6-18-2012

Harris v. Bank of Commerce Respondent's Brief Dckt. 39204

IN THE SUPREME COURT OF THE STATE OF IDAHO

DARRYL HARRIS and CHRISTINE HARRIS, husband and wife,

Plaintiffs/Appellant,

v.

THE BANK OF COMMERCE, an Idaho Corporation

Defendant/Respondent,

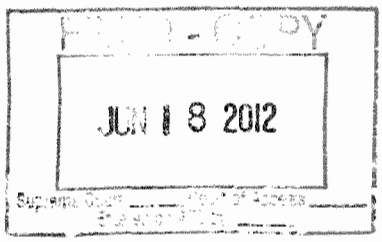
and

DUANE L. YOST and LORI YOST, husband and wife, DUANE L. YOST as Trustee of the DUANE L. YOST TRUST, and JOHN DOES I-X,

Defendants.

Docket No. 39204-2011

Bonneville County Case No. CV-2009-3488



RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County.

Honorable Dane H. Watkins, Jr., District Judge, presiding.

Counsel for Appellants

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II. TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

III. STATEMENT OF THE CASE

A. Course of the Proceedings Below

The Appellant's Course of Proceedings in their Appellant's Brief is, for the most part, accurate. However, the following clarifications are necessary and relevant.

Neither party ever requested a jury trial.

Duane Yost ("Duane")[1] and Lori Yost ("Lori") (collectively, the "Yosts") and The Bank of Commerce (the "Bank") entered into a stipulation in which the Yosts acknowledged receipt of the Bank's Answer, Counterclaim Crossclaim and Third Party Claim. R. at Vol. I, pp. 135-138. Morever, the Yosts consented to the entry of an order of foreclosure, relinquished any claims to the Subject Real Property, agreed that pursuant to the Bank's various Deeds of Trust that the Bank was granted the right to sell the Subject Real Property, and stipulated that following the sale of the Subject Real Property the trial court would retain jurisdiction to determine and issue a deficiency judgment. *Id.*

Pursuant to their own request, Darryl Harris ("Darryl") and Christine Harris ("Christine") (collectively, the "Harrises") obtained a default judgment against the Yosts and the Yost Trust on October 16, 2009, not for the return or possession of the Subject Real Property, but as a money judgment in the amount of $800,000.00, plus interest, court costs, service fees and attorney fees. R. at Vol I., pp. 130-134.

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[1] Duane Yost, Lori Yost, Darryl Harris and Christine Harris will be referred throughout this brief by their first names in order to avoid confusion between spouses. No disrespect is intended.

The Harrises and the Bank filed cross-motions for summary judgment.

B. Statement of the Facts

Corrections, clarifications and additions to the Statement of Facts as set forth in the Appellants' Brief are as follows:

The Harrises state that "[c]onsideration for the purchase of the 40 acres was $800,000.00 *cash.*" Appellants' Brief, p. 6 (emphasis added).[2] However, Darryl testified that he and Duane had agreed that Duane would pay Darryl $800,000.00 for the Subject Real Property, but Darryl did not remember Duane "saying that he was going to write a check or pay me in one hundred dollar bills or anything else." R. at Vol. II, p. 263, ll. 7-21. Darryl testified that he believed that before the $800,000.00 was actually transferred, Duane had told him that he was going to pay for the Subject Real Property with an $800,000.00 transfer from Duane's Trigon account to Darryl's Trigon account. R. at Vol. II, p. 262, l. 16 to p. 263, l. 11. When Duane transferred the $800,000.00 into Darryl's Trigon account on October 1, 2007, Duane assumed that it was as a result of their prior discussions regarding the purchase of the Subject Real Property. *Id.*

The Harrises state that "Yost admitted in his deposition that he gave no consideration to the Harrises in exchange for the corrected quitclaim deed he received." Appellants' Brief, p. 9. However, Duane testified that he intended to pay the Harrises for the purchase of the Subject

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[2] In support of this alleged fact, the Harrises cite to approximately 63 pages of the Clerk's Record. However, only one or two pages of the cited Record are even remotely on point. Moreover, counsel for the Bank cannot find any factual support in the record that the $800,000 had to be paid in *cash.* In fact, the record makes it clear that the form of payment of the $800,000 was not important. Throughout their entire Appellants' Brief, the Harrises cite to lengthy portions of the Clerk's Record, rather than to clear and concise citations.

Real Property as he knew the Harrises were not just giving him the property. R. at Vol. II, p. 233, Duane Yost Depo. Tr., p. 13, ll. 5-11. Moreover, Duane believed that he had paid $800,000.00 for the deed to the Subject Real Property. R. at Vol. II, p. 239, Duane Yost Depo. Tr., p. 43, l. 25 to p. 44, l. 5. Consistent with both Darryl's and Duane's deposition testimony, Duane further explained in his affidavit that "[t]he source of the $800,000.00 purchase price was not essential to the transaction; what was essential was that I agreed to pay Darryl Harris $800,000.00 for the Subject Real Property." R. at Vol. III, p. 533, Second Aff. Duane Yost, ¶ 5. Duane further testified that "Darryl Harris did not demand or require that the only method of paying the $800,000.00 be a transfer from my Trigon account to his Trigon account. What was important to the purchase and sale agreement was that the purchase price was $800,000.00, not the form of the $800,000.00." R. at Vol. III, p. 533, Second Aff. Duane Yost, ¶ 6.

Although the Harrises did not immediately execute and deliver a deed to Duane at the time of the $800,000.00 Trigon transfer, Darryl and his accountant, Steve Crandall, informed Trent Summers, a manager and vice president of the Bank, in approximately September 2008, that the Subject Real Property was not the Harrises', but that it was owned by Duane. R. at Vol. I, p. 150, Summers Aff., ¶ 10.

Darryl attempted to transfer the Subject Real Property to Duane when he executed a QuitClaim Deed on November 25, 2008. R. at Vol. II, p. 386, Darryl Harris Depo. Tr., p. 54, l. 20 to p. 56, l. 22. However, because Christine had not signed the first QuitClaim Deed, Duane gave Darryl a Corrected QuitClaim Deed in order to get Christine to sign it too. R. at Vol. II, p.

388, Darryl Harris Depo. Tr., p. 63, l. 17 to p. 65, l. 3. Darryl understood that the main reason for the Corrected Quitclaim Deed was that Christine also needed to sign it. *Id.* Darryl knew that the Corrected QuitClaim Deed would be relied on by the Bank and the title company to make sure that title to the Subject Real Property had actually been transferred to the Yosts. R. at Vol. II, p. 389, Darryl Harris Depo. Tr., p. 68, ll. 2-17. Furthermore, Darryl knew that the Bank would rely on the Corrected QuitClaim Deed in securing its loan with Duane. *Id.* When Darryl couldn't locate Christine, he forged her name on the Corrected QuitClaim Deed, and then left it at Robert Crandall's office. R. at Vol. II, p. 389, Darryl Harris Depo. Tr., p. 69, l. 4 to p. 70 l. 11; *see also* R. at Vol. II, p. 405, Darryl Harris Depo. Tr., p. 132, ll. 22-25.

The Corrected QuitClaim Deed was notarized by Robert Crandall on December 1, 2008. R. at Vol. II, p. 471. Robert Crandall is the brother of Steve Crandall, who was the Harrises' accountant. R. at Vol. II, p. 460, Robert Crandall Depo. Tr., p. 8, ll. 1-8 and p. 12, ll. 12-25. Robert Crandall, an attorney, had done some legal work for the Harrises in the past. *Id.*

1. Christine Harris

The following facts are relevant to Christine's consent to the conveyance of the Subject Real Property:

Over the years, the Harrises have owned and sold several pieces of real property, including bare ground, houses and cabins. R. at Vol. II, pp. 433-36, Christine Harris Depo. Tr., p. 11, l. 11 to p. 24, l. 20. Christine knew that each time she and Darryl sold a piece of real property that she would have to sign a deed giving her interest to the buyer. R. at Vol. II, pp.

