents did not witness any recreational use of the property by Siegwarths, and in fact there was no indication of human activity on the property. (Tr. p. 780, L. 21 – p. 781, L. 6; p. 809, ls. 9-11; p. 945, ls. 10-13). Further, the bulk of the testimony indicates that there was heavy foliage on the property, blocking access to the beach; even Robert Siegwarth, one of the Siegwarths, admitted that the property was full of scrub brush, buck brush and various plants and trees, referring to the property as "wild." (Tr. p. 507, ls.14-19, pp. 364, 506-507, 779-781, 791-792, 905-906.)

While the testimony of Siegwarths' and Respondents' witnesses may have been conflicting at times, this is not enough to overcome the trial court's findings of fact. There was substantial evidence introduced at trial to support the trial court's finding that Siegwarths did not meet their burden of showing open, notorious and continuous use of Lot 8/10.

F. I.C. § 50-1309 Was Not Erroneously Applied.

The trial court properly applied the requirements of I.C. § 50-1309 when analyzing whether the BBT I Plat met the statutory requirements for dedication of the putative common

areas depicted therein. As previously outlined, each property owner[7] desiring to subdivide must cause a plat to be made, which accurately describes and sets forth the streets, easements, public grounds, blocks, lots, etc. I.C. § 50-1302. Similarly, I.C. § 50-1309(1) requires that each owner: (1) sign a certificate containing the correct legal description of the property with a statement that it is the owner's intention to include the described premises in the plat; and (2) make a dedication of all public streets and rights–of-way shown on the plat. (emphasis added)

As aptly noted by the trial court, I.C. § 50-1309 does not restrict compliance to only those subdivisions containing a public dedication. Rather, the statute simply requires that if public streets or rights-of-way are shown on the plat, then they must be accompanied by a statement of dedication. Thus, the other requirements of I.C. § 50-1309(1), that the owners of the property sign a certificate with the legal description of the property and a statement of intention to include those premises in a plat, is not dependent upon there being a public dedication in the instrument.

Indeed, as is seen in this case, neither BBT I nor BBT II contains any dedication of public streets or rights-of-way. Yet, of course, both are "plats" and both contain the required certificates along with legal descriptions and statements of intention to include the land described (represented to be owned by the signatory platters) as part of the plat.

The trial court concluded that I.C. § 50-1309 reflected a legislative policy that one subdividing and creating a plat should be required to certify that he or she is the actual owner of the property. (Aug R. 102). And, the court reasoned, this amounts to no more than a technical restating of a fundamental tenet of property law—if one does not own Blackacre, one cannot unilaterally subdivide Blackacre. (Aug. R. at 102).

The trial court found that the Smiths who signed the BBT I plat certification, did not own the northerly portion of the plat lying within Section 7. (Aug. R. at 103). For this reason, it then considered whether the true owners had nevertheless consented to the plat. Due to the Siegwarths' failure to properly meet this burden, the trial court correctly found that there was no evidence that the true owners of the Section 7 property contained within the plat even knew

[7] Defined as being "the proprietor of land, (having legal title)." I.C. § 50-1301(5).

about the plat, much less consented to it. (Aug. R. at 105). As such, the trial court correctly held that the BBT I plat, as to the ground contained in Section 7, was invalid. (Aug. R. 106).

In their brief, Siegwarths argue that if I.C. § 50-1309 is deemed to require all owners to sign a plat, the Court erred in failing to conclude that they were in turn required to sign the BBT II plat. However, the BBT II plat does not include property in which the Siegwarths established they held title. Therefore, they were not "owners" of the real property in BBT II and their signatures are not required.

G. The Trial Court did not Err in Allowing Respondents to Object to Plat.

In strained fashion, Siegwarths assert Respondents were time-barred from raising any challenges to the BBT I Plat. Siegwarths' sole reliance on *Curtis v. City of Ketchum* is misplaced. 111 Idaho 27, 33 (1986). *Curtis* only stands for the proposition that a party must comply with the time limitations imposed by chapter 65, title 67, Idaho Code, when seeking to challenge adverse zoning decisions. Had the Respondents been seeking to challenge the City of Hayden Lake's decision to approve the BBT I Subdivision, *Curtis* might be applicable in Siegwarths' argument.

Siegwarths claim that the BBT I plat gave them an interest in Respondents Schadels', Blanchettes' and Felsings' properties. Their claim was denied because they could never establish their right or title to Respondents' properties. Respondents Schadel, Blanchette, and Felsing established prima facie evidence of titles to their properties which were quieted by the judgment. Therefore, the limitations discussed in *Curtis* are entirely inapplicable to the facts of this case, and the Respondents' challenges to the BBT I plat were both proper and timely raised

As previously noted, the subdivision plat process is governed by chapter 13, title 50, Idaho Code. There is no authority in that code section to support the proposition that the mere filing of a plat creates a presumption of ownership of the described property. As evidenced by the facts of this case, Smiths were able to record the BBT I plat without proving they owned the property encompassed within the plat. A rule barring an owner of property from challenging an adverse claim to the owner's title based on a fatally defective subdivision plat would be unjust.

H. The Site View Was Properly Conducted and Cannot Constitute Reversible Error.

In summary fashion, Siegwarths take issue with the trial court's visit of the subject property. Although it is not entirely clear, it appears they only take issue with the manner in which the visit was conducted. In any event, Siegwarths cannot demonstrate the court's decision to conduct a visit was adequately preserved for appeal[8]. *Houston v. Whittier*, 147 Idaho 900, 911, 216 P.3d 1272, 1283 (2009).

The trial court's conduct of the view is governed by Rule 43(f), which broadly provides:

> During a trial, the court, in its discretion, may order that the court . . . shall have a view of (1) the property which is the subject of the action, . . . A view by the court shall be conducted personally by the court after notice to all parties. Counsel shall have the right to be present at any view by the court . . .

