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Fuquay v. Low Respondent's Brief 1 Dckt. 44155

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN E. FUQUAY; CLINTON WARD FUQUAY and HAILEY ROSE FUQUAY, Plaintiff/Appellants, v. SUSIE LOW; CAL LOW; GILBERT KING as Trustee of the HEART K RANCH TRUST UTA DECEMBER 28, 2012; AVCO FINANCIAL SERVICES OF IDAHO FALLS, INC.; THE ESTATE OF GORDON G. KING; ROSE M. KING; FIRST AMERICAN TITLE INSURANCE COMPANY, Defendants/Respondents,	SUPREME COURT NO. 44155 Third Dist, Owyhee Co. No. CV 2014-0278

KING RESPONDENTS' BRIEF

Appeal from the District Court of the Third Judicial District
for the County of Owyhee

Honorable Thomas J. Ryan, District Judge, Presiding

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN E. FUQUAY; CLINTON WARD FUQUAY and HAILEY ROSE FUQUAY,

Plaintiff/Appellants,

v.

SUSIE LOW; CAL LOW; GILBERT KING as Trustee of the HEART K RANCH TRUST UTA DECEMBER 28, 2012; AVCO FINANCIAL SERVICES OF IDAHO FALLS, INC.; THE ESTATE OF GORDON G. KING; ROSE M. KING; FIRST AMERICAN TITLE INSURANCE COMPANY,

Defendants/Respondents,

GILBERT KING, as Trustee, and ROSE M. KING, as Beneficiary of the HEART K RANCH TRUST UTA DECEMBER 28, 2012,

Counterclaimants/Respondents,

v.

JOHN E. FUQUAY; CLINTON WARD FUQUAY and HAILEY ROSE FUQUAY,

Counterdefendants/Appellants.

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from the district court's grant of summary judgment, which denied the Fuquay Appellant's claim to an alleged prescriptive easement in a private roadway, King Lane, which crosses the King Respondents' ranch property, Heart K Ranch. The King Respondents had argued that on the basis of Idaho's "joint-use-in-common" rule, the Fuquay Appellants' use of King Lane at all times had been permissive since the time King Lane had been first constructed for the Kings' own use in 1973. This presumed "permissive use" eliminated the required elements of proof necessary to establish a prescriptive easement, that the claim be both "adverse," and asserted as a "matter of right," such that the Kings were entitled to summary judgment as a matter of law.

B. COURSE OF PROCEEDINGS BELOW

This proceeding was commenced by the Fuquay Appellants by a complaint for prescriptive

easement and motion for Temporary Restraining Order (TRO) filed on September 4, 2014. (R., pp. 13-59). The declarations filed by Raymond Jayo, (R., pp. 60-61); John Fuquay, (R., pp. 62-66) and Matthew Cleverley, (R., pp. 67-68), were submitted in support of the issuance of the TRO, which was heard by the district court by telephonic hearing on September 5, 2014, with a TRO issued by the district court on that date. (R., pg. 2).

On September 9, 2014 the King Defendants answered the Fuquays' Complaint and asserted counterclaims requesting declaratory relief as to the scope of any permissive use by the Fuquays on King Lane; requesting permanent injunctive relief; and requesting quiet title relief. (R., pp. 69-83). On September 17, 2014 the Low Defendants also filed an answer and asserted counterclaims for trespass and injunctive relief. (R., 113-121).

In rebuttal to the relief that had been obtained by the Fuquays through the issuance of the temporary restraining order (TRO) on September 5, 2014, and in opposition to any further injunctive relief, as requested by the Fuquays, and as set for hearing on September 18, 2014, the Kings had submitted the affidavits of Denice Collett (school bus driver), (R., pp. 84-86); Rose King, (R., pp. 87-94); Gilbert King, (R., pp., 95-104); Ronald P. Rainey, (R., pp. 105-107); Declaration of Shawn Drew (Schwann Delivery Person), (R., pp. 108-09); Scott Snyder, Owyhee County Deputy Sheriff (R., pp. 122-127); and Seth Thomas, (R., pp. 128-131). In addition, the Respondent Lows submitted the Affidavit of Susie Low as to her observations concerning the existence of gates across King Lane and the purpose served by those gates in controlling livestock. (R., pp. 110-112).

A hearing for entry of a preliminary injunction was held on September 18, 2014 at which time both the opposing affidavits and live testimony was presented to the district court, which court then addressed the primary basis for both the issuance of the TRO, and any continuing necessity on that same basis, for the entry of a preliminary injunction, which requested injunctive relief was denied, with only a limited exception recognized for the use of King Lane by emergency vehicles. An "Order Denying Plaintiffs' Motion for a Preliminary Injunction," was entered on September 29, 2014. (R., pg. 4) (R., pg. 272, Tr. pg. 122, LL 4-17).

After the hearing conducted on September 18, 2014, on the Fuquays' motion for preliminary injunction, the September 5, 2014 TRO was quashed and the only injunctive relief ordered for any "use" of King Lane was such "use" as was necessary for emergency vehicle access. (R., pp. 272-73, incorporating the September 18, 2014 hearing transcript; Tr., pg, 123 L. 125 to pg. 124, LL. 1-8) ("You're going to have to make the long route around until we style this case for trial and have a hearing. Until then, you got to make the long route." Tr., pg. 122, LL. 13-16, R., pg. 272).

After the preliminary injunction hearing, on October 29, 2014 the Fuquay Appellants proceeded to file a motion for partial summary judgment as brought only against the Low Respondents (R., pp. 132-143), to which the Lows responded, (R., pp. 215-228), as supported by the Affidavit of Rose King, (R., pp. 229-235); and by the Affidavit of the Low's predecessor in interest, Sam Steiner. (R., pp. 236-39). This summary judgment motion was subsequently withdrawn by the Fuquays on December 17, 2014. (R., pp 274-75). The significance of this particular motion is that

it was at this point when the Fuquays described the scope of use for their alleged prescriptive easement claims over King Lane as encompassing regular personal vehicle access, regular use for driving large semi-trucks, regular farm use for cattle trucks and moving farm equipment, pedestrian use, and personal vehicular use by guests. (R., pg. 136). All of these alleged prescriptive easement uses were supported by the Declaration of John Fuquay. (R., pg. 201-214).

On January 28, 2015 the Fuquay Plaintiffs filed a motion for leave to file an amended complaint, primarily to add a new party, Michael and Teena Lewis, who owned property located off of Castle Lane. This proposed amended complaint otherwise neither amended any of the existing claims, nor added any new claims, as alleged against the existing King and Low Defendants. (R. pg. 6). Because the proposed addition of the Lewis Defendants would not assist in resolving the existing claims as made against the King Defendants, and would potentially complicate the resolution of those claims by injecting new issues concerning the prohibited assertion of prescriptive easement claims over public BLM roadways, the King Defendants opposed the addition of those claims and that new party to the action below.

The district court did grant the Fuquays limited leave to file an amended complaint, but without adding the proposed Lewis Defendants as new parties to the action. On March 30, 2015 the Fuquays filed their First Amended Complaint. (R., pp. 432-485). In paragraph 16 of that amended complaint the Fuquays continued to make no allegation of any "use" of King Lane arising before 1989, and continued to raise no claim as to any "use" of King Lane by any "predecessors" upon

which use the Fuquays based their own prescriptive right claim. (R., pg. 436).

One day after the Fuquays filed that motion for leave to amend, the Kings on January 29, 2015 moved for summary judgment, essentially on the ground that the Fuquays could not prove a required element of their prescriptive easement claim – adverse use of King Lane – and therefore the Kings were entitled to judgment as a matter of law on that prescriptive easement claim. (R., pp. 291-93). This motion was supported by the affidavits of Gilbert and Rose King; (R., pp. 276-84); by the affidavit of counsel; (R., pp. 285-290); the supporting memorandum of the Lows; (R., pp. 308-310); and by the Kings own supporting memoranda; (R., pp. 294-307; 414-422). The Fuquays opposed the King's motion for summary judgment not by addressing the issue raised on the motion – that the required element of adverseness could not be established – but instead by simply ignoring that argument altogether. (R., pp. 311-327). The Fuquays then resubmitted all of the previous testimony of the parties to the action in an attempt to substantiate its summary judgment opposition argument that genuine issues of fact existed which precluded entry of summary judgment. (R., pp. 328-413).