434-35 & 438, Christine Harris Depo. Tr., p. 16, ll. 12-25; p. 18, ll. 11-17; p. 30, ll. 11-14. Christine testified that Darryl told her in December 2008, that he had forged her name on the Corrected QuitClaim Deed. R. at Vol. II, p. 444, Christine Harris Depo. Tr., p. 54, ll. 1-9, 20 to p. 56, l. 9. More specifically, Darryl testified that he told Christine that he had signed her name on the deed about two weeks after he had done so. R. at Vol. II, p. 390, Darryl Harris Depo. Tr., p. 71, l. 21 to p. 72, l. 2. Prior to learning that Palmer and Trigon were a fraud, Darryl told Christine that he and Duane had agreed to transfer the Subject Real Property to the Yosts. R. at Vol. II, p. 441, Christine Harris Depo. Tr., p. 42, ll. 3-19. Also prior to learning about the fraud, Christine learned that Duane had transferred $800,000.00 into Darryl's Trigon account. *Id.* at p. 44, ll. 6-17. Christine also admitted that Darryl probably told her what the purpose of the $800,000.00 was. *Id.* at p. 44, ll. 20-23. When Christine learned about the forgery, approximately two weeks after Darryl had signed her name to the Corrected QuitClaim Deed, she did not object to it but rather did nothing despite knowing that the forgery would be relied upon by others. R. at Vol. II, p. 390, Darryl Harris' Depo. Tr., p. 71, l. 21 to p. 73, l. 6; R. at Vol. II, p. 444, Christine Harris Depo. Tr., p. 56, ll. 6-17 & p. 57, ll. 12-16. In fact, Darryl's forgery did not even bother Christine at the time she learned about it. *Id.* at p. 56, ll. 12-17. Moreover, she did not tell anyone about the forgery. *Id.* Not only did Christine not get upset with Darryl, she was okay with the fact that he had signed her name because she trusted him. R. at Vol. II, p. 445, Christine Harris Depo. Tr., p. 58, ll. 11-24. If Duane had brought them the $800,000.00 in cash, Christine would not have objected to signing the deed to the forty (40) acres. *Id.* at p. 61, ll.

6-15. Because Christine believed that the $800,000.00 had been transferred into Darryl's Trigon account, she admitted she probably would not have objected to giving Duane the deed to the forty (40) acres and that she probably would have been okay with it. R. at Vol. II, p. 445-46, Christine Harris Depo. Tr., p. 61, l. 16 to p. 62, l. 10. As of the date of her deposition on November 9, 2010, Christine was not planning on pressing any criminal charges against Darryl for forging her name. R. at Vol. II, p. 444, Christine Harris Depo. Tr., p. 56, l. 18 to p. 57, l. 3. Despite knowing of the forgery, the Harrises filed their Complaint in which they alleged that both Darryl and Christine signed the Corrected QuitClaim Deed. R. at Vol. I, p. 14, Complaint, ¶ 17. Although the Complaint was signed by the Harrises' attorney, they subsequently signed the Plaintiffs' Response to the Defendants, The Bank of Commerce First Set of Interrogatories and Requests for Production of Documents dated May 7, 2010 ("Discovery Response") before a notary public. R. at Vol. I, p. 178. In their Answer to Interrogatory No. 1 of the Discovery Response, Christine and Darryl stated under oath that they "have knowledge of the facts and information contained in the Complaint." R. at Vol. I, p. 173. On October 15, 2009, Christine and Darryl obtained a Judgment by Default against the Yosts in the amount of $800,000.00 plus interest, costs and attorney fees. R. at Vol. I, pp.133-34. Christine did not raise the issue of the forgery until November 2010, nearly two (2) years after she learned about the forgery and more

than one (1) year after she had obtained the judgment against the Yosts.[3]

2. The Bank

a. What the Bank Knew

In the latter end of 2008, as a result of the world economic down turn, the Bank made efforts with several of its customers to secure unsecured loans with collateral. R. at Vol. I, p. 144, Romrell Aff., ¶ 7. In order to do so, many of the loans were rewritten with modified terms such as extended payoff dates, different interest rates, etc. *Id.*

Duane represented that he owned the Subject Real Property. R. at Vol. II, p. 244, Romrell Depo. Tr., p. 13, ll. 9-17.

In approximately September 2008, Darryl and Steve Crandall informed the Bank the Subject Real Property belonged to Duane. R. at Vol. I, p. 150, Summers Aff., ¶ 10.

At that time, Darryl and Steve Crandall told the Bank that the documents for the transfer of the Subject Real Property to Duane may not have been completed correctly and that they were in the process of making sure that the Bonneville County records reflected that the Subject Real Property was in Duane's name. R. at Vol. I, p. 151, Summers Aff., ¶ 12.

When the Harrises signed a separate deed of trust for the Bank, the security was not for the Subject Real Property but for the adjacent 40 acres that were owned by them. R. at Vol. I, pp.

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[3] Compare the Harrises' Supplementary Answer to Interrogatory No. 1, dated November 1, 2010, (R. Vol. II, pp. 369-70) with their prior Answer to Interrogatory No. 1, dated May 7, 2010 (R. at Vol. I., pp. 172-73). In their November 1, 2010, supplemental answer, the Harrises disclose for the first time the fact that Darryl had forged Christine's name on the Corrected QuitClaim Deed and that Christine knew it. Their prior answer of May 7, 2010, is silent regarding the forgery and Christine's knowledge of it.

150-52, Summers Aff., ¶¶ 5-14. More specifically, on November 24, 2008, the Harrises secured a loan from the Bank to their sons (which was used to pay the Harrises for their sons' purchase of Harris Publishing) by signing a deed of trust for the middle 40 acres, not for the Subject Real Property which was the west 40 acres. R. at Vol. II, pp. 384-85 & 388-89, Darryl Harris Depo. Tr., p. 48, l. 23 to p. 50, l. 10; p. 65, l. 4 to 66, l. 10.

Until November 2010, the Bank believed that both of the Harrises had executed the Corrected QuitClaim Deed on December 1, 2008, deeding the Subject Real Property to the Yosts. R. at Vol. II, pp. 360-61, Second Aff. Romrell, ¶¶ 3-9. The Corrected QuitClaim Deed was notarized by Robert Crandall, indicating that both Darryl and Christine had personally appeared before him and acknowledged to him that they had executed the Corrected QuitClaim Deed. R. at Vol. II, p. 471. The Corrected QuitClaim Deed was recorded in Bonneville County as Instrument No. 1317892 on December 2, 2008. *Id.*

Duane's two Deeds of Trust which provided the Subject Real Property as security for his renewal loan from the Bank were recorded on December 17, 2008, and December 30, 2008 ("Deeds of Trust"). R. at Vol. I, pp. 161-62, Morrison Aff., ¶ 7.

Tom Romrell ("Romrell"), the president of the Bank, had a meeting on December 8, 2008, with several of the Trigon investors. R. at Vol. II, p. 245, Romrell Depo. Tr., p. 18, l. 13 to p. 20, l. 2. Those investors had represented that their accountants had done due diligence regarding Trigon. *Id.* Additionally, those investors represented to Romrell that Trigon had been caught up in the economic downturn that was exposing other large financial institutions, such as

Lehman Brothers. *Id.* These investors also represented that Trigon had eight to ten million dollars available to return to its investors. R. at Vol. II, p. 245, Romrell Depo. Tr., p. 20, ll. 3-13. Even the Harrises' accountant, Steve Crandall, was working to get some updated financial statements to the Bank about where Duane was sitting financially. *Id.* at p. 20, ll. 14-24.

Duane had other non-Trigon assets the Bank was looking at to determine whether Duane would be able to repay his loans to the Bank, including cars, machinery, cargo trailers, real property in the Shadow Ridge subdivision, real property in the Waterstone division in Jefferson County, airport hangars in Palm Springs, and a large boat on Lake Mead. R. at Vol. II, pp. 246 & 249, p. 28, ll. 8-12; p. 54, l. 12 to p. 56, l. 18.

b. What the Bank Did Not Know

Duane did not tell anyone at the Bank what money he had used to purchase the Subject Real Property, either before he signed the Deeds of Trust or prior to learning that Trigon had been fraudulent. R. at Vol. I, pp. 147, 152 & 156, Yost Aff., ¶ 7; Summers Aff., ¶ 15; Romrell Aff., ¶ 17. More specifically, when Duane was in the process of obtaining the renewal loan, he did not mention to anyone at the Bank that the $800,000.00 that he had used in the Fall of 2007 to purchase the Subject Real Property was a transfer of $800,000.00 from his Trigon account to Darryl's Trigon account. *Id.*

At all relevant times, the Bank did not know that Darryl had signed Christine's name on the Corrected QuitClaim Deed. R. at Vol. II, p. 360-61, Second Romrell Aff., ¶¶ 5-7. Nor did the Bank know that the notary public, Robert Crandall, had notarized the Corrected QuitClaim

Deed even though neither Darryl nor Christine appeared before him to acknowledge their purported signatures. *Id.;* R. at Vol. II, p 391, Darryl Harris Depo. Tr., p. 75, ll. 3-22. The Bank did not know that Darryl had told Christine that he had signed her name on the Corrected QuitClaim Deed because the Harrises failed to tell anyone else about the forgery. R. at Vol. II, p. 444, Christine Harris Depo. Tr., p.54, ll. 20-23; p. 55, l. 14 to p. 56, l. 17; R. at Vol. II, pp. 360-61, Second Romrell Aff., ¶¶ 5-7.