The judge's viewing and inspection may properly be considered by him in determining the weight and applicability of such evidence. *Uhrig v. Coffin*, 72 Idaho 271, 274, 240 P.2d 480, 481 (1952). This Court has previously held where the trial court personally views property that is the subject of litigation, but makes its findings of fact on exhibits and evidence in the record, then all findings will be supported by substantial and competent evidence. *Akers v. Mortensen*, 147 Idaho 39, 48, 205 P.3d 1175, 1184 (2009); *Weitz v. Green*, 148 Idaho 851, 859, 230 P.3d 743, 751, n. 4 (2010).

Again, it was Siegwarths' burden to specify to this Court which findings of fact they contend are not supported by the evidence. *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010) ("A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue."). This Court will not search the record for error. *Id.* In support, Siegwarths generally cite to pages 123-128 of the Augmented Record. For this reason, Siegwarths should be deemed to have waived this issue on appeal. *McLean v. Dawson*, 2012 Opinion No. 87 (Idaho, 6/1/2012).

It is clear from reading the court's decision that the trial court did not rely on his inspection, but based his findings of fact on the totality of the testimony and exhibits offered at

[8] As Siegwarths are aware, the trial court advised the parties of its intention to conduct a view. Subsequently, nobody objected to the courts' intention to view the property at issue.

trial. (Aug. R. at 088 – 137). In its Memorandum Opinion, the trial court briefly mentions the site visit and only does so to explain the testimony and evidence analyzed. The site visit was appropriate and Siegwarths show no unfair harm or abuse of discretion. There is no reversible error. I.R.C.P. 61.

I. There is No Evidence Supporting Appellant's Putative Ownership in Lot 10.

Siegwarths take issue with the trial court's determination that they only had a right to use Lot 10 for "lake access." However, the evidence does not establish they have even that.

This Court recently said:

> In a case of this nature, where a party asserts ownership over a strip of land shown by property records to be titled to a neighbor, we start with the assumption that the property records are correct. A party with title to the disputed property is presumed to be the legal owner of the property. *Teton Peaks Inv. Co., LLC v. Ohme,* 146 Idaho 394, 397, 195 P.3d 1207, 1210 (2008). "Another person who claims ownership to that property must establish the claim by clear, satisfactory, and convincing evidence." *Id.*

Huskinson v. Nelson, 152 Idaho 547, 272 P.3d 519, 522 (2012).

The deeds to the Respondents of Lot 8, BBT II [Lot 10, BBT I] established prima facie evidence of their title to "Lot 10" [BBT I; Lot 8, BBT II]. (Exs. ZZ, CCC, DDD, EEE; Tr. 640-652.) Idaho law presumes the holder of **record title** to property is the legal owner of that property. *Luce v. Marble*, 142 Idaho 264, 270, 127 P.3d 167, 173 (2005). Another person who claims ownership to that property must establish the claim by clear, satisfactory, and convincing evidence. *Id.* Like Fenn in *Fenn v. Noah*, 142, Idaho 775, 780, 133 P.3d 1240, 1245 (2006), Siegwarths "took title to the property described in [their] deed, not the property [they] believed [they] possessed."

Siegwarths primarily rely upon the impeached testimony of Michael Smith regarding the language contained in the Schafhausen Deed. (Ex. 79.3). Despite this, no document evidenced such intent to grant title to any property within BBT II plat to Siegwarths or their predecessors in interest. The unambiguous language of the BBT I plat signed by Smiths does not grant title to

Lot 10 to any lot owner. Moreover, the Siegwarths have not introduced any deeds from the Smiths granting title to Lot 10 to their predecessors-in-interest.

The Schahausen Trust deed provided the "most clear and unambiguous [evidence] of Smith's [sic] intent." (Aug. R. at 131). That grant of any interest pertaining to Lot 10 was especially limited:

> The Grantor [Smiths] hereby agrees that the ***Lake Frontage*** **contained** in Lot 10 of proposed Berven Bay Terrace Subdivision **may be used** by the Grantee herein and its successors and assigns and by all other owners of lots in proposed Bervens [sic] Bay Terrace Subdivision for access to the Lake.

(Ex. 79.3) (emphasis added). As is readily apparent from the plain language, the deed states that only the "*Lake Frontage* contained in Lot 10 . . . may be used by the Grantee ..." – not the entirety or rest of Lot 10. If Smiths intended that *all* of Lot 10 was to be used as access to the lake, they could have so stated but did not. If Smiths intended to grant an easement encompassing all of Lot 10, they could have said so but did not.

Given the expansive statements of intent and magnificent plans espoused by Michael Smith and asserted by Siegwarths, the narrow scope of the "access" grant is remarkable. If anything, the trial court's decision to award Siegwarths an easement across Lot 10 for "lake access" was overly broad and beyond the description in the Schafhausen Deed. In sum, Siegwarths have failed to demonstrate that they have any title or interest in Lot 10 by clear, satisfactory, and convincing evidence. (Aug R. at 88-137); *Huskinson v. Nelson.* 152 Idaho 547, 272 P.3d 519, 522 (2012).

J. Trial Court's Grant of "Lake Access" Easement to Siegwarths was Overly Broad.

This Court has said that the original dedicating owner's intent can be inferred only from the plat itself. *Smylie v. Pearsall,* 93 Idaho 188, 193, 457 P.2d 427, 432 (1969). Siegwarths rely heavily on the proffered testimony of Michael Smith regarding his "intentions" for the Berven Bay Subdivision. *Brief of Appellant, pp. 39-40.* Respondents objected to this testimony of Smith based on the parole evidence rule. *Trancript, pp. 265, 272, 275, 276, 278, 280, 1026.*

Michael Smith's testimony regarding intent is also contradicted by both the BBT I plat [which does not designate Lot 10 as a "common area"] and the Schafhausen Deed, and is best evidenced by the documents that he signed. This Court's decision in *Ponderosa Home Site Lot Owners v. Garfield Bay Resort, Inc.*, established that under Idaho law a dedication, whether express or at common law, creates an easement and because an easement is created by a private dedication, easement law must apply. 139 Idaho 699, 700, 85 P.3d 675, 677 (2004). The property in dispute in the *Ponderosa* decision was shown on the plat as an area marked as "lake access," which was a small piece of lakeshore property located between two lots within the subdivision. *Id.*, 139 Idaho at 700, 85 P.3d at 677. In this case, Lot 10 is not marked "lake access" on the BBT plat. In fact, there was no express designation of "lake access" anywhere on the BBT I plat.[9] Because the trial court determined that Siegwarths acquired an access easement based on the Schafhausen Deed over Lot 10 for lake access, based on Exhibit 79.3, the court had to determine the width and scope of the dedicated easement.

