11-4-2013

Regan v. Owen Respondent's Brief Dckt. 40848

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRENT REGAN and MOURA REGAN, husband and wife, Plaintiffs/Respondents, vs. JEFF D. OWEN and KAREN A. OWEN, husband and wife, Defendants/Appellants.	**Docket No. 40848-2013** Kootenai County District Court Case No. CV 2011-2136

RESPONDENTS' BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho in and for the County of Kootenai

Honorable John P. Luster, District Judge presiding

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I. STATEMENT OF THE CASE

A. The "Orphan" Parcel:

This case involves the inadvertent creation of an "orphan" parcel through the mutual mistake of the parties' predecessors-in-interest, and the right to use an existing roadway that passes through that orphan parcel.

The common predecessor-in-title of both Regan and Owen are Alexander H. Hargis, John W. Acheson, Jr., M. Eileen Acheson, and R. C. Collins who acquired the land that eventually became the Regan property and the Owen parcel from BAR-ACH, Inc. under a Deed recorded on July 28, 1979. [AR pp. 160-162] R. C. Collins died and March of 1987 and his children, Thomas Collins and Judy Baker, were appointed as co-personal representatives of his estate. [AR pp. 461-462] Prior to the conveyance to Hargis, Acheson and Collins, BAR-ACH commissioned a survey of a portion of the Southwest quarter of Section 27, Township 50 North, Range 3 West, Boise Meridian, Kootenai County. [Appellants' Brief, Ex. A] This survey, conducted by K.A. Durtschi, described and depicted a proposed 60' wide roadway commencing south of Section 27 at the corner of Bonnell Road and continuing westerly along a gradual curve to the north side of the south line of Section 27.

The centerline legal description of the 60' roadway surveyed by K.A. Durtschi in 1979 was eventually incorporated into subsequent conveyances by Alexander H. Hargis, John W. Acheson, Jr., M. Eileen Acheson, Thomas Collins and Judy Baker (hereafter abbreviated as Hargis *et al.*) as follows:

a. **Hart/Honeyman Parcel**: In March of 1988, Hargis *et al.* deeded a parcel located in the Southwest Quarter of Section 27 to Patricia H. Hart under a Warranty Deed recorded on March 24, 1988 as Kootenai County Instrument No. **1112028**. [R pp. 40-42] The southern boundary of the parcel conveyed to Patricia Hart was the centerline of the roadway surveyed by K. A. Durtschi in 1979. [AR pp. 468-470] In subsequent deeds, Patricia Hart held title as Patricia H. Reid and finally as Patricia Honeyman. [R pp. 43-48]

b. **Smart/Owen Parcel**: On November 25, 1988, Hargis *et al.* deeded the parcel now occupied by Owen to Harold and Jean Smart under a Warranty Deed recorded on December 28, 1988, as Kootenai County Instrument No. **1137747**. The legal description incorporated into that Deed used the section line between Sections 27 and 34 as the northern boundary of the parcel, and not the curved centerline of the roadway previously surveyed by K.A. Durtschi. [AR pp. 463, 471-474]. Smart conveyed the parcel to Cheryl Bower in 1994, Bower conveyed the parcel to David and Helen Hanna in 1997, and Hanna conveyed the parcel to the appellants, Jeff and Karen Owen, in 2003. [R p. 97]

c. **Johnson Parcel**: Only 3 days after the conveyance to Smart, Hargis *et al.* deeded the parcel immediately to the East of the Smart/Owen Parcel to Judith M. Johnson on November 28, 1988 under a Warranty Deed recorded as Kootenai County Instrument No. **1137749**. The deed to Judith Johnson used the curved centerline of the roadway surveyed by K.A. Durtschi as the northern boundary of the conveyed parcel. [AR pp. 463, 475-478] The Johnson parcel was later platted into two lots as the Double J Ranch.

