10-1-2018

Hardy v. Phelps Appellant's Brief Dckt. 45933

IN THE SUPREME COURT OF THE STATE OF IDAHO

JEFFREY T. HARDY and JOHNNA A. HARDY, husband and wife,

Plaintiffs/Counterdefendants Respondents,

v.

RONALD O. PHELPS and DONNA J. PHELPS, husband and wife, RONALD O. PHELPS and DONNA J. PHELPS, TRUSTEES OF THE PHELPS FAMILY TRUST U/D/T/ SEPTEMBER 16, 2004; and DOES I-X, as individuals with interest in real property located in Boise County, Idaho legally described as Lots 26 and 27 of Mores Creek Heights, according to the plat thereof, recorded as Instrument No. 95549, records of Boise County, Idaho,

Defendants/Counterclaimants/Appellants,

RONALD O. PHELPS and DONNA J. PHELPS, husband and wife, RONALD O. PHELPS and DONNA J. PHELPS, TRUSTEES OF THE PHELPS FAMILY TRUST U/D/T/ SEPTEMBER 16, 2004; and DOES I-X, as individuals with interest in real property located in Boise County, Idaho legally described as Lots 26 through 32 of Mores Creek Heights, according to the plat thereof, recorded as Instrument No. 95549, records of Boise County, Idaho,

Cross-claimants/Appellants,

v.

BOISE COUNTY a political subdivision of the state of Idaho, and JOHN and JANE DOE I through X, whose true identities are unknown,

Cross-defendants/ Respondents.

Supreme Court No. 45933-2018

APPELLANTS' OPENING BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BOISE

HONORABLE PETER BARTON, PRESIDING DISTRICT JUDGE

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B. Did the district court err by concluding the efforts used by the county tax collector to locate and serve the record owner(s) of the real property in question satisfied the property owners' fundamental right to due process as guaranteed under the Idaho and United States Constitutions.

C. Did the district court misapply its policy considerations which favored finality of the deed issuance and property taking process over strict compliance with due process.

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III. STATEMENT OF THE CASE

A. Nature of the Case

This appeal implicates the balance between the guaranteed right of due process afforded property owners, and the government's right to take privately owned real property via the tax deed formula set forth in Idaho Code. *See* Idaho Code § 63-1001, *et seq.* Here, the Appellants, Ronald and Donna Phelps[1] (hereinafter the "Phelps") are the private citizens who owned, but lost seven (7) parcels of real property situated in Boise County, Idaho. The Respondent Boise County[2] is the public agency who took the seven (7) parcels of property from the Phelps, without first affording the Phelps actual notice.

At the time Boise County took the Phelps' property in July 2014, the Phelps were allegedly delinquent in taxes, late charges, interest, and associated costs in the total amount of $43,203.26 for all seven (7) lots. By contrast, the Boise County assessor appraised the fair market value of the seven (7) lots in 2014 at $66,780.00 per lot, for a total assessed value of $467,460.00. As such, based upon simple math and the county's own valuations, the Phelps lost over $400,000.00 of equity as a result of the taking of their seven (7) lots. The other Respondents, Jeffrey and Johnna Hardy[3] (hereinafter the "Hardys"), purchased two (2) of the lots from Boise County at public auction in September 2015, for $15,500.00 and $6,225.89 respectively, and started this action by filing a quiet title complaint against the Phelps in October 2016.

On appeal, the Phelps assert that Boise County failed to satisfy their fundamental right to due process, before the county took the seven (7) parcels from them by way of the aforementioned tax deeds. The Phelps further contend the county violated statutory and constitutional due process by not first attempting to locate and serve the Phelps by using a valid email address within the

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[1] Also, Defendants, Counterclaimants and Cross-Claimants.
[2] Also Cross-defendants.
[3] Also Plaintiffs and Counterdefendants.

county's possession, before resorting to service by publication in a local newspaper. Accordingly, because notice was defective and due process was deprived, all seven (7) of the tax deeds the county issued to itself are void *ab initio*. As such, the Phelps maintain the county cannot cure its lack of valid title by the passage of time or by the attempt to convey the Phelps' property to third-parties, like the Hardys and others here.

Wherefore, the remainder of this *Opening Brief* shall demonstrate that the Phelps remain as the true and rightful owners of the seven (7) lots in question.

B. Course of Proceedings Below

As noted above, the Hardys prompted this litigation by filing their *Verified Complaint for Declaratory Relief (Quiet Title)* against the Phelps on October 19, 2016, in Boise County. R., Vol. I, pp. 13-33. In their Complaint, the Hardys sought to quiet title of two (2) of the seven (7) lots at issue, alleging Boise County had properly taken title to the lots from the Phelps by way of tax deeds, and then properly quitclaimed the lots to the Hardys. *Id.* at 15-16.

In turn, the Phelps served their *Answer to Complaint, Counterclaim, and Cross-Claim* upon the Hardys and Boise County on December 21, 2016. R., Vol. I, pp. 38-48. In their pleadings, the Phelps alleged the tax deeds had "no lawful effect and were unlawfully issued, without proper notice to [the Phelps] of any alleged tax delinquency, and in violation of [the Phelps] right to due process guaranteed under the Fourteenth Amendment to the U.S. Constitution and the Idaho Constitution, Article 1, § 13." *Id.* at 42, ¶11.

On January 4, 2017, the Hardys filed their *Answer to [the Phelps] Counterclaim*. R., Vol. I, pp. 49-55. And then, on March 10, 2017, Boise County filed its *Answer to [the Phelps] Cross Claim*. R., Vol. I, pp. 56-60.

