4-18-2014

# Golub v. Kirk-Scott, LTD Respondent's Brief Dckt. 41501

No. 41501-2013

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALAN GOLUB and MARILYN GOLUB, husband and wife,

Plaintiffs/Respondents

vs.

KIRK-SCOTT, LTD, a Texas corporation; KIRK-HUGHES DEVELOPMENT, LLC, a Delaware limited liability company; GERALDINE KIRK-HUGHES and PETER SAMPSON, husband and wife; KIRK-HUGHES & ASSOCIATES, INC., a Nevada corporation;

Defendants/Appellants

and

KELLY POLATIS, an individual, and DELANO D. and LENORE J. PETERSON, husband and wife; INTERNAL REVENUE SERVICE; TOMLINSON NORTH IDAHO, INC., an Idaho corporation,

Defendants

# RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Kootenai,
Honorable Lansing Hayes, District Judge, Presiding

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## STATEMENT OF THE CASE

### A. Nature of the case.

Alan Golub (Golub) obtained a default judgment against Geraldine Kirk-Hughes (Kirk-Hughes), Kirk-Hughes Development (KHD), and Kirk-Hughes & Associates in 2009 (collectively the Kirk-Hughes defendants). He properly undertook collection efforts which were impeded by KHD's two bankruptcies, which were dismissed. He was further impeded by a claim that another entity, Kirk-Scott, LLC (a company owned in large part by Kirk-Hughes' sister, Balinda Antoine), claimed a deed of trust on the real property owned by KHD, which was superior to the Golubs' judgment lien; that deed was purportedly given in 2004 and recorded in violation of the bankruptcy stay in 2010. Golub brought an action for declaratory relief to establish his judgment priority against Kirk-Scott, and the trial court granted summary judgment establishing Golub's priority. That action was consolidated with this action, in which the Kirk-Hughes defendants join Kirk-Scott to assert that the trial court erred in ruling that the Golubs' judgment had priority, and in awarding sanctions.

### B. Statement of facts.

Originally, Alan Golub commenced suit against KHD, Geraldine Kirk-Hughes, and Kirk-Hughes & Associates, as well as other defendants including Kelly Polatis and the Petersons, because instead of paying a real estate commission owed for procuring a sale of property owned by the Petersons, the various parties tortiously manipulated sales of the property to avoid the real estate commission. (*R. Vol. I, pp. 162-169*) After defending the case for a year and a half, the Kirk-Hughes defendants defaulted, and Mr. Golub obtained a judgment against

them in the amount of $941,000 on March 11, 2009. *(R. Vol. I, pp. 35-37)* KHD filed for bankruptcy on April 6, 2009 in Nevada. *(R. Vol. I, p. 79)* While that bankruptcy was pending, Kirk-Scott LLC recorded a Deed of Trust on the property owned by KHD; the Deed of trust was purportedly given in 2004. *(Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 5)* Kirk-Scott is a company owned by Geraldine Kirk-Hughes' sister, Balinda Antoine. Kirk-Scott is a 51.5% member of KHD; Antoine is a 3% member. *(Augmented Record, May 3, 2013 Aff. of Michael T. Howard, Ex. 10, p. 23)* On October 28, 2010, KHD's bankruptcy was dismissed, and having resolved the remaining claims against the remaining defendant, Peterson, Golub re-recorded his judgment. *(R. Vol. I, p. 35)*

**C. Course of proceedings.**

When Golub thereafter learned that Kirk-Scott had recorded a Deed of Trust against the properties, he filed a declaratory judgment action to determine the priority of his judgment lien against all persons claiming interest, which included Kirk-Scott, the IRS, and the Kirk-Hughes Defendants. *(R. Vol. I, pp. 28-32)* Golub moved for summary judgment to establish that his judgment lien was prior to the improperly recorded Kirk-Scott Deed of Trust, which was allegedly given in 2004, but not recorded until September 2010. *(R. Vol. I, pp. 67-97)*