d. **Doney/Lonam Parcel**: In May of 1989, Hargis *et al.* deeded a parcel located north of the Smart/Owen parcel and West of the Patricia Hart parcel to Robert and Debora Doney, under a Warranty Deed recorded on June 5, 1989 as Kootenai County Instrument No. **1150484**. Again, Hargis *et al.* used the centerline of the roadway as surveyed by K.A. Durtschi as the southern boundary for the parcel conveyed to Doney. [AR pp. 463, 464, 479-482] Mr. and Mrs. Doney conveyed their parcel to Joseph and Margarita Lonam in June of 2000. [R pp. 36-39]

e. **Marchelli/Regan property**: Finally, Hargis *et al.* contracted with the Leslie Jean Schunemann Marchelli Trust in September of 1989 to sell a portion of the property that is now occupied by the respondents, Brent and Moura Regan. The Marchelli Trust completed that contract in 1999 and a Warranty Deed to the Trust was recorded on April 30, 1999 as Kootenai County Instrument No. **1586858**. [R pp. 49-66] The centerline of the roadway surveyed by K.A. Durtschi in 1979 was used as one of the boundaries for the land deeded to the Marchelli Trust and later acquired by Mr. and Mrs. Regan in 1999, (described as "Parcel II" in the Warranty Deed from the Marchelli Trust to Regan). [R pp. 23-25]

The five parcels identified above surround an "orphan" parcel that was inadvertently created when Hargis *et al.* deeded to the Marchelli Trust in April of 1999. This orphan parcel was surveyed at the request of Jeff Owen in July of 2010 and the record of that survey references the five Instrument numbers shown above in bold print. [AR p. 460]

After the conveyance to the Marchelli Trust in 1999, the Kootenai County Assessor assigned a new parcel number (50N03W-27-7160) to the orphan parcel and the County Treasurer began to levy property taxes against that parcel. [AR pp. 404, 430-434] When the property taxes became delinquent, the Kootenai County Treasurer took the orphan parcel under a Tax Deed recorded on April 14, 2004 as Kootenai County Instrument No. 1869850. [R pp. 67-68] Jeff Owen purchased the orphan parcel from Kootenai County and took title under a County Deed recorded on November 28, 2005 as Kootenai County Instrument No. 1997638. [R pp. 69-70] Jeff Owen then deeded the orphan parcel to Jeff D. Owen and Karen A. Owen, husband and wife, under a Warranty Deed recorded on December 9, 2010 as Kootenai County Instrument No. 2294085000. On the same day, Jeff and Karen Owen filed a request with the Kootenai County Assessor's office to combine the orphan parcel into their existing parcel for assessment purposes. [AR pp. 409-412]

B. The Roadway Easement:

In the deed from Hargis *et al.* to Smart in December of 1988, the grantors reserved an easement for "roadway and all utility purposes" over the North 30 feet of Smart/Owen parcel for the benefit of the grantors and their heirs, successors and assigns. [R pp. 30-32] Similar roadway and utility easements were reserved by Hargis *et al.* in the conveyances to Hart, Johnson, Doney and the Marchelli Trust. The thirty foot wide easement reserved over the southern boundary of the Hart parcel ran parallel to the thirty foot easement reserved over the north boundary of the Johnson parcel. However, the orphan parcel created an unintended gap between the thirty foot

easement reserved along the northern boundary of the Smart parcel and the thirty foot easement reserved along the southern boundary of the Doney parcel. [AR p. 460]

An existing gravel roadway extends west from the corner of Bonnell Road to the Regan property. That roadway runs approximately along the centerline of the 60' roadway surveyed by K.A. Durtschi in 1979. [AR pp. 275, 283-285] That roadway existed when Regan purchased the Regan property from the Marchelli Trust in March of 1999 and Regan significantly improved the roadway later that year by adding more gravel and grading the surface. [AR p. 280] Regan then used the improved roadway to bring in heavy equipment and materials for the construction of a private airstrip on the Regan property. [May 31, 2012 Preliminary Hearing Tr. pp. 22, 27-29] The record contains conflicting evidence about exactly *when* the roadway was first constructed. Bruce Anderson, the Kootenai County Surveyor, testified that a roadway existed as early as 1987 based upon aerial photographs maintained in the Kootenai County Assessor's records. [AR pp. 319-323] Harold Smart testified that a gravel roadway existed when he and his wife purchased the Smart parcel from Hargis *et al.* in 1988. According to Mr. Smart, that roadway started at the corner of Bonnell Road and extended westerly along what Mr. Smart believed to be the northern boundary of the parcel that they purchased. [AR pp. 435-440, 448] Patricia Honeyman (Hart) testified that no roadway existed when she contracted to purchase her property in 1979. [May 31, 2012 Preliminary Hearing Tr. p. 200-201] She also testified that an undetermined portion of the roadway was built after Judith Johnson purchased her 10 acre parcel in 1988. [May 31, 2012 Preliminary Hearing Tr. p. 202]