On July 20, 2017, the Hardys filed their *First Amended Verified Complaint for Declaratory Relief (Quite Title)*. R., Vol. I, pp. 138-157. In it, the Hardys added the alternative claim of "Unjust

Enrichment" against the Phelps alleging that: "In the event the Court finds that Boise County violated due process in its issuance of the subject Tax Deeds, as asserted by Phelps, and that said Tax Deeds have no lawful effect and/or were unlawfully issued and title to the Property is quieted in Phelps, Plaintiffs [Hardys] allege that Phelps has [sic] been unjustly enriched." R., Vol. I, p. 141, ¶16. On November 13, 2017, the Phelps filed their *Answer to [Hardys] First Amended Verified Complaint for Declaratory Relief (Quite Title)*. R., Vol. I, pp. 742-747.

On September 7, 2017, the Phelps moved the district court for partial summary judgment (R., Vol. I, p. 388) supported by a memorandum (R., Vol. I, p. 391), and the *Affidavit of Donna J. Phelps* (R., Vol. I, p. 376), and the *Affidavit of Bruce S. Bistline* (R., Vol. I, p. 413). Based upon the summary judgment record before the court, the Phelps sought the following relief: "The tax deeds issued with respect to the seven (7) parcels at issue in this matter should be declared void *ab initio*. R., Vol. I, p. 411.

Boise County likewise moved the lower court for summary judgment on September 7, 2017. R., Vol. I, p. 371. The county's motion was supported by a memorandum (R., Vol. I, p. 345) and several affidavits. On September 12, 2017, the Hardys filed a *Partial Joinder* with the county's motion for summary judgment. R., Vol. I, p. 568.

On November 9, 2017, the district court issued its *Memorandum Decision and Orders* respecting the competing motions for summary judgment, concluding:

> In sum, the facts alleged by each party create a genuine issue of material fact as to whether Boise County's acts were sufficient to attempt to locate and serve Phelps before serving by publication. *See Chandler,* 147 at 771, 215 P.3d at 491 (finding error in granting of summary judgment without first considering whether a genuine issue of fact exists). Either party might prevail at trial: for example, Boise County (and thus Hardy) by showing among other things that Boise County did attempt to locate and serve Phelps, and Phelps, by showing among other things that Boise County did not attempt to locate and serve Phelps. Summary judgment is inappropriate on the documents submitted.

R., Vol. I, p. 733 (emphasis added).

Also on November 9, 2017, the parties filed a *Joint Stipulation for Trial*. R., Vol. I, pp. 736-741. In the joint stipulation, the parties agreed, *inter alia*, to stipulate to submit the case to the district court for decision on the record. R., Vol. I, p. 737. The joint stipulation framed the first issue to be determined by the district court as follows: "First, the Court must determine whether the Phelps' were provided with lawful and constitutionally sufficient notice of the tax deed process ('First Issue')." *Id.* The joint stipulation further defined the scope of the record upon which the court was to resolve the first issue:

> 1. All documents attached by any party to any affidavit filed in associate with the parties respective Motions for Summary Judgment shall be deemed "admitted' as Exhibits which are part of the Record, and each party waives any objection to the admission of each such document.
>
> 2. The averments made in any affidavit filed by any party and content of any depositions submitted in association with the parties respective Motions for Summary Judgment shall be deemed as admissible testimonial evidence and each party waives any objection to the admission of such testimonial evidence.

R., Vol. I, p. 738.

Finally, under the joint stipulation, if the district court found that the Phelps were not provided lawful and constitutionally sufficient notice of the tax deed process in 2014, then a trial would commence to "address the Second Issue: to wit damages claims." *Id.* at 739.

On November 16, 2017, the parties again pursuant to stipulation appeared at the Boise County Courthouse for a bench trial, whereby the parties agreed to supplement the record before the court with additional exhibits and the testimony of three (3) witnesses: (1) Donna Phelps; (2) Jeffrey Hardy; and (3) Daniel Derby with Alliance Title. Tr., Vol. I, pp. 1-47. After the close of

the bench trial, the parties submitted their respective *Proposed* Findings of Fact and Conclusions of Law. *See Phelps' Proposed Findings/Conclusions, R., Vol. I, pp. 801-816.*

On February 1, 2018, the district court issued its, "*Findings of Fact and Conclusions of Law*." R., Vol. I, pp. 852-871. In doing so, the district court concluded the Phelps received lawful and sufficient notice of the tax deed process. *Id.* On March 3, 2018, the district court entered *Judgment and Decree Quieting Title in Plaintiffs Jeffrey and Johnna Hardy*. R., Vol. I, pp. 872-875. It quiets title of the two (2) lots in favor of the Hardys, and states that the Hardys unjust enrichment claims are moot in light thereof. *Id.*

The Phelps timely filed their *Notice of Appeal* on April 2, 2018. R., Vol. I, pp. 876-880. The Notice lists the following preliminary issues on appeal:

> Whether the district court erred in its interpretation and application of Idaho Code § 63-1005(2)(b), which requires the county tax collector to "attempt to locate and serve" the record owner(s) of real property after the effort to serve written notice by certified mail on the record owner(s) has failed, but before resorting to service of notice by publication in the newspaper.
>
> Whether the district court erred by concluding the efforts used by the county tax collector to locate and serve the record owner(s) of the real property in question satisfied the property owners' fundamental right to due process as guaranteed under the Idaho and United States Constitutions.
>
> Whether the district court misapplied its policy considerations which favored finality of the deed issuance and property taking process over strict compliance with due process. Policy considerations dictate the most efficient way to achieve finality and to thereby avoid the litigation of claims over due process violations is to ensure the property owners receive actual, written notice of the pendency of the issuance of a tax deed. A policy endorsing due process and actual notice most definitely would have rendered moot the trial herein and now this appeal herein.