The trial court granted Mr. Golub's motion for summary judgment, finding his judgment lien to be valid and prior to the Kirk-Scott unrecorded Deed of trust. *(R. Vol. I, pp. 414-421)* The trial court also awarded sanctions against both Kirk-Scott and the Kirk-Hughes Defendants for improperly bringing a motion to amend judgment under Rule 59. Kirk-Scott appealed on a variety of issues; the remaining Kirk-Hughes Defendants also appealed, but limited this appeal to

two issues: 1) that the district court erred because Mr. Golub had knowledge of the Kirk-Scott deed of trust, which precluded his priority under the good faith requirement of Idaho Code §55-606; and 2) that the trial court erred in awarding sanctions against the Kirk-Hughes defendants because while they had joined in an improper motion, they had not filed additional briefing. The Kirk-Hughes Defendants misstate both the law and the facts relevant to the priority issue, and the court did not abuse its discretion in awarding sanctions, so no basis for reversal exists.

## ARGUMENT

The Kirk-Hughes defendants' argument regarding Golub's "knowledge" of the six year old deed of trust misapplies the relevant law; Golub was not a purchaser and so his good faith knowledge is wholly irrelevant to the priority of his judgment lien. Even so, the Kirk-Hughes defendants also mischaracterize the facts to assert Golub had actual knowledge of the deed; proper analysis of the testimony establishes his lack of actual knowledge, and the Kirk-Hughes defendants concede the defective and void 2010 recordation could not have provided constructive notice.

Moreover, while the Kirk-Hughes defendants did not file additional briefing on the motion to amend, it is undisputed they joined the motion in violation of I.R.C.P. 11(a). As a result, the court did not err in ordering the Kirk-Hughes defendants to share in the order on sanctions.

### A. Idaho's priority statute does not impose the obligation on a judgment debtor to exercise bona fide purchaser "good faith" to establish its priority.

The Kirk-Hughes defendants assert that the trial court should have found that Golub's judgment lien is inferior to Kirk-Scott's Deed of Trust under I.C. §55-606 because the trial court failed to find that Golubs exercised "good faith"; this is a misapplication of the requirement of the priority statute. That requirement applies to purchasers or encumbrancers, and not to judgment liens.

Idaho Code §55-606 governs the treatment of a judgment lien in determining priority of interests in real property and provides:

> Every grant or conveyance of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or encumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument **or** valid judgment lien that is first duly recorded. (Emphasis added)

I.C. §55-606.

The Kirk-Hughes defendants' position rests upon an interpretation of I.C. §55-606 that conditions the priority of a judgment lien upon good faith.[1] Courts interpreting a statute are to give effect to legislative intent. *See Robison v. Bateman–Hall, Inc.*, 139 Idaho 207, 210, 76 P.3d 951 (2003). The interpretation of a statute must begin with the literal words of the statute. *Statev. Yzaguirre*, 144 Idaho 471, 475, 163 P.3d 1183 (2007). The plain meaning of a statute therefore will prevail unless clearly expressed legislative intent is contrary or unless plain

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[1] The Kirk-Hughes defendants do not also address the requirement "for valuable consideration" which is addressed in the Kirk-Scott appeal. Presumably, that requirement is ignored here because it underscores the lack of logical application of the statute to a judgment lien.

meaning leads to absurd results. *Id.* If the language of the statute is capable of more than one reasonable construction it is ambiguous. An ambiguous statute must be construed to mean what the legislature intended it to mean. *Id.* To ascertain legislative intent, the Court examines not only the literal words of the statute, but the reasonableness of the proposed interpretations, the policy behind the statute, and its legislative history. *Id.*

By its plain terms, I.C. §55-606 does not condition the priority of a judgment lien upon food faith or the giving of additional consideration. When read as a whole, the statute provides protection for two classes of interest holders: (1) a purchaser or encumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument; **or** (2) a valid judgment lien. In appropriate statutory interpretation, the word "or" indicates alternative things; in a statute should be given its usual disjunctive meaning. *State v. Rivera*, 131 Idaho 8, 10, 951 P.2d 528(Ct. App. 1998). These clauses here must be read disjunctively, because use of the word "lien" more than once would be redundant and superfluous if the statute were not intended to distinguish a valid judgment lien from a lien by any another instrument taken in good faith for consideration.