In situations where the grant is at best indefinite as to the particular location, width, and character of the easement, the practical construction placed upon it by the parties fixes the limits of the burden imposed upon the servient estate, and is the measure of grantee's rights under the easement. *Reynolds Irrigation Dist. v. Sproat*, 69 Idaho 315, 334, 206 P.2d 774, 786 (1949). The only specification in the trial evidence for access to the lake frontage provided by Smiths was the 10' wide corridor from the cul-de-sac and the westerly "common areas" to the "public access road" shown on the BBT I plat. (Ex. 79.2). The trial court noted testimony from Mark Schafhausen that he used the designation of the common areas of the BBT I from the westerly common area to the cul-de-sac and the ten foot wide corridor for trail access to the lake frontage. (Aug R. at 114, 130). While the judge found no need for the common areas in Section 7 for access to Lot 10, their designation on the BBT I plat evidenced Smiths' intent that the access be through a designated corridor *around – not all over* Lot 10. (Aug. R. at 122, 127). This Court should interpret the plat like a deed and apply the plain provision of the plat if it is unambiguous.

[9] There is a "platted public road access" shown on Exhibit 79.2.

Kepler-Fleenor, 268 P.3d at 1164. Because Smiths did not designate any access easement across Lot 10, it must be inferred that access to the lake was the "Lake Frontage" - which is the intersection of the lake level with the land – not over Lot 10.

Siegwarths cite the decision of *Mountainview Landowners Co-op. Ass'n, Inc. v. Cool*, to argue that "lake access" includes "broad recreational use." 142 Idaho 861, 863, 136 P.3d 332, 334-335 (2006). There is an important difference between the *express* grant in the *Mountainview* decisions and the provision in the Schafhausen Deed. In *Mountainview*, the easements specified: "[a] perpetual *easement* is granted to the grantees, their heirs and assigns, *for the use of the beach* adjoining said Mountain View Addition, such use is to be common with the other owners in said Mountain View Addition, and for *boating and bathing purposes* only ...." *Id.*, at 862. (emphasis added). There is no similar language in the Schafhausen Deed. In reaching its decision, the trial court found that the Schafhausen Deed provided for only "lake access" and limited the location of that access to the "Lake Frontage." In sum, there is simply no factual basis in any of the evidence before this Court to support Siegwarths' strained argument.

A more reasonable reconciliation of the lesser of the ambiguous Smith documents, (Exs. 79.2 and 79.3), is to note that the "common area" trail extending from the cul-de-sac in a southeasterly direction terminates on the "Platted Public Road Access. This interpretation is consistent which omits any reference to an access easement over Lot 10 in the Schafhausen Deed. Consequently, one must reasonably conclude that Smiths' intended access to the "Lake Frontage" was *around* Lot 10 on the "Platted Public Road Access" and not over Lot 10. Therefore the district court's judgment granting an easement over Lot 10 should be reversed.

K. Trial Court did not Err in Defining "Lake Access" and did not Err in Refusing Evidence on Dock/Riparian Rights.

Siegwarths argue that the trial court failed to define what activities would constitute "lake access" for the purpose of the easement over Lot 10 of Berven Bay Terrace. In support, Siegwarths only generally cite to one page of the trial transcript for support. (Tr. at 1164). Unfortunately, that portion of the transcript simply contains a colloquy between the trial court and one of Respondents' counsel regarding the form of the order. It is clear that the trial court

considered the evidence submitted by the parties in his Supplemental Memorandum Decision as cited by Siegwarths. (R. at 138-153). To date, no evidence has been presented of any historical placement of a dock within the littoral areal of Lot 8, BBT II, aside from the respondents' floating dock. (R. at 141). Siegwarths fail to support their objection on this issue with authority or argument so this Court need not consider it. *Bach v. Bagley*, (supra) (2010).

In the Court's Supplemental Memorandum Decision, the District Judge expressly noted that the "lake access" area of Lot 8, BBT II, does not readily support "the usual lake access activities one would contemplate, such as boating, swimming, and sunbathing." (R. at 141-142); *see also* (R. at 126) ("Indeed witnesses, including Michael Smith, testified that the area ["Lot 10", Lot 8, BBT II] varied between a wilderness of tangled brush with a creek, an area of swamp like conditions.").

Despite the glaring lack of evidentiary support, Siegwarths press on by contending the trial court erred in declining to accept additional evidence as to whether under the granted easement they would be able to place a dock off the lake frontage of Lot 8, BBT II. Siegwarths are reminded that in open court prior to the May 28, 2008, evidentiary hearing the court stated:

> ... Once that is defined, whether that legally entitles anybody to even make an application for a dock is **an issue that was not presented to this Court**. And I don't know -- we are not prepared to resolve that in this -- at this stage. So, the evidence on -- that's the reason why the Court had suggested to counsel that the dock evidence be presented as an offer of proof, as I don't consider arguments with regard to docks to be helpful to me in the decision that I need to make at this time which is the physical location and dimensions of an easement necessary to provide lake access.