The above questions substantially remain as the primary issues on appeal and are addressed below.

C. Statement of Facts

1. The Phelps reside in Ladera Ranch, California. Tr., Vol. I, p. 15 [*Tr., p. 41, L. 25 – p. 42, L. 13*]. Mr. Phelps, age 74 [now 75], remains permanently disabled due to an accident occurring roughly thirty seven (37) years ago where he suffered multiple head and bodily injuries. *See Affidavit of Donna J. Phelps, R., Vol. I, p. 377.* As such, Ms. Phelps, age 66 [now 67], had to assume the management of the family finances. *Id.* at ¶*3*. Unfortunately, Ms. Phelps, herself, was also involved in a car wreck where the residuals of her injuries negatively impact her memory and executive functioning. *Id.* at ¶*4*.

The Phelps Own Real Property in Boise County

2. It is undisputed that the Phelps acquired fee simple title to the following seven (7) parcels of real property situated in Boise County, in or about 1980, by Warranty Deed:

a. Township 4 North, Range 4 East, Section 2 of Lot 26 of Mores Creek Heights.

b. Township 4 North, Range 4 East, Section 2 of Lot 27 of Mores Creek Heights.

c. Township 4 North, Range 4 East, Section 2 of Lot 28 of Mores Creek Heights.

d. Township 4 North, Range 4 East, Section 2 of Lot 29 of Mores Creek Heights.

e. Township 4 North, Range 4 East, Section 2 of Lot 30 of Mores Creek Heights.

f. Township 4 North, Range 4 East, Section 2 of Lot 31 of Mores Creek Heights.

g. Township 4 North, Range 4 East, Section 2 of Lot 32 of Mores Creek Heights.

See Phelps' Answer to Complaint, Counterclaim, and Cross-Claim, R., Vol. I, p. 45, ¶6, and Boise County's Answer to Phelps' Cross-Claim, R., Vol. I, p. 57, ¶7; see also Findings of Facts and Conclusions of Law, R., Vol. I, p. 853, ¶1.

3. The Phelps purchased the seven (7) lots for $250,000.00. *See Donna Phelps' Trial Testimony, Tr., Vol. I, p. 19* [*Tr., p. 57, Ll. 1-3*]. These seven (7) lots are depicted on a parcel map which shows their respective size in acres, their shapes, and their overall configuration - one to the other. *See Trial Exhibit 507, Ex. R., p. 127.*

4. On or about September 16, 2004, Ronald Phelps and Donna Phelps conveyed and granted all right, title and interest of the subject property to: "Ronald O. Phelps, and Donna J. Phelps, Trustees, or their Successors in Trust of the Phelps Family Trust u/d/t September 16, 2004" by way of Trust Transfer Deeds which were then recorded in Boise County on October 1, 2004. *See Trial Exhibit 501, Ex. R., pp. 40-53*; *see also Findings of Facts and Conclusions of Law, R., Vol. I, p. 853, ¶2.*

5. At all relevant times, April Hutchings has been the Boise County Treasurer/Tax Collector, having first been appointed to the position in September/October 2009, first elected in 2010, and then re-elected in 2014, for a four-year term. R., Vol. I, p. 430 [Tr., p. 11, L. 23 - p. 12, L 5]. It is her job to collect real property taxes for Boise County. R., Vol. I, p. 431 [Tr., p. 15, L. 16 – p. 16, L. 6].

The Phelps Notify Boise County of Change of Mailing Address

6. In October 2012, Ms. Phelps phoned the Boise County Treasurer's office and advised as follows:

> [I] believe I spoke to Gina Turner, and explained that I was concerned about our property taxes because we had not received notices for a long time. I explained that we had moved and the El Toro P.O. Box was no longer used and that mail delivery at our Street address, 1 Craftsbury Place, in Ladera Ranch California had proven to be unpredictable. Consequently we had obtained a post office box in the nearest post office and I provided her with that address - - P.O. Box 3779, Mission Viejo.

Affidavit of Donna J. Phelps, R., Vol. I, p. 378, ¶6 (emphasis added).

7. On October 30, 2012, Ms. Turner sent an email to Ms. Phelps, and stated therein that "you will also want to fill out a change of address form and mail that in to us." *Affidavit of Gina Turner, R., Vol. I, p. 225, ¶40.* Although the county does not acknowledge it, Ms. Phelps stated she faxed the county a completed change of address form. *Affidavit of Donna J. Phelps, R., Vol. I, p. 378, ¶6.*

8. Due to tax arrearages on the seven (7) lots for 2010, Boise County retained Alliance Title to produce litigation guarantees for all seven (7) of the Phelps' lots, in March of 2014. *Affidavit of Gina Turner, R., Vol. I, p. 230, ¶66.*

9. Dan Derby, a title officer for Alliance Title, testified about the nature and purpose of litigation guarantees, and how the title company had delivered the guarantees to Boise County, in March 2014. *Derby's Trial Testimony, Tr., Vol. I, p. 14 [Tr., p. 36, L. 18 – p. 37, L. 7].* The guarantees are designed to locate the names and last known addresses of the record owners and other interested parties of real property after searching the public records of the county. *Derby's Trial Testimony, Tr., Vol. I, p. 10 [Tr., p. 20, Ll. 1-20].*

10. Here, the litigation guarantees identified the Phelps as the only owners/interested parties for the seven (7) lots in question, and listed the following addresses for the Phelps: P.O. Box 1047, El Toro, California 92630, and to: 1 Craftsbury Place, Ladera Ranch, California 92691. *See Trial Exhibits 231, 232, and 260, Ex. R., p. 312, p. 324, p. 469, respectively.* These are the same addresses as those Ms. Phelps advised Boise County were outdated in October 2012.