Before the January 12, 2009, telephone call from Duane to Romrell, the Bank had no idea that Palmer was dishonest nor that Trigon was a hoax. R. at Vol. I, p. 156, Yost Aff., ¶ 6; R. at Vol. I, p. 146, Romrell Aff., ¶ 15. Following that telephone call, Romrell heard others refer to Trigon as a Ponzi scheme, but neither Romrell nor the Bank had any prior knowledge that Trigon was a Ponzi scheme. *Id.* Darryl testified that he does not have any actual facts or evidence indicating that the Bank knew Trigon was a fraud prior to himself finding out that it was a fraud. R. at Vol. II, pp. 395-96, Darryl Harris Depo. Tr., p. 92, ll. 21-24; p. 93, l. 18 to p. 94, l. 3. In fact, Darryl does not know of anyone who knew Trigon was a fraud prior to January 2, 2009, other than Palmer. R. at Vol. II., p. 394, Darryl Harris Depo. Tr., p. 89, ll. 2-13.

Other important information regarding the Bank's knowledge, or lack thereof, regarding Palmer and Trigon, is that the Bank did not have a close relationship to either Palmer or Trigon. Specifically, the Bank has never made any loans to Palmer or Trigon. R. at Vol. I, p. 146, Romrell Aff., ¶ 12. Furthermore, the Bank has never held any accounts owned by Palmer or Trigon. R. at Vol. I, p. 146, Romrell Aff., ¶ 13.

The purpose of a signature card at the Bank is not to verify signatures on notarized documents. R. at Vol. II, p. 361, Second Aff. Romrell, ¶ 8.

3.. Darryl's Beliefs Regarding Palmer and Trigon

Significantly, Darryl and the other investors felt they had no reason to doubt Palmer or Trigon. R. at Vol. II, p. 391, Darryl Harris Depo. Tr., p. 77, 9-10. Darryl had his accountant check into Trigon and Palmer. R. at Vol. II, pp. 391-92, Darryl Harris Depo. Tr., p. 77, ll. 1-4; p. 78, l. 5 to p. 79, l. 12. Darryl and his accountant were satisfied that Palmer was legitimate. *Id.* Darryl trusted Palmer and thought he was a "financial trading market genius". R. at Vol II, p. 391, Darryl Harris Depo. Tr., p. 77, ll. 11-18. Despite the very high rate of return that Palmer was paying investors, Darryl did not have any doubts that maybe Trigon was a little too good to be true. R. at Vol II, p. 391-92, Darryl Harris Depo. Tr., p. 77, l. 19 to p. 78, l. 4. Sometime in December 2008, Darryl had heard that Palmer or Trigon had written checks which had bounced. R. at Vol II, p. 394-95, Darryl Harris Depo. Tr., p. 88, ll. 5-13; p. 92, ll 3-10. Even when the Trigon and Palmer investments started to sour during the last half of 2008, Darryl and the other investors thought it was all related to the downturn in the market because the stock market had taken huge hits. R. at Vol. II, pp. 392-93, Darryl Harris Depo. Tr., p. 81, l. 14 to p. 82, l. 11. None of the investors suspected that the losses were really because of Palmer's fraud. *Id.* Even when Darryl and some of the other investors met with Palmer on December 15, 2008, and were told by Palmer there was only perhaps fifteen percent (15%) of the value left in Trigon, Darryl believed it was because of the market downturn, not because of any fraud committed by Palmer.

Id. On December 15, 2008, when he learned that Trigon had lost so much money, Darryl just accepted it because everybody was losing money in the stock market and in real estate values. R. at Vol. II, p. 393, Darryl Harris Depo. Tr., p. 84, ll. 20-25. Darryl was completely shocked to learn on January 2, 2009, that Palmer and Trigon had been frauds. *Id.* at p. 84, l. 14 to p. 85, l. 3. As far as Darryl knows, everyone was surprised to learn of Palmer's fraud. *Id.*

Darryl testified that he does not have any information, facts or evidence that the Bank knew about Palmer's fraud before Darryl learned about it on January 2, 2009. R. at Vol. II, pp. 395-96, Darryl Harris Depo. Tr., p. 92, ll. 21-24; p. 93, l. 24 to p. 94, l. 3.

IV. ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Whether the Bank is entitled to attorney fees and costs on appeal pursuant to contract and/or Idaho Code § 12-120(3) and Rules 40 and 41, I.A.R.

V. ARGUMENT

A. Standard of Adjudication and Review

In *Finholt v. Cresto,* 143 Idaho 894, 896, 155 P.3d 695, 697 (2007), the Idaho Supreme Court stated:

> This Court's review of the district court's ruling on a motion for summary judgment is the same as that required of the district court when ruling on the motion.... Summary judgment is appropriate when the pleadings, depositions, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c).

(citations omitted.)

"A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment." *Id.*

The moving party is entitled to a judgment as a matter of law when the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. *See Dunnick v. Elder,* 126 Idaho 308, 312, 882 P.2d 475, 479 (Ct. App. 1994) (*citing Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)).

In *Drew v. Sorensen,* 133 Idaho 534, 537, 989 P.2d 276, 279 (1999), the Idaho Supreme Court stated:

> Generally, when considering a motion for summary judgment, a court "liberally construes the record in a light most favorable to the party opposing the motion and draws all reasonable inferences and conclusions in that party's favor." *Brooks v. Logan,* 130 Idaho 574, 576, 944 P.2d 709, 711 (1997). However, where the evidentiary facts are undisputed and the trial court rather than a jury will be the trier of fact, "summary judgement is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences." *Riverside Development Co. v. Ritchie,* 103 Idaho 515, 519, 650 P.2d 657, 661 (1982). As long as the parties have filed cross-motions for summary judgment and no jury has been requested, the trial court may draw the inferences it would be allowed to draw from the evidence at trial. *See Williams v. Computer Resources, Inc.,* 123 Idaho 671, 673, 851 P.2d 967, 969 (1993).

See also Land O'Lakes, Inc. v. Bray, 138 Idaho 817, 819, 69 P.3d 1078, 1080 (Ct. App. 2003) ("When an action is to be tried without a jury, however, the court is not compelled to draw inferences in favor of the party opposing the motion; rather, the court is "free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.") (citations

omitted).

In this case, the Harrises and the Bank filed cross-motions for summary judgment. Moreover, neither party requested a jury trial.

B. The Bank is a Bona Fide Lender

The Bank is a bona fide lender for value and has priority over all other liens or interests in the Subject Real Property.

Idaho Code § 55-812, provides: "Every conveyance of real property ... is void as against any subsequent purchaser or mortgagee of the same property, or any party thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded."

The Idaho Supreme Court recently explained the requirements to be a bona fide purchaser, as follows:

> In order to claim the protection of being a BFP, a party "must show that at the time of the purchase he paid a valuable consideration and upon the belief and the validity of the vendor's claim of title without notice, actual or constructive, of any outstanding adverse rights of another." *Imig v. McDonald*, 77 Idaho 314, 318, 291 P.2d 852 855 (1955)....

Weitz v. Green, 148 Idaho 851, 859, 230 P.3d 743, 751 (2010).

The same rationale that protects a bona fide purchaser also protects a bona fide mortgagee/encumbrancer. *Sun Valley Land and Minerals, Inc. v. Burt,* 123 Idaho 862, 866, 853 P.2d 607, 611 (Ct. App. 1993).

> Status as a bona fide lender/mortgagee is obtained if the lender/mortgagee obtained an interest in the property in good faith, for value and without notice of the claim or interest of a third party. *Houston First Am. Sav. v. Musick,* 650

> S.W.2d 764, 769 (Tex. 1983). This point of error once again revolves around the central issue of actual notice....

World Savings Bank, F.S.B. v. Gantt, 246 S.W.3d 299, 306 (Tex. App. 2008).

1. Good Faith

The Bank obtained its security interest in the Subject Real Property in good faith. There is no evidence that the Bank acted in bad faith, and the Harrises are not alleging bad faith. R. at Vol. I, p. 176, Answer to Interrogatory No. 14.

2. For Value

The Bank gave value in exchange for the Deeds of Trust securing the Subject Real Property. Romrell testified:

> Additional consideration for the renewed loan was provided by both parties. Yost agreed to pay additional interest and loan processing fees and to provide collateral. The Bank agreed to extend the maturity date for one (1) year, making the principal and interest on Loan Number 4010805495 due on November 21, 2009....

Romrell Aff., ¶ 8.

The uncontroverted fact is that the Bank provided value to Duane in exchange for the Deeds of Trust.

3. Without Notice of the Claim or Interest of a Third Party

The Bank has set forth ample evidence establishing that at the time it obtained and recorded the Deeds of Trust, it was unaware of the Harrises' claims against the Subject Real Property. *See* the above section beginning on page 6 entitled: "III. Statement of the Case,

B. Statement of Facts, 2. The Bank, a. What the Bank Knew"; *see also* the above section beginning on page 9 entitled: "III. Statement of the Case, B. Statement of Facts, 2. The Bank, b. What the Bank Did Not Know".