(Tr. p. 1200, ls. 1-11) (emphasis added). Thus, it is clear the trial court's determination was premised on Siegwarths' failure to timely present an evidence to support their claim. Again, Siegwarths have made no showing that this issue was timely raised with the trial court so there can be no error. Furthermore, the Idaho Land Board has the authority to

regulate, control and permit encroachments such as docks on navigable lakes and this Court has held that such authority was properly delegated. Idaho Code § 58-1303; *Kootenai Envt'l. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085 (1983).

L. Siegwarths have Failed to Demonstrate a Failure of Proof Concerning the Trial Court's Determination of Lack of Intent.

Despite Michael Smith's felony convictions for fraud and the contradiction between his testimony and the documentary evidence, Siegwarths maintain a deep abiding faith in his various revisionist oral representations. With blinders firmly in place and without supporting evidence, Siegwarths urge this Court to accept his sweeping fantasy schemes for Lot 10, BBT. Siegwarths urge this Court to accept Smith's contradictory statements as irrefutable truth and evidence of his "intentions" to grant them rights in Respondents' properties. The trial court obviously weighed Smith's credibility, considered all the evidence and found against Seigwarths.

This Court recently held:

> Whether a common law dedication has occurred is an issue of law. When a written instrument is complete on its face and is unambiguous, extrinsic evidence of prior or contemporaneous representations or negotiations are inadmissible to contradict, vary, alter, add to, or detract from" the instrument's terms. For the purpose of the parol evidence rule, plats are complete instruments. Plats must accurately describe and set forth all the streets, easements, public grounds, blocks, lots, and other essential information. In other words, all the essential terms for creating a new subdivision are in each plat.
>
> Accordingly, this Court has held that when deciding whether a dedication occurred, plats are to be interpreted like deeds. The inquiry begins by determining whether a deed is ambiguous, which is a question of law subject to free review. Only when a document is ambiguous is parol evidence admissible to discover the drafter's intent. Otherwise, the intention of the parties must be ascertained from the document itself.
>
> **If a plat unambiguously does or does not dedicate land, the plain language of the instrument controls**. Once someone purchases a lot referencing the plat, the dedication offer has been accepted. An ambiguous plat, on the other hand, equivocates as to whether the owner intended to dedicate the land. In those cases,

> extrinsic evidence would be admissible to show the owner's intent in drafting the plat. [citations omitted]

Kepler-Fleenor v. Fremont County, ___ Idaho ___, 268 P.3d 1159, 1163 (2012) (emphasis added).

"The intent of the owner to dedicate his land to public use must be clearly and unequivocally shown and must never be presumed." *State ex rel. Haman v. Fox*, 100 Idaho 140, 147, 594 P.2d 1093, 1100 (1979). A party claiming a right by dedication bears the burden of proof on every material issue. *Id.*

Michael Smith's intentions are anything but clear and unequivocal. The two documents that he signed – the BBT plat (Ex. 79.2) and the Schafhausen Deed (Ex. 79.4) – do not evidence an intention to dedicate Lot 10, BBT I, as a "common area." Further, the testimony relied upon by Siegwarths to show his "intent" to create common area is parol evidence and conflicts sharply with the unambiguous documentary evidence. (Tr. pp. 262-263, 302-303 and 306-307). Despite his experience as a real property developer, Mr. Smith was unable to articulate why Lot 10 was *not* expressly dedicated in either instrument. (Tr., pp. 256-257). The best evidence of the dedicator's intent is what is in the plat and deed he signed, not what was supposedly hidden in his mind at the time. *Hanson v. Proffer*, 23 Idaho 705, 711, 132 P. 573 (1913).

A party who signs an instrument manifests assent to it and may not later complain that he did not read the instrument or that he did not understand its contents. *Irwin Rogers Ins. Agency v. Murphy*, 122 Idaho 270, 273, 833 P.2d 128, 131 (Ct. App. 1992). Mr. Smith not only signed the plat, he was involved in getting it approved and he recorded it. (Tr. p. 263, ls. 9-20; Ex. 79.2).

The only dedicatory language in the BBT plat pertains to expressly **designated** common areas:

> All areas designated common areas as shown hereon are to be owned jointly by all lot owners in a ratio of 1/17 per lot and that all common areas are for the sole use and enjoyment of the owners of this subdivision along with use for utility purposes.

(Ex. 79.2). Lot 10 is *not* designated a "common area" on the plat - nor is any other lot. In fact, if Lot 10 had been a "common area," the interests of the lot owners in the common areas would have been 1/16 instead of 1/17, as acknowledged by Mr. Smith. (Tr., p. 307, ls. 2-4). When confronted with the BBT I plat, Mr. Smith acknowledged it was "accurate." (Tr. p. 263, ls. 18-20).

When considering the testimony of Mark Schafhausen of what he was told by Michael Smith about his grandiose plans for Lot 10 of BBT and Mr. Smith's testimony of his "intent" for Lot 10, it cannot go without notice how narrowly drafted the Schafhausen Deed was. (Ex. 79.3). As Smiths purported to do with the "common areas" designated on the BBT I plat, they could have *expressly granted* an interest in the *proposed* Lot 10 to the other property owners of BBT I. It is clear from the evidence, however, that they did not do so. The Schafhausen Deed conveyed parcels, which were identified as Lots 3-5 in the yet-to-be-filed BBT I plat, and contained this provision:

> The grantor hereby agrees that the **Lake Frontage** contained in Lot 10 of proposed Berven Bay Terrace subdivision **may be used** by the grantee herein and its [sic] successors and assigns and by all other owners of lots in proposed Berven Bay Subdivision **for access** to the lake.

(Ex. 79.3) (emphasis added).