11. On or about May 22, 2014, Boise County attempted to serve written Notice of Pending Issuance of Tax Deed of all seven (7) of the above-described parcels upon the Phelps by certified mail, return receipt demanded. R., Vol. I, p. 437 [*Tr., p. 39, Ll. 11-24*]. The notices related to the property tax delinquencies for year 2010. *See Notice of Pending Issue of Tax Deed for lots 26 to 32, Ex. R., pp. 185-198.* Boise County mailed the notices to: P.O. Box 1047, El Toro, California 92630, and to: 1 Craftsbury Place, Ladera Ranch, California 92691. R., Vol. I, p. 436 [*Tr., p. 33, L. 16 – p. 34, L. 16*].

12. Boise County has acknowledged that the notices mailed to the Phelps contained the incorrect date for the tax deed hearing, listing July 23, 2014, as the date, even though the hearing was actually scheduled for the day before, on July 22, 2014. *See Notice of Correction,* R., Vol. I,

p. 749. Boise County further acknowledged that: "Idaho Code § 63-1005(4)(f) requires that the notice of pending issue of tax deed contain the 'time, date, place at which, and by whom the tax deed will issue . . .' As such, it appears that the County did not comply with Idaho Code § 63-1005(4)(f) in that regard." *Id.*

All Written Notices Mailed to the Phelps Returned to Boise County as Undelivered

13. Treasurer/Tax Collector Hutchings conceded all of the respective notices sent via certified mail returned to her as - unclaimed or undelivered. R., Vol. I, p. 437, 441 [*Tr., p. 39, Ll. 11-24, and p. 54, Ll. 3-9*]. Treasure Hutchings testified there was no question in her mind that all notices sent via certified mail returned unclaimed or undelivered. R., Vol. I, p. 441 [Tr., p. 54, Ll. 3-9].

14. On June 23, 2014, (30 days before the scheduled hearing) Treasurer Hutchings's assistant, Gina Turner, responded to an email sent by Ms. Phelps on June 20, 2014. *See Trial Exhibit 505, Ex. R, p. 89.* This email was sent to Ms. Phelps as part and parcel of an email thread which began in October 2012. *Id.* The June 23, 2014, email from Ms. Turner does not include information about the time, date, and place of any public hearing at which a tax deed may be issued, and did not advise Ms. Phelps of her right to be heard at any hearing scheduled on July 22, 2014, saying nothing at all about her right to due process. *Trial Exhibit 505, Ex. R, p. 89.* The email did not afford any notice to Mr. Phelps. *Id.*

15. When all the non-compliant notices returned unclaimed or undelivered, but before resorting to notice by publication, the county, in an effort to locate and serve the Phelps, conducted nothing more than a "brief internet search," the particulars of which are not known or recorded,

and a search of the assessor's records and the records kept by the treasurer's office. R., Vol. I, p. 446 [*Hutchings Depo. Tr., p. 73, L. 4 – p. 74, L. 10, and p. 76, Ll. 13-16*]. [4]

Boise County did not Follow-up on Obvious Lead Contained within Its Own Records

16. The county failed to follow-up on an obvious lead contained within the county records. In fact, Treasurer/Tax Collector Hutchings testified that she did not use Ms. Phelps' email address, which was on file, to help gain a proper address to serve the Phelps written notice of the pendency of the issuance of tax deeds. R., Vol. I, p. 447 [*Hutchings Depo. Tr., p. 78, Ll. 10-17*]; *see also the Affidavit of Donna J. Phelps, R., Vol. I, p. 379, ¶¶7-9, and the email thread appended thereto.*

17. When pressed as to why she did not search the records where the Phelps' email address could have been found, Treasurer/Tax Collector Hutchings was candid in her response:

> Q. And why didn't you search the database at that point in time?
>
> A. I don't – We just don't do it. We have never done it before.. . .
>
> Q. And so I'm wondering: Wouldn't you agree with me that checking that database would fall under the definition of conducting a reasonable and diligent search for the taxpayer's proper address?
>
> A. Like I said, we researched the assessor's records, our records. Those are our data – databases. This is email. No, we don't generally go out and check the e-mails.
>
> Q. I know.
>
> A. Maybe we should.
>
> Q. Right. That's what I'm wondering. Don't you agree that you should?
>
> A. Yes.
>
> Q. All right. And – so, therefore, you would agree that that would fall under the heading of doing a reasonable and diligent search for the taxpayer's proper address?

[4] In less than a few minutes, counsel for Phelps was able to locate the proper address for the Phelps via an internet search. *See Affidavit of Bruce S. Bistline*, R., Vol., I, p. 413, *¶¶1-7, and Exhibits referenced therein.*

Q. You would agree with me, wouldn't you?

A. At this point, yes.

R., Vol. I, p. 448 [*Hutchings Depo. Tr., pp. 83-85 (emphasis added)*].

18. Boise County next turned to service of Notice of Pending Issuance of Tax Deed by publishing a summary in an area newspaper for four (4) consecutive weeks. According to Treasurer/Tax Collector Hutchings, the summary of the notice was published in the Idaho World on June 18th, June 25th, July 2nd, and July 9th of 2014. R., Vol. I, p. 442 [*Hutchings Depo. Tr., p. 60, Ll. 4-24*]. The final summary was untimely published on July 9, 3014, only thirteen (13) days before the July 22 hearing, rather than "no less than fourteen (14) days before the time set for the tax deed to issue." *See* Idaho Code § 63-1005(2)(b).