After Regan completed the airstrip on the Regan property in 1999, the Regan family continued to use the existing roadway to access the Regan property from Bonnell Road. [May 31, 2012 Preliminary Hearing Tr. p. 37] The Regan family continued to use the existing road after Owen purchased the Owen parcel and built a residence on that property in 2003. [May 31, 2012 Preliminary Hearing Tr. pp. 39, 40] After Owen acquired the orphan parcel from Kootenai County in 2005, the Regan family continued to use the existing roadway to access the Regan property from Bonnell Road. [May 31, 2012 Preliminary Hearing Tr. pp. 44, 45] Brent Regan also testified that at some point prior to Owen's purchase of the Smart/Owen parcel, a chain gate was stretched across the existing roadway at the eastern boundary of the Smart/Owen parcel. At that point Regan sought and obtained a legal opinion from a local attorney that confirmed Regan's express easement rights to use the existing roadway from Bonnell to access the Regan property. [AR p. 660] The chain gate did not deter Regan's use of the roadway. [May 31, 2012 Preliminary Hearing Tr. pp. 45, 46]

In March of 2010, Brent Regan made arrangements for a water well to be drilled on the Regan property. Regan directed the well drilling company to access the Regan property via the existing roadway from Bonnell Road. When the drilling truck arrived at the chain gate, Jeff Owen refused to let the truck pass onto the orphan parcel. When Mr. Regan arrived at the chain gate, Jeff Owen informed him that the express easement over the north 30 feet of the Owen parcel did not provide access to the Regan property from Bonnell Road, and that Regan did not have the right to use the existing roadway through the orphan parcel that Owen now owned. [AR p. 153; May 31, 2012 Preliminary Hearing Tr. pp. 47-49] In August of 2010, Regan obtained a

building permit from Kootenai County to construct a new residence for his daughter on Parcel II of the Regan property. The County assigned a Bonnell Road address for this new residence. [AR p. 188-189] When Owen continued to refuse access to the Regan property via the existing roadway through the orphan parcel, Regan initiated this litigation in March of 2011.

In September of 2011, Regan moved for partial summary judgment on Regan's claim related to the express easement reserved over the north thirty feet of the Owen parcel. The trial court granted Regan's motion and entered an order declaring Regan's right to use the easement across the north thirty feet of the Owen parcel for roadway and all utility purposes and without hindrance or obstruction from Owen. [R p. 76, 77] When Regan attempted to build a new access road through the north thirty feet of the Owen parcel, Owen interfered with those efforts and Regan filed motions seeking a preliminary injunction to allow Regan to use the existing roadway to access the Regan property, and for Owen to be held in contempt for violating the court's partial summary judgment Order. [AR p. 172] In May and June of 2012, the trial court heard testimony on the Regan preliminary injunction motion, and that motion was granted. [R pp. 92-94]

In August of 2012, Regan filed a second motion for summary judgment on their mutual mistake/reformation claim. [AR p. 527] Owen filed a cross motion for summary judgment on the same claim [AR pp. 636, 637] and the trial court heard argument on both motions before entering a decision and order granting the Regan motion and denying the Owen motion in November of 2012. [R pp. 95-112] Owen appeals from that decision and order.

II. ARGUMENT

A. Introduction

Regan became aware of the existence of the orphan parcel after his conversation with Jeff Owen in March of 2010. Prior to that encounter, Regan understood that his property enjoyed easement rights over the existing gravel roadway to Bonnell Road, and the Regan family had used that road at their convenience during the previous 11 years. When Owen denied Regan's easement rights and obstructed the Regan family's use of the existing roadway, Regan had reason to investigate the history of the orphan parcel and the parcels located north and south of the roadway. That investigation led Regan to conclude that the orphan parcel was the result of a mistake in the legal description of the Owen property. Based on two days of testimony and the exhibits admitted on the motion for preliminary injunction; and after cross motions for summary judgment supported by numerous affidavits, including affidavits from the original seller and buyer in the 1988 transaction between Hargis *et al.* and Smart, the trial court agreed with Regan and concluded that:

1. The Regan claim of mutual mistake was not time barred;
2. Regan carried the burden to show a mutual mistake in the transaction between Hargis *et al.* and Smart;
3. Regan was entitled to the remedy of reformation; and
4. Owen was a bona fide purchaser of the Owen parcel and the orphan parcel, but would not be prejudiced by reformation of the Owen legal description.