A review of the legislative history behind the 1989 amendment to the statute supports this reading. Prior to 1989, the statute did not include reference to judgment liens. In 1989, the legislature amended the statute by including the single phrase "or valid judgment lien." (*R. Vol. I, p. 346*) The stated purpose of the amendment provides:

> This legislation would provide that a valid judgment lien that is first duly recorded has priority over subsequently recorded grants or conveyances of an estate in real property.

*(R. Vol. I, p. 347)*

The minutes of the Judiciary and Rules Committee further provide:

> Senator Crapo presented this legislation and stated that it clarifies the effect of a valid judgment lien regarding a grant or conveyance of an estate in real property. The Supreme Court has recently allowed a judgment to be eliminated if the property is sold before collection can be made.

*(R. Vol. I, p. 347)*

Reading the statute to require a judgment lienholder to exercise good faith or produce additional consideration is somewhat of a square peg in a round hole, and leads to an absurd result. The necessity of good faith and consideration serves the purpose of protecting the purchaser; a purchaser must exercise good faith to determine whether any prior interests exist on the property so that he knows what he is purchasing. The failure the possessor of an interest in property to provide would-be purchasers with notice of that prior interest necessarily may not use the failure to disclose to their advantage. This principle is based upon the notion of a bargained for exchange to allow the purchaser of an interest in land to know what he or she is buying.

A lien by judgment is wholly different. A judgment line is not bartered for or exchanged for value; the holder obtains its interest as a matter of a statutory lien granted to judgment creditors. *See* I.C. §10-1110. It exists as a matter of law, and not in an exercise of reaching a deal with the record owner or others. The judgment creditor cannot protect itself by choosing not to have been injured by the property owner, which give it its lien rights. There is no additional consideration necessary to give rise to the rights, nor is there any notice or knowledge of other superseding interest that impacts its rights; it simply is.

A judgment holder has no such ability or requirement. It obtains its interest as a matter of a statutory lien granted to judgment creditors. I.C. §10-1110. It exists as a matter of law, and not in an exercise of reaching a deal with the record owner or others, as by giving consideration. The judgment lien holder's knowledge of other interests is irrelevant to its lien. Recordation is the only requisite to secure its priority.

Accordingly, neither the text of I.C. §55-606 nor the courts interpreting it require that any finding of good faith or additional consideration, beyond the underlying obligation giving rise to the judgment, is necessary for the holder of a valid judgment lien to avail himself to the protections of I.C. §55-606. The Kirk-Hughes defendants' argument underscores the absurdity that such a read of the statute would result in, and the trial court properly awarded Golub priority as a judgment lienholder without such findings.

**B. No disputed issues of fact establish Mr. Golub's actual knowledge of Kirk-Scott's deed of trust.**

Even were Golub required to establish his good faith, the undisputed facts establish that he had no actual knowledge of the Kirk-Scott deed of trust. Put very simply, the Kirk-Hughes Defendants specify four pieces of evidence that they assert create an issue of fact, or establish Mr. Golub's knowledge regarding the Kirk-Scott deed of trust before he re-recorded his judgment in October 2009. In each instance, the evidence does not raise an issue of fact sufficient to defeat summary judgment, or reverse the trial court opinion.

The Kirk-Hughes Defendants first incorrectly assert that Golub testified he was aware of the deed of trust when Kirk-Scott recorded it on September 17, 2010. Mr. Golub's affidavit actually stated:

> 14. I was not aware that Kirk-Scott had executed a deed of trust to Kirk-Hughes Development prior to Kirk-Scott recording one during Kirk-Hughes Development's bankruptcy on September 17, 2010.

*(R. Vol. I, p. 96)* Golub was testifying only as to his knowledge **prior to** September 7, 2010. His affidavit is silent regarding his knowledge on or after September 17, 2010, and the Kirk-Hughes defendants simply restate the above "conversely" to reach the conclusion that Golub testified he became aware on that date. This is not what the affidavit says, and the Kirk-Hughes defendants cannot restate someone's testimony to create alleged inconsistencies.