In order for the Bank to lose its bona fide lender status, the Harrises would have had to show that at the time the Bank obtained the Deeds of Trust from the Yosts: (1) that the Bank knew Palmer was dishonest, that Trigon was a Ponzi scheme and that Trigon investment money was not worth anything and (2) that the Bank knew that Duane had paid the Harrises for the Subject Real Property using Trigon investment money. Only if the Harrises could have shown these two things, could they then have made the inference that the Bank was on notice of the Harrises' possible future claims against the Subject Real Property. However, there is no evidence the Bank knew either of these critical facts.

As much as the Harrises want to avoid foreclosure of the Subject Real Property by claiming the Bank had actual, constructive or inquiry notice of their possible future claims, the truth is that neither the Bank, the Harrises, the other Trigon investors nor anyone else knew about Palmer's deceit until after the Corrected QuitClaim Deed had been delivered and the Bank's Deeds of Trust had been executed by the Yosts and recorded with the Bonneville County Recorder's Office. Moreover, there is no evidence that the Bank knew what assets Duane had used to pay the Harrises for the Subject Real Property.

To defeat the Bank's bona fide lender status, the Harrises would need to show that at the time the Bank perfected its security interest in the Subject Real Property through its Deeds of

Trust, the Bank had actual, constructive or inquiry notice that the Harrises would be claiming an interest in the Subject Real Property upon theories of equitable mortgage, vendor's lien, mutual mistake, deed as security, quiet title and foreclosure. At the time the Deeds of Trust were recorded, even the Harrises did not know that they would eventually make such claims against the Subject Real Property. Therefore, it is completely unreasonable to infer that the Bank could have had any kind of notice of such unknown claims at that time.

The Harrises argue at length that prior to the recording of the Corrected QuitClaim Deed, the Bank knew that the Subject Real Property was in the Harrises' name and that before and after said deed was recorded, the Yosts were not "in possession" of the farmland making up the Subject Real Property. This argument is completely irrelevant. Also irrelevant are discussions Darryl, Duane and Steve Crandall may have had in 2007 regarding the possibility of developing the Subject Real Property, along with another 40 acre parcel, in some kind of partnership. Even if relevant, there is no evidence the Bank had any knowledge of such discussions. All of these arguments are completely irrelevant and ignore the following uncontroverted facts: Both Darryl and Duane represented to the Bank that the Harrises had transferred the Subject Real Property to the Yosts. R. at Vol. I, pp. 150-51, Summers Aff., ¶¶ 10, 14; R. at Vol. I, p. 144, Romrell Aff., ¶ 8. When it was discovered that the Harrises had not yet executed the proper legal documents transferring the Subject Real Property, the Corrected QuitClaim Deed to the Yosts was executed and delivered, thus completing the transaction. R. at Vol. I, p. 151, Summers Aff., ¶ 12; R. at Vol. I, p. 145-46, Romrell Aff. ¶ 10; *see also* R. at Vol. I, pp. 13-14, Complaint ¶¶ 6-7, 12, 15-

17.

The Harrises also make an extended argument that the Bank should have known or at least investigated whether Trigon was a Ponzi scheme and Palmer was a dishonest thief. This argument is a red herring because prior to the Yosts' execution of the Bank's Deeds of Trust, the Bank did not know that the consideration for the transfer of the Subject Real Property from the Harrises to the Yosts included the transfer of $800,000.00 in the Yosts' Trigon account to the Harrises' Trigon account. R. at Vol. I, p. 147, Romrell Aff., ¶ 17.

Even if the Bank had known what assets the Yosts had used to purchase the Subject Real Property from the Harrises, it would not matter because the Bank did not learn or have any idea that Palmer was dishonest or that the Trigon investments had been a hoax until January 12, 2009, long after the Yosts had executed the Bank's Deeds of Trust and ten days after Darryl had learned the unexpected, unfortunate news. R. at Vol. I, p. 146, Romrell Aff., ¶¶ 14-15; R. at Vol. II, p. 391, Darryl Harris Depo Tr. p. 75, l. 25 to p. 76, l. 2.

The Bank had no reason to suspect that Palmer was dishonest and that Trigon was a Ponzi scheme because the Bank never made any loans to Palmer or Trigon and never held any accounts owned by them. R. at Vol. I, p. 146, Romrell Aff., ¶¶ 12-13.

Importantly, Darryl and the other Trigon investors also had no idea that Palmer was a fraud and that Trigon was a Ponzi scheme, despite claiming to have thoroughly investigated Trigon. Even knowing that Trigon had bounced some checks and that Palmer had indicated Trigon had lost 85% of its value, Darryl did not consider the possibility that it was all just a

scam. It wasn't until January 2, 2009, that Darryl learned the truth. The Bank did not learn the truth until ten days later. Therefore, at the time the Bank obtained the Deeds of Trust from Duane, it had no idea that the Harrises would eventually claim that they had not actually deeded the Subject Real Property to Duane.

As much as the Harrises would like to rewrite history and prevent foreclosure of the Subject Real Property, the actual facts do not support their argument that the Bank knew or should have known about their future claims against the Subject Real Property.

As the Bank obtained the Deeds of Trust on the Subject Real Property in good faith, for value and without notice of the claims or interests now asserted by the Harrises, the Bank is a bona fide lender.

C. Failure/Lack of Consideration

The Harrises claim that their agreement with the Yosts to exchange the Subject Real Property for $800,000.00 failed for lack of consideration because they argue the Yosts never paid them the full purchase price.[4] However, the Harrises have not presented any admissible evidence to support their lack-of-consideration argument.

1. Clear Language of the Deed

The Harrises' statements regarding a lack of consideration are simply their opinions but

[4] This claim is inconsistent with their obtaining a money judgment against the Yosts in the amount of $800,000.00 plus interest, costs and attorney fees as discussed more thoroughly below under failure of consideration, quasi estoppel and judicial estoppel.

those statements are inadmissible to contradict the Corrected QuitClaim Deed's clear language.

In *Bliss v. Bliss,* 127 Idaho 170, 898 P.2d 1081 (1995), the Idaho Supreme Court held that extrinsic evidence was not admissible to contradict the clear language of a quitclaim deed. In *Bliss,* the grantor attempted to void the deed for lack of consideration. However, the Idaho Supreme Court stated:

> Thereafter, Gordon executed a quitclaim deed to forty-eight unencumbered acres of the ranch property. Althea recorded the deed with the county recorder's office the next day. The deed provided in pertinent part,
>
> > THE GRANTOR, GORDON F. BLISS, a married man, ... for and in consideration of ONE DOLLAR and OTHER GOOD and VALUABLE CONSIDERATION, conveys and quit claims to ALTHEA BLISS, a married woman, *as her separate property,* whose address is ..., the following described real estate.... (Italics added, capitalization original.)
>
> Because the deed was in writing, signed by the grantor, and included the name and address of the grantee, it constituted a valid conveyance of legal title to real property. I.C. § 55-601;1 *see, e.g., Erb v. Kohnke,* 121 Idaho 328, 337, 824 P.2d 903, 912 (Ct.App.1992)....
>
> ...
>
> At trial, Gordon testified that Althea gave no consideration for the execution of the deed to her. ... Gordon asks this Court to declare the deed void for lack of consideration, and thereby hold that the forty-eight acres is community property. We decline.
>
> Gordon attempted to overcome the presumption of separate property ... by asserting that Althea gave no consideration for execution of the deed. However, Gordon's statements regarding intent and consideration were inadmissible to contradict the deed's clear language. In *Hall v. Hall,* 116 Idaho 483, 484, 777 P.2d 255, 256 (1989), we reiterated that where a deed is plain and unambiguous, the intention of the parties must be determined from the deed itself. "Oral and

> written statements are generally inadmissible to contradict or vary unambiguous terms contained in a deed." *Id.* Here, not only did Gordon "convey" the property to Althea, thereby raising the presumption of separateness under I.C. § 32-906(2), the deed expressly states the land is conveyed "as her separate property." Further, the deed unambiguously declares that it is "in consideration of ONE DOLLAR and OTHER GOOD and VALUABLE CONSIDERATION." Gordon's extrinsic evidence is inadmissible to contradict these clear statements....

Id. at 174, 898 P.2d at 1085.

In the present case, the Corrected QuitClaim Deed provides, in part, as follows:

> **Darryl Harris and Christine Harris,** Husband and Wife, Grantors, of Idaho Falls, Idaho hereby RELEASES, and Forever QUITCLAIMS to **Duane Yost and Lori Yost,** Grantees, for good and valuable consideration the following described tract of land in Bonneville County, State of Idaho, ...