The matter was heard by the district court on February 27, 2015. (R., pg. 6). On March 25, 2015 the district court issued its memorandum decision denying the King's motion for summary judgment, (R., pp. 423-431), ruling that there was a material issue of fact as to when adverse use began. (R., pg. 430).

On April 7, 2015 the Kings moved for reconsideration under Civil Rule 11(a)(2)(B), (R., pp. 490-92), arguing that the district court had missed the essence of the point raised on their summary

judgment motion that from the time King Lane had been built in 1973 all use by the Fuquays had been permissive – as a matter of law – under the "joint-use-in-common-rule," and that the Fuquays had completely failed to provide any evidence of an interfering use that would constitute an adverse use required in support of their prescriptive right claims. (R., pp. 499-516). In a short response the Fuquays continued to adhere to their previous position that disputed facts, notwithstanding the lack of evidence in support of a required element of their claim, dictated that summary judgment be denied. (R., pp. 517-522). In reply the Kings continued to point out that the record before the district court simply failed to support the existence of any adverse claim made by the Fuquays against the Kings that would support a right to a prescriptive easement in King Lane. (R., pp. 523-535).

On reconsideration the district court granted the King's motion for summary judgment on June 19, 2015. (R., pp. 536-547). Then on July 6, 2015 the Fuquays filed their own motion for reconsideration, and for the first time in the proceeding below argued on that motion that they were entitled to a presumption of adverseness on their claim to a prescriptive easement in King Lane because it was unknown when the "use" of King Lane that they were claiming had originated by any of their predecessors. (R., pp. 548-570). On August 4, 2015 the King Defendants opposed the Fuquays' motion for reconsideration, arguing that the Fuquays had mis-stated both the facts and applicable Idaho legal standards, (R., pp. 602-13), that applied to the "joint use in common" doctrine. The Fuquays submitted a reply memorandum on August 15, 2015, continuing to adhere to their

argument that when there is no evidence as to when "use" of the road began a presumption of adverseness applies. (R., pp. 616-621).

On September 11, 2015 the district court issued a memorandum decision denying the Fuquays' motion for reconsideration, (R., pp. 629-636), finding that the evidence was undisputed that King Lane had been constructed by the Kings in 1973 and that the Fuquays' use of that roadway had in no way interfered with the Kings' own use of that roadway, such that the Fuquays' use was presumed to be permissive under the "joint use in common" doctrine. (R., pp. 634-35).

The Respondent Lows had submitted their own motion for partial summary judgment on July 15, 2015, (R., pp. 592-94), requesting entry of summary judgment on the same basis as it had been granted to the Kings, as supported by both a memorandum, (R., pp. 595-601), and a reply memorandum. (R., pp. 622-28). Following the determination of the Fuquays' motion for reconsideration, the district court also granted the Lows' motion for summary judgment on September 21, 2015. (R., pp. 637-641).

A judgment was entered on December 21, 2015. (R., pp. 642-43). The Fuquays filed an initial notice of appeal, (R., pp. 644-650), which was dismissed on the basis that it did not constitute an appealable final judgment, due to the fact that the counterclaims of the Defendant Kings and Lows still remained pending and unadjudicated before the district court. (R., pp. 651-52). With some additional briefing provided by the parties, (R., pp. 653-661), the district court on March 29, 2016 filed a Memorandum Decision Upon Request for Final Judgment that disposed of the pending

counterclaims, (R., pp. 665-67), and then entered an Amended Final Judgment (R., pp. 663-64).

The Fuquay Appellants filed a timely notice of appeal on May 2, 2016. (R., pp. 668-674).

C. STATEMENT OF FACTS

As required by Idaho Appellate Rule 35(g), and as generally consistent with the evidence previously submitted through the affidavit of Gilbert King (R., pp. 95-104), two Google Earth images are attached at the end of this respondents' brief that generally represent the respective properties of the parties to this appeal in relation to the Oreana Loop Road, Castle Lane, and King Lane, and that specifically represent King Lane in relation to the properties of the parties to this appeal.[1]

The Fuquay Appellants have alleged a prescriptive easement claim to an all weather private road known as "King Lane," which is about a half mile in length, that runs in an east-west direction between the public Oreana Loop Road and Castle Lane. After King Lane connects with Castle Lane, that roadway then turns south and reconnects with the public Oreana Loop Road. This private roadway was named "King Lane" in 2002 in response to a request from Owyhee County Sheriff Gary

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[1] As a part of their opposition of the Fuquays' Motion for Leave to Amend their Complaint, the Kings had argued that as based upon the existing facts on the ground it was quite possible that the Fuquays had an enforceable alternative legal access to their properties over Castle Lane which enforceable alternative legal access was likely an, "R.S. 2477 right-of-way," as preserved under the Federal Land Policy and Management Act of 1976 ("FLPMA"), P.L. 94-579, 90 Stat. 2792. *See e.g., Flying A Ranch, Inc. v. County Commissioners of Fremont County*, 157 Idaho 937, 342 P.3d 649 (2015). Because the existence of an alternative right of way is not a defense to a claim of a prescriptive easement, that briefing has not been made a part of the record on this appeal.

Aman in order to assist emergency responders, who needed to have accurate addresses. (Dec. 9, 2014 Rose King Aff., ¶ 4, R., pg. 230).

The King Respondents own the parcel of land north of King Lane and the Respondent Lows own the parcel of land to the south of King Lane. The Fuquay Appellants own parcels of land to the west of King Lane, where that roadway ends and connects with Castle Lane. As the district court declared, in its ruling on the Lows' motion for summary judgment, "It is not specifically known to what extent the road crosses the Low and King properties, but there is no dispute that the road cross a portion of each." Memorandum Decision Upon Low Defendants' Motion for Summary Judgment at pg. 2 (R., pg. 638).

The district court granted summary judgment for the respondent landowners, the Kings and the Lows, denying the Fuquay Appellants' prescriptive easement claim in King Lane. The basis for that ruling was that from the time this road – King Lane – was first built by the Kings in 1973, the only evidence submitted in support of its "use," concerning the Fuquays' prescriptive easement claims was the "use" that had been submitted by the Appellant Fuquays, which "use" was entirely permissive having been undertaken "in common" with the Kings, as owners of the road, which "use" had been commenced no earlier than 1977. (R., pp. 545-46; R., pp. 634-35).

The Fuquays' alleged prescriptive easement claims, as primarily supported by the Declaration of John Fuquay, (R., pg. 201-214), were declared to be for the following types of uses: (1) regular personal vehicle access; (2) regular use by large semi-trucks; (3) regular farm use by cattle trucks

and for moving farm equipment; (4) pedestrian use; and (5) personal vehicular use by guests of the Fuquays (R., pg. 136).

On the record before this Court it is undisputed that the Respondent Kings acquired their property in 1973 and that same year began to build a roadway that was suitable for vehicular uses that is now known as King Lane. (Rose King Aff., ¶ 2, R., pg. 230). This roadway did not become suitable for usage by large trucks prior to 1989, when the "welded barrel culvert" was replaced with a concrete culvert. (Rose King Aff., ¶¶ 3 & 16, R., pp. 230 & 233-34). It is also undisputed that the Lows, who are the adjacent landowners to the Kings and own the property on the south side of King Lane, acquired their property interest in 2006 from their predecessor – Sam Steiner (R., pg. 626).

It is also undisputed by their own declarations that the Appellant Fuquays' own use of King Lane did not begin at any time before 1977. (Declaration of John Fuquay, R., pp. 201-14). Nonetheless, the essence of the claims they have advanced on this appeal is well summed-up in a single paragraph provided in the reply brief that they submitted in support of their motion for reconsideration to the district court:

> In this case, the evidence shows that the roadway has been in existence for nearly 100 years and was used by the property owners prior to the Plaintiffs. There is no evidence that the initial use of the roadway was ever permissive. Therefore the use of the roadway from its inception, including the time through Plaintiffs predecessors, is presumed to be adverse to the Kings. The Kings have the burden of showing permissive use at the time the roadway was built and use began, not just from the Fuquays's first use in 1977. The Kings have not shown any evidence that the initial use nearly 100 years ago was permissive; therefore, the presumption is that the use has been adverse.