Silence on an issue does not create a disputed fact, particularly when Golub testified directly on the issue in his deposition:

> Q. All right. Prior to 2013 when you were first handed a physical copy of the November 18, 2004 Kirk-Scott deed of trust, did you have any idea that Kirk-Scott claimed an interest in the properties?
>
> A. I did not know of any claim of interest in the properties or this deed of trust. No, I did not.

*(R. Vol. I, p. 99)*

Thus, the statements in the Affidavit of Golub identify a period in which he was unaware of the Deed of Trust, but do not identify that he had actual knowledge of the filing. He simply did not opine in his Affidavit that he was aware as of September 17, 2010, and his **subsequent** deposition testimony, during which KHD could have questioned him on the Affidavit, clearly establishes that he did not know of the Deed of Trust until it was physically shown to him in

2013. The Kirk-Hughes Defendants' attempt to utilize a specific interpretation, or misinterpretation, of Golub's one line sentence does not create an inconsistency with his actual testimony on when he became aware of the September 17, 2010 filing. Trying to read disputed facts into the two statements are necessary for the Kirk-Hughes Defendants, because there simply is no evidence of Golub's actual knowledge of that filing.

The Kirk-Hughes Defendants' liberal recitation of the facts in the record is underscored by the other two pieces of testimony on which the Kirk-Hughes Defendants rely to establish that Mr. Golub was aware of Kirk-Scott's deed of trust. First, the Kirk-Hughes Defendants assert that "Darlene Moore testified that...she personally informed Mr. Golub that Kirk-Scott had an interest in the Sloan property." Darlene Moore's testimony was instead:

**Affidavit of Darlene Moore**

> In November of 2004...I advised Alan that it was my belief that Ms. Kirk-Hughes was still interested in the property and still interested in pursuing the development because she had just recently created a corporation called Kirk-Hughes Development and had **asked me to prepare a Note and Deed of Trust in favor of her sister, Balinda Antoine**, to exchange for the title to the Sloan property that had been purchased in Kirk-Scott, Ltd. name. Alan had proposed that Ms. Kirk-Hughes use the Sloan parcel to acquire financing to assist Ms. Kirk-Hughes in purchasing the Peterson property. I told them this was not possible as **I had already prepared the mortgage in favor of Balinda**.

*(R. Vol. I, pp. 306-307)* (emphasis added)

> In 2006 ... 3) I reminded Alan that Balinda Antoine had a mortgage on the Sloan parcel so there would be no asset to collect against.

*(R. Vol. I, pp. 307-308)*

Ms. Moore's Affidavit only purports to establish that she informed Golub that she prepared *some* instrument, but provides no testimony that Golub had knowledge that an instrument encumbering the property was actually executed. Moreover, Moore's Affidavit is unclear as to whether she informed Golub that she prepared a Deed of Trust or a mortgage.[2] Clearly, if she informed Golub that she had prepared a mortgage, it cannot be said that he had knowledge of a Deed of Trust.

What is clear from Ms. Moore's Affidavit is that whatever encumbrance was intended, she informed Golub that it related solely to the Sloan property[3] and was in favor of Balinda Antoine; **not** Kirk-Scott, Ltd.[4]

Next, the Kirk-Hughes Defendants state that "Geraldine Kirk-Hughes testified that she also informed Mr. Golub that a deed of trust was granted to Kirk-Scott." In reality, Ms. Kirk-Hughes' testimony was:

**Affidavit of Geraldine Kirk-Hughes**

> In September 2004...I told Mr. Golub that I was forming a separate entity to develop the land, and that title to all the properties **would** be transferred to the new company. **I specifically told Mr. Golub that I was giving my sister a mortgage or deed of trust** to secure Kirk-Scott, Ltd.'s interest. (Emphasis added)

*(R. Vol. I, p. 313)*

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[2] Deeds of Trust differ from Mortgages in that deeds of trust always involve at least three parties, where the third party holds the legal title, while in the context of mortgages, the mortgagor gives legal title directly to the mortgagee.

