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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Plaintiffs/Appellants,

vs.

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,

vs.

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

Counterdefendants.

Supreme Court Docket No. 44155

Owyhee County Case No. CV-2014-0278

RESPONDENT'S BRIEF

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Appeal from the District Court of the Third Judicial District for the State of Idaho,
In and for Owyhee County
Honorable Thomas J. Ryan, District Judge

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COMES NOW, Respondents Cal and Susie Low (hereinafter referred to as "the Lows"), by and through their attorneys of record, Sawtooth Law Offices, PLLC, and submits this Respondent's Brief in the above-titled matter.

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This appeal involves prescriptive easement claims by the Appellants relating to a road sometimes referred to as "King Lane" located in Owyhee County, Idaho.[1] The road is a dirt road which lies on the border between the property owned by the Lows and the property owned by Respondent, Heart K Ranch Trust (hereinafter referred to as "the Kings"). There is no dispute that a portion of King Lane crosses the property owned by the Lows and a portion of the road crosses the property owned by the Kings. However, a survey of the location of the road and the respective properties has not been performed to determine to what extent King Lane crosses the property of the Lows and to what extent King Lane crosses the property owned by the Kings. Appellants have named both the Lows and Kings in this lawsuit and claimed a prescriptive easement across both the Lows and Kings' properties.

There is no dispute that the road in question has been "occasionally" used by Appellants since 1977, that said use has been "in common" with the Lows and Kings, or that the Appellants have not done any decisive act concerning the use of the road, other than mere use of the road. Appellants contend that "using the roadway for access" and putting a mobile home on "their" property is

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[1] The road/lane in question is a dirt road has been commonly referred to as "King Lane" because it provides access to the King property and the King residences. It was named "King Lane" by Rose King in 2002 for emergency responders. (R. pg. 230, ¶ 4). For purposes of this *Respondent's Brief*, the road in question is referred to as "King Lane."

evidence of distinct and decisive acts of adverse use to rebut the presumption of permissiveness. However, this argument is simply continuation of their prior arguments which were rejected by the district court that "mere use" in common with the Kings and Lows is not sufficient to show adverse use. The district court, Honorable Thomas Ryan presiding, rejected Appellants' arguments and granted summary judgment in favor of the Lows and Kings. The district court concluded:

> Based upon 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 under a claim of right. Even when this Court makes all inferences in favor of 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 general public." *Marshall* 130 Idaho at 680; (quoting *Simmons*, 63 Idaho 136, 118 P.2d 740 (1941). 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.

(R. pg. 545).

Appellants filed a motion for reconsideration with the district court, which argued in large part the same arguments Appellants now make on appeal, and the district court denied Appellants' motion. In denying Appellants' motion for reconsideration, the district court further explained that the Kings constructed the road for their own use in 1973, the mere use of the road by Appellants beginning in 1977 does not amount to interference or adverse use, and that the Appellants "failed to take their argument to the next and necessary step by way of showing that such use interfered with the Kings' use." (R. pg. 635).

The district court then entered judgments in favor or both the Lows and Kings which dismissed Appellants' claims for a prescriptive easement. Appellants now appeal these judgments.

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B. COURSE OF PROCEEDINGS AND DISPOSITION.

On August 11, 2014, Appellants filed a *Complaint* in this matter asserting a claim of prescriptive easement across the property of the Lows and Kings for the roadway commonly referred to as King Lane. (R. pgs. 13-59).[2] Shortly thereafter, on September 4, 2014, and because Appellants claimed that the road was being blocked by locked gates, Appellants filed a *Motion for a Temporary Restraining Order ("TRO")* to enjoin the Kings from blocking their access and use of King Lane. (R. pg. 2)[3]. The district court, Honorable Christopher S. Nye, granted the *TRO* the next day on September 5, 2014, and then set the matter for a preliminary injunction hearing on September 18, 2014. (R. pg. 2).

A preliminary injunction hearing was held on September 18, 2014 before Judge Nye and testimony was provided by Appellants and two other witnesses of Appellants.[4] Following the hearing, Judge Nye denied the request for a preliminary injunction other than use of King Lane for emergency vehicle access, and vacated the *TRO* because Appellants were unable to meet the

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[2] It is worth noting that Appellants did not claim an easement across the properties of the Kings or Lows by implication or necessity because Appellants have access to their respective properties via a roadway known as Castle Lane. Thus, the claims in this case only involved whether the Appellants could establish the requisite elements for a prescriptive easement. Also, Appellants later filed a *First Amended Complaint* to include a claim for an easement for Castle Lane across the property of a third party, but the issues as between Appellants, the Kings and the Lows concerning whether there was a prescriptive easement to use King Lane did not change. (R. pgs. 432-485).

[3] Appellants' Motion for a *TRO*, the Order granting the *TRO* and the order setting the matter for hearing are not in the Record on appeal but are listed in the list of documents and proceedings on page 2 for the Record.