Plaintiffs' Reply in Support of Motion for Reconsideration at pg. 3 (R., pg. 618).

There is no evidence in the record before this Court on this Appeal, just as there was not evidence before that district court, that supports any of the above-stated assertions, and it was for that reason that the district court denied the Fuquay Appellants' motion for reconsideration. The district court ruled:

> In this case, it is undisputed that the Kings began improving the roadway, which is now King Lane, in 1973 to benefit their farming operation. In her affidavit, Rose King stated that at the time of their purchase of this property in 1973, "King Lane was only a path through grass and weeds and was wet and muddy most of the year. . . . We desired to access our fields through the use of this filed [sic, "field"] lane, therefore, we started hauling rocks to build a base for this road so that it would be passable for our farm equipment. We did this annually. . . ." *Affidavit of Rose King*, pg. 2, filed Dec. 9, 2014. Thus, the Kings constructed the roadway for their own use and convenience. The law applicable here is that "the mere use thereof by others which in no way interferes with his use will be presumed to be by way of license or permission." *Simmons v. Perkins*, *supra*. Therefore, the permissive presumption is applicable here.

Memorandum Decision Upon Plaintiffs' Motion For Reconsideration Filed July 6, 2015, at pp. 6-7 (R., pp. 634-35).

The only facts alleged by the Fuquay Appellants in support of their claim to a presumption of adverse right in the use of King Lane is a single excerpt from the deposition of Rose King upon which they also relied in their argument before the district court (R., pg. 561), and the rather indefinite statements of the Lows' predecessor, Sam Steiner, as to what he saw as being the rather intermittent use of King Lane in his observations over the years (R., pp. 561-62). This alleged evidence of prior use, submitted by the Fuquays to establish a "presumption of adverse use," was

rejected by the district court for the purpose of establishing the required use of King Lane by the Fuquays' predecessors which allegedly commenced at some unknown time. Rose King's deposition excerpt did nothing more than establish the location of the Kings' property boundaries:

> A. It goes right where it is today. It is the same spot. It hasn't moved. That lane goes to where the fence - - the gate is because those fences are all the border lines. When we bought the property, nobody resurveyed any land. Where we live, it was surveyed in 1894. So when they took us around to show us the borderline, and if you will look, the fence goes all the way across what's between Cal and Susie's and then it comes right here in front of Clint and JC's house. That same fence. And then it turns and goes south.

(R., pg. 561; Deposition of Rose King at pp. 15-16, R, pg. 574). Likewise, the observations made by Sam Steiner, who was two years old when his family first moved onto the property in 1959 (Steiner Aff., ¶ 2, R., pg. 237), are indefinite as to his time of observation and could be equally consistent with uses made of King Lane after the improvements to the road were made in 1973:

> 6. Sometimes hunters used it to go back to the reservoir on the BLM ground. Kings used it to go to the geothermal well they had leased on the BLM ground. Renters on the old Munger property, now owned by Fuquays and previously owned by Bob Collett used it occasionally as a short-cut to Grand View. I think that Jim Fuquay used it occasionally when he lived in the mobile home located near the rental property now owned by Clint Fuquay. Jim and John Fuquay lived in the old Foreman farm residence down by the Foreman Reservoir for many years and while they generally drove out Castle Road, they also used the lane as a short-cut to Grand View. When Jim Fuquay moved on a mobile home at the corner of what would be King Lane and Castle Road, he would occasionally use King Lane, probably as a short-cut when he went out to Grand View.
>
> 7. However, the majority of the vehicle use was down Castle Road to Oreana Loop Road to the west. This was especially true during wet weather because there is a slough at the common west corner of the Fouquay [sic], Low's and King's properties that was pretty muddy in wet weather. It was pretty difficult to get through

then. When Zane Block had the King property under contract, he and Jim Fuquay did some work on the lane one year.

8. While there was some use of King Lane by passenger vehicles and pickup trucks, I don't believe I ever saw anyone take a large truck out that way, logging trucks or cattle trucks. Those kind of vehicles always went out Castle Road. However, I think that John Fuquay may have brought an empty cattle truck in that way a few times.

Affidavit of Samuel V.C. Steiner at pg. 2, R., pg. 237

Therefore, as relevant to the nature and extent of the alleged prescriptive easement claims that had been advanced by the Fuquay Appellants below, and on this appeal, there is no evidence in the record before this Court that King Lane in its present "all-weather" configuration, as originally constructed by the Kings in 1973 to support general farm and ranch vehicle traffic, and as not suitable for any large truck traffic before 1989, either existed as anything other than a mere wet and muddy path through the weeds before 1973, or that there was any "use" whatsoever made of that roadway by any Fuquay predecessor prior to the commencement of their own use of the roadway in 1977 that is consistent with the prescriptive use claims that they made in the action below.

The "facts" which are submitted in support of the "use" of a prescriptive right claim must provide evidence of "continuous and uninterrupted use" by the claimant, or a predecessor, for the required prescriptive period. The only "facts" concerning any "use" of King Lane that were submitted in this action in support of the alleged prescriptive right claims of the Fuquay Appellants were those alleged "uses" that commenced in 1977 when John Fuquay purchased the property adjoining the Kings, (Declaration of John Fuquay, R., pp. 201-14), and nothing before that time.

D. STANDARD OF REVIEW

On appeal the appellate court reviews the district court's grant of summary judgment *de novo*, and applies the same standard used by the district court in ruling on the motion. *Tiller White, LLC v. Canyon Outdoor Media, LLC*, 160 Idaho 417, 419, 374 P.3d 580, 582 (2016); and *Idaho Dev., LLC v. Teton View Golf Estates, LLC*, 152 Idaho 401, 404, 272 P.3d 373, 376 (2011) (quoting *Mortensen v. Stewart Title Guar. Co.*, 149 Idaho 437, 441, 235 P.3d 387, 391 (2010)). A grant of summary judgment is warranted where "the pleadings, depositions and 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 judgment as a matter of law." *Id.* (quoting I.R.C.P. 56(c)).

Where the non-moving party will bear the burden of proof at trial, the moving party's burden may be satisfied by showing the absence of material fact with regard to any essential element of the non-moving party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The absence of a genuine issue of fact with regard to an essential element of the plaintiff's claim renders any other potential issues of fact irrelevant. Once the absence of sufficient evidence on an element has been shown, the burden shifts to the non-moving party to establish a genuine issue of material fact. The non-moving party cannot merely rely upon its pleadings, but must produce affidavits, depositions, or other evidence establishing an issue of material fact. *R.G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 410, 797 P.2d 117, 118 (1990). The non-moving party need not submit evidence on every element upon which it will bear the burden at trial, but only those elements about

which the moving party successfully carried its burden. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 887 P.2d 1034 (1994).

II.

RESPONDENT'S RESTATEMENT OF THE ISSUES RAISED ON APPEAL

1. Did the district court appropriately grant summary judgment to both the King and Low Respondents by application of the "Joint Use In Common" rule in finding upon undisputed facts that at all times the Fuquay Appellants' use of King Lane was permissive, thus eliminating any possibility that the Fuquays could prevail upon their prescriptive easement claim?

2. If the King Respondents prevail on this appeal are they entitled to an award of their costs, and an award of attorney's fees under I.C. § 12-121?

III.

ARGUMENT

A. The District Court Correctly Applied The "Use In Common" Rule In Granting Summary Judgment To The Respondents

The focal point of this appeal arises out of the district court's grant of summary judgment to the King Respondents on June 19, 2015, and to the Low Respondents on September 21, 2015, on the basis that the Fuquay Appellants' use of King Lane was undertaken within the scope of the "joint-use-in-common-rule," and was therefore deemed to be entirely permissive. Consequently, in granting the King and Low Respondents' motion for summary judgment, the district court denied the Fuquay Appellants' claim for the recognition of a prescriptive easement over King Lane.