Smiths could have at least granted an easement **over** the entirety of Lot 10 appurtenant to the five parcels that were designated as lots in BBT that had been sold or were conveyed in the Schafhausen Deed and for the use of other lot owners. They did not even do that. No reasonable person could conclude that the conflicting and ambiguous statements as to dedication in the BBT I plat (Ex. 79.2) and the Schafhausen Deed (Ex. 79.3) reflect Smiths' unequivocal intent. *Asbury Park, LLC* 271 P.3d at 1200 (2012); citing *Molyneux v. Twin Falls Canal Co.,* 54 Idaho 619, 632, 35 P.2d 651, 656 (1934) (noting that the dictionary definition of "unequivocal" includes "not ambiguous").

The trial court acted properly under *Kepler-Fleenor* in discounting Michael Smith's revisionist testimony to conclude that there was a lack of clear and convincing evidence to

dedicate these small parcels that served no purpose aside from being part of common areas in Section 7 that were invalid. *See Coward v. Hadley*, 150 Idaho 282, 289, 246 P.3d 391, 398 (2010) (Holding a common law dedication must be for a public use, not to individuals or to a class of private grantees.).

M. The Court Did Not Err in Concluding Smiths' Quitclaim Deeds Transferred Title.

In their brief, Siegwarths assert in summary fashion the trial court erred in giving effect to unidentified quitclaim deeds. First, it must be noted the Siegwarths fail to cite specific exhibits they are challenging. *Bach*, 148 Idaho at 790, 229 P.3d at 1152. Thus, they should be deemed to have waived this issue on appeal. *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 16, 175 P.3d 172, 178 (2007). While they quote a correct rule of law from *Scrogins*, as to the effect of a quitclaim deed, they fail to provide any argument or authority in aid of their objection to the trial court's conclusion that the Klages and Petersen acquired title to the remaining, unconveyed properties in the BBT I plat.

A grantor can convey nothing more than he or she owns, and ordinarily a grantee acquires nothing more than the grantor owns and can convey. *See Gardner v. Fliegel,* 92 Idaho 767, 770, 450 P.2d 990, 993 (1969). A quitclaim deed conveys whatever interest the grantors possess at the time of the conveyance. *Luce v. Marble*, 142 Idaho 264, 270, 127 P.3d 167, 173 (2005) (citing *Scrogins*).

The record clearly establishes that the Smiths conveyed their interest in "Berven Bay Terrace" to Larry Anderson shortly after the recording of the BBT I plat. (Ex. BB). The record also shows the Klages and Petersens recorded a Declaration of Forfeiture of Smiths' interest in the Section 7 property prior to the recording of the BBT I plat in September 1984. (Exs. W, 79.2). In June 1985, Smiths and Anderson issued quitclaim deeds to Klages and Petersens. (Exs. DD and 79.5). Smiths' deed was sufficient to transfer their title to the described property in Exhibit 79.5 to Klages and Petersens.

N. The plat of Bervan Bay Terrace II is Valid.

Siegwarths suggest that the plat of BBT II was invalid because it "subsumed" part of BBT I plat. The evidence at trial established that the owners of the Section 7 portion of the

property in the BBT I plat, Klages and Petersen, did not sign the plat. The validity of the BBT I plat cannot be sustained because it is integrated with subdivision and purported dedications of property owned and not owned by Smiths.

Idaho Code § 50-1301(7) defines "Owner" for the purposes of a subdivision plat as the "proprietor of the land (having legal title)." It is the "owner," having legal title to the land in the proposed subdivision that shall file a subdivision plat. I.C. § 50-1302. As pointed out above, this Court recently held in *Saddlehorn Ranch Landowner's, Inc.*, that an effective dedication in a subdivision plat required the signatures or ratification by all the owners holding title to the subdivided land. 146 Idaho at 750-751, 203 P.3d at 680-681. There is no evidence proffered by the Siegwarths to show that Klages and Petersen, owners of the Section 7 portion of the real property subdivided and dedicated in the BBT I plat, signed the BBT I plat or otherwise ratified it. In fact when Klages and Petersen obtained Smiths' title to the Lot 35 property portion of the BBT I subdivision, they replatted it as BBT II , as opposed to simply "ratifying" the BBT I plat.

The Court's holding in *Saddlehorn* was based on its earlier decision in *Birdwood Subdivision Homeowners' Assoc., Inc. v. Bulotti Constr., Inc.*, 145 Idaho 17, 175 P.3d 179 (2007) wherein this Court affirmed the trial court's summary judgment holding that restrictive covenants for a subdivision did not bind the real property when the owner of that property did not execute or ratify the covenants. The Court stated "it is axiomatic that one person cannot unilaterally restrict the use of another's land simply by drafting and recording restrictive covenants allegedly applicable to that land. *Id.*, at 21.

It is likewise "axiomatic" that the Smiths could not subdivide and dedicate land they did not own as they attempted to do in the BBT I plat. Because the BBT I plat was an integrated scheme comprising the subdivision and dedication of land owned and not owned by Smiths, its validity cannot be sustained. The owners of the Section 7 portion of BBT I, Klages and Petersen, did not sign the plat and did not ratify it.

O. The Trial Court's Correctly Found that Smiths Abandoned the BBT I Plat.

Siegwarths erroneously contend the trial court erred when it concluded that Smiths abandoned the BBT I plat when they quitclaimed their remaining interest in the "BBT I

property" to Larry Anderson [who in turn also quitclaimed to Klages and Petersens by Ex. DD] and the Klages and Petersens. (Ex 79.5). The record shows that Klages and Petersens recorded a declaration of forfeiture of Smiths' option to purchase the Section 7 property in May 1984, which was **prior to** the recording of the BBT plat on September 7, 1984. (Exs. W and 79.2). Smiths then conveyed their interest in "Berven Bay Terrace" to Larry Anderson **two days** after the recording of the BBT I plat. Subsequently, both Smiths and Anderson issued quitclaim deeds to Klages and Petersens. (Exs. DD and 79.5). The trial court's finding that Smiths abandoned their BBT I subdivision scheme is not only supported by the substantial evidence (Exs. DD, 79.4, 79.5), it has never been contradicted by the testimony of Mr. Smith. (Tr. at 286-87, 291).