19. On July 16, 2014, the treasurer/tax collector recorded an "AFFIDAVIT OF COMPLIANCE" for each of the seven (7) parcels of real property. R., Vol. I, p. 443 [*Hutchings Depo. Tr., p. 62, L. 11 – p. 64, L. 12*]; *see also the Affidavit of Compliance for lots 26-32, at Phelps' Trial Exhibit 502, Ex. R., pp. 54-67.* Each affidavit incorrectly states: "the Boise County Treasurer has complied with 63-1005, Idaho Code, and that all conditions of issuance of the Pending Issue of Tax Deed described in 63-1005, Idaho Code have been carried out." *Id.*

20. As referenced above, Boise County has conceded it did not comply with Idaho Code § 63-1005(4)(f) by listing the wrong date set for the tax deed hearing and § 63-1005(2)(b) by failing to provide a full fourteen (14) days between the completion of the publication and the date of the hearing.

Boise County Issues Tax Deeds to Itself

21. On July 22, 2014, Boise County held a hearing relating to the Notice of Pending Issuance of Tax Deed. R., Vol. I, p. 445 [*Hutchings Depo. Tr., p. 71, Ll. 6-22*]. It was during this hearing where Treasurer/Tax Collector Hutchings presented the commissioners with a set of

written "FINDINGS OF FACT AND CONCLUSIONS OF LAW". *Id. See also the Findings of Fact and Conclusions of Law, for lots 26-32, at Phelps' Trial Exhibit 503, Ex. R., pp. 68-81.* The Phelps did not appear at the hearing, but nonetheless a "Tax Deed" was issued for each of their seven (7) parcels of real property. R., Vol. I, p. 450 [*Hutchings Depo. Tr., p. 90, Ll. 17-25*]; *see also Tax Deeds for lots 26-32, at Phelps' Trial Exhibit 504, Ex. R., pp. 82-88.*

22. The Findings of Fact and Conclusions of law correctly note that: "The Treasurer received a return of the Notice of Pending Issue of Tax Deed as undeliverable or unclaimed." *Trial Exhibit 503, Ex. R., pp. 68-81.* However, they go on to incorrectly state: "A reasonable and diligent search for the taxpayer's address failed to yield a proper address for notification of the pending tax deed." *Id.* Here, the stipulated facts show Boise County did not conduct a reasonable and diligent search for the Phelps' proper address, before it resorted to service by publication.

Boise County Sells Phelps' Property to Third-Parties at Public Auction

23. About twelve (12) months later, in September 2015, Boise County sold all seven (7) parcels of the Phelps' real property at public auction to the highest bidder. R., Vol. I, p. 451 [*Hutchings Depo. Tr., pp. 95-99*]. The Hardys purchased two (2) of the parcels, Lot 26 for $15,500.00, and Lot 27 for $6,225.89. R., Vol. I, p. 452 [*Hutchings Depo. Tr.,* p. 100, L. 6 – p. 102, L. 8]. In exchange for the purchase price, the county issued the Hardys a "COUNTY QUITCLAIM DEED" for lot 26, and lot 27. The Cogswells purchased Lot 28. *Id.* The Loseys bought the remaining four (4) parcels, Lot 29, Lot 30, Lot 31, and Lot 32. *Id.*

24. The Phelps never received notice about "a tax deed proceeding or the issuance of tax deeds until December of 2015 when notice of certified mail turned up in our box at 1 Craftsbury Place." *Affidavit of Donna J. Phelps, R., Vol. I, p. 379, ¶11.* The letter explained that their properties in Boise County had been sold. *Id.* Ms. Phelps phoned Boise County to confirm the letter. *Id.* ¶12. Treasurer/Tax Collector Hutchings recounted the phone discussion as follows:

> Ms. Phelps called shortly after we sold the properties. I can't remember when it was she called and asked about it, and I informed her that they were sold, and she had a heart attack almost.
>
> And that's – I think the only time I've ever spoke with her by phone.

R., Vol. I, p. 432 [*Hutchings Depo. Tr., p. 20, Ll. 15-25*] (emphasis added).

25. It is unchallenged here that each of the seven (7) parcels held an assessed value in year 2014 of $66,780.00 per lot as appraised by the Boise County Assessor. *See Phelps' Trial Exhibit 506, Ex. R., pp. 95-126, and Donna Phelps' Trial Testimony, Tr., Vol. I, p. 21* [*Tr., pp. 63 -66*]. The total assessed value for all seven (7) lots thus equals $467,460.00.

26. It is likewise unchallenged here that based upon her ownership of the lots for many years, and her background in real estate, Ms. Phelps appraised the fair market value of each lot to be $75,000.00, for a total of $525,000.00. *Donna Phelps' Trial Testimony, Tr., Vol. I, p. 21* [*Tr., p. 66, L. 13 – p. 67, L. 17*].

27. Neither the county nor the Hardys offered other valuations or opinions about the fair market value of the lots in question.

IV. ISSUES PRESENTED ON APPEAL

A. Did the district court err in its interpretation and application of Idaho Code § 63-1005 which requires the county tax collector to "attempt to locate and serve" the record owners of real property before the county becomes entitled to a tax deed.

B. Did the district court err by concluding the efforts used by the county tax collector to locate and serve the record owner(s) of the real property in question satisfied the property owners' fundamental right to due process as guaranteed under the Idaho and United States' Constitutions.