"Because 'it is no trivial thing to take another's land without compensation,' easements by prescription are not favored by the law. *Simmons v. Perkins*, 63 Idaho 136, 143, 118 P.2d 740, 744 (1941)." *Hughes v. Fisher*, 142 Idaho 474, 480, 129 P.3d 1223, 1229 (2006); and *Lorang v. Hunt*, 107 Idaho 802, 803, 693 P.2d 448, 449 (1984). A plaintiff must establish by clear and convincing evidence each of the five required elements necessary to establish a prescriptive easement as declared by the Idaho Supreme Court in *Hodgins v. Sales*, 139 Idaho 700, 963 P.2d 383 (1998):

> To establish an easement by prescription, the claimant must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period. *See* I.C. § 5-203; *Baxter v. Craney*, 135 Idaho 166, 173, 16 P.3d 263, 270 (2000). **Each element is essential to the claim, and the trial court must make findings relevant to each element in order to sustain a judgment on appeal**.

139 Idaho at 229, 76 P.3d at 973 (emphasis added).

The King Respondents, as Defendants below, had requested summary judgment on the Fuquay Appellants' claim to a prescriptive easement in King Lane on the basis that if at "all times" the Fuquays' use of King Lane had been permissive, then their prescriptive easement claim would fail for lack of any evidence in support of the required element of the claim being "adverse." The applicable rule on summary judgment is that the absence of any evidence which is necessary to establish **an essential element** of a claim that the nonmoving party will be required to prove at trial necessarily **renders all other potential issues of fact irrelevant**. *Bromley v. Garey*, 132 Idaho 807, 810-11, 979 P.2d 1165, 1168-69 (1999). (R., pp. 299-300; R., pp. 415-416). The Kings argued

below that the Fuquays had failed to present any evidence establishing any adverse use of King Lane for any claimed five year period, within the scope of their pleading. (R., pp. 300-305; R., pp. 418-421). Consequently, in the absence of any evidence necessary to support of an essential element of the Fuquay Appellants' prescriptive easement claim – the element of adverse use – the district court granted summary judgment for the King and Low Respondents, reasoning as follows:

> Based on the record before this Court the plaintiff has failed to make any showing on the essential element that plaintiffs' use of King Lane was adverse and under claim of right. Even when this Court makes all inferences in favor of the plaintiffs, there is nothing in the record to indicate a decisive act or incident of separate and exclusive use from 1977 until 2011. While the use of King Lane may not have started with express or even implied permission, **the record and testimony of the plaintiffs shows that plaintiffs' use of King Lane was in "common with the owner and the general public**." *Marshall* 130 Idaho at 680; (quoting *Simmons*, 63 Idaho 136, 118 P.2d 740 (194). A prescriptive easement cannot be granted unless there is evidence of a decisive act or incident showing adverse use that could be considered an "actual invasion of or infringement on the rights of the owner." *Hughes*, 142 Idaho at 480.
>
> Because there is no proof or evidence concerning this essential element of the plaintiffs' case, that the Fuquays' use was adverse and contrary to the ownership rights of the Kings, **the King defendants have met their burden of showing there is no genuine issue of material fact regarding the element of *adverse use***.
>
> > Once such an absence of evidence has been established, the burden shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56(f). *Boots v. Winters*, 145 Idaho 389, 392, 179 P.3d 352, 355 (Ct.App.2008).
>
> This court has reviewed the record throughly and cannot find that plaintiffs have met this burden. Thus summary judgment is appropriate. This is especially so given the plaintiffs burden of proof at trial (clear and convincing evidence).

Memorandum Decision Upon King Defendants' Motion For Reconsideration at pp. 10-11 (R., pp. 545-46) (italicized emphasis in original; bold/underlined emphasis added).

It was not until the Fuquay Appellants had filed their own motion for reconsideration of the district court's grant of summary judgment to the Kings and Lows, that for the first time any issue emerged in this case that the Fuquays' use of King Lane should be "presumed to be adverse" on the basis that there was no evidence as to how the use of King Lane began. (R., pp. 548-570).

In opposing the Fuquays' motion for reconsideration, the Kings presented evidence to the district court which demonstrated that the Fuquays themselves had clearly established that their own use of the King Lane had not begun at any time prior to 1977. (Declaration of John Fuquay, R., pg. 201-214). In addition, no evidence had been presented to the district court that any roadway, which was suitable for vehicular traffic and that was consistent with the nature of the Fuquays' alleged prescriptive easement claims, had existed at the current location of King Lane at any time before the Kings constructed the current roadway in 1973. (R., pg. 230; Rose King Aff., ¶ 2).

The statement of Samuel V.C. Steiner did not establish that there had been "any use" whatsoever of any earlier tract or pathway at the present location of King Lane prior to the construction of the current roadway in 1973 (R., pg. 237). Mr. Steiner, who was born in 1957, (R., pg. 237, Steiner Aff., ¶ 2), simply testified that, "I do not know who, if anyone, constructed King Lane." (R., pg. 237, Steiner Aff., ¶ 5). Even Mr. Steiner's hearsay declaration as to what his dad had told him is consistent with Rose King's own affidavit that some sort of "path through grass and

weeds," (R., pg. 230, Rose King Aff., ¶ 2), had existed at that location prior to the current roadway's construction in 1973. Steiner's testimony concerning his observations of occasional and irregular use of King Lane, mostly by the Fuquays themselves, is otherwise indefinite as to the time that any of this alleged use occurred. (R., pg. 237, Steiner Aff. ¶¶ 6, 7, & 8).

The only other alleged evidence upon which the Fuquays rely in support of their argument that any "prior use" of King Lane supports the existence of a presumption of adverseness upon which they would be entitled to rely, consists of the statements that were made by Rose King in her deposition concerning her property boundaries, which at best only indirectly relates to the location of King Lane:

> A. It goes right where it is today. It is the same spot. It hasn't moved. That lane goes to where the fence - - the gate is because those fences are all the border lines. When we bought the property, nobody resurveyed any land. Where we live, it was surveyed in 1894. So when they took us around to show us the borderline, and if you will look, the fence goes all the way across what's between Cal and Susie's and then it comes right here in front of Clint and JC's house. That same fence. And then it turns and goes south.

(R., pg. 561; Deposition of Rose King at pp. 15-16, R, pg. 574).[2]

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[2] The August 12, 2015 Declaration of Matthew Cleverley submitted the Deposition Excerpts of Gilbert and Rose King to the district court in support of the Plaintiff's Motion for Reconsideration, and it is a part of the record on appeal (R., pp. 614-615). Those deposition excerpts had been submitted earlier in the action as only attached to the Fuquays' Motion for Reconsideration. *See*, Certificate of Service at R., pg. 570. On August 4, 2015 the King Defendants had filed a Motion to Strike (R., pg. 9) on the basis that while a party is entitled to submit new evidence to the court on a Rule 11(a)(2)(B) Motion for Reconsideration, that evidence must be submitted in affidavit form. *See*, *Franklin Building Supply Co., Inc. v. Hymas*, 157 Idaho 632, 642, 339 P.3d 357, 367 (2014). In this appellate record those deposition excerpts have been submitted as originally attached to that motion (R., pp. 571-89).

Prescriptive rights are defined by the actual prescriptive use of the property over the statutory period. *Hodgins v. Sales*, 139 Idaho 225, 229, 76 P.3d 969, 973 (2003). In denying the Fuquay Plaintiffs' motion for reconsideration the district court declared:

> In this case, it is undisputed that the Kings began improving the roadway, which is now King Lane, in 1973 to benefit their farming operation. In her affidavit, Rose King stated that at the time of their purchase of this property in 1973, "King Lane was only a path through grass and weeds and was wet and muddy most of the year. . . . We desired to access our fields through the use of this filed [sic, "field"] lane, therefore, we started hauling rocks to build a base for this road so that it would be passable for our farm equipment. We did this annually. . . ." *Affidavit of Rose King*, pg. 2, filed Dec. 9, 2014. Thus, the Kings constructed the roadway for their own use and convenience. The law applicable here is that "the mere use thereof by others which in no way interferes with his use will be presumed to be by way of license or permission." *Simmons v. Perkins*, *supra*. Therefore, the permissive presumption is applicable here.