Complaint, Exhibit "C"; Nelson Aff. ¶ 9, Exhibit "D", Exhibit "2" (bold and capitalization in original).

The Corrected QuitClaim Deed unambiguously declares that it is "for good and valuable consideration." Therefore, any statements by the Harrises in which they claim the Corrected QuitClaim Deed was not supported by consideration are not admissible to contradict the clear language of the Corrected QuitClaim Deed.

2. Failure of Consideration

In an effort to show that no consideration was actually paid from Duane to them, the Harrises submitted the Affidavit of Wayne Klein. However, Mr. Klein's testimony is irrelevant because, at most, it would support a failure of consideration, not a lack of consideration.

"As a general rule a deed which is otherwise valid will not be invalidated by reason of a

total or partial failure of consideration, and will nevertheless operate to convey title." 26A C.J.S. *Deeds* § 32 (2001).

The Idaho Court of Appeals has stated:

> The term "failure of consideration" includes instances where a proper contract was entered into when the agreement was made, but because of supervening events, the promised performance fails, rendering the contract unenforceable. *General Insurance Co. of America v. Carnicero Dynasty Corp.*, 545 P.2d 502 (Utah 1976); *Taliaferro v. Davis,* 216 Cal.App.2d 398, 31 Cal.Rptr. 164 (1963); 1 S. WILLISTON, WILLISTON ON CONTRACTS § 119A (W. Jaeger, 3d ed. 1957); 17 C.J.S. *Contracts* § 129 (1963). Failure of consideration generally refers to failure of performance of a contract. *Converse v. Zinke,* 635 P.2d 882 (Colo.1981); RESTATEMENT (SECOND) OF CONTRACTS § 237 comment a (1981) (hereinafter referred to as RESTATEMENT). "Failure" of consideration is to be distinguished from "want" or "lack" of consideration, which refers to instances where no consideration ever existed to support the contract, rendering the contract invalid from the beginning. *General Insurance Co. of America v. Carnicero Dynasty Corp., supra.*

World Wide Lease, Inc. v. Woodworth, 111 Idaho 880, 884-85, 728 P.2d 769, 773-74 (Ct. App. 1986).

In *World Wide Lease,* the Court of Appeals determined that under a lease, "mutual promises to perform served as the consideration." *Id.* at 885, 728 P.2d at 774.

"A promise for a promise is adequate legal consideration to support a contract." *E. Idaho Prod. Credit Ass'n v. Placerton, Inc.,* 100 Idaho 863, 867, 606 P.2d 967, 971 (1980). *See also Barrett v. Simmons,* 221 S.E.2d 25, 27 (Ga. 1975) ("A promise to pay constitutes consideration. Failure to pay the consideration promised, although it constitutes a breach, does not render the conveyance invalid for lack of consideration.").

The agreement between Darryl and Duane contained mutual promises. Duane agreed to pay $800,000.00 to Darryl in exchange for the Subject Real Property. Because they both made mutual promises to each other, the agreement was supported by consideration. Whether Duane actually paid the $800,000.00, or not, does not change the outcome of this case.

The District Court correctly determined that "[e]ven if Mr. Yost's Trigon account was empty when he made the transfer [of the $800,000.00], that deficiency is only relevant to his ability to perform on his promise to pay; it has nothing to do with consideration." R. at Vol. 3, p. 556, Memorandum Decision, p. 11.

Prior to the transaction, Duane had no obligation to give the Harrises $800,000.00. However, because of their agreement, the Harrises were obligated to transfer the Subject Real Property to Duane and Duane was obligated to give $800,000.00 to the Harrises. When the $800,000.00 of "investment credit" was transferred from Duane to Darryl, the parties believed Duane had performed his part of the bargain. The Harrises subsequently performed their part of the bargain when they transferred the Subject Real Property to Duane and Lori. Only later, after discovering Palmer's fraud, did the parties learn that the "vast majority of investment credits listed on investor account statements were merely paper representations and did not represent actual tangible assets held by Trigon." R. at Vol. III, p. 567, Klein Aff., ¶ 8. This revelation may have given rise to a failure of consideration, but not a lack of consideration. Duane was still obligated to pay the Harrises $800,000.00. In fact, the Harrises sued the Yosts and obtained a judgment against them in the amount of $800,000.00 plus interest and costs. It would not be

legal or ethical for the Harrises to have requested and obtained a judgment for the $800,000.00, if the Yosts were not legally obligated to pay the $800,000.00 to the Harrises in exchange for the transfer of the Subject Real Property.

Because Duane was legally obligated to pay the Harrises $800,000.00, his failure to actually do so, at most, resulted in a failure of consideration. Failure of consideration can only make the Corrected Quitclaim Deed voidable, not void, and therefore cannot defeat the Bank's status as a bona fide lender. "Where a deed is only voidable, the defense of bona fide purchaser is available." *First Interstate Bank of Sheridan v. First Wyoming Bank, N.A. Sheridan,* 762 P.2d 379, 382 (Wyo. 1988). Therefore, the District Court correctly determined that "the Bank qualifies for the protections afforded to a bona fide lender, and any issue regarding the failure of consideration is moot." R. at Vol. III, p. 564, Memorandum Decision, p. 19.

3. Lack of Consideration

Even if Duane's failure to pay the promised $800,000.00 could somehow be construed as a "lack of consideration", such would not negate the Bank's protected status as a bona fide lender. Although Idaho has never squarely addressed this issue other states have determined that a bona fide purchaser keeps its protected status even if there is a lack of consideration.

> A deed procured without consideration and without the free consent of the grantor because of duress, but which is otherwise regular and is delivered, is, as between the parties thereto, voidable only and not void.... As a voidable deed, it effectually accomplishes the thing sought to be accomplished, until annulled in a suit brought for that purpose.

Goodwin v. City of Dallas, 496 S.W.2d 722, 723 (Tex. Civ. App. 1973) (citations omitted).

Courts have held that a bona fide purchaser is protected when the original grantor alleges lack of consideration. *See First Interstate Bank of Sheridan,* 762 P.2d at 384 (lack of consideration on the part of the original grantor would fail to annul the protections afforded the mortgagee bank under the bona fide purchaser doctrine); *Brown v. Johnson,* 11 So.2d 713, 717 (La. Ct. App. 1942), ("[T]he conveyance act executed by Jamerson to Johns was valid on its face, and neither lack of consideration for it nor equities that existed between those parties can be urged against Johnson, who was a bona fide purchaser for value.")

The Harrises' claim of lack of consideration fails to set aside the Bank's Deeds of Trust and its priorities thereunder because the Bank is a bona fide lender for value.

4. Fraud by Palmer

The Harrises argue that in addition to a lack of consideration, the Corrected QuitClaim Deed was void because of fraud. However, the fraud mentioned by the Harrises was committed by Palmer, a third party, and not by any of the parties to the Corrected QuitClaim Deed nor by the Bank.

"An action to rescind a deed will not be sustained merely because of fraudulent representations by a third party who does not act under authority of the defendants, and which they neither participate in, nor have notice of,..." 26A C.J.S. *Deeds* § 118 (2001).

In *Swinehart v. Turner,* 44 Idaho 461, 259 P. 3 (1927), the Idaho Supreme Court held that a sale to bona fide purchasers for a valuable consideration who had no knowledge or notice of a fraudulent purchase by their grantor would not be set aside.

None of the parties in this matter actually committed any of the Trigon-associated fraud.[5] More importantly, the Bank was a bona fide lender for value without knowledge or notice of Palmer's fraud. Therefore, this Court should not set aside the Corrected QuitClaim Deed.

D. Delivery of the Deed

The Harrises claim the Corrected QuitClaim Deed was not actually "delivered" because delivery was conditional on full payment. However, the uncontroverted facts can only lead to the conclusion that Darryl intended to deliver the Corrected QuitClaim Deed when he signed it and then left it at Robert Crandall's office.

"The question of delivery is one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed." *Barmore v. Perrone,* 145 Idaho 340, 344, 179 P.3d 303, 307 (2008). "[T]he real test of the delivery of a deed is this: Did the grantor by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered." *Id.*

"It is beyond controversy that the evidence of delivery must come from without the deed. In other words, a deed never shows upon its face nor by the terms thereof a delivery, and parol evidence thereof must necessarily be admitted when the question of delivery arises." *Id.* at 345, 179 P.3d at 308 (*citing Whitney v. Dewey.* 10 Idaho 633, 655, 80 P. 1117, 1121 (1905)).