For the following reasons, Regan now urges this Court to uphold and affirm the trial court's conclusions:

B. Owen failed to carry their burden of showing that the mutual mistake claim was time barred under I.C. 5-218(4):

Under I.C. §5-218(4), a cause of action based on mistake does not accrue and the 3-year statute does not begin to run "until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." This Court has held: "The discovery rule applicable to fraud requires more than an awareness that something may be wrong but requires knowledge of the facts constituting fraud." *McCoy v. Lyons,* 120 Idaho 765, 773, 820 P.2d 360, 368 (1991). Actual knowledge of fraud can be inferred if the aggrieved party could have discovered the fraud by the exercise of due diligence. This Court has also noted that courts should hesitate to infer knowledge of fraud. *Id.* In *Aitken v. Gill,* 108 Idaho 900 (Ct.App. 1985), the Court of Appeals held that the same principles should apply to claims based on mistake. The Idaho Court of Appeals has summarized the law as follows:

> Application of I.C. § 5-218(4) does not depend on when the plaintiff should have been aware that something was wrong; as used in the statute, "discovery" means the point in time when the plaintiff had actual or constructive knowledge of the facts constituting the fraud. *McCoy,* 120 Idaho at 773, 820 P.2d at 368. Actual knowledge will be inferred if the allegedly aggrieved party could have discovered the fraud by the exercise of due diligence. *Nancy Lee Mines, Inc. v. Harrison,* 95 Idaho 546, 547, 511 P.2d 828, 829 (1973); *Gerlach v. Schultz,* 72 Idaho 507, 514, 244 P.2d 1095, 1099 (1952); *Mason v. Tucker and Associates,* 125 Idaho 429, 435, 871 P.2d 846, 852 (Ct.App.1994). The question of when the plaintiff discovered the fraud is generally a question for the jury and summary judgment on the issue is only appropriate if there is no factual dispute about when this discovery occurred. *McCoy,* 120 Idaho at 774, 820 P.2d at 369.

McCorkle v. Northwestern Mutual Life Insurance Co., 141 Idaho 550, 554, 112 P. 3d 838, 843 (Ct.App. 2005).

The location, size and configuration of the orphan parcel are reasons to suspect a problem with that parcel. By itself, the orphan parcel is 660 feet long but only 30 feet wide at its widest point. A roadway runs through the orphan parcel and recorded easements parallel its north and south boundaries. While these characteristics make the orphan a strange and undesirable piece of land, they do not create actual or constructive knowledge of a mutual mistake. Under the legal standards quoted above, the relevant questions are: (a) when did Regan become the aggrieved party and (b) when should Regan have discovered the mutual mistake through the exercise of due diligence. The record in this case supports the following conclusions.

It is important to note that the orphan parcel did not exist in the County records when Regan purchased from the Marchelli Trust in 1999. A Kootenai County Assessor's map was attached to a title insurance commitment prepared for Regan as part of the Marchelli Trust transaction. That Assessor's map showed the orphan parcel as part of a larger parcel, #3750 located in Section 34, south of Section 27. [AR p. 619, 620] At that time, Regan had no reason to suspect that there was any problem with *that part* of parcel #3750. In connection with Regan's 1999 purchase transaction, there was nothing in the property records, in the title documents or "in view" that would put Regan on notice of a mutual mistake in the Hargis *et al.* to Smart transaction from ten years prior. The orphan parcel was not identified by the County and assigned its own parcel number until after Regan purchased from the Marchelli Trust.