Memorandum Decision Upon Plaintiffs' Motion For Reconsideration Filed July 6, 2015, at pp. 6-7 (R., pp. 634-35).

In bringing this appeal the Fuquays have made no mention whatsoever of the fact that the current King Lane, as suitable for their alleged claimed prescriptive uses, was first built by the Kings in 1973. As the district court found, prior to the 1973 construction of King Lane, it had only been a path through grass and weeds and was wet and muddy most the year. (R., pg. 634). Yet that very fact – the construction of King Lane in 1973 and the "non-interfering use by the Fuquays of that roadway subsequent to their purchase of the adjoining property in 1977 – figured very prominently in the decision of the district court in denying the Fuquays' request for a prescriptive easement in that roadway.

> The only evidence of an adverse use and decisive act occurred in 2011 when the plaintiffs increased large commercial truck traffic over King Lane. However, that adverse use places the prescriptive easement claim within the twenty year statutory period.

Memorandum Decision Upon King Defendants' Motion For Reconsideration at pg. 8 (R., pg. 543).

As the district court found, as is pointed out further below, the Fuquays' own evidence and testimony established that they had not interfered in any way with the Kings' use of King Lane after 1977. The Fuquays have simply predicated their arguments advanced on this appeal upon ignoring the critical fact that the Kings constructed the roadway now known as King Lane in 1973, which in fact has made their claimed prescriptive uses of that road possible. On this appeal the Fuquays have strenuously attempted to allege that their actions constituted "distinct acts of adverse use," (Appellant's Brief at pp. 20-25), but all of those actions in using King Lane were simply found by the district court to be "non-interfering" uses, as based upon the Fuquays' own testimony, under the *Simmons* rule, as more fully addressed below, and were deemed to be a permissive "use in common."

The foundation of the "joint-use-in-common" rule, which was the basis for the district court's decision below, is the 75 year-old decision of the Idaho Supreme Court in *Simmons v. Perkins*, 63 Idaho 136, 118 P.2d 740 (1941), in which the Court had first set out supporting authority from a number of sister states in support of that rule, which decision since that time has been consistently followed in this jurisdiction, having been most recently cited and followed by the Idaho Supreme Court in, *Lattin v. Adams County*, 149 Idaho 497, 503, 236 P.3 1257, 1263 (2010). As originally stated by the Court in 1941, in *Simmons v. Perkins*, 63 Idaho 136, 118 P.2d 740 (1941), the rule was

set out as follows:

> The rule would seem to be that where the owner of real property constructs a way over it for his own use and convenience, the mere use thereof by others **which in no way interferes with his use will be presumed to be by way of license or permission**. *Harkness v. Woodmansee*, 7 Utah 227, 26 P. 291; *Howard v. Wright*, 38 Nev. 25, 143 P. 1184; *Bradford v. Fultz*, 167 Iowa 686, 149 N.W. 925; *Burk v. Diers*, 102 Neb. 721, 169 N.W. 263; *Long v. Mayberry*, 96 Tenn. 378, 36 S.W. 1040; *Parish v. Kaspare*, 109 Ind. 586, 10 N.E. 109; *Null v. Williamson*, 166 Ind. 537, 78 N.E. 76; *Gascho v. Lennert*, 176 Ind. 677, 97 N.E. 6; *Kilburn v. Adams*, 48 Mass. 33, 7 Met. 33, 39 Am. Dec. 754; 18 C. J., sec. 120, p. 105.
>
> The use of a driveway **in common with the owner and the general public**, in the absence of some decisive act on the user's part **indicating a separate and exclusive use on his part negatives any presumption of individual right therein in his favor**. *Clarke v. Clarke*, 133 Cal. 631, 66 P. 10; *Heenan v. Bevans*, 51 Cal.App. 277, 196 P. 802; *Bradford v. Fultz*, 167 Iowa 686, 149 N.W. 925; *Pirman v. Confer*, 273 N.Y. 357, 7 N.E.2d 262, 264.
>
> An individual using land as a road **in common with the public cannot acquire a prescriptive right of way against the owner**. *Thornley Land & Livestock Co. v. Morgan Bros.*, 81 Utah 317, 17 P.2d 826; *Pirman v. Confer*, 273 N.Y. 357, 7 N.E.2d 262; 111 A. L. R., Extended Annotation, p. 221.
>
> The rule is well established that no use can be considered adverse or ripen into a right by prescription **unless it constitutes some actual invasion or infringement of the rights of the owner**. *Thomas v. England*, 71 Cal. 456, 12 P. 491; *Monarch Real Estate Co. v. Frye*, 77 Ind.App. 119, 133 N.E. 156; 19 C. J. 887, sec. 52, Citations, Note 74.

63 Idaho at 144, 118 P.2d at 744 (emphasis added). In this case the district court specifically found that beginning in 1977 the Fuquay Appellants had commenced a non-interfering use-in-common of King Lane – conducted along with non-interfering use by members of the general public (R., pp. 542-45).

The Idaho Court of Appeals in *Melendez v. Hintz*, 111 Idaho 401, 724 P.2d 137 (Ct.App. 1986) engrafted the above-stated rule from *Simmons v. Perkins* as an additional exception to the general rule that where there is no evidence as to how the use began, then that use raises a presumption that it was adverse and under a claim of right. The Court of Appeals in *Melendez* then summarized the *Simmons* exception within this specific context as follows:

> Our Supreme Court has also recognized that the general rule has another exception which is applicable in the absence of evidence as to whether the use began adversely or with permission of the servient owner. In *Simmons v. Perkins*, 63 Idaho 136, 144, 118 P.2d 740, 744 (1941) the Court said:
>
> > The rule would seem to be that where the owner of real property constructs a way over it for his own use and convenience, the mere use thereof by others which in no way interferes with his use will be presumed to be by way of license or permission. *Harkness v. Woodmansee*, 7 Utah 227, 26 Pac. 291; *Howard v. Wright*, 38 Nev. 25, 143 Pac. 1184; [additional citations omitted].
>
> Other states which currently recognize this rule include Colorado, Nevada, Oregon, and Utah. *See, e.g., Allen v. First National Bank of Arvada*, 120 Colo. 275, 208 P.2d 935 (1949); *Westland Nursing Home, Inc. v. Benson*, 33 Colo.App. 245, 517 P.2d 862 (1974); *Jackson v. Hicks*, 95 Nev. 826, 604 P.2d 105 (1979); *Woods v. Hart*, 254 Or. 434, 458 P.2d 945 (1969); and *Zollinger v. Frank*, 110 Utah 514, 175 P.2d 714 (1946). *See also* Annot. 170 A.L.R. 776, at 825. In *Jackson v. Hicks*, 604 P.2d at 106, the Nevada Supreme Court, quoting from *Turrillas v. Quilici*, 72 Nev.289, 303 P.2d 1002 (1956), stated the rule as follows:
>
> > **Where a roadway is established or maintained by a landowner for his own use**, the fact that his neighbor also makes use of it, under circumstances **which in no way interfere with use by the landowner himself**, does not create a presumption of adverseness. The presumption is that the neighbor's use is not adverse but is permissive and **the result of neighborly accommodation** on the part of the landowner.

111 Idaho at 404, 724 P.2d at 140 (emphasis added). The only evidence in the record before this

Court on this appeal is the declaration made by Rose King in her affidavit that prior to the Kings' reconstruction and improvement of that road in 1973 "King Lane was only a path through grass and weeds and was set and muddy most of the year . . . ." (Rose King Aff., ¶ 2, R., pg. 230; District Court Memorandum Decision, R., pg. 634). Under the Court's statement in *Melendez* this conduct by the Kings in constructing King Lane in 1973 was sufficient to raise a presumption of permissive use by the Fuquays, so long as their use remained non-interfering, which it did until 2011 (R., pg. 543), a time that is well outside the scope of the Fuquays' five year prescriptive use claims that were made in the action below.