However, once delivery has been made, parol evidence is not admissible to show that a

[5] Darryl's forgery was the only undisputed bad act that was committed by any of the parties to this lawsuit.

deed is to take effect upon a condition precedent. In *Whitney,* the Court explained:

> "[P]arol evidence is inadmissible to show that the deed was to take effect upon condition." The author thereupon proceeds to quote as a part of the text, and with approval, from the opinion of Harris, J., in *Lawton v. Sager,* 11 Barb. 349, in whose opinion the following language is used: "Whether a deed has been delivered or not is a question of fact, upon which, from the very nature of the case, parol evidence is admissible. But whether a deed, when delivered, shall take effect absolutely or only upon the performance of some condition unexpressed therein, cannot be determined by parol evidence. To allow a deed absolute upon its face to be avoided by such evidence would be a dangerous violation of a cardinal rule of evidence."

Whitney, 10 Idaho at 652, 80 P. at 1121.

In their Complaint, the Harrises alleged the following:

> 12. Relying upon the [Bank of America] bank letter, the Harrises agreed to complete their planned transaction and deliver a deed.
>
> ...
>
> 17. Subsequently, the Harrises' executed a corrected quitclaim deed conveying the subject property to the Yosts. That quitclaim deed was recorded December 2, 2008, as Instrument No. 1317892 in the Recorder's Office for Bonneville County, Idaho. A copy of that quitclaim deed is attached as Exhibit C and incorporated here by reference.

R. at Vol. I, p. 14.

Before the District Court, the Harrises argued that

> On both separate occasions when Harris delivered the first quitclaim deed and the corrected quitclaim deed to Yost, that delivery was unquestionably *conditional on payment.* Harris delivered the deed with the intention and *condition that Yost pay* Harris for the 40 acres....
>
> Where the *condition of payment* was not satisfied at the time of delivery of either quitclaim deed, there was no delivery of the deed...

R. at Vol. II, pp. 324-25 (emphasis added).

The uncontroverted evidence can only be construed to show that Darryl intended to deliver the Corrected QuitClaim Deed to Duane. After Darryl had signed the first Quitclaim Deed, Duane gave Darryl the Corrected QuitClaim Deed and told Darryl to get it back to him as fast as he could. R. at Vol. II, pp. 387-88, Darryl Harris Depo. Tr., p. 60, l. 21 to p. 62, l. 2. Darryl testified that Duane told him that the Bank wanted Darryl to sign the new Corrected QuitClaim Deed. R. at Vol. II, p. 388, Darryl Harris Depo. Tr., p. 63, ll. 17-18. Darryl understood the purpose of a deed was to show the transfer of land from one person to another. R. at Vol. II, p. 389, Darryl Harris Depo. Tr., p. 66, l. 24 to p. 67, l. 5. In addition, Darryl understood that a deed is recorded in the county recorder's office to put everyone on notice of who owns the property. *Id.* at p. 67, l. 6 to p. 68, l. 1. Darryl knew that the Bank was relying on the Corrected QuitClaim Deed to make sure that title to the Subject Real Property had really been transferred to the Yosts and in order to secure its loan to Duane. *Id.* at p. 68, ll. 2-17. Darryl went to Robert Crandall's office and met Duane there. Duane gave Darryl the Corrected QuitClaim Deed and they both left. Darryl signed the Corrected QuitClaim Deed and then returned to Robert Crandall's office where he left it. R. at Vol. II, p. 391, Darryl Harris Depo. Tr., p. 75, ll. 11-20. Darryl admitted that he had transferred the Subject Real Property. R. at Vol. II, p. 401, Darryl Harris Depo. Tr., p. 116, l. 22 to p. 117, l. 8. Finally, the Corrected QuitClaim Deed was recorded on Duane's behalf by Robert Crandall in Bonneville County on December 2, 2008. R. at Vol. II, p. 471.

There is no genuine issue of material fact concerning the delivery of the Corrected QuitClaim Deed because all of the evidence indicates that Darryl intended to, and did in fact, deliver said deed.

Harrises' actual argument appears to be that upon delivery of the Corrected QuitClaim Deed, it did not immediately take effect because it was conditioned upon full payment of $800,000.00. However, whether the deed took effect absolutely upon delivery or only upon the performance of some condition unexpressed therein, cannot be determined by parol evidence. *See Whitney, supra.* The written language of the Corrected QuitClaim Deed does not mention any condition precedent that is necessary before the deed would become effective. Rather, the Corrected QuitClaim Deed provides, in part, as follows:

> **Darryl Harris and Christine Harris**, Husband and Wife, Grantors, of Idaho Falls, Idaho hereby RELEASES, and Forever QUITCLAIMS to **Duane Yost and Lori Yost**, Grantees, for good and valuable consideration the following described tract of land in Bonneville County, State of Idaho, ...

R. at Vol. II, p. 471 (bold and capitalization in original). Because the written language of the Corrected QuitClaim Deed does not set forth any conditional event necessary to become effective, it became absolutely effective upon Darryl's uncontroverted delivery.

E. Idaho Code § 32-912

The Harrises argue that because Darryl forged Christine's signature on the Corrected QuitClaim Deed, it is void under Idaho Code § 32-912. However, the Harrises should be estopped from claiming the Corrected QuitClaim Deed is void.

"Estoppel is a recognized exception to the spousal joinder requirement of I.C. § 32-912 where the conduct of the non-consenting spouse is consistent with the existence and validity of the disputed contract." *Lovelass v. Sword,* 140 Idaho 105, 108, 90 P.3d 330, 333 (2004).

> "While it is true that a contract to convey community real estate is void if not signed and acknowledged by both the husband and wife under this statute, this is not an inexorable rule," *Tew v. Manwaring,* 94 Idaho 50, 53, 480 P.2d 896, 899 (1971), and "conduct from which acquiescence can be inferred may be sufficient to establish an estoppel." *Calvin v. Salmon River Sheep Ranch,* 104 Idaho 301, 305, 658 P.2d 972, 976 (1983). Further, a non-consenting spouse's "failure to participate in the negotiations is not determinative of the issue of estoppel." *Id.*

Id. at 109, 90 P.3d at 334.

> "[E]ven if an instrument lacks an acknowledgement of a spouse's signature, the spouse will be deemed to have waived the defect if his or her conduct is consistent with the existence and validity of the instrument." *Lowry v. Ireland Bank,* 116 Idaho 708, 711, 779 P.2d 22, 25 (Ct.App.1989) (*citing Tew,* 94 Idaho at 54, 480 P.2d at 900).

Id.

After she learned about Darryl's forgery of her name on the QuitClaim Deed, Christine did not object for nearly two years. Moreover, she acquiesced to the forgery.

The term "acquiescence" includes the recognition of an existing transaction, which by necessity involves action occurring after the transaction. Specifically, "acquiescence" is defined as follows:

> Conduct recognizing the existence of a transaction, and intended, in some extent at least, to carry the transaction, or permit it to be carried, into effect. It is some act, not deliberately intended to ratify a former transaction known to be voidable, but recognizing the transaction as existing, and intended, in some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it,

> and thus differs from "confirmation," which implies a deliberate act, intended to renew and ratify a transaction known to be voidable. Passive compliance or satisfaction; distinguished from avowed consent on the one hand, and, on the other, from opposition or open discontent. Conduct from which assent may be reasonably inferred. Equivalent to assent inferred from silence with knowledge or from encouragement and presupposes knowledge and assent. Imports tacit consent, concurrence, acceptance and assent. A silent appearance of consent. Failure to make any objections. Submission to an act of which one had knowledge. Exists where a person knows or ought to know that he is entitled to enforce his right or to impeach a transaction, and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right.

Black's Law Dictionary 24 (6th ed. 1990) (case citations omitted).

In *Grice v. Woodworth,* 10 Idaho 459, 80 P.912 (1904), the Idaho Supreme Court held that a wife was estopped from asserting the statutes (similar to § 32-912) that required both husband and wife to execute and acknowledge the conveyance of community property because she had failed to object following the agreement between the husband and the purchaser of the property. In that case, "after [the purchaser] had so entered into the possession the [wife] was informed of the improvements made thereon, and knew that said improvements had been made and possession taken by the [purchaser] under the belief that he was the owner of said premises, and to all of which said [wife] made no objection." *Id.* at 464, 80 P. at 913. In his dissent, Justice Ailshie lamented that "[t]he majority have told the good wives of this state that they must talk [meaning object and complain] or be estopped." *Id.* at 475, 80 P. at 917.

Put another way, the *Grice* majority held:

> Courts of equity will not permit the statute of frauds or the statute in regard to conveyance of married women to be a shield to protect fraud, and those statutes were not enacted to encourage frauds and cheats.... Because of the facts of this

> case, the principle that governs is more in the nature of an estoppel or waiver on the part of [the wife], and not the broad principle of abandonment, as suggested by the provisions of section 3041, Rev. St., above quoted. While the provisions of the sections above quoted were made for the protection of married women, they were not intended to operate as a shield to relieve them against a fraudulent transaction, such as the one under consideration, and she is estopped by her own acts from interposing the provision of said sections as a valid defense to this action....