[3] The November 18, 2004 Deed of Trust identifies only two of the three Sloan parcels, and includes the Atkinson parcel. *(R. Vol. I, pp. 39-40)*

[4] Ms. Moore's Affidavit provides no foundation to establish she has personal knowledge of a mortgage executed in favor of Balinda Antoine.

> In November of 2004, your affiant requested Darlene Moore to prepare a Note and Deed of Trust in favor of Kirk-Scott, Ltd. to cover the monies spent by Balinda Antoine to acquire the Sloan parcel. Your affiant specifically informed Alan of this ....

*(R. Vol. I, pp. 315-316)*

> After Ms. Moore prepared the Note and Deed, your Affiant signed the same. ...

*(R. Vol. I, p. 316)*

Ms. Kirk-Hughes' Affidavit demonstrates her September 2004 intent to give **Balinda Antoine** (as opposed to Kirk-Scott, Ltd.) a future mortgage **or** deed of trust. It then states that Golub was informed of **a request to prepare** a Deed of Trust to Kirk-Scott in November 2004. Finally, it evidences that **after** the document was prepared, it was executed by Ms. Kirk-Hughes.

Ultimately, the affidavits submitted to contradict Golub's testimony only provide evidence that Golub had knowledge of a ***desire or intent*** to encumber the property; they provide no evidence that he had knowledge that such an encumbrance ***actually*** attached to any of the subject properties.

> As between a mortgagee and another claimant, one who has actual notice of the other's prior claim or lien generally takes subject to it, even though the prior claim or lien is unrecorded.
>
> ...
>
> In order to have this effect, the notice or knowledge must be acquired prior to the attaching of the rights of the party to be affected by it. Actual notice of a mortgage is express, direct information. Notice does not mean a formal written warning served on a party. Instead, it means actual knowledge of the fact in question, regardless of how it was acquired. However, **it must be knowledge of the actual existence of the prior conveyance or encumbrance and not merely information of a purpose or agreement on the part of the grantor to make or give it**.

59 C.J.S. Mortgages §298 (emphasis added).

Construing the priority of interests under I.C. §55-612, the Idaho Supreme Court has similarly held that knowledge of an intent to create or acquire an interest in property is not a legally recognizable interest that would constitute an adverse claim for purposes of defeating the status as a bona fide purchaser. In *Sun Valley Hot Springs Ranch, Inc. v. Kelsey*, 131 Idaho 657, 661 (1998), the Court explained this concept as follows:

> In discussing whether a party had actual or constructive notice in regards to determining its bona fide purchaser status, this Court in *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 874 P.2d 528 (1994), concluded that a party's prior notice of another party's use of a well did not create a real property right in the party using the well. A purchaser's prior notice of another party's use of property does not create any real property right in the using party that would serve as an adverse claim that could defeat the purchaser's status as a bona fide purchaser. *Id.* at 725-26, 874 P.2d at 536-37. Where notice of another party's "use" of property does not create a property right in the using party, it follows that notice of another party's "intent" to use property in the future would not create a property right in that party.

*Sun Valley Hot Springs Ranch, Inc.*, 131 Idaho at 661.

In a recent decision addressing the same issue presented here, the Court in *Insight, LLC v. Gunter*, 154 Idaho 779, 302 P.3d 1052 (2013), rejected evidence similar to that proffered by Defendants, holding:

> It is not technically possible for IM to have notice of an encumbrance on property before that encumbrance actually comes into existence. Though IM knew that Summitt was intending to execute a deed of trust, that was notice of an intent to subsequently encumber property, not notice of an actual encumbrance on property. Therefore, the district court's finding that IM had notice of the Gunters' deed of trust is clearly erroneous.

*Insight,* 154 Idaho at 783-84.

Here, the Kirk-Hughes Defendants have not provided any evidence to contradict Golub's testimony that he had no knowledge of Kirk-Scott's encumbrance prior to re-recording his Judgment in October 2010. As a result, the trial court did not err in ruling that Golub's Judgment lien was valid and had priority under I.C §55-606.