The Idaho Court of Appeals continued to adhere to the *Melendez* statement of the "joint-use-in-common rule" in its subsequent decisions as one of two recognized exceptions to the general rule that when where there is no evidence as to how the use began, then a presumption arises that the use is adverse and under a claim of right. *See*, *Chen v. Conway*, 116 Idaho 901, 903, 781 P.2d 238, 240 (Ct.App.1989); *Roberts v. Swim*, 117 Idaho 9, 13, 784 P.2d 339, 343 (Ct.App.1989); *Chen v. Conway*, 121 Idaho 1006, 1010, 829 P.2d 1335, 1359 (Ct.App.1991); and *Burns v. Alderman*, 122 Idaho 749, 754, 838 P.2d 878, 883 (Ct.App.1992).

In 1997 the Idaho Supreme Court incorporated the Court of Appeal's *Melendez* analysis in *Marshall v. Blair*, 130 Idaho 675, 946 P.2d 975 (1997):

> Generally, proof of open, notorious, continuous, and uninterrupted use of the way for the prescriptive period, without evidence as to how the use began, raises a presumption that the use was adverse and under claim of right. *Deer Creek*, 94 Idaho at 534-35, 493 P.2d at 393-94. Proof of all of these elements shifts the burden to the

> owner of the servient estate, who must demonstrate that the claimant's use was permissive. *Id.* at 534-35, 493 P.2d at 393-94. This Court has articulated exceptions to this general rule. The exceptions allow a party to rebut the presumption of adverse use in order to demonstrate that the use was permissive. In *Simmons v. Perkins*, 63 Idaho 136, 118 P.2d 740 (1941), for example, this Court held that "use of a driveway in common with the owner and the general public, *in the absence of some decisive act on the user's part indicating a separate and exclusive use on his part* negatives any presumption of individual right therein in his favor." *Id.* at 144, 118 P.2d at 744 (emphasis added). This Court further explained in Simmons that use of a roadway must invade or infringe on the owner's rights in order for the use to be considered adverse and, thus, to ripen into a prescriptive right of way. *Id.* at 144, 118 P.2d at 744.

130 Idaho at 680, 946 P.2d at 980 (italicized emphasis in original).

Since the time of the Supreme Court's decision in *Marshall v. Blair*, it has on at least two-more occasions addressed the question of the application of the "joint-use-in-common rule" in terms which have specific application to the argument that has been raised by the Fuquay Appellants on this appeal. In *Beckstead v. Price*, 146 Idaho 57, 190 P.3d 876 (2008) the Court summarized its application of this rule as earlier addressed *Simmons*, *Marshall*, and in particular, as clarified in its decision in *Hughes v. Fisher*, 142 Idaho 474, 129 P.3d 1223 (2006):

> In Idaho, the adverse use presumption has been rebutted by evidence of "use of a driveway in common with the owner and the general public, **in the absence of some decisive act on the user's part indicating a separate and exclusive use**. . . ." *Marshall*, 130 Idaho at 680, 946 P.2d at 980 (quoting *Simmons v. Perkins*, 63 Idaho 136, 144, 118 P.2d 740, 744 (1941)) (emphasis removed); *see also Hughes v. Fisher*, 142 Idaho 474, 481, 129 P.3d 1223, 1230 (2006).
>
> A second exception to the adverse use presumption has been applied in Idaho: when "a landowner 'constructs a way over [the land] for his own use and convenience, **the mere use thereof by others which in no way interferes with his use** will be presumed to be by way of . . . permission.'" *Hughes*, 142 Idaho at 481,

> 129 P.3d at 1230 (quoting *Simmons*, 63 Idaho at 144, 118 P.2d at 744) (alteration in original). **In *Hughes*, the parties cited these exceptions and argued over whether the presumptions applied, whether the burdens shifted, and whether the latter exception applies when the owner did not construct the way over the land**. *Id.* This Court held those two rules were simply an approach to determining whether the claimant had met the elements for a prescriptive easement by clear and convincing evidence. *Id.* The Court stated a desire to "disentangle Idaho prescriptive easement law" and "emphasize[d] the need for courts to streamline their analysis by focusing simply on whether the five prescriptive easement elements have been satisfied based on the facts before them." *Id.* Here, the district court found that the Becksteads did not seek or obtain permission from the Prices to use the road and that the Prices recognized the Becksteads' right to use the road. There was evidence the Becksteads' use of the road was adverse and under a claim of right. To the degree there was conflicting evidence, it was the province of the district court to weigh that evidence. *Benninger*, 142 Idaho at 489, 129 P.3d at 1238. The district court's findings are supported by substantial and competent evidence.

146 Idaho at 64, 190 P.3d at 883 (emphasis added).

The ultimate effect of the Idaho Supreme Court's decisions in *Beckstead* and *Hughes*, appears to be that the "joint-use-in common rule" has application both on the basis as that rule was originally stated in the 1941 *Simmons* decision as a free-standing rule of easement law that when a landowner constructs a roadway for his own use and convenience, which thereafter is used without interference by a neighboring landowner, that use will be presumed to be permissive, and also as an exception to adverse-use presumption rule, when applicable as based upon the facts presented.

On this appeal the Fuquay Appellants have attempted to claim the benefit of an alleged presumption of adverse use to King Lane as based upon an allegation that it is unknown when any first use of King Lane began. *See*, Appellant's Brief pp. 12-13. The essential problem with this argument is that the Fuquays have not provided any evidence of any actual prior use of King Lane

by any of their predecessors. They rely only upon vague statements made in a deposition excerpt of Rose King, and upon the indefinite statements made as to use of King Lane included in Sam Steiner's affidavit – and nothing more. Certainly a prescriptive right claimant is entitled to tack his claim with that of a predecessor. *Hodgins v. Sales*, 139 Idaho 225, 230, 76 P.3d 969, 974 (2003) ("Tacking is the concept that allows the current owner to combine his or her prescriptive use with that of a previous owner, in order to meet the five-year statutory requirement."). But on the facts of this case, the evidence presented establishes neither the existence of any roadway at the location of King Lane that would support the type and kind of prescriptive easement claims made by the Fuquay Appellants, nor that any such "uses" were ever made of any such roadway at any time by the Fuquays' alleged predecessors. *See e.g.*, *Lattin v. Adams County*, 149 Idaho 497, 503, 236 P.3d 1257, 1263 (2010) ("The moving party is entitled to summary judgment if the nonmoving party cannot raise a question of fact for an element that it would have to establish at trial. . . . Prior to the mid-1980s, the road was overgrown and hardly accessible by vehicle.").

Even if there were evidence in the record before this Court to substantiate the Fuquays' claims – which there is not – that evidence would have no effect upon the district court's findings that it was the very fact of the King's construction of the current all-weather King Lane in 1973, as suitable for year-round use, that is the basis upon which the permissive use by the Fuquays arose under the *Simmons* rule. The Kings simply constructed and maintained an all-weather roadway suitable for year-round use, which their neighbors used on a non-interfering basis. ("Simply put, the

Fuquays have produced no evidence that their use of King Lane interfered with the Kings rights." R., pg. 635).

Because any right gained by prescription is confined to only the extent of that right as it was exercised during the prescriptive period, *West v. Smith*, 95 Idaho 550, 556, 511 P.2d 1326, 1333 (1973), at best even if the Fuquay Appellants had produced any evidence of their predecessors use, they could only claim the benefit of any prescriptive right that had ripened prior to the Kings' construction of the current roadway in 1973, if in fact they were able to present that evidence, which they have not done. There was simply no roadway other than the muddy tract testified to by Rose King, and virtually no use – certainly no use of the continuous and uninterrupted variety necessary to establish a prescriptive easement.

As the district court ruled, as based upon an application of the *Simmons* case, the Fuquays own vehicular-use based prescriptive use claims to King Lane have all been asserted after the Kings constructed that roadway in 1973. ("In this case, it is known when the Fuquays' use of King Lane began, 1977. When the Kings acquired their property in 1973, they took steps to improve the roadway. Thereafter, Jim Fuquay acquired his property in 1977, placed a mobile home on his property and began using King Lane at that time." (R., pg. 634)). The Fuquays' own testimony as submitted at the September 18, 2014 preliminary injunction hearing, as also extensively quoted on the face of the district court's June 19, 2015 memorandum decision, stated that they made no interfering use of King Lane (R., pp. 543-45).