Id. at 468, 80 P. at 915.

On rehearing, the *Grice* majority stated:

> Now, what was the duty of [the wife] when she visited the premises in dispute, and found them occupied by [the purchaser] and his family, making valuable and lasting improvements upon the house in good faith, believing they were the owners thereof? ...
>
> ...
>
> ... If [the wife] desired to deal fairly with the [purchasers] when she returned from Moscow, and found them in possession of her property, upon which she had filed a homestead declaration (if she did not know they were occupying the property under a claim of purchase prior to that time), she should have then said to them: "You are improving property, upon which I have filed my homestead declaration. I have never consented to the sale of it, and still desire to claim it as my home." This would have been good faith and reasonable diligence. Equity does not permit her to remain silent as to her claims, and by her conversation encourage appellants to continue their payments and improvements on the property,...

Id. at 470-72, 80 P. at 916. Of course, it is the majority opinion in *Grice* that is the law of Idaho.

Silence can play a role in estoppel. In *Joplin v. Kitchens,* 87 Idaho 530, 394 P.2d 313 (1964), the Idaho Supreme Court stated:

> Mere silence of itself will not raise an estoppel. To make the silence of a party operate as an estoppel the circumstances must have been such as to render it his duty to speak, and there must also have been an opportunity to speak.

> It is essential that the one claimed to be estopped should have had knowledge of the facts, and that the adverse party should have been ignorant of the truth, and have been misled into doing that which he would not have done but for such silence. Silence will not support an estoppel unless the person claiming an estoppel justifiably relied on the silence to his prejudice, and such conduct in reliance must be intended or reasonably anticipated by the one who remained silent.

Id. at 535, 394 P.2d at 315 (1964).

The Idaho Supreme Court has stated:

> Appellants contend that a mere acquiescence where there is no duty to speak does not raise an estoppel, and further that there was no duty to speak in this instance. Appellants cite 31 C.J.S. *Estoppel* § 114, pp. 593-594 in support of this contention. However, it is there said that,
>
> > "Where nonaction or passivity is relied on to create an estoppel, it must appear that the party to be estopped was under a duty to act under the circumstances, or, as is sometimes declared, *was bound in equity and good conscience actively to evidence his intention not to be bound by the transaction."* (Emphasis added)
>
> In the Idaho case of *Neer v. McFarland,* plaintiff asserted certain slots were contemplated in the foundation defendant was building as part performance of a contract between plaintiff and defendant. This Court held plaintiff was estopped from asserting the slots were contemplated by the parties, because plaintiff acquiesced in defendant's construction of the foundation without the slots when he had ample opportunity to tell defendant of the alleged error. The only duty to speak was the duty imposed by the requirements of good conscience and equity. There may be an equitable duty to speak, if subsequent maintenance of a position inconsistent with that acquiesced in would lead to unconscionable results....

KTVB, Inc. v. Boise City, 94 Idaho 279, 284, 486 P.2d 992, 997 (1971) (emphasis in original)

(footnote omitted).

Christine was bound by the requirements of good conscience and equity to inform Duane and the Bank that Darryl had forged her name on the Corrected QuitClaim Deed. It would be unconscionable for Darryl to have forged the Corrected QuitClaim Deed and to have told Christine that he had done so, and to allow Christine to fail to inform anyone about the forgery, especially Duane and the Bank, and then to allow Christine to raise the protection of § 32-912 nearly two (2) years after she learned of the forgery and after she had brought suit and obtained a judgment against the Yosts for $800,000.00 plus interest, costs and attorney fees.

Under the doctrines of estoppel, including, but not limited to, quasi estoppel, judicial estoppel and equitable estoppel, Christine should be estopped from now arguing that the Corrected QuitClaim Deed is void under § 32-912. Facts relating to all types of estoppel are set forth above in the section beginning on page 4 entitled: "III. Statement of the Case, B. Statement of Facts, 1. Christine Harris".

After Christine learned about the forged Corrected QuitClaim Deed, her conduct has been consistent with the existence and validity of the instrument as well as her acquiescence to the transfer of the forty (40) acres to the Yosts.

In addition, the Bank did not know about the forgery and relied on Christine's acquiescence to the transfer of the Subject Real Property to the Yosts. Darryl told Christine about the forgery on or about December 15, 2008.[6] Thereafter, believing that the Corrected

[6] Darryl signed the Corrected QuitClaim Deed on December 1, 2008. He testified that he told Christine about the forgery about two weeks later.

QuitClaim Deed was properly signed by both of the Harrises, the Bank had its first Deed of Trust "re-recorded to correct an error on the legal description on December 17, 2008 as Instrument No. 1319093 in the Recorder's Office for Bonneville County, Idaho." R. at Vol. I., pp. 14-15, Complaint, ¶18. Later, still believing that the Harrises had finalized the transfer of the forty (40) acres to the Yosts, the Bank had the Yosts sign the second Deed of Trust and the Bank recorded it in the Bonneville County Recorder's Office on December 30, 2008. R. at Vol. I., p. 15, Complaint, ¶ 19. Romrell testified, "If the Bank had learned in December 2008 that Darryl Harris had forged his wife's name on the Corrected QuitClaim Deed, the Bank would have immediately requested that a second Corrected QuitClaim Deed be signed by both Darryl Harris and Christine Harris." R. at Vol. II, p. 361, Second Romrell Aff., ¶ 9. Christine did not raise the issue of Darryl's forgery until November 2010, after she had already commenced this action, acknowledged the facts contained in the Complaint and obtained a judgment against the Yosts for $800,000.00 plus interest and costs. R. at Vol II, pp. 369-70; R. at Vol. I, pp. 133-34. Thus, Christine's acquiescence in the entire transaction gained some advantage for her (the $800,000.00 judgment plus interests and costs). Moreover, her acquiescence in the transaction and her failure to notify anyone about the forgery has produced a disadvantage to the Bank (the recording of both of the Deeds of Trust while not knowing that Darryl had forged Christine's name and the inability to now obtain a second corrected quitclaim deed signed by both Darryl and Christine).

1. Quasi Estoppel

Pursuant to the doctrine of quasi estoppel, the Harrises should be estopped from claiming that the Corrected QuitClaim Deed was not signed by Christine or that the Corrected QuitClaim Deed is void because Christine did not sign it.

In *Keesee v. Fetzek,* 111 Idaho 360, 723 P.2d 906 (Ct. App. 1986), the Idaho Court of Appeals discussed quasi estoppel.

> Quasi estoppel is a broadly remedial doctrine, often applied ad hoc to specific fact patterns. It "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him." *KTVB, Inc. v. Boise City,* 94 Idaho 279, 281, 486 P.2d 992, 994 (1971). The doctrine is designed to prevent a party from reaping an unconscionable advantage, or from imposing an unconscionable disadvantage upon another, by changing positions. *E.g., Dawson v. Mead,* 98 Idaho 1, 557 P.2d 595 (1976); *Lupis v. Peoples Mortgage Co.,* 107 Idaho 489, 690 P.2d 944 (Ct.App.1984). Quasi estoppel, unlike equitable estoppel, does not require misrepresentation by one party or actual reliance by the other. *Evans v. Idaho State Tax Commission,* 97 Idaho 148, 540 P.2d 810 (1975).

Id. at 362, 723 P.2d at 906.

In *KTVB,* the Idaho Supreme Court stated:

> "The doctrine classified as quasi estoppel has its basis in election, ratification, affirmance, acquiescence, or acceptance of benefits; and the principle precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit."

Id. at 281, 486 P.2d at 994 (*quoting Clontz v. Fortner,* 88 Idaho 355, 364-65, 399 P.2d 949, 954 (1965). KTVB had participated in the bid process in the hopes of receiving cable television

franchises by the participating cities. After a lengthy bidding process, KTVB was not granted the franchise. Only then did KTVB raise the issue that the bidding process had been conducted illegally. The Court stated:

> While appellants may not have been required to forego bidding on the franchise in order to raise the objections to the franchise that they now make, it is clear from *Godoy* that they at least were required to make some objection to the various deficiencies which they now claim existed in the bidding and granting processes, rather than to intimate full approval by their acquiescent conduct while harboring serious reservations about the processes.
>
> The requirements for proper application of quasi estoppel are, then, that the person against whom it is sought to be applied has previously taken an inconsistent position, with knowledge of the facts and his rights, to the detriment of the person seeking application of the doctrine. It is therefore, incumbent upon this Court to consider the appellants' assertions of irregularity of the procedure and illegality of the franchise in light of appellants' previous position in the award process.
>
> Appellants' prior conduct can only be characterized as full acquiescence in the bidding and award process they now challenge. Appellants' participation in the bidding and award process, guided consistently by competent legal counsel, was clearly aimed at securing the franchise, within the framework of the process they now challenge, for their proposed joint venture. It seems clear that it is only the end result of the process, and not the process itself, which prompts appellants' allegations of illegality at this time. No protest was made by appellants when the several city governments banded together to form the Treasure Valley Cable Television Committee to investigate the award of a franchise and recommend a franchisee, nor was any objection lodged against the prospect of the various cities granting franchises....