**C. The recordation of Kirk-Scott's deed of trust while the bankruptcy stay was in place and with an improper acknowledgement could not provide constructive notice.**

The Kirk-Hughes Defendants apparently concede the acknowledgement on the deed of trust filed on September 17, 2010 was defective, and the recording during the pendency of the bankruptcy was void. The Kirk-Hughes defendants apparently agree that these defects preclude constructive knowledge of the recordation, but argue that Golub's "actual knowledge" renders the defects immaterial. However, as outlined above, Golub did not have actual knowledge, and thus to the extent the Kirk-Hughes defendants have to establish constructive knowledge by the recording, they cannot do so. As a result, Golub's judgment is prior to the defective recording of the six-year old Deed of Trust.

**D. A sanctions order is an appropriate exercise of the court's discretion and no basis exists for reversal.**

The Kirk-Hughes Defendants joined in Kirk-Scott's motion to alter or amend the 2013 judgment pursuant to I.R.C.P. 59(a), which was in reality a motion to reconsider the court's ruling on the Rule 60(b) motion to vacate the 2007 judgment, and prohibited by I.R.C.P. 11(a)(2)(B). The Kirk-Hughes Defendants' appeal on the sanctions order is not based on any assertion that the Rule 59 motion was appropriate, but is instead based on the fact that while they joined the motion, the Kirk-Hughes Defendants did not file additional pleadings or advance

any arguments in support of the motion. As a result, they argue the order for sanctions issued by the court based upon an apportionment of the fees incurred in responding to the motion between the two moving parties is incorrect.

However, I.R.C.P. 11(a)(1) is clear that the signature of an attorney on a pleading is the conduct that subjects the party to sanctions if the pleading is not grounded in appropriate facts and law. It is undisputed that the Kirk-Hughes Defendants were a moving party and "signed" the pleading by joining the motion, thereby relying on the Kirk-Scott pleadings. Once the court determined that the motion had no basis in law or fact, it had the discretion to award "sanctions," which "may" include the amount of reasonable expenses incurred because of the improper filing. I.R.C.P. 11(a)(1). The rule itself does not limit the sanction to a moving party that files briefing, but is based instead on the submission of an improper pleading.

It is undisputed that the Kirk-Hughes defendants joined the motion and thus are subject to the same sanction for the improper conduct; the court properly exercised its discretion in simply splitting the amount of the sanction between the moving parties. *See Campbell v. Kildew*, 141 Idaho 640, 651, 115 P.3d 731 (2005) (the amount of sanctions is committed to the "sound discretion" of the court, and attorney fees incurred by the aggrieved party can serve as a "guide" to the amount of the award). There is no law that limits the trial court's discretion in the award of sanctions to an amount actually incurred by a party in responding to briefing. The trial court's order on sanctions was a reasonable determination when both parties propound an improper motion, and no basis exists to reverse the award.

## CONCLUSION

For the foregoing reasons, the summary judgment in favor of the Golubs on the priority of its lien should be affirmed, and the award of sanctions should be affirmed.

DATED this 16th day of April, 2014.

FOR 5900

MICHAEL T. HOWARD
WINSTON & CASHATT, LAWYERS
Attorneys for Plaintiffs

525083

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 16th day of April, 2014, caused a true and correct copy of the attached RESPONDENT'S BRIEF postage prepaid to the following parties:

| | |
|---|---|
| Michael S. Bissell<br>Campbell & Bissell, PLLC<br>Corbet Aspray House<br>820 W. 7th Avenue<br>Spokane, WA 99204<br>Attorney for Defendants-Appellants, Kirk-Hughes Development, LLC, Kirk-Hughes & Associates, Inc., Geraldine Kirk-Hughes, and Peter Sampson | **VIA REGULAR MAIL** ☒<br>**VIA CERTIFIED MAIL** ☐<br>**HAND DELIVERED** ☐<br>**BY FACSIMILE** ☐<br>**VIA FEDERAL EXPRESS** ☐ |
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