All of the Fuquays' use of King Lane has been permissive under the "joint-use-in-common rule," during the entire period of the of their alleged five year prescriptive use claim as pled in their complaint. (Amended Complaint, ¶ 16, "since at least 1989," R., pg. 436), and as supported by the testimony they had provided at the preliminary injunction hearing, (Exh. A, Farris Aff. R., Sept. 18, 2014 Tr., pp. 4-125., pp. 243-72), and as supported by the Declaration of John Fuquay (R., pg. 201-214). As the Kings argued to the district court below, the only issues to be considered on a motion for summary judgment are those that have been raised by the pleadings (R., pp. 504-05), citing to *Mickelsen Construction, Inc. v. Horrocks*, 154 Idaho 396, 405, 299 P.3d 203, 212 (2013); *but see*, *Skinner v. U.S. Bank Home Mortgage*, 159 Idaho 642, 650 n. 2, 365 P.3d 398, 406 n. 2 (2016).

As argued before the district court, once that joint-use-in-common of King Lane had been established after the Kings had constructed the current road in 1973, then the burden was upon the Fuquays to thereafter to establish a change to adverse use as stated in *H.F.L.P. v. City of Twin Falls*, 157 Idaho 672, 339 P.3d 557 (2014):

> Moreover, if the presumption of permissiveness applied when the use began, the presumption continues until a hostile and adverse use is clearly manifested and "brought home" to the servient property owner. *Backman v. Lawrence*, 147 Idaho 390, 398, 210 P.3d 75, 83 (2009); *Gameson v. Remer*, 96 Idaho 789, 792, 537 P.2d 631, 634 (1975).

157 Idaho at 681, 339 P.3d at 566.

In sum, there is simply no evidence in the record before this Court on this Appeal that supports the conclusion that the district court erred. The Fuquay Appellants only ask this Court to

reverse the district court on the very same evidence, and on the very same arguments that have already been rejected below. Therefore, this Court should affirm the decision of the district court.

B. The Respondent Kings Are Entitled To An Award Of Costs Under Idaho Appellate Rule 40, And An Award Of Attorney's Fees Under I.C. § 12-121 On This Appeal

Should the King Respondents be the prevailing party on this appeal then they request an award of their costs under Idaho Appellate Rule 40(a).

In addition, should the King Respondents be the prevailing party on this appeal then they request an award of their attorney's fees under I.C. § 12-121, as provided by Idaho Appellate Rule 41(a).

Any award of attorney's fees to a prevailing party under I.C. § 12-121 is discretionary, *Jim & Maryann Plane Family Trust v. Skinner*, 157 Idaho 927, 935, 342 P.3d 639, 647 (2015). A prevailing party seeking an award of attorney's fees must support that claim with both argument and supporting legal authority. *Evans v. Sayler*, 151 Idaho 223, 228, 254 P.3d 1219, 1224 (2011). The appellate rules require that the argument shall contain the respondent's contentions, the reasons therefor, in addition to citations to those parts of the transcript and the record relied upon. *Sherman Storage, LLC v. Global Signal Acquisitions II, LLC*, 159 Idaho 331, 339, 360 P.3d 340, 348 (2015).

Generally, an award of attorney's fees pursuant to Idaho Code section 12-121 is inappropriate where a party does nothing more than make a request by merely citing to the code section, but then fails to provide any significant argument as to why it is entitled to an award of fees. *Bagley v. Thomason*, 149 Idaho 799, 805, 241 P.3d 972, 978 (2010). In order for the responding party on an

appeal to be entitled to an award of attorney's fees under I.C. § 12-121 the Court must be left with an abiding belief that the appeal was brought and pursued frivolously, unreasonably, or without foundation. *Steuerer v. Richards*, 155 Idaho 280, 286, 311 P.3d 292, 298 (2013). The entire appeal must have been pursued frivolously, unreasonably, and without foundation. *Bagley v. Thomason*, 155 Idaho 193, 198, 307 P.3d 1219, 1224 (2013).

On this appeal the Fuquay Appellants have advanced the exact same argument that they made on reconsideration before the district court that they were entitled a presumption of adverseness based upon evidence that it was not known when the use of King Lane began. (R., pp. 548-570; pp. 616-621). The district court rejected that argument because the undisputed evidence established King Lane itself, as a roadway suitable for vehicular traffic within the nature and scope of the Fuquays' claim prescriptive uses, was first built by the Kings in 1973. (R., pp. 634-35) Furthermore, the district court found no evidence in the record before it, or that is in the record before this Court on this appeal, which supports any claimed use of King Lane other than the use that was commenced by the Fuquays in 1977. (R., pg. 634 "In this case, it is known when the Fuquays' use of King Lane began, 1977.") The Fuquays use, being non-interfering and in common with that of the Kings and Lows, was deemed to be permissive as a matter of law under the rule of law first announced 75 years ago in *Simmons v. Perkins*, 63 Idaho 136, 118 P.2d 740 (1941), and was reaffirmed by Idaho's high court as recently as, *Lattin v. Adams County*, 149 Idaho 497, 503, 236 P.3d 1257, 1263 (2010) ("'[W]here the owner of real property constructs a way over it for his use

and convenience, the mere use thereof by others which in no way interferes with his use will be presumed to be by way of license or permission.' *Chen v. Conway*, 121 Idaho 1000, 1005, 829 P.2d 1349, 1354 (Ct.App.1992) (quoting *Simmons v. Perkins*, 63 Idaho 136, 144, 118 P.2d 740, 744 (1941)).").

On this appeal, the Fuquay Appellants have advanced no argument, nor advanced any rule of law, nor have they pointed to any evidence in the record, that would support overturning the district court's decision, that they have not already raised before the district court below, nor have they made any cogent or logical argument as to why the district court erred, as based upon the evidence presented and law that was argued below that court. Instead, the Fuquays have simply ignored a critical undisputed fact underlying the district court's decision below, which was the Kings' construction of the current King Lane in 1973 which made that roadway suitable for year-round vehicle use, including farm vehicles, and then by further improvements, large trucks in 1989. This roadway's construction and the associated improvements invoked the "use in common" rule of *Simmons v. Perkins*, which was properly applied to the facts of this case. As the Idaho Supreme Court recently declared in, *Thornton v. Pandrea*, __ Idaho __, __ P.3d __, 2016 WL 4811064 (2016):

> "The Court will award fees to a prevailing party under Idaho Code section 12-121 when the Court believes that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation." *Sweet*, 159 Idaho at 767, 367 P.3d at 162 (internal quotation omitted). In an appeal where the prevailing party sought attorney fees under section 12-121, the Court granted fees where the nonprevailing party "**continued to rely on the same arguments used in front of the district court, without providing any additional persuasive law or bringing into doubt the existing law on which the district court based its decision**." *Castrigno v.*

> *McQuade*, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005). The nonprevailing parties "may have had a good faith basis to bring the original suit based on their interpretation of Idaho law" but "it was frivolous and unreasonable to make a continued argument" by appealing the district court's decision when on appeal "**they failed to add any new analysis or authority to the issues raised below**." *Id.*

2016 WL 4811064 at *18 (emphasis added).

The Fuquay Appellants have done nothing more than advance the same arguments and same facts that were advanced before the district court, without alleging why or on what basis that court erred in the law applied, or failed to consider any applicable evidence. Under the standard stated in *Thornton v. Pandrea*, and upon the general standards applicable to awards of attorney's fees under I.C. § 12-121 as cited above, the King Respondents are entitled to an award of their attorney's fees under I.C. § 12-121 on this appeal.

IV.

CONCLUSION

This Court should affirm the decision of the district court dismissing the Fuquay Appellants' claim for prescriptive easement over King Lane, and grant the Respondents an award of attorney's fees under I.C. § 12-121.

Respectfully submitted this 14th day of November, 2016.