P. Siegwarths' Have Failed to Demonstrate on What Basis the Trial Court Erred in Bifurcating the Parties' Claims for Trial.

In a tenuous and confusing fashion, Siegwarths challenge the trial court's decision to bifurcate their claims for trial. (Aug. R. at 84-87). Unfortunately, the Siegwarths have failed to demonstrate how the court's discretionary decision was in error, and more importantly, how any error impacted their substantive rights or the ultimate outcome.

First, the cursory and vague nature of Siegwarths' argument does not satisfy their burden on appeal. The Supreme Court "do[es] not presume error on appeal; the party alleging error has the burden of showing it in the record." *Murray v. Spalding*, 141 Idaho 99, 101, 106 P.3d 425, 427 (2005). Most recently, this Court held "'if issues on appeal are not supported by propositions of law, authority or argument, they will not be considered . . . A party waives an issue on appeal if either authority or argument is lacking, not just if both are lacking.'" *Hurtado v. Land O'Lakes, Inc.*, 2012 WL 1918411, 4 (May 29, 2012); citing *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 16, 175 P.3d 172, 175 (2007); accord *U.S. v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (Holding it is a well "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."). In an oft-quoted phrase, the federal Seventh Circuit of Appeals has remarked that appellate judges "are not like pigs, hunting for truffles buried in briefs." *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

In support of their cursory argument, Siegwarths generally direct the Court to two pages of the trial court's oral decision which do not contain any specific findings that support their challenge. Siegwarths should be deemed to have waived this issue.

Next, I.R.C.P. 42(b) grants trial court's broad discretion to bifurcate actions if it is deemed "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." In its reasoned decision, the trial court noted it was bifurcating the claims to simplify the parties' respective presentations at trial. (Tr. p. 40, ls. 5-8). Additionally, the court recognized that bifurcation could potentially eliminate or limit the scope of the parties' subsequent evidence on damages. (Tr. p. 42, L. 18. - p. 44, L. 14).

This Court has acknowledged that bifurcation can have the affect of decreasing efficiency, yet still serving the ends of justice and the goals of Rule 42(b):

> [S]ometimes a single trial covering all aspects of the case will be neither desirable nor feasible. Evidence bearing upon one aspect of a case may be unduly prejudicial with respect to another. Or certain matters may be ripe for trial while consideration of others would be premature. In such cases, the trial court may order separate trials pursuant to I.R.C.P. 42(b). When this occurs, the fact that the separately tried aspects of the case are joined as a matter of pleading does not contribute substantially to the cause of efficiency. As a practical matter, the litigation has become fragmented, and some efficiency will almost certainly be lost. However, the loss is tolerated because the fragmentation is necessary in order to serve the ends of justice.

Heaney v. Brd. of Trustees of Garden Valley School Dist. No. 71, 98 Idaho 900, 903, 575 P.2d 498, 501 (1978). This case exemplifies the Court's comments in *Heaney* and the purposes for which I.R.C.P. 42(b) was promulgated.

It is well established that a decision to bifurcate is committed to the sound discretion of the trial court. *Bank of Idaho v. Colley*, 103 Idaho 320, 323, 647 P.2d 776, 778-779 (1982); *Silverstein v. Carlson*, 118 Idaho 456, 461-62, 797 P.2d 856, 862 (1990). In sum, Siegwarths have set forth absolutely no evidence to demonstrate how the trial court abused its discretion in bifurcating the parties' claims for trial. Rather, the record demonstrates that the trial court exercised its discretionary authority in a reasoned and deliberate manner.

In passing, Siegwarths disingenuously assert that bifurcation contributed to the trial court's failure to rule upon their jury demand. In reaching its decision, the trial court noted each of the equitable issues would be resolved first by a court trial. (Tr. p. 41, ls. 12-23). Further, it deferred ruling on Siegwarths' motion for jury trial until after the parties' respective rights in the subject property had been adjudicated. (Tr. p. 50, ls. 2-25). Subsequently, the trial court determined that the Siegwarths do not have any ownership interest in Respondents' property. (Aug. R. at 88-137). Consequently, this dispatched Siegwarths' claims for damages, thereby rendering their motion for a jury trial moot.

[ADDITIONAL ISSUES ON APPEAL]

Q. The Nature and Scope of the Access Easement Granted to Siegwarths and Armands was Not Based Upon Substantial and Competent Evidence.

1. The District Judge Erred in Granting an Easement to Siegwarths and Armands over Lot 10.

The District Judge erred in construing the Schafhausen deed to grant an easement over Lot 10, BBT I. Consistent with the plain conveyance language, the easement should have been restricted to use of Lot 10's "lake frontage" and nothing more.

In reaching its decision, the trial court noted that the Schafhausen Deed provided the "most clear and unambiguous [evidence] of Smith's intent . . .'" (R. at 131). In its entirety, the Deed states:

> The Grantor [Smiths] hereby agrees that the ***Lake Frontage*** **contained** in Lot 10 of proposed Berven Bay Terrace Subdivision **may be used** by the Grantee herein and its successors and assigns and by all other owners of lots in proposed Bervens [sic] Bay Terrace Subdivision for access to the Lake.

(Ex. 79.3) (Emphasis added). As is evident to the discerning reader, the deed **only** provides the "***Lake Frontage*** **contained in Lot 10** of proposed [BBT I] **may be used** by the Grantee ...," **not Lot 10.** At trial, Siegwarths' surveyor conceded that "Lake Frontage" is defined as a line without depth:

> 10 Q. BY MR. SWENEY: The deed uses the word "lake frontage"?
> 11 A. Correct.