When the chain gate went up across the access road from Bonnell, Regan sought a legal opinion regarding the express easement rights contained in his title. When those express easement rights were confirmed, Regan was not *aggrieved* and did not have any reason to

investigate further. When the orphan parcel was taken by the County through a Tax Deed in 2004, and when the orphan was purchased by Owen in 2005, Regan was not aggrieved and had no reason to suspect that a mutual mistake had caused the creation of the orphan parcel. It was not until March of 2010, when Regan's use of the roadway through the orphan parcel was obstructed by Owen, that Regan became an *aggrieved party* and had some reason to investigate whether Owen's claims were true. Regan did not discover facts indicating that the orphan was caused by a mistake until March of 2010. [AR pp. 661, 662] Regan filed this action one year later; within the 3-year limitation period under I.C. 5-218(4).

On the Owen motion for summary judgment, Owen carried the burden of showing that the Regan claim of mutual mistake was time barred. The trial court correctly concluded that Owen failed to prove that affirmative defense and denied Owen's summary judgment motion. As they argued below, Owen contends that the recorded documents that existed in 1999 were sufficient to put Regan on notice of a mutual mistake in the Hargis *et al.* to Smart transaction if Regan had simply exercised "ordinary care and due diligence." [1] Basically, Owen suggests that Regan should have researched the title history of all the properties *adjacent to* the property that Regan was purchasing from the Marchelli Trust in 1999. Obviously this suggestion goes far beyond ordinary care and due diligence, and no such duty exists under Idaho law. Regan did exercise ordinary care and due diligence by inspecting the property he was purchasing and by obtaining a title insurance commitment before buying from the Marchelli Trust. Nothing before that purchase gave Regan any reason to suspect a mistake in the history of an adjacent parcel,

[1] Appellants' Opening Brief, pg. 25.

and circumstances did not give Regan any reason to investigate further until Owen interfered with Regan's easement rights in 2010. Because material issues of fact remained on the question of when Regan discovered the mutual mistake in the Hargis *et al.* to Smart transaction, the trial court correctly denied the Owen motion for summary judgment.

In addition to the arguments made below, Owen now asserts that the actual or constructive knowledge of Regan's predecessor-in-title should bar Regan's mutual mistake claim. Owen claims that Hargis *et al.* knew or should have known about the mistake in the 1988 deed to Smart. First, Owen claims that each individual grantor *reviewed* the legal description in the deed to Smart and *approved* that legal description by their individual signatures. Second, Owen notes that the legal description in the Smart deed described the northern boundary as running, "... thence South 89°07'48" East along the North line of said Northwest quarter, a distance of 660.00 feet more or less..." [2] And third, Owen proposes that Hargis *et al.* had actual or constructive notice of the prior surveys showing the alignment of the roadway crossing the line separating Sections 27 and 34. Based on these speculations, Owen concludes that Hargis *et al.* should have discovered the mistake in the deed to Smart.

Unfortunately for Owen, there is no evidence in the record to support any of the assumptions upon which Owen's argument is based. In fact, the only evidence before the trial court regarding the knowledge or understanding of Hargis *et al.* comes from the affidavit of Thomas Collins, one of the original grantors in the Smart transaction. In his affidavit, Mr. Collins states unequivocally that the orphan parcel was supposed to be part of the property

[2] Appellants' Opening Brief, pg. 24.

conveyed to Smart in 1988. [AR p. 464] There is no evidence in the record to support Owen's claim that Hargis *et al.* actually read the legal description in the Smart deed, or understood the meaning of the bearings and distances described therein. Owen argues that Regan's mutual mistake claim should be time barred because Hargis *et al.* were unable to correctly interpret the metes and bounds legal description in the Smart deed. Professional land surveyors are trained and licensed to understand and write legal descriptions for real property. Lay grantors in real estate transactions are not held to the same standard as a professional surveyor.

Based on the record before the trial court, and under the standard required by civil rule 56, the trial court correctly determined that Owen was not entitled to summary judgment on their affirmative defense under I.C. 5-218(4).