Ronald P. Rainey
Attorney for the Respondents
Heart K Ranch

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 14th day of November, 2016, two true and correct copies of the foregoing **KING RESPONDENTS' BRIEF** were served upon the following in the manner described below

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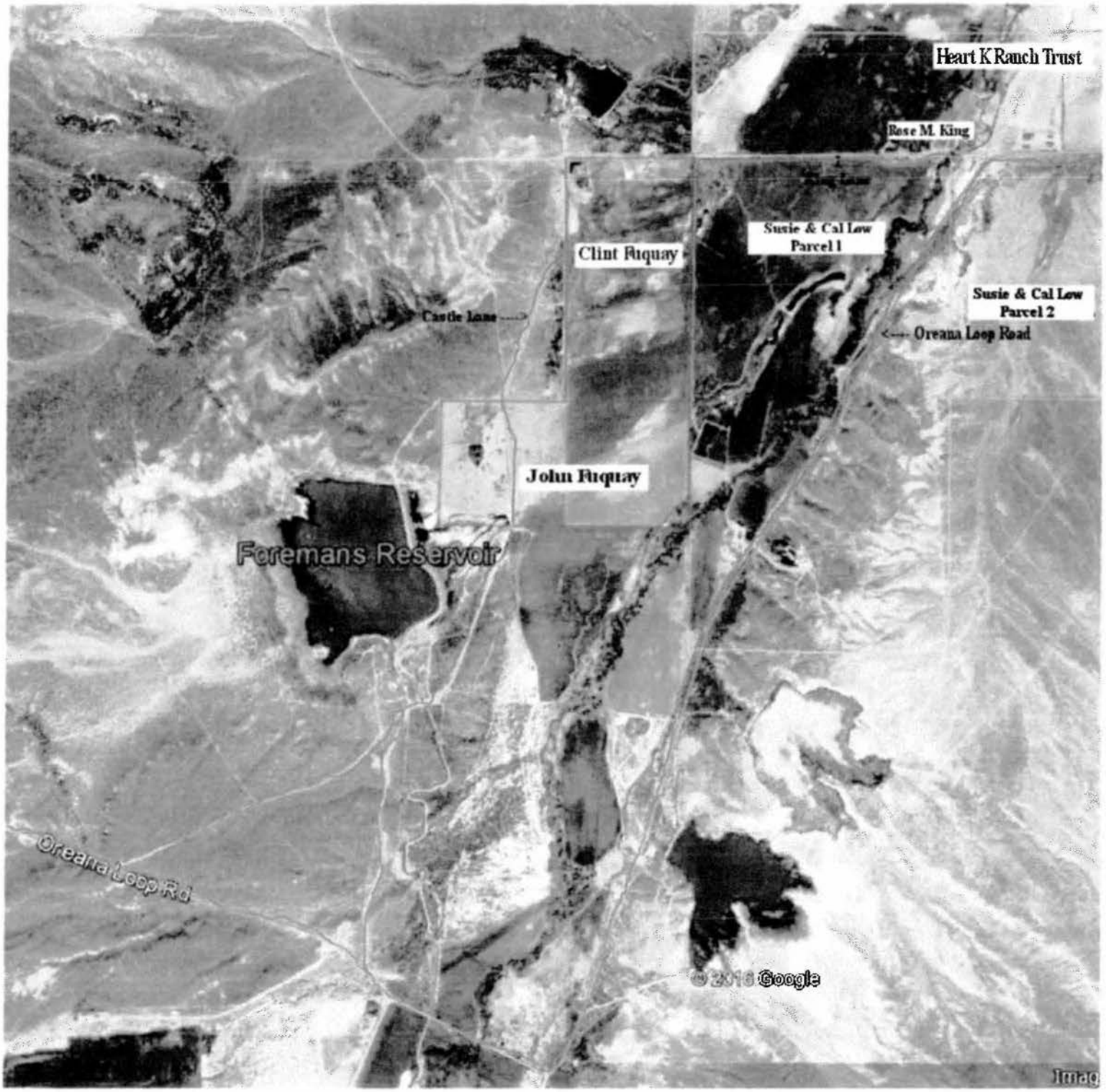
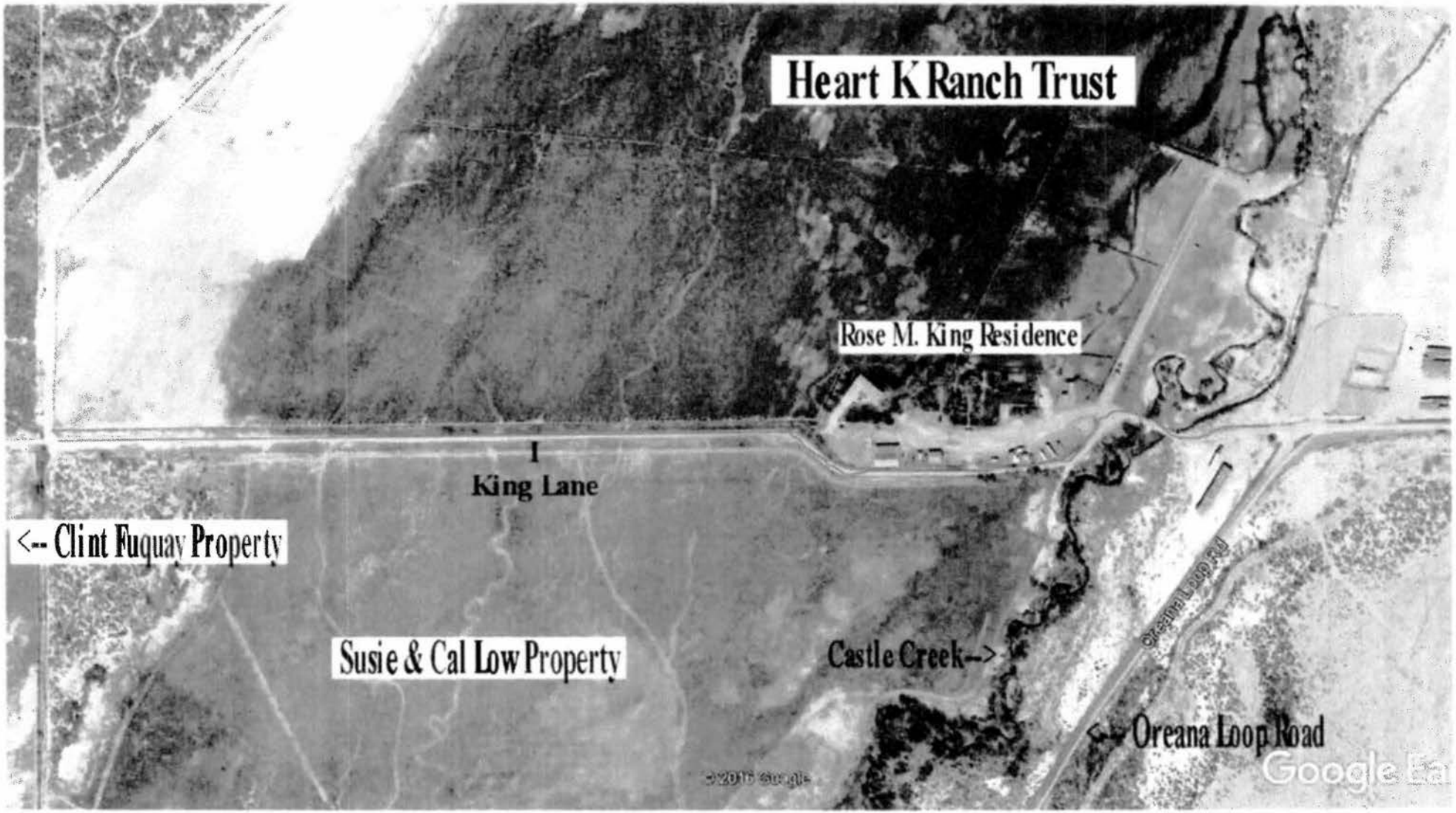
X Hand Delivery
___ _____

Attorney for Low Respondents

Ronald P. Rainey


Heart K Ranch Trust
Rose M. King
Susie & Cal Low
Parcel 1
Clint Fitquay
Susie & Cal Low
Parcel 2
Castle Lane
Oreana Loop Road
John Fitquay
Foremans Reservoir
Oreana Loop Rd
Google


Heart K Ranch Trust
Rose M. King Residence
King Lane
<-- Clint Fuquay Property
Susie & Cal Low Property
Castle Creek-->
Oreana Loop Road
Google Ea