[4] A transcript of the *Preliminary Injunction Hearing* is attached to the *Affidavit of S. Bryce Farris*. *See* (R. pgs. 240-273).

necessary showing for an injunction under I.R.C.P. 65, including that there was waste or irreparable injury. (R. pgs. 240-273, Transcript, pgs. 120-122).

On October 29, 2014, Appellants filed a motion for summary judgment against the Lows arguing that Appellants were entitled to summary judgment on their claims for prescriptive easements across the property of the Lows. (R. pgs. 132-143). Appellants did not file the motion for summary judgment against the Kings because Appellants apparently were of the belief that the claims had more merit against the Lows because they had owned their property for less time. However, the Lows responded to the motion for summary judgment, which included the affidavits of Rose King (R. pgs. 229-234), Samuel V.C. Steiner (R. pgs. 236-238) and the transcript of the preliminary injunction hearing (R. pgs. 240-273). Appellants subsequently withdrew their motion for summary judgment. (R. pgs. 274-275).[5]

On January 29, 2015, the Kings filed a motion for summary judgment seeking the dismissal of Appellants' claims for a prescriptive easement. (R. pgs. 291-307). The Lows filed a response and joined in the Kings' motion. (R. pgs. 308-310). On March 25, 2015, the district court, Honorable Thomas Ryan presiding, issued a *Memorandum Decision* denying the motion and held that "[t]he material question of fact that remains to be decided is when adverse use began, (whether it was in 2011 as alleged by the Kings or in 1977 as alleged by John Fuquay)." (R. pgs. 423-431).[6]

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[5] Even though Appellants withdrew their own motion for summary judgment, and never filed a cross-motion for summary judgment as to the prescriptive easement claims, the Appellants suggest at the end of their *Appellant's Brief* that they are entitled to summary judgment against the Lows. For the reasons discussed, *infra*, summary judgment cannot and should not be granted in favor of the Appellants.

[6] This case was initially assigned to Judge Nye, and it was Judge Nye that heard and decided the motion for preliminary injunction. However, the case was later re-assigned to Judge Ryan and Judge Ryan presided over the remainder of the case.

On April 7, 2015, the Kings filed a *Motion for Reconsideration* of the denial of their motion for summary judgment. (R. pgs. 490-492). On June 19, 2015, the district court granted the *Motion for Reconsideration* and held that because there is no proof or evidence of adverse use by the Appellants, there is no genuine issue of material fact regarding the element of adverse use and summary judgment is appropriate. (R. pgs. 536-547). The district court subsequently entered judgment in favor of the Kings on July 8, 2015 dismissing Appellants' claim for a prescriptive easement. (R. pgs. 590-591).

On July 6, 2015, Appellants filed their own *Motion for Reconsideration.* (R. pgs. 548-589). On September 11, 2015, the district court issued a *Memorandum Decision upon Plaintiffs' Motion for Reconsideration filed on July 6, 2015*, which denied Appellants' motion. (R. pgs. 629-636). The district court reiterated that the Kings constructed the road in question for their own use, that any use of the road by Appellants was in common with the Kings, and that other than mere use in common the Appellants had failed to show any interference or adverse use of the road during the prescriptive period. (R. pg. 635).

The Lows joined in the initial motion for summary judgment filed by the Kings and then filed their own motion for partial summary judgment seeking to dismiss Appellants' prescriptive easement claims on July 15, 2015. (R. pgs. 592-601).[7] On September 21, 2015, the district court issued a *Memorandum Decision Upon Low Defendants' Motion for Summary Judgment* which granted the Lows' motion based upon the analysis of the court in its prior decisions issued on June 19, 2015 and

[7] The Lows had filed a Counterclaim against the Appellants based upon trespass and damage to their fences. These claims were not included in the Lows' motion for partial summary judgment and are not included in this appeal. Appellants and Lows reached a settlement to resolve the Lows' Counterclaims and the claims were dismissed as part of the Judgment issued on December 21, 2015. (R. pg. 642).

September 11, 2015. (R. pgs. 637-639). On December 21, 2015, the district court issued a judgment as to the claims between Appellants and the Lows which dismissed Appellants' claims for a prescriptive easement across the Lows' property. (R. pgs. 642-643).

On January 6, 2016, Appellants filed an *Amended Notice of Appeal*. (R. pgs. 644-650). However, a final judgment had not been issued as to all of the claims between Appellants and the Kings and thus the appeal was dismissed by this Court as premature. (R. pgs. 651-652).[8] The district court subsequently issued an amended final judgment as to the claims between the Appellants and the Kings on March 23, 2016. (R. pgs. 663-664). Appellants thereafter filed this appeal. (R. pgs. 668-674).