12 Q. And lake frontage is a linear measurement, correct?
13 A. Correct.
14 Q. It is the interface of the water with the land,
15 correct?
16 A. Correct.
17 Q. So that's why it is designated on the line, correct?
18 A. We can go into some more discussion about that, I
19 guess, but basically yes, that's the platted lot line along the
20 lakefront.
21 Q. And that's what the instrument says; it just refers to
22 lake frontage?
23 A. Yeah, but if you took that to the next step, maybe it
24 follows the shoreline.
25 Q. But then you talk about depth, which isn't there,
1 correct?
2 A. Right.

(Tr. p. 639, L. 10 – p. 640, L. 2).

The plain and unambiguous language of the Schafhausen Deed expressly restricted use of Lot 10 to the "Lake Frontage," and nothing more. (Ex. 79.3). Exhibit 79.3 was issued just over a month after Klages and Petersens recorded their Declaration of Forfeiture of Smiths' option to purchase the Section 7 property.

The only specification in the trial evidence for access to the "Lake Frontage" is the 10' wide corridor from the cul-de-sac located between Lots 9 and 11 in the BBT I plat. (Ex. 79.2). In its decision, the court noted testimony from Mark Schafhausen that the corridor was useful in terms of access to Lot 10. (Aug R. at 114, 130). While the district court found no need for the common areas in Section 7 for access to Lot 10, their designation on the BBT I plat evidenced Smiths' documented intent that the access to the "Lake Frontage" be through a single designated corridor to the "platted public access road." (Aug R. at 122, 127). The trial court should have construed the BBT I plat and Schafhausen Deed together as the best evidence of Smiths' intentions, and to conclude that the intended access to the "Lake Frontage" was via the "common area" cul-de-sac and corridors designated on Exhibit 79.2. There is no evidence that Smiths intended to grant an easement over Lot 10 and a reasonable construction of the BBT I plat is that

they intended to grant any access around Lot 10 through the BBT I cul-de-sac corridor and the "platted public access road" to the lake frontage of Lot 10. Since Smiths did not have title to the Section 7 cul-de-sac corridor property, they obviously could not create an enforceable access easement on that property to the lake. *Burns v. Alderman,* 122 Idaho 749, 753, 838 P.2d 878, 882 (Ct. App.,1992) (Owner of designated servient parcel in deed must have title to that parcel to create express easement.). Without title to the Section 7 property where Smiths intended to provide access to the "Lake Frontage" and without an expression of intent to grant an easement over Lot 10 in Exhibit 79.3 there is no legal basis for a valid easement against the property of Respondents Schadel, Blanchette, and Felsing for access to the "Lake Frontage." *See Exhibits 79.2, 79.3, and W.* The judgment granting an express easement to Siegwarths and Armands over Lot 10, BBT I [Lot 8, BBT II] must be reversed.

2. A 4' Wide Access Easement Was Not Intended by the Parties, nor is it Necessary for Reasonable "Lake Access".

Should this Court affirm the trial court's decision to award Siegwarths and Armands an easement across Lot 10 for lake access, Respondents Schadel and Blanchette submit the court erred in defining the scope thereof. "An easement is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner." *Northwest Pipeline Corp. v. Luna,*149 Idaho 772, 775, 241 P.3d 945, 948(2010). "A grant indefinite as to width and location must impose no greater burden than is necessary." *Conley v. Whittlesey*, 133 Idaho 265, 270, 985 P.2d 1127, 1132 (1999). An easement is to be defined according to the intention of the parties and circumstances in existence at the time the easement was given and carried out. *Argosy Trust v. Wininger*, 141 Idaho 570, 572, 114 P.3d 128, 130 (2005) (emphasis added). "That intent is a question of fact and the trial court's findings on the issue will not be disturbed on appeal if supported by substantial and competent evidence." *Id.*

As noted above, the trial court's award was premised upon language in the Schahausen Deed. The express language in that instrument, however, is entirely indefinite as to width and location of the access easement. As a result, it was the Armands' and Siegwarths' burden to

demonstrate that a four foot wide easement was consistent with the historical intentions of the parties and circumstances existing at the time the easement was granted.

At trial, Siegwarths primarily focused on the current feasibility of access paths, recent use of the access trails, and personal opinions as to the location of access paths. In addition, they attempted to introduce additional evidence regarding then-current regulations and ordinances. (Tr. p. 1294, L. 4 – p. 1298, L. 12). Mark Schaufhausen who lived at Lot 2 for 2 short years, gave historical testimony regarding use of Lot 10. He described a scant trail that he improved by stomping down bushes. (Tr. p. 353, ls. 10-11; Tr. p. 370, L. 20 – p. 371, L. 11). Mr. Siegwarth testified at length about trails subsequently constructed on the property, and conceded that the trail he had constructed and commonly used was less than three feet wide. (Tr. p. 1252, L. 25 – p. 1253, L. 18). Despite the abundance of testimony and evidence submitted at the trials, Siegwarths insufficient evidence regarding the Smiths' and Mark Schafhausen's intentions, location of any easement, or scope of such an easement under the circumstances existing, as of June 28, 1984. Armands and Siegwarths failed to properly meet their burden at trial and establish that a four foot wide access trail was consistent with the parties' intentions and circumstances existing at the time the easement was created. For that simple reason, the trial court's determination cannot be supported by substantial evidence and must be reversed.

3. An Express Reservation for a "Secondary Easement" Was Unnecessary and Unreasonably Increased the Burden on Servient Estate.

"One acquiring an easement and right to travel over the lands of another not only assumes the burden of maintaining the right of way but all other burdens incident to use." *Conley* 133 Idaho at 271, 985 P.2d 1133. "The duty requires that the easement owner maintain the easement so as not to create an additional burden on the servient estate or an interference such as would damage the land, such as flooding of the servient estate." *Id.* Idaho courts recognize the existence of secondary easements, which "include the right to repair and maintain the primary easement and *cannot be used to enlarge the burden to the servient estate*." *Id.*, (emphasis added); *Drew v. Sorensen*, 133 Idaho 534, 538, 989 P.2d 276, 280 (1999). In *Conley*, the Supreme Court elaborated on the right, noting:

> The term "secondary easement" is applied to the right to enter and repair and do those things necessary to the full enjoyment of the easement existing. Often times an implied easement, a secondary easement is distinguishable from an additional servitude such as a change, alteration, or extension of the easement. *Id.* The right of secondary easements is not a right to change the mode of enjoyment, if such change increases the burden upon the servient estate. Without the consent of the grantee of the servient tenement, an easement cannot be changed by the owner of the dominant tenement.