C. The orphan parcel was the result of a mutual mistake:

On the issue of the mutual mistake alleged by Regan, the trial court was presented with uncontested affidavits from Thomas Collins, one of the original Hargis *et al.* grantors, and Harold Smart, one of the original grantees to the transaction at issue. Both Collins and Smart testified that they intended and assumed the northern boundary of the Smart parcel would be the centerline of the roadway as surveyed by K. A. Durtschi in 1979, and not the section line dividing Sections 27 and 34. Neither Collins nor Smart knew or had any reason to suspect that the northern boundary of the Smart parcel was other than the centerline of the roadway. [AR pp. 435-460; 461-503] In addition, the trial court had the uncontested affidavit of David English, the title officer with Pioneer Title Company who handled the Hargis *et al.* to Smart transaction in

1988. [AR pp. 504-513] Owen presented no evidence to contradict the testimony of Collins, Smart or English. Based on this uncontroverted evidence, the trial court concluded that Regan carried their burden to show a mutual mistake occurred in the conveyance to Smart in 1988.

On appeal, Owen now argues that the mistake was not "mutual" because there were no direct discussions between Hargis *et al.* and Smart regarding the location of the northern boundary of the property. In *Bailey v. Ewing* the Court of Appeals addressed this issue and held that a mistake must be mutual to constitute grounds for equitable relief. "A mutual mistake occurs when both parties, at the time of contracting, share a misconception about a basic assumption or vital fact upon which they based their bargain." 105 Idaho 636, 639, 671 P.2d 1099, 1101 (Ct.App. 1983). The Court of Appeals rejected situations where the parties labor under differing misconceptions regarding the same basic assumption or vital fact, and concluded that the assumption or fact must be the same, "... otherwise two unilateral mistakes, instead of one mutual mistake, would result." *Id.*

The affidavits of Thomas Collins and Harold Smart clearly show that both parties shared the same misconception about the same basic assumption or vital fact; that the centerline of the roadway marked the location of the northern boundary of the Smart parcel. It was not necessary for Collins and Smart to talk to each other for this assumption to be shared. And because the record clearly showed that Collins and Smart shared the same assumption about the same vital fact, the trial court did not need to *infer* a mutual mistake. Evidence of the mutual mistake came directly from the buyer and seller and there was no evidence in the record to contradict the testimony of Collins and Smart on this issue.

Finally, Owen argues that the Regan motion for summary judgment should have been denied because of conflicting evidence regarding the location or condition of the roadway at the time of the Hargis *et al.* to Smart transaction in 1988. As the ultimate trier of fact in this case, the trial court was responsible to resolve conflicting inferences and to arrive at the most probable inferences based upon the undisputed evidence before it. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007). Based on the uncontroverted affidavits of Collins and Smart, the trial court concluded that both buyer and seller assumed the northern boundary of the property was the centerline of the existing roadway. Collins testified that an unimproved roadway existed in 1988. That roadway started at the corner of Bonnell Road and continued westerly roughly along the centerline of the roadway surveyed by K. A. Durtschi in 1979. [AR p. 462] Harold Smart also testified that in 1988 an unimproved roadway existed from the corner of Bonnell and extended westerly along the northern boundary of the parcel that they eventually purchased. In the summer of 1988, Mr. and Mrs. Smart drove over that roadway to inspect the property. [AR p. 436] Because both buyer and seller relied upon the same existing roadway in making their mistaken boundary assumption, the trial court correctly concluded that a mutual mistake occurred in the Hargis *et al.* to Smart transaction. The testimony of other witnesses regarding the location or extent of that roadway over time did not create a genuine issue of material fact to preclude summary judgment on the mutual mistake claim.

D. Owen was a bona fide purchaser on inquiry notice of the mutual mistake, and Owen suffered no prejudice by reformation of their legal description:

When an instrument does not reflect the true intentions of the parties because of a mutual mistake, a court can reform the instrument unless the reformation will prejudice the rights of bona fide and innocent purchasers who did not have notice of the mistake.

> The general rule is that reformation will not be granted if it appears such relief will prejudice the rights of bona fide and innocent purchasers. See cases collected in 44 A.L.R. 78 (1926), supplemented by 79 A.L.R.2d 1180 (1961). A purchaser must lack notice both of the mistake and of the true intent of the parties, in order to prevent reformation. *Beams v. Werth,* 200 Kan. 532, 438 P.2d 957 (1968). Actual notice however is not required. *Elwood v. Stewart,* 5 Wash. 736, 32 P. 735 (1893). If there are circumstances which ought to put a party on inquiry as to ownership of property, that party is not considered a purchaser without notice and so cannot avoid reformation of the instrument. *Fajen v. Powlus,* 96 Idaho 625, 533 P.2d 746 (1975). *Walters v. Tucker,* 308 S.W.2d 673 (Mo.1957).
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> ...
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> Whether a party is aware of circumstances sufficient to put him on inquiry is a question of fact. *Pfleuger v. Hopple,* 66 Idaho 152, 156 P.2d 316 (1945).