C. STATEMENT OF FACTS.

Pursuant to Idaho Appellate Rule 35(g), attached hereto are two maps, identified as Exhibits 1 and 2, depicting the location of the parties respective properties, Oreana Loop Road, Castle Lane and the disputed road known as King Lane. As described by the district court:

> King Lane is a private, all-weather road about one-half mile in length. It runs in an east-west direction from the public Oreana Loop Road until it connects with Castle Lane, which then runs south until it connects with Oreana Loop Road. The King defendants own the parcel of land to the north of King Lane, the Low defendants own the parcel of land to the south of King Lane and the plaintiffs own parcels of land to the west of King Lane where it ends and connects with Castle Lane.

(R. pg. 538). The Lows would also point this Court to the findings of fact by the district court which also summarize the facts and evidence presented to the district court. (*See* R. pg. 423-426).

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[8] The Kings had asserted a Counterclaim against Appellants for an injunction to enjoin Appellants from using King Lane which was never resolved in the first judgment.

1. Common Use of the Road by the Kings and Lows since 1973.

The testimony concerning the earliest use and condition of the road in question is from Rose King, who stated that when she and her husband purchased the Kings' property in 1973, the road in question was nothing more than grass and weeds. (R. pgs. 87-94; 229-235; and 280-284).[9] She and her husband then constructed and improved the roadway for their own use. *Id.* Rose King also confirmed the use of the road by the Lows or their predecessor also goes back as far as 1973 and she stated that: "When my husband and I purchased our ranch in 1973, **the property now owned by Lows** was owned by Steiner family, and the Steiners used the road to access their property to get to and from their fields. **This use has continued since 1973 to present**, including now that the property is owned by Cal and Susie Low."

(R. pg. 231, ¶ 5) (emphasis added).

Samuel V.C. Steiner, who moved to the parcel now owned by the Lows in 1959 with his parents and was the owner of the Lows' property from 1984 to 2006, testified that the road in question was "used occasionally by a variety of people" and neither he nor his parents ever stopped anyone from using the road as long as they didn't interfere with their operations. (R. pg. 237, ¶ 5). It is worth noting that while Samuel Steiner's affidavit provides testimony concerning the use of King Lane by Appellants, his affidavit does not refute the statements of Rose King that it was the Kings which constructed and improved the road in 1973.

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[9] Rose King filed three separate affidavits in this matter on September 9, 2014 (R. 87-94), December 9, 2014 (R. 229-235) and January 29, 2015 (R. 280-284). The last affidavit incorporated the prior to affidavits by reference. (R. 281, ¶ 2).

2. Use of the Road by the Appellants.

The Appellants' own allegations concerning their use of the road and when such use began is conflicting. The initial Declaration of John Fuquay filed on September 4, 2014 and the Appellants' *First Amended Complaint* both assert that Appellants use of the road in question began in 1989. *See* R. pg. 65; ¶¶ 14-15; and R. pg. 436, ¶ 16 ("Plaintiffs have used King Lane to access the Clint Fuquay Parcel and John Fuquay Parcel since at least 1989"). Thus, Appellants' own pleadings and evidence suggests that their use of King Lane did not begin until 1989.

Appellants then contradicted their own allegations when they filed a second Declaration of John Fuquay on October 29, 2014, and then assert that the alleged use of the road by the Appellants began in 1977. (R. pgs. 201-214). More specifically, John Fuquay repeatedly testified in a subsequent affidavit that his father purchased what is now the Appellants' property in 1977 and the alleged use of King Lane has been "since 1977." (R. pgs. 201-214, ¶¶ 6, 11, 23(b), 25(b), 27(b), 29(b), 31(b), 33(b), 43(b), 45(b), 47(b) and 49(b)). Thus, whether the alleged use began in 1989 (as alleged in Appellants' own pleadings and affidavits), or in 1977 (as alleged in Appellants' second affidavit), Appellants' alleged use began a minimum of four years after the road was constructed and used in common by the Kings and the prior owners of the Lows' property. Noticeably absent from the Appellants' claims is any allegation or evidence presented by Appellants that there was any use of King Lane by Appellants' predecessors in interest and instead Appellants have relied on the alleged use beginning when James Fuquay purchased the property in 1977.

As to whether the alleged use of the road by Appellants was adverse, Appellants contend that beginning in 1977, when James Fuquay purchased the property adjoining the Kings and Lows, that use of the road included regular personal vehicle access, regular use by large trucks, regular use by

farm equipment, pedestrian use and personal use by guests. *See Declaration of John Fuquay,* dated October 29, 2014 (R. pgs. 201-214). The evidence is undisputed that the Appellants did in fact use the road for regular vehicle use during this time frame but is disputed as to whether it included large trucks. Rose King stated that it was not possible for large trucks to utilize the road until 1989 when a "welded barrel culvert" was replaced with a concrete culvert. (R. pgs. 230, 233-34, ¶¶ 3 and 16; pg. 283, ¶ 10). Samuel Steiner testified that he did not see "anyone take a large truck out that way, logging trucks or cattle trucks. Those kind of vehicles always went out Castle Road." (R. pg. 237, ¶ 2).