C. Did the district court misapply its policy considerations which favored finality of the deed issuance and property taking process over strict compliance with due process.

V. ARGUMENT

A. The District Court Misconstrued The Notice Provisions Set Forth In Idaho Code § 63-1005.

The district court misconstrued the notice provisions set forth in Idaho Code § 63-1005, particularly the interrelationship between the provisions in §§ 63-1005(1), 63-1005(2)(a), 63-1005(2)(b). The interpretation of a statute presents a question of law over which the Idaho Supreme Court exercises free, *de novo* review. *In re Estate of Peterson*, 157 Idaho 827, 832, 340 P.3d 1143, 1149 (2014). Where the language of a statute is plain and unambiguous, the courts give effect to the statute as written, without pause for statutory construction. *Id. See also* Idaho Code § 73-113(1). The Idaho Supreme Court will only engage in statutory construction when the language of the statute is ambiguous, and will then look to the rules of construction for guidance upon considering the reasonableness of the conflicting interpretations. *Id. See also* Idaho Code § 73-113(2).

In the case at bar, the statutory language in question is plain and unambiguous, and the district court erred by not giving effect to the statute as written. Idaho Code § 63-1005(1) states that a "county shall not be entitled to a tax deed" for real property, until "notice of pending issue of tax deed" has been given.

Idaho Code § 63-1005(2) then outlines how notice must be given:

> The county tax collector of the county wherein the real property for which a tax deed may issue shall serve or cause to be served written notice of pending issue of tax deed upon the record owner or owners and parties in interest of record in the following exclusive manner:
>
> (a) By serving or causing to be served a copy of such notice by certified mail with return receipt demanded upon the record owner or owners and parties in interest of record at their last known address, such service of notice to be

made no more than five (5) months nor less than (2) months for the tax deed to issue;

(b) In the event that such notice is served as above described and returned undelivered after attempting to locate and serve the record owner or owners and parties in interest of record, by publishing a summary of such notice in a newspaper having general circulation in the county wherein the real property is situated.

Id. (Emphasis added).

Thus, the first paragraph of § 63-1005(2) compels the county tax collector to first serve written notice upon the record owners in an "exclusive" manner. Idaho Code § 63-1005(2)(a) dictates that the exclusive manner for service is by "certified mail" with "return receipt" demanded. Idaho Code § 63-1005(2)(b) then describes what shall take place when service by certified mail is unsuccessful. It states in material part: "In the event that such notice is served . . . and returned undelivered after attempting to locate and serve the record owner . . . and parties in interest of record, by publishing a summary of such notice in a newspaper . . . ." (Emphasis added).

The aforementioned language has an obvious temporal element to it. The language of the statute is quite clearly referring to what must be done (1) after service by certified mail fails, but (2) before the tax collector may resort to service by publication. The answer to what must be done in this timeframe is unequivocally spelled out in the statute as well – the tax collector must now proceed by "attempting to locate and serve" the record owner with written notice. In other words, the statutory onus of "attempting to locate and serve" the record owner does not arise, until service by certified mail at the record owners' last known address fails, returning undelivered. The above sections of the code mandate that the property owner must be served with written notice, exclusively, by certified mail with return receipt demanded. When service in that exclusive manner fails, like here, the county has an unambiguous statutory duty to "attempt to locate and serve" the property owner, before resorting to service by publication. *Id.*

When giving the literal words of the above-referenced statutes their plain, usual and ordinary meaning, the legislative intent is clearly expressed therein, and thus the district court erred by engaging in statutory construction when rendering the following conclusions:

> Although the efforts made by Alliance Title in preparing the litigation guarantees qualify as attempting to locate the Phelps, this Court must consider whether Section 63-1005(2)(b) requires a taxing authority to initiate its attempt to locate a property owner after certified mail is returned and before the taxing authority resorts to service by publication. The statute could be read to impose such a temporal requirement. On the other hand, the statute may be read to require only that a sufficient attempt to locate be made before service by publication is relied on.
>
> If the County had ordered the March 2014 Alliance Title litigation guarantees after July 2, 2014, and before requesting notice by publication, the efforts undertaken by Alliance Title would have complied with Section 63-1005(2)(b). The County argues that it ordered litigation guarantees as a matter of course before the statute requires that level of effort be made. The County then mails notices to all likely addresses. Then the County apparently also publishes the notices, even before it may receive mail returned from out of state. The County argues that it would be wasteful and duplicative for the County to repeat the cost and effort represented by the litigation guarantees or to publish notice again every time a certified notice of pending tax deed issuance is returned.
>
> This is a reasonable interpretation of the statute, and the interpretation this Court concludes was intended by the Legislature. If Boise County has made reasonable efforts to locate someone so as to maximize the chance of reaching that person by mail, and if that effort was made during the course of giving notice of the same year's pending issuance of a tax deed, Section 63-1005(2)(b) would not require Boise County to repeat their efforts merely because one or more of the certified notices was returned undelivered. The March 2014 litigation guarantees, obtained prior to publication of summary notices in The Idaho World satisfied Section 63-1005(2)(b)'s requirement that service by publication be made only after attempting to locate the Phelpses.

See Findings of Fact and Conclusions of Law, R., Vol. I, p. 863, ¶¶13- 15 (emphasis added).