Id. at 282, 486 P.2d at 995. Finally, the Idaho Supreme Court stated that "the essence of the proper application of the doctrine of quasi estoppel is the focus of the Court's attention upon the specific facts and circumstances of the case at bar." *Id.*

It would be unconscionable to allow Christine to believe that she and Darryl had received $800,000.00 from Duane in exchange for the Subject Real Property, acquiesce to the forgery, remain silent, file the Complaint alleging that she and Darryl had executed the Corrected QuitClaim Deed, reap the benefits of the $800,000.00 money judgment against the Yosts, and to then seek to set aside the deed, pursuant to § 32-912, all to the detriment of the Bank.

2. Judicial Estoppel

Based on the doctrine of judicial estoppel, the Harrises should be estopped from claiming that the Corrected QuitClaim Deed is void.

The Idaho Supreme Court discussed the application of judicial estoppel as follows:

> Judicial estoppel is applied when a litigant obtains a judgment, advantage, or consideration from one party, through means of sworn statements, and subsequently adopts inconsistent and contrary allegations or testimony to obtain a recovery or a right against another party, arising out of the same transaction or subject matter. *Loomis,* 76 Idaho at 93-94, 277 P.2d at 565.

Heinze v. Bauer, 145 Idaho 232, 240, 178 P.3d 597, 605 (2008).

In *Sword v. Sweet,* 140 Idaho 242, 252, 92 P.3d 492, 502 (2004), the Idaho Supreme Court stated:

> The application of judicial estoppel is one of discretion. In *McKay v. Owens,* 130 Idaho 148, 152, 937 P.2d 1222, 1226 (1997), the Court referred to the *Rissetto v. Plumbers and Steamfitters Local,* which applied the doctrine of judicial estoppel and stated the doctrine and the policies behind it:
>
> > Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.

Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 600 (9th Cir.1996). There are also important policies behind judicial estoppel. In *Rissetto,* the Ninth Circuit stated that:

> The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings .... Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts .... *Because it is intended to protect the dignity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.*

Id. at 601 (quoting *Russell v. Rolfs,* 893 F.2d 1033, 1037 (9th Cir.1990) (emphasis added), *cert. denied,* 501 U.S. 1260, 111 S.Ct. 2915, 115 L.Ed.2d 1078 (1991)).

(Emphasis in original.)

Christine should be judicially estopped from using the allegations of her Complaint, which include the allegation that she signed the Corrected QuitClaim Deed[7] and which she acknowledged in her sworn Discovery Response,[8] to obtain the $800,000.00 money judgment against the Yosts, while later inconsistently claiming a forgery in an attempt to set aside the Corrected QuitClaim Deed in order to also obtain title to the Subject Real Property at the expense of the Bank.

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[7] R. at Vol. I, p. 14, ¶ 17 ("Subsequently, the Harrises' executed a corrected quitclaim deed conveying the subject property to the Yosts.").

[8] R. at Vol I, p. 173, Answer to Interrogatory No. 1 ("Darryl Harris and Christine Harris, c/o Manwarring Law Office, P.A.: have knowledge of the facts and information contained in the Complaint."); *see also* R. at Vol. I, p. 178 (Verification signed by Christine Harris under oath).

3. Equitable Estoppel

The Harrises should also be equitably estopped from arguing that the Corrected QuitClaim Deed is void.

In *Ogden v. Griffith,* 149 Idaho 489, 495, 236 P.3d 1249, 1255 (2010) the Idaho Supreme Court stated:

> The elements of equitable estoppel are: (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment was made with the intent that it be relied upon; and (4) that the person to whom the representation was made, or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice.

The Harrises argue that the first three elements have not been met. However, all of the elements have been established.

First, Christine actually knew about the forgery soon after Darryl had signed her name, but she concealed the truth from everyone, especially the Bank.

Second, the Bank did not know and could not have reasonably discovered the truth regarding the forgery. Neither Darryl nor Christine told the Bank about the forgery until on or after November 1, 2010. More importantly, there is no dispute that the Harrises failed to tell anyone outside of their marriage about the forgery at any time during December 2008. The Bank did not know nor could it have discovered that the deed had been forged because Christine's signature had been notarized. The Harrises argue that the Bank should have looked at other instances of Christine's signature, such as signature cards or other deeds of trust executed by the

Harrises, and compared those signatures with the Corrected QuitClaim Deed to verify that Christine actually had signed the Corrected QuitClaim Deed. However, the notarization was prima facia evidence that it had been executed by both Darryl and Christine. The Bank had the right to rely on the notarized Corrected QuitClaim Deed. *See Ameriseal of North East Florida, Inc. v. Leiffer,* 673 So.2d 68, 69-70 (Fla. Dist. Ct. App. 1996) ("Indeed, being able to rely on documents is the purpose of having them notarized."); *Immerman v. Ostertag,* 199 A.2d 869, 873 (N.J.Super. 1964) (plaintiff had a right to rely upon notary's certification).

Third, Christine concealed the forgery even though she knew that every time she and Darryl sold a piece of real property, she would have to sign a deed giving her interest in the property to the buyer. Therefore, she knew that others would rely on the forged Corrected QuitClaim Deed when she learned about it in December 2008, but she nevertheless concealed that information from everyone outside of her marriage until November 2010.

Finally, Duane and the Bank relied on Christine's concealment of the forgery when the Bank recorded the Deeds of Trust toward the end of December 2008.

Christine's conduct and acquiescence is more than sufficient to establish equitable estoppel.

The District Court correctly estopped the Harrises from claiming that the forged Corrected QuitClaim Deed was void under § 32-912.

F. The Bank is Entitled to Attorney Fees and Costs on Appeal

The Bank is entitled to attorney fees on appeal pursuant to contract and/or Idaho Code § 12-120(3) and Rule 41, I.A.R. Furthermore, the Bank asks for costs on appeal pursuant to Rule 40, I.A.R.

1. Attorney Fees Based on Contract

The Bank is entitled to attorney fees and costs based on the Universal Note and Security Agreement dated November 18, 2008; the Deed of Trust recorded on December 17, 2008; and the Deed of Trust recorded on December 30, 2008.

The Universal Note and Security Agreement provides:

> **Collection Costs and Attorney's Fees** - I agree to pay all costs of collection, replevin or any other or similar type of cost if I am in default. In addition, if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs...

R. at Vol. I, p. 73.

The Deed of Trust recorded on December 17, 2008, and the Deed of Trust recorded on December 30, 2008, both provide:

> **18. EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS.** Except when prohibited by law, Grantor agrees to pay all of Lender's expenses if Grantor breaches any covenant in this Deed of Trust. Grantor will also pay on demand all of Lender's expenses incurred in collecting ... the Property... Grantor agrees to pay all costs and expenses incurred by Lender in enforcing or protecting Lender's rights and remedies under this Deed of Trust, including, but not limited to, attorneys' fees, court costs, and other legal expenses. Once the Secured Debt is fully and finally paid, Lender agrees to release this Deed of Trust...

R. at Vol. I, p. 85, ¶ 18 & p. 101, ¶ 18.

The Bank was required to hire attorneys to enforce the Universal Note and Security Agreement and the Deeds of Trust. The Subject Real Property secures all amounts owed to the Bank pursuant to these documents, including all attorney fees and costs incurred in this action. Therefore, this Court should award the Bank all of its attorney fees and costs on appeal.

2. Attorney Fees Based on Statute

Idaho Code § 12-120(3), authorizes a court to award reasonable attorney fees to the prevailing party on appeal in any civil action to recover on a note and in any commercial transaction.

As this is an action to recover on a note and because the underlying claim is based on a commercial transaction, the Court should award the Bank all of its attorney fees and costs on appeal.

VI. CONCLUSION

The Bank is a bona fide lender for value. Therefore, its Deeds of Trust encumbering the Subject Real Property are superior to any claims made by the Harrises.

The Corrected QuitClaim Deed is not void nor is it voidable as to the Bank based on either the theory of failure of consideration or lack of consideration.

The Corrected QuitClaim Deed was delivered and there is no admissible evidence that the deed would only take effect upon a condition precedent.

The Harrises should be estopped from claiming that the forged Corrected QuitClaim Deed was void under § 32-912.

Therefore, this Court should affirm the District Court's grant of summary judgment in favor of the Bank.

The Bank should be granted its attorney fees and costs on appeal.

DATED this 15th day of June, 2012.

for: Brian T. Tucker

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