Regardless of whether or not the Appellants used large trucks on the road prior to 1989 in common with the use by the Kings and Lows, the evidence is undisputed that they did not interfere with the use until 2011 when the large trucks began causing damage to the road. As stated by Rose King, any use of the road by trucks which amounted to an interference by causing damage to the road did not begin until 2011 when the use of large trucks increased. (R. pg. 232, ¶ 9; pgs. 281-282, ¶ 9). This was not disputed by Appellants and in fact the Appellants (John Fuquay, Clint Fuquay and J.C. Fuquay) testified at the hearing on the preliminary injunction that they did nothing to interfere with the use of the roadway. (R. pgs. 259, 247, 263, Transcript pgs. 66-67, 16-17 and 86-87). As the district court correctly found:

> the evidence show that prior to 2011, the plaintiffs never interfered with the defendants' use of King Lane and their use was in common with the Kings, the Lows and the general public. 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.

(R. pg. 543). The district court went on to reiterate that Appellants themselves admit they did not

interfere with the Kings from 1977 to 2011. (R. pgs. 543-545).

II. ISSUES PRESENTED ON APPEAL

The issues presented on appeal by Appellants are confusing and make little sense as Appellants have included a standard of review in the "Issues Presented on Appeal" and have suggested that they request de novo review of the Kings and Lows' "Motions." *Appellants' Brief*, pgs. 9 and 10. That said, the issues on appeal can be summarized as follows:

1. Whether the district court erred in granting summary judgment to the Lows and the Kings because Appellant's have not met their burden of establishing the elements for a prescriptive easement?
2. Whether the Lows are entitled to attorney fees and costs incurred as a result of this appeal?

III. STANDARD OF REVIEW

When reviewing a grant of summary judgment, the appellate court applies the same standard of review the district court did when ruling on the motions for summary judgment. *Lattin v. Adams County*, 149 Idaho 497, 500, 236 P.3d 1257, 1260 (2010). Summary judgment must be granted when "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 a judgment as a matter of law." I.R.C.P. 56(c); *Friel v. Boise City Housing Authority*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). The court liberally construes the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. *Friel*, 126 Idaho at 485, 887 P.2d at 30 (citing *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Harris v. Dept. of Health and Welfare*, 123 Idaho

295, 298, 847 P.2d 1156, 1159 (1992)). If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, a summary judgment motion is typically denied. *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho at 272, 869 P.2d at 1367.

However, these standards differ where cases, such as this one, are tried to courts in the absence of a jury. As stated by the district court:

> '[w]hen an action will be tried before the court without jury, the judge is not constrained to draw inferences in favor of the party opposing the motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.' *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991) (internal citations omitted) (emphasis added); *see also Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982) (internal citations and quotation marks omitted). **On review, the court will look to whether the record reasonably supports the inferences drawn by the trial court**. *Intermountain Forest Mgmt. Inc. v. Louisiana Pac. Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001).

(R. pg. 539); *See also*, *State v. Yakovac*, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008) (emphasis added).

IV. ARGUMENT

A. The District Court Did Not Err in Granting Summary Judgment to the Lows and Kings.

An easement "is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property owner." *Beckstead v. Price*, 146 Idaho 57, 62, 190 P.3d 876, 881 (2008) (citations omitted). In *Akers v. D.L. White Construction, Inc.*, 142 Idaho 293, 303, 197, 127 P.3d 196 (2006), the Idaho Supreme Court succinctly laid out the elements for a prescriptive easement. Easement by prescription requires the party seeking the easement to prove by clear and convincing evidence the use is: a) Open and Notorious; b) Continuous and Uninterrupted; c) Adverse and Under a Claim of Right; d) With Actual or Imputed Knowledge of

the Owner of the Servient Tenement; and e) For the Statutory Period [20 years at the time of Filing pursuant to I.C. § 5-203].[10]

"Recognizing that '[p]rescription acts as a penalty against a landowner[.]' this Court has stated prescriptive rights 'should be closely scrutinized and limited by the courts.'" *Beckstead v. Price*, 146 Idaho 57, 64, 190 P.3d 876, 883. Accordingly, "[e]ach 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." *Hodgins v. Sales*, 139 Idaho 225, 229, 76 P.3d 969, 973 (2003). Moreover, "where there is more than one claimant [i.e. both John and Clint Fuquay] to a prescriptive easement, the trial court must make findings sufficient to support each claim." *Id.*

1. Prescriptive Easement Presumptions.

The general rule is that while clear and convincing proof of each element is necessary to establish a prescriptive easement, without evidence of how the use began, there is a presumption that the use was adverse and under a claim of right. *See Hodgins v. Sales*, 139 Idaho 225, 229, 76 P.3d 969, 973. In other words, there is a presumption that the use was adverse if there is no evidence to show how and when the use began and the burden shifts to the servient estate owner to demonstrate the use was permissive. *Id.* However, in *Beckstead v. Price*, 146 Idaho 57, 64, 190 P.3d 876, 883, the Idaho Supreme Court reiterated that Idaho law has recognized two exceptions to an adverse use presumption when the roadway was jointly used or used in common with the underlying property