Even if the Idaho Supreme Court were to deem it proper to engage in statutory construction, the above interpretation placed upon the applicable statutes by the district court suffers from

serious flaws. First, Idaho Code § 63-1005(2)(a) instructs the county tax collector to serve written notice upon the record owners "at their last known address." Thus, the only statutory efforts which must be made by the tax collector before serving notice by certified mail are those which assist in locating the owners' last known address, presuming it is not readily traceable in the public record. The purchase of litigation guarantees may well assist a county tax collector in finding the record owners' last known address. In fact, Dan Derby with Alliance Title stated as much. He testified how the guarantees are designed to locate the names and last known addresses of the record owners and other interested parties by searching the public records of the county. *See Derby's Trial Testimony, Tr., Vol. I, p. 10 [Tr., p. 20, Ll. 1-20].* However, not a single fact in the record suggests the litigation guarantees assist in locating the record owners, when they are no longer receiving mail at the last known address revealed in the public record.

Furthermore, the district court's conclusion that Idaho Code § 63-1005(2)(b) would not require Boise County to "repeat their efforts merely because one or more of the certified notices was returned undelivered" misses the mark. It is true that § 63-1005(2)(b) does not require a duplication of efforts. In fact, repeating the same efforts would only cause the same failed results. It does, however, require the tax collector to employ new or different means to locate the record owners, when service at their last known address returns undelivered. This is the singular way of giving true meaning to the language "after attempting to locate and serve." The statute clearly does not permit the taxing authority, like the district court concluded below, to rely on the tactics previously used to locate the owners' last known address, after all certified mailings return undelivered. Such an interpretation of the statute lacks sound reasoning. The legislature would not intend to compel a taxing authority to do again what failed in the first instance. Rather, the legislature would clearly intend for the taxing authority to attempt new and different methods for

achieving the goal of serving actual notice. Accordingly, the district court committed clear err in finding an ambiguity as a justification for adopting the construction espoused by Boise County.

Moreover, as referenced above, Boise County has conceded it did not comply with Idaho Code § 63-1005(4)(f) by listing the date of July 23, 204, for the tax deed hearing when it was actually held on July 24, 2014. *See Notice of Correction,* R., Vol., I, pp. 748-752. It further conceded it did not comply with Idaho Code § 63-1005(2)(b) by failing to provide the full fourteen (14) days between the completion of the publication and the date of the hearing. *Id.*

All told, the county did not have (1) the statutory authority to resort to service of notice by publication; (2) noted the wrong date for the hearing on the pending issue of tax deed; (3) and fell one-day short of providing the fourteen (14) required days between the final date of publication and the date of hearing.

The county's multiple failings in providing adequate notice presents a fatal defect to the overall process. *Sines v. Blaser*, 100 Idaho 50, 52, 592 P.2d 1367, 1369 (1979). Accordingly, Boise County's position on appeal is unsustainable.

B. The District Court Erred By Concluding The Efforts Used By Boise County To Locate And Serve The Phelps Satisfied The Phelps' Fundamental Right To Due Process Guaranteed Under The Idaho And United States' Constitutions.

The Idaho Supreme Court defers to the trial court's factual findings when an appellant asserts a violation of a constitutional right, but exercises free review over the trial court's determination as to whether constitutional requirements have been satisfied in light of those facts found. *Idaho v. Stanfield*, 158 Idaho 327, 332, 347 P.3d 175, 180 (2015). The Phelps challenge whether the constitutional right to due process has been satisfied in light of the facts found, giving rise to the "free exercise" standard of review on appeal.

In the instant case, the district court recognized: "This matter, at its core, presents a question of due process and notice." *See Findings of Fact and Conclusions of Law, R., Vol. I, p. 859, ¶1.* Nonetheless, the district court did not apply the key due process concepts set forth in the controlling opinions from the U.S. Supreme Court and the Idaho Supreme Court. The failure of the district court to do so constitutes clear grounds for reversal because an application of the law to the facts found by the district court demonstrates Boise County violated the Phelps' fundamental right to due process. *See Fourteenth Amendment to the U.S. Constitution and the Idaho Constitution, Article 1, § 13.*

In the recent case of *Jones v. Flowers*, 547 U.S. 220, 223 (2006), the United States Supreme Court confirmed that: "Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner 'notice and opportunity for hearing appropriate to the nature of the case.'" Even more recently, the Idaho Supreme Court reaffirmed the manner of service must afford the landowner procedural due process, as guaranteed under both the Idaho and United States Constitutions. *Salladay v. Bowen* 161 Idaho 563, 566-7, 388 P.3d 577, 580- 581 (2017). As referenced above, the failure to give adequate notice is a fatal defect to the overall process. *Sines v. Blaser*, 100 Idaho 50, 52, 592 P.2d 1367, 1369 (1979).

Both the Idaho Supreme Court and the United States Supreme Court have supplied guidance as to what governmental actions may or may not satisfy due process guarantees. For example, in *Giacobbi v. Hall,* 109 Idaho 293, 707 P.2d 404 (1985), the Idaho Supreme Court announced that notice by publication is sufficient only where an interested party is not "reasonably identifiable." The Court further noted that due process "requires that in any proceeding by which a person can be deprived of life, liberty or property, there must be 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford

them the opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information . . . ." *Id.* 109 at 297, 707 P.2d 408. In *Giacobbi*, this Court determined the county "was neither diligent nor reasonable in not following up on 'obvious' leads contained in the county records which would clearly have led to Hall's address." *Id.* at 298.