Bailey v. Ewing, 105 Idaho 636, 641, 671 P.2d 1099, 1104 (Ct.App. 1983).

On their bona fide purchaser defense, Owen carried the burden of proof. The trial court concluded that Owen failed to meet that burden because their purchase of the orphan parcel in 2005 put them on inquiry notice of a mistake in the 1988 transaction between Hargis *et al.* and Smart. In addition, prior to their purchase in 2003, Owen received a Commitment for Title Insurance issued by First American Title Company. That document expressly identified and excluded from coverage the 1988 Warranty Deed from Hargis *et al.* to Smart and the Record of Survey commissioned by Smart in December of 1994. [AR pp. 405, ¶ 6.] At the time of their

purchase in 2003, Owen had actual or constructive knowledge of the existence of the orphan parcel, the provisions in the 1988 Warranty Deed to Smart, the 1994 Record of Survey showing the centerline of the road and the parallel 30 foot easements, and the provisions in the recorded deeds to Hart, Johnson, Doney and the Marchelli Trust. This information was certainly sufficient to put Owen on inquiry notice regarding the ownership of the orphan parcel and the mistake in the 1988 deed to Smart.

In addition, the trial court concluded that Owen would not be prejudiced by reformation of their legal description to include the orphan parcel. This case presents a unique situation in that Owen voluntarily reformed their own legal description when they purchased the orphan parcel and requested that the County Assessor combine the orphan with their original parcel in December of 2010. [AR pp. 409-412] By combining the orphan with their original parcel, Owen corrected the mistake that occurred in the original Smart transaction in 1988. The only additional change effected by the trial court's Judgment was to move the reserved thirty foot easement from the original northern boundary of the Owen parcel to the new northern boundary of the orphan parcel. Before reformation, Owen owned a parcel encumbered by a thirty foot easement for roadway and utility purposes for the benefit of Regan. After reformation, Owen still owned a parcel encumbered by the same easement. Reformation added no burden on the Owen property. In fact, reformation actually lessened the burden on the Owen property. Before reformation, there was no roadway or utilities within the 30' easement reserved over the Owen parcel. After reformation, the reserved 30' easement was reunited with the existing roadway. By relocating the easement to the north boundary of the orphan parcel, Owen avoids having a

new access road built through their property and avoids having to share a portion of their driveway with Regan. These tangible and practical benefits of reformation clearly outweigh or mitigate the intangible aesthetic concerns expressed by Owen below.

It should not be overlooked that the roadway through the orphan parcel existed and was in use by Regan when Owen acquired the orphan in 2005. When Owen combined the orphan with their other parcel in December of 2010, Owen was well aware of Regan's claims to that existing roadway. Owen did not purchase pristine, unencumbered property when they purchased the orphan parcel. Owen took title to the orphan parcel without warranty and subject to any and all existing rights or adverse claims. The trial court correctly concluded that reformation would not prejudice Owen's property rights.

E. Owen's Waiver and Estoppel Defenses:

Owen misstates the record regarding Regan's claims and actions related to the thirty foot easement reserved along the northern boundary of the Owen property. This case was filed because Owen refused to acknowledge that Regan had *any* easement rights across the Owen property or orphan parcel. In their complaint, Regan claimed express easement rights across the Owen parcel as described in the Owen's chain of title, and Regan sought reformation of Owen's title to correct the original mistake that severed the orphan parcel from the Smart parcel in 1988. It was necessary and proper for Regan to obtain judicial confirmation of the express easement across the Owen property as an essential component of Regan's mutual mistake claim. Reforming Owen's title would have no benefit to Regan if Regan did not have confirmed

easement rights over the Owen property. From the filing of the complaint through the trial court's final Judgment, Regan's claims and position did not change.