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[10] I.C. § 5-203 was amended in 2006 to provide that the statutory period was twenty (20) years. Prior to the amendment, the statutory period was five years. Thus, as the district court noted, Appellants would have to establish the elements for a prescriptive period, "five year period leading up to 2006" or at a minimum from 2001-2006 and the evidence of use after 2006 was not relevant. (R. pg. 540). In other words, use of the road by large trucks in 2011 or use by Clint Fuquay after he purchased a portion of the property is not relevant to whether Appellants had established a prescriptive easement prior to the amendment of the statute in 2006.

owner. First, "the adverse use presumption has been rebutted by evidence of 'use of the driveway in common with the owner and the general public, in absence of some decisive act on the user's part indicating a separate and exclusive use . . . .'" *Id.* (citations omitted). Second, "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'" *Id.* The Court, referring to its prior decision in *Hughes v. Fisher*, 142 Idaho 474, 481, 129 P.3d 1223, 1230 (2006), stated such exceptions remain applicable as an "approach to determining whether a claimant had met the elements for a prescriptive easement by clear and convincing evidence." *Id.* In other words, where the use is joint or common use with the servient estate then the general rule is not applicable. Instead, there is a rebuttable presumption that the use is permissive and the burden is on the party claiming the easement to establish adversity.

If the presumption of permissiveness applied when the use began, i.e., the use began as joint or common use with the servient estate, then "the presumption continues until a hostile and adverse use is clearly manifested and 'brought home' to the servient property owner." *H.F.L.P., LLC v. the City of Twin Falls*, 157 Idaho 672, 339 P.3d 557 (2014). "Proof of independent, decisive acts, such as maintenance of the roadway, tearing down barriers, and other indications of separate and exclusive use is sufficient to rebut a presumption of permissive use." *Hodgins v. Sales*, at 232, 76 P.3d at 976; *Hughes v. Fisher*, 142 Idaho at 482, 129 P.3d at 1231 (in order to establish adverse use there must be evidence of a decisive act or incident that would amount to an "actual invasion of or infringement on the rights of the owner.").

2. The District Court Correctly Applied the Presumptions in this Case.

It is undisputed in this case that the roadway in question, King Lane, has been jointly used by Lows and Kings to access their respective properties. It is also undisputed that the use by the servient estate began in 1973 and it was the Kings that constructed and improved the roadway for their own use and said road was also used during this time by the owners of the Lows' property. While not entirely clear from Appellants own allegations, Appellants claim that their use of the road began 1977 or four years after the road was constructed by the Kings and four years after the evidence is clear that there had been joint or common use by the owners of the Kings and Lows' properties. Accordingly, the district court correctly held that the general rule presuming adverse use was not applicable. Instead, the district court correctly held that the presumption was that the use began as permissive and the burden is on the Appellants to then establish adverse use by some decisive act or interference.

The district court found that the presumption shifted because there was no dispute that the road was used in common. The district court stated that there was a genuine issue of material fact as to whether the road was used in common with the general public. (R. pg. 635). The Lows submit that there is no genuine issue of material fact that the road was used in common with the general public and the presumption shifted because of this exception also. This Court has upheld the judgment of the lower court upon alternative grounds. *See Munson v. State, Dept. of Highways*, 96 Idaho 529, 531, 531 P.2d 1174, 1176 (1975); *Hanf v. Syringa Realty, Inc.* 120 Idaho 364, 370, 816 P.2d 320, 326 (1991).

Here, the undisputed evidence is that the road was used by hunters and the general public. *See Affidavit of Samuel V.C. Steiner*, (R. pg. 237); *Affidavit of Rose King* (R. pg. 233, ¶ 12). Both

confirmed that the road was used by the general public, including hunters, and there is no evidence to refute this testimony. Instead, Appellants' argued that there was an material issue of disputed facts as to whether Appellants' **guests**, including a Schwans delivery person, utilized the road.[11] However, it remains undisputed that the hunters and the general public occasionally used the road. Thus, the Lows submit that the evidence is undisputed that King Lane was used in common by the parties to this case and the district court correctly applied the presumptions, but as an alternative basis, there is undisputed evidence that the road was used in common by the general public also.

3. The District Court Correctly Held there Was No Evidence of Adverse Use.

Appellants' assertions of occasional use in common with the Lows and Kings fails to meet their burden by clear and convincing evidence that such "casual" use is adverse under a claim of right.[12] As the district court correctly held, even when it makes all inferences in favor of the Appellants, "there is nothing in the record to indicate a decisive act or incident of separate and exclusive use from 1977 to 2011." (R. pg, 545).