In *Jones v. Flowers*, 547 U.S. 220, 231 (2006), the United States Supreme Court addressed what must be done to locate the taxpayer:

> In *Mullane*, we stated that "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," *339 U.S., at 315, 70 S.Ct. 652*, and that assessing the adequacy of a particular form of notice requires balancing the "interest of the State" against "the individual interest sought to be protected by the Fourteenth Amendment," *id.*, at 314, 70 S.Ct. 652.
>
> We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed.
>
> By the same token, when a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so. [Citations omitted]. This is especially true when, as here, the subject matter of the letter concerns such an important and irreversible prospect of the loss of a house. Although the State may have made a reasonable calculation on how to reach Jones, it had good reason to suspect when the notice was returned that Jones was "no better off than if the notice had never been sent." *Malone,* 614 A.2d., at 37. Deciding to take no further action is not what someone "desirous of actually informing" Jones would do; such a person would take further reasonable steps if any were available. (Emphasis added).

Here, the efforts made by the county after the notice returned unclaimed and undelivered clearly fell short of the strict due process obligations imposed by the United States and Idaho Constitutions, for want of diligence and conscientiousness. In the crucial timeframe, the county conducted nothing more than a "brief internet search," the particulars of which are not known or recorded, and a search of the assessor's records and the records kept by the treasurer's office.

When considering the surrounding circumstances, the meager efforts used by the county to locate and serve written notice upon the Phelps simply does not pass constitutional due process muster. It could not have been much of a surprise that all the mailings returned to the county unclaimed, since Ms. Phelps had notified the county of a change of address in October of 2012 by phone, and may have submitted a written change of address form and faxed it to the county thereafter. *Affidavit of Donna J. Phelps, R., Vol. I, pp. 378-379, ¶¶6-8.* In addition, Ms. Phelps had exchanged emails with Boise County in late June 2014, not long before the hearing on the notice of pending issue of tax deed occurred on July 22, 2014. As such, at the point in time when the notices returned undelivered, the Phelps and their location remained "reasonably identifiable" and, therefore, resorting to service by publication was not constitutionally permissible. *Giacobbi v. Hall,* 109 Idaho 293, 707 P.2d 404 (1985).

The Phelps were struggling with disabilities, but obviously did not wish to abandon the seven (7) parcels which by year 2014 held a collective fair market value in the neighborhood of $525,000.00. Nevertheless, the county failed to follow-up on an obvious lead contained within the county records. In fact, the county tax collector testified that she did not use Ms. Phelps' email address, which was on file, to help gain a proper address to serve the Phelps written notice of the pendency of the issuance of tax deeds or to otherwise provide actual notice. R., Vol. I, p. 447 [*Hutchings Depo. Tr., p. 78, Ll. 10-17*]; *see also the Affidavit of Donna J. Phelps, R., Vol. I, p. 379, ¶¶7-9, and the email thread appended thereto.* The tax collector has since admitted that it would have been reasonable to use Ms. Phelps' email address as a means to locate a proper mailing address to effect service compliant with due process. A county truly desirous of actually informing a property owner of the pending issuance of tax deeds would take and has a constitutional obligation to take further reasonable steps if any were available, and plainly in this case additional reasonable steps of notifying the Phelps were available to Boise County.

Accordingly, for the reasons cited above, the tax deeds the county issued to itself are void *ab initio*, and the county cannot cure its lack of valid title by the passage of time or by the attempt to convey it to third-parties, like the Hardys here. *See Salladay v. Bowen*, 161 Idaho 563, 568 (2017) (*citing Dufur v. Nampa & Meridian Irr. Dist.,* 128 Idaho 319, 324, 912 P.2d 687, 692 (Ct. App. 1996) (Upholding a district court's finding that a tax deed was void due to the issuing authority's failure to comply with the constitutional requirements of due process). When due process has been violated, there can be no *bona fide* purchaser claim or defense.

The Phelps remain the rightful owners of the seven (7) lots.

C. The District Court Misapplied Its Policy Considerations Which Favored Finality Of The Tax Deed Process Over Strict Compliance With Due Process.

The district court concluded finality of the tax deed process protects the delinquent owner's rights as well as the rights of the person who later purchases the property at the public auction. *See Findings of Fact and Conclusions of Law, R., Vol. I, p. 865, ¶19.* The district court then elaborated on the policy of finality in the following way:

> Bidders at auction incorporate the risk that the tax deed may not be final into the amount they bid. A bidder who perceives a tax deed to be final will bid higher than he or she would bid if the tax deed were not final. He or she may have to subsequently litigate the disputed ownership, perhaps over years, and seek to recover the funds paid. There may also have been improvements made in the interim on the land, which would perhaps require litigation to recoup or to adjudicate the amount to be recouped. Delinquent owners want these bids to be as high as possible, not lowered, as it is the delinquent owner who received credit for the amount paid and ultimately payment for any amount paid over the delinquency.

Id. (Emphasis added).

The district court's policy considerations are certainly fair and reasonabe when viewed in the abstract. However, the considerations are ultimately misplaced because the best way to assure a bidder at public auction receives clear and marketable title to the property and, therefore, remains

willing to pay the highest price is by providing the delinquent owner with actual notice and constitutionally sufficient due process, rather than relying on notice by publication. Undoubtedly, a delinquent owner's ability to successfully show a deprivation of due process increases proportionately with the flimsiness of the notice given. This appeal represents a clear case in point.

CONCLUSION

The Phelps respectfully seek a reversal of the district court's judgment, and either a declaration that all seven (7) the tax deeds the county issued to itself are void *ab initio* or judgment in favor of the Phelps equal to the fair market value of the property in the amount of $525,000.00.

DATED: This 1 day of October, 2018.

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorney for Defendants/Counterclaimants/Cross-Claimants/Appellants

CERTIFICATE OF MAILING, DELIVERY, OR FACSIMILE TRANSMISSION

I CERTIFY that on October 1, 2018, I caused a true and correct copy of the foregoing document to be:

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