Id. (citations omitted). The use and scope of secondary easements is fixed by the objective "reasonable" standard. *Abbott v. Nampa School District N. 131,* 119 Idaho 544, 549-550, 808 P.2d 1289, 1294-1295 (1991).

A determination of what land is necessary for the "secondary easement" is a function of an objective standard; what is reasonably necessary. *Id.* To limit and control the scope of secondary easements, Idaho appellate courts have consistently held that they may not be utilized as a guise to further burden to the servient estate. *Id.*

In granting Siegwarths and Armands an easement, the trial court created an additional four (4) foot wide easement for the limited purpose of "trail maintenance." (Aug. R. at 152). This right is duplicative and unnecessary in light of their right reserved by way of the "secondary easement" that attaches to all express easements. This secondary easement unreasonably increased the burden on the servient estate. Finally, an express "trail maintenance" easement is not supported by evidence of the parties' intentions or circumstances at the time of conveyance. As a result, Respondents Schadel and Blanchette submit that the "trail maintenance" easement should be vacated and left a function of what is reasonable and necessary if this Court affirms the access easement granted.

R. Siegwarths Should be Judicially Estopped from Asserting Continued Claims to the "Common Areas" of BBT I Within BBT II.

On February 9, 2007, the trial was concluded as to this quiet title action, and a judgment was subsequently entered on April 20, 2009. On May 28, 2009, Respondents Schadel and Blanchette, submitted Siegwarths' responses to requests for admissions which establish that Siegwarths received an arbitrator's award for their claim against their title insurer for their loss

of rights in the "common areas" which were determined in this action to be owned by the Respondents Schadel, Blanchette, and Felsing. (Tr. pp. 178-195). Siegwarths, having recovered the arbitration award as compensation for their "loss" from their insurance company, should therefore be judicially estopped from asserting any further interest in "common areas" in which title has been quieted to the Respondents.

Judicial estoppel "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Heinze v. Bauer*, 145 Idaho 232, 235, 178 P.3d 597, 600 (2008); *Riley v. W.R. Holdings, LLC,* 143 Idaho 116, 121–22, 138 P.3d 316, 321-322 (2006). The policies underlying judicial estoppel are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings. *Id.* The doctrine is intended to prevent a litigant from playing fast and loose with the courts. *Id.*

Respondents acknowledge that this Court will generally not consider issues raised for the first time on appeal. Here the district court determined that Siegwarths had no rights to the common areas in BBT II, the Respondents' properties, except for the lake access easement in its June 22, 2007 decision. Aug. Tr. 088-137. Judicial estoppel could not be asserted until Siegwarths filed this appeal renewing and reasserting their claims to an ownership interest in the common areas of BBT II, adjudicated in the February 2007 trial, for which they were compensated by the arbitration award in December 2007. Siegwarths' appeal of that decision was not properly before this Court until this proceeding. *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 744, 215 P.3d 457, 464 (2009) (Appellants' *pro se* status could not be argued until appeal.).

If there were ever a case where a "litigant is playing fast and loose with the courts," this is it. Despite the fact that they have received compensation from their title insurance company for their for loss of interest in the "common areas" of BBT I, the Siegwarths now ask this Court to reverse the sound judgment of the trial court quieting title to those same properties. Simply put, Siegwarths are asking this Court to bestow property rights to them for which they have been compensated in another forum. Estoppel should be invoked against their claims.

S. Respondents are Entitled to an Award of Their Fees and Costs on Appeal.

Idaho Code § 12-121 provides in part:

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. . .

"This code section allows the Court the discretion to award attorney fees to the prevailing party." *Belstler v. Sheler*, 151 Idaho 819, 827 (2011).

"Normally, this Court will award attorney fees pursuant to I.C. § 12-121 if the appeal merely invites the Court to reweigh the evidence or second guess the lower court, of if the appeal was brought or defended frivolously, unreasonably, or without foundation." *Id.*; citing *Crowley v. Critchfield*, 145 Idaho 509, 514 (2007). This Court has "repeatedly stated that 'where issues of discretion are involved, an award of attorney fees is proper if the appellant fails to make a cogent challenge the judge's exercise of discretion.'" *JUB Eng'r, Inc. v. Security Ins. Co. of Hartford*, 146 Idaho 311, 318 (2008). "Finally, an award of attorney fees is appropriate if the law is well settled and the appellants have made no substantial showing that the trial court misapplied the law." *Utter v. Gibbins*, 137 Idaho 361, 367 (2002).

As outlined above, Siegwarths' arguments are really a disguised invitation for this Court to reweigh the evidence. They devote little effort to directing the court to specific findings in the record and transcript which support their tenuous and conclusory claims. And in other instances, they fail to demonstrate how any putative error is reversible. When viewed as a whole, there is absolutely no foundation for this appeal. Thus, Respondents request an award of their fees and costs pursuant to Idaho Code § 12-121 and Rules 40 and 41, I.A.R.

IV. CONCLUSION

The judgment of the District Court quieting title to the real properties in the Berven Bay Terrace II plat to Respondents Schadel, Blanchette, and Felsing and dismissing Siegwarths claims should be affirmed. That part of the judgment granting Siegwarths an access easement over Lot 8, Berven Bay Terrace II should be reversed with a remand to the District Judge

directing entry of judgment that Siegwarths and Armands have no right, title, interest or easement over Lot 8, Berven Bay Terrace II.

Respectfully Submitted,

Dated: June 7, 2012

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of June 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

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