On appeal, Appellants assert that putting a mobile home on the Appellants' property and using the roadway to access the property was a decisive act that should have put the Kings and Lows

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[11] Rose King stated that she did not believe guests of Appellants used the road to provide services to Appellants. (R. pgs. 232-33, ¶ 11). However, the very next paragraph in her affidavit stated that the road was used by the general public including hunters. (R. pg. 233, ¶ 12). The evidence which Appellants pointed to related to the Appellants' guests and did not refute the testimony from Rose King and Samuel Steiner concerning the use by the general public.

[12] In determining whether a prescriptive easement had been acquired for a public roadway the Court in *Lattin v. Adams County*, 149 Idaho 497, 502, 236 P.3d. 1257, 1262 (2010) stated "[t]his Court has repeatedly found that casual or sporadic use is not enough – the use must be regular and continuous." The Court cited to *Kirk v. Schultz*, 63 Idaho 278, 282-84, 119 P.2d 266, 268-69 (1941), which held that "casual and desultory" use by "miners, hunters, fisherman, and persons on horseback, even of a well-marked road was not public use."

on notice that the use was hostile or adverse. This same argument was rejected by the district court because putting a mobile home on their own property did nothing to interfere with the servient estate. (R. pg. 635). The decisive act which Appellants point to was an improvement on their own property and had nothing to do with the servient estate other than continued use in common with the Kings and Lows. Appellants did nothing to interfere with or infringe on the rights of the Kings and Lows.

Moreover, John Fuquay, Clint Fuquay and J.C. Fuquay (John's son) testified at the preliminary injunction hearing that they did nothing to interfere with use of the Kings. (R. pgs. 252, 259, 263, Transcript pgs. 37, lns. 2-15, 66-67, lns. 20-8, 86-87, lns. 16-14). Based upon the evidence, or lack thereof, concerning adverse use, the district court correctly held that Appellants cannot rebut the presumption that the use was in common and thus permissive. Because Appellants cannot point to any evidence of an adverse, decisive or hostile act other than mere use in common with the Kings and Lows, the Appellants cannot establish the necessary elements for a prescriptive easement and summary judgment is appropriate.[13]

Appellants on appeal recognize that they did not do any decisive act to interfere with the use of the Kings and Lows and instead argue that it is illogical for them to cause damage to the road. *Appellants' Brief*, pg. 15. However, damage to the road is not the only means to show there is a adverse claim, it is just an example of a means to prove an adverse use. It is still the burden of Appellants to show some adverse act to put the servient estate on notice of their prescriptive

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[13] Appellants have suggested that there was a four year period from 1982-86 in which the King property was owned by Zane Block and this somehow supports there claim of adverse use. *Appellants' Brief*, pgs. 15-16. However, Appellants fail to present any evidence to show that there use during this four year period was any different than common use or that there use was adverse. Again, the burden is on the Appellants to show some adverse act and simply suggesting that the Kings did not own the property during this period, without anything more, does not rebut the presumption the use continued as permissive.

easement claim. The fact remains that Appellants cannot point to any evidence concerning their use of the road which would be considered adverse or hostile to the claims of the Lows and Kings and instead acknowledge that they did not do anything to interfere.

4. The District Court Did Not Err in Granting Summary Judgment to the Lows.

In a related but distinguishable argument, Appellants assert that the district court erred in granting summary judgment to the Lows simply because the Lows purchased their property in 2006. However, this argument lacks merit and fails because Appellants again have not disputed that the use of King Lane was in common with the Lows' predecessors, namely Samuel Steiner. While the Lows may not have owned the property during this time frame, they have submitted the affidavit of a predecessor in interest, Samuel Steiner, which was relied upon by the district court, who moved to the parcel in 1959 with his parents and was the owner of the property since 1984. (R. pg. 237). Mr. Steiner testified that the road in question was used by a variety of people and neither he nor his parents objected to such use so long as it did not interfere with their operations. (R. pg. 237). In addition, Appellants fail to address and simply disregard the *Affidavit of Rose King,* also filed on December 9, 2014, which provided the following:

> What has been referred to as King Lane for purposes of litigation **has also been used by Cal and Susie Low**, which own the property generally to the south of the King property/ranch **and their predecessors in interest**. When my husband and I purchased our ranch in 1973, the property now owned by Lows was owned by Steiner family, and the Steiners used the road to access their property to get to and from their fields. **This use has continued since 1973 to present**, including now that the property is owned by Cal and Susie Low.

(R. pg. 231, ¶ 5).

For Appellants to now suggest that the easement ripened before the Low purchased the property is flat out incorrect. Again, the evidence is clear that the use was in common before and

during Appellants' alleged use and Appellants have not and cannot meet their burden of showing by clear and convincing evidence that their alleged use was adverse. Simply because the Lows purchased their property in 2006 does not alleviate Appellants from establishing adverse use by a decisive act.