Recall that Regan was trying to build a home for his daughter in the spring of 2010, and Owen refused to allow Regan to use the existing access road through the orphan parcel for that construction project. After the trial court confirmed the express easement over the north thirty feet of the Owen parcel, Regan communicated to Owen's attorney that Regan would prefer to use the existing roadway so that Regan would not be forced to build a new road through the Owen parcel. [AR p. 189, ¶ 5] A similar offer was communicated to Owen's attorney via email prior to any road building work on the Owen parcel. [AR p. 186, 187] When Owen refused to allow Regan to use the existing roadway through the orphan parcel, Regan attempted to build a new access road across the north thirty feet of the Owen parcel. When Owen interfered with those efforts as well, Regan halted the road construction and filed a contempt motion against Owen. [AR pp. 172, 179-181, 188-215]

Owen now claims that Regan should be estopped from seeking reformation of Owen's title because of the road construction efforts that Owen forced Regan to start and prevented Regan from completing. Owen's estoppel claims simply have no factual basis or legal merit. Given the record before the trial court, Owen's estoppel claims were properly ignored.

F. The trial court's prescriptive easement finding is harmless error:

Owen correctly notes that the trial court's Decision and Order on the parties' cross motions for summary judgment contains the following statement:

> The Court, then, determined that the Regans enjoy a thirty-foot prescriptive easement that runs along the centerline of the proposed road. Thus, the Regans have an express easement over the northern thirty feet of the OWEN Parcel (the portion that split away from the proposed road and runs south of the proposed road), and a prescriptive easement over the Orphan Parcel.

[R p. 99]

While this statement is inconsistent with the trial court's findings made at the conclusion of the preliminary injunction hearing, there is no indication that this prescriptive easement finding had any bearing on or relevance to the court's rulings on Regan's mutual mistake claim or Owen's affirmative defenses. Because Owen has failed to show, or claim, that this finding was prejudicial to them, the trial court's preliminary injunction finding is harmless error.

III. CONCLUSION

The orphan parcel at issue in this case was abandoned by Hargis *et al.* because they didn't intend to create it and didn't know it existed. Except in their conveyance to Harold and Jean Smart in 1988, Hargis *et al.* consistently incorporated the centerline of the surveyed roadway into the legal descriptions of the parcels that they sold. Hargis *et al.* also consistently reserved easements in those transactions to provide access and utility services for their remaining property. Even though the orphan parcel was identified by Kootenai County in 1999, the mutual mistake that created the orphan parcel was not discovered by Regan until after Owen acquired that parcel and then blocked Regan's use of the existing roadway running through the orphan in 2010. The trial court received and considered extensive evidence through the various hearings and motions that occurred below, and applied the correct standards when it ruled on the parties'

cross motions for summary judgment. As the trier of fact, the trial court properly determined that Regan was entitled to judgment as a matter of law on the mutual mistake and reformation claims, and that Owen did not meet their burden of proof on their affirmative defenses.

For the reasons stated above, Regan respectfully requests that the trial court's decisions be affirmed.

Dated this 1st day of November, 2013.

SCOTT L. POORMAN, P.C.

Scott L. Poorman, attorney for Respondents

Certificate of Service

I hereby certify that on the 1st day of November, 2013, I mailed an original and six (6) bound copies plus one (1) unbound copy of the foregoing **Respondents' Brief** by UPS overnight delivery, postage prepaid, to the Clerk of the Idaho Supreme Court in compliance with I.A.R. 34. I further certify that I served (2) true and correct copies of the foregoing **Respondents' Brief** by hand delivery to:

Susan P. Weeks
JAMES VERNON & WEEKS, P.A.
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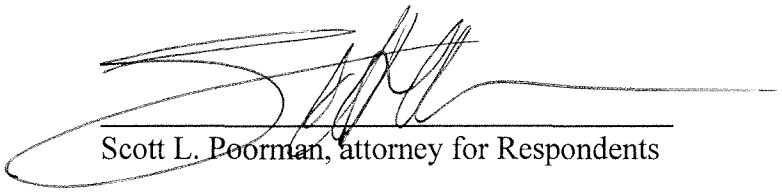

Scott L. Poorman, attorney for Respondents