The district court granted summary judgment to the Lows on the same basis and reasoning as it granted summary judgment to the Kings – the use of the road was in common and Appellants have not met the burden of establishing adverse use by any decisive act. The Lows also contend that summary judgment in favor of the Lows is appropriate because Appellants' claims against the Lows are rendered moot by the court's decision granting summary judgment to the Kings. If Appellants cannot establish an easement over the property of the Kings, which there is no dispute that the roadway crosses a portion of the King property, then Appellants cannot establish a prescriptive easement across any portion of the roadway which crosses the property of the Lows. In other words, Appellants cannot have a prescriptive easement to nowhere, and there can be no easement across only the property of the Lows because there is no continuous easement for Appellants' to access from their property to Oreana Loop Road. The district court did not reach this issue as it was not necessary after the district court granted summary judgment in favor of the Lows. However, to the extent Appellants contend they **only** have an easement across the Lows, such and easement cannot exist and would be moot if Appellants have no easement across the property of Kings.

Again, the district court did not address this argument but in response to this argument before the district court, Appellants cited to a Montana decision which suggests "better rule" is that the existence of intervening land does not itself defeat an easement. Appellants failed to point out that the "better rule" cited in the Montana decision, recognizes a disagreement among jurisdictions on

the issue, but then holds that the "better rule" which the Montana court followed applies to an **express easement** and not implied easements or easements by prescription like the one at issue in this case. *See Davis v. Hall*, 280 P.3d 261 (Mont. 2012). In other words, the court did not hold that there can be intervening land when dealing with implied easements. Indeed, the court stated "this Court adheres to the rule that in order to establish an implied easement, the dominant and servient parcels must be held as a single track of land or contiguous tracts of land at the time of severance." *Id.* at 270. Appellants cannot have an easement by prescription which goes nowhere.

Finally, Appellants suggest for the first time on appeal that summary judgment should be granted "in favor of [Appellants] because there is no way for the Lows to prevail at trial." *Appellants' Brief*, pg. 31. First, Appellants withdrew their own motion for summary judgment and thus are seeking summary judgment now for the first time on appeal. This Court will not and should not address an issue raised for the first time on appeal. *See Schiewe v. Farwell*, 125 Idaho 46, 867 P.2d 920 (1993). Second, there is no merit or basis for this new argument. Appellants initially moved for summary judgment against the Lows on the theory that the Lows only owned their property since 2006 but when the Lows submitted affidavits from Rose King and Samuel Steiner concerning their use of the road the Appellants withdrew their motion. The facts remain the same that there has been joint/common use since at least 1973 by the Kings and the Lows, there has been no showing of any adverse act by the Appellants, (again, Appellants' own arguments are that their use did not begin until at the earliest 1977) and there is no basis for granting summary judgment on appeal to the Appellants.

B. The Lows are Entitled to Attorney Fees on Appeal.

Pursuant to Idaho Appellate Rules 40 and 41 and Idaho Code section 12-121, the Lows request costs and attorney fees be awarded to them on appeal. This Court recently addressed a claim for attorney fees on appeal under Idaho Code section 12-121 and stated the following standard:

> "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 62 (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.*

Thornton v. Pandrea, 2016 Ida. LEXIS 278 (September 14, 2016) (emphasis added).

In this case, Appellants do nothing more than assert the same arguments that failed before the district court, without adding significant analysis or authority. More specifically, these same arguments not only mirror the arguments made by Appellants in response to the Lows and Kings' motions for summary judgment but these same arguments were made as part of Appellant's motion for reconsideration. On July 6, 2015, Appellants filed a motion for reconsideration which argued the same points they now raise on appeal. (R. pgs. 548-569). These arguments were addressed and rejected by the district court on September 11, 2015. (R. pgs. 629-636). Now, without providing any additional analysis or authority, Appellants ask this Court to second guess the district court. In other words, Appellants do not dispute that the use of King Lane was in common with the servient estate owners, that Appellants use began in 1977, which is a minimum of four years after the use by

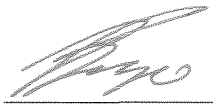
the servient estate owners, or that they did not do anything to interfere with the use of the servient estate owners. Instead, Appellants contend mere use of the road should be sufficient and it is "illogical" for them to have to do some decisive act to demonstrate adverse or hostile use. Accordingly, the Lows contend that they are entitled to an award of costs and attorney fees.

V. CONCLUSION

For the foregoing reasons, the Lows respectfully request that the district court's decisions and judgments be affirmed. Appellants have done nothing more than ask this Court to second guess the decisions of the district court without providing any citations or authority to challenge the district court's decisions. Appellants have not provided any basis that summary judgment in favor of the Kings and Lows was not appropriate because the Appellants had failed to provide evidence that their use of King Lane was adverse which is a required element of Appellants' claim. Lastly, this Court should award the Lows costs and attorney fees on appeal pursuant to Idaho Code section 12-121 and Idaho Appellate Rules 40 and 41.

DATED this 14th day of November, 2016.

SAWTOOTH LAW OFFICES, PLLC

By 
S. Bryce Farris
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CERTIFICATE OF SERVICE/COMPLIANCE

I hereby certify that pursuant to I.A.R. 34(d) two (2) copies of this *Respondent's Brief* were served to all parties on this 14th day of November, 2016 by the following method indicated below. In addition, pursuant to I.A.R. 34.1 an electronic copy of this *Respondent's Brief* was filed with the Supreme Court and served to all parties at the following electronic mail addresses:

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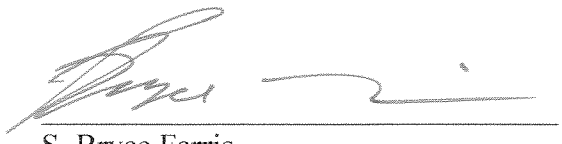

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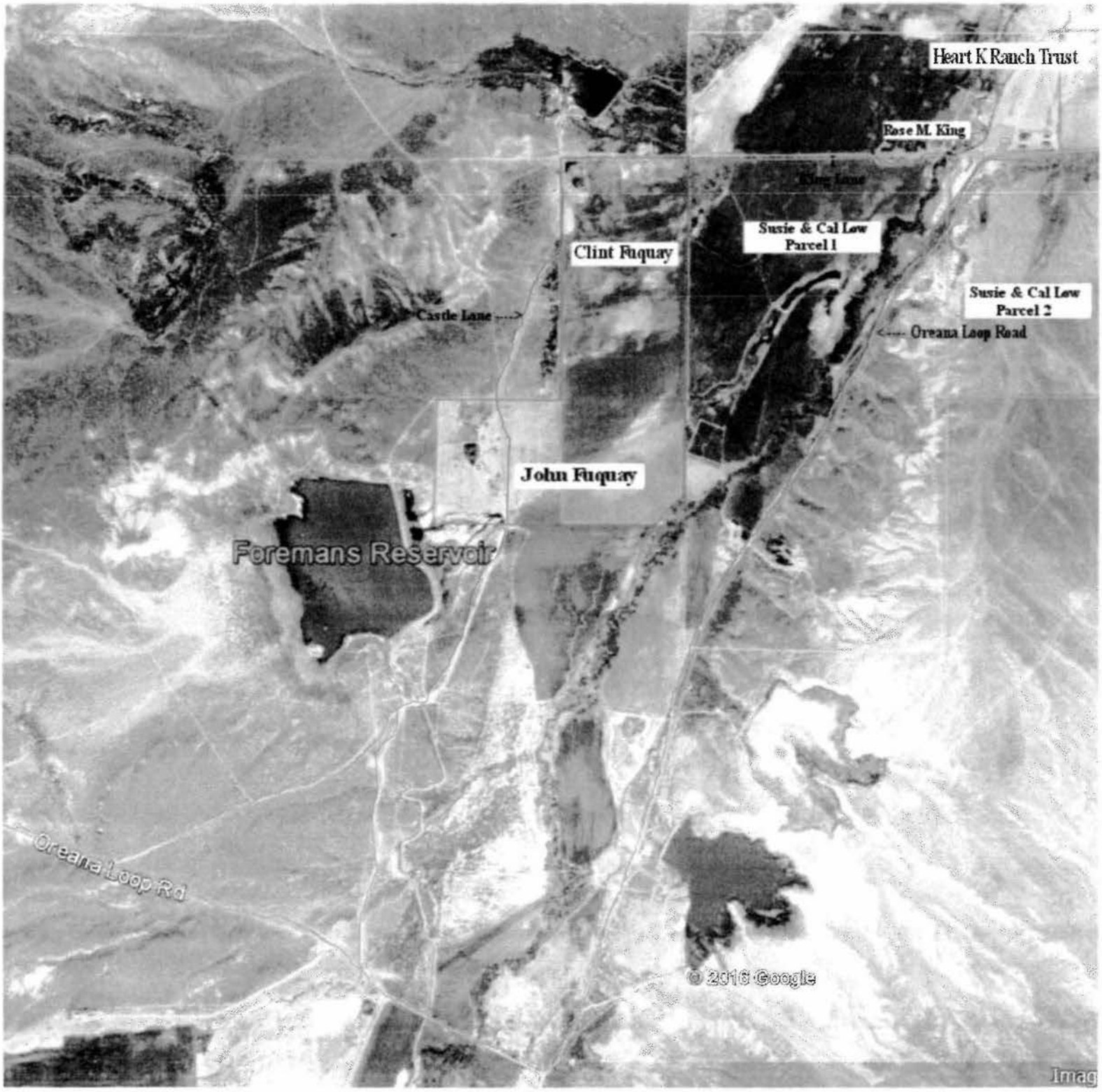
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Clint Fuquay
Susie & Cal Low Parcel 2
Castle Lane
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Heart K Ranch Trust
Rose M. King Residence
King Lane
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