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' REPLY 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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A. Introduction

The Defendants/Counter and Cross-Claimants/Appellants, Ronald and Donna Phelps (hereinafter the "Phelps"), lodged their *Appellants' Opening Brief* on October 1, 2018. By way of their opening brief, the Phelps articulated the position that the district court erred when construing Idaho Code § 63-1005, which provides a county shall not be entitled to take real property from private citizens via a tax deed, until statutory notice has been properly served. The Phelps further argued that, in any event, the taxing agency in question here, Boise County, failed to properly afford the Phelps with notice as guaranteed by the respective due process clauses set forth in the Idaho and United States' Constitutions. *See* U.S. Const. amend. XIV, § 1, and Idaho Const., Article 1, § 13.

On November 13, 2018, the Respondents lodged *Boise County's and Jeffrey and Johnna Hardy's Joint Response Brief*. In it, the Respondents assert the district court correctly interpreted Idaho statutory law respecting the service of notice, and that Boise County afforded the Phelps with all notice due them under the due process clauses of the respective state and federal constitutions. In doing so, the Respondents accused the Phelps of urging this Court: (1) to re-write Idaho Code to create new obligations where they don't exist, and (2) to ignore U.S. Supreme Court precedent by requiring actual notice before any tax deed may be issued. *See Respondents' Brief, p. 9.* The Respondents also accused the Phelps of, after "missing the mark in asserting that Idaho Code was not complied with, the Phelpses urge this Court to find that this compliance – and therefore the statute itself – is unconstitutional." *Id.* at 12.

In truth, it is the Respondents who have re-written the Phelps' position on this appeal and, after having done so, they then go on to argue against the Phelps' position as rewritten by them. As a result of the restructuring of the Phelps' position, the Respondents have side-stepped many

of the core issues raised by the Phelps on this appeal. Simply put, the Phelps do not argue the applicable provisions of Idaho Code are unconstitutional. Rather, as shown below, the Phelps' interpretation of the statutory notice provisions render them harmonious with constitutional due process. Furthermore, the Phelps nowhere urge this Court to ignore U.S. Supreme Court precedent by requiring a taxing authority to provide "actual notice" before any tax deed may be issued. Rather, as shown below, the Phelps only contend Boise County had to exhaust additional reasonable steps to serve actual notice, before it could resort to service of notice by publication. The Phelps maintain their position along these lines remains, as shown below, consistent with both U.S. Supreme Court and Idaho Supreme Court precedent.

The Phelps do not believe it necessary to reply to each and every argument raised in Respondent's brief. To the extent they do not reply, the Phelps stand on their opening brief.

B. The Phelps Do Not Urge This Court To Rewrite Idaho Statutory Law.

The Phelps have been wrongfully accused by Respondents of urging this Court to rewrite the applicable notice sections of Idaho Code, to wit: Idaho Code § 63-1005(2)(a) and Idaho Code § 63-1005(2)(b). The Phelps do not so urge. Rather, in the first instance, the Phelps ask this Court to give effect to the statutory language as written. *See Appellants' Opening Brief, p. 14.* Alternatively, the Phelps contend that even if this Court concluded the statutory language contains an ambiguity, it still should not adopt the statutory interpretation used by the district court below in light of the existence of a more reasonable, albeit conflicting interpretation. *Id.* at pp. 16-18.

Statutory Analysis

Idaho Code § 63-1005(2)(a) and Idaho Code § 63-1005(2)(b) read as follows :

> 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).

Idaho Code § 63-1005(2) and (2)(a) clearly commands the county tax collector to serve written notice upon the record owner(s) in an "exclusive" manner: "By serving . . . such notice by certified mail with return receipt demanded upon the record owner . . . at their last known address . . . ." *Id.* (Emphasis added). On this point, the parties to this appeal seemingly agree. However, the Respondents erroneously believe: "the [county's] obligation to attempt to locate [the property owner] *precedes* the service of notice." *Id.* This theory might have been sound if the legislature had not already directed service to be made at the property owner's last known address. But the legislative enactment is plain on its face – the notice is to be served upon the "record owners" at their "last known address." With the legislature directing service to be made in an exclusive manner and to a specific address, there is no need for the tax collector to serve an owner "after attempting to locate and serve." The task under Idaho Code § 63-1005(2)(a) is simple. The tax collector identifies the record owner and serves notice to the record owner at their last known address listed in the public record.

Additionally, Idaho Code § 63-1005(2)(a) says nothing about "after attempting to locate" the record owner before serving notice by certified mail to their last known address. Such a construction would impose a duty on the tax collector to "attempt to locate" the owner before the

tax collector had any reason to believe the owner is no longer receiving mail at the last known address or is otherwise absent. Moreover, the burden on the tax collector to attempt to "locate and serve" arises under Idaho Code § 63-1005(2)(b), and not until written notice served by certified mailing returns - undelivered. *Id.* Yet the Respondents, as the district court did below, wish to engraft the "attempt to locate and serve" language into Idaho Code § 63-1005(2)(a), when the legislature clearly and plainly inserted the language in Idaho Code § 63-1005(2)(b):

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

If the legislature had intended for the tax collector's duty to "attempt to locate and serve" to *precede* the service of notice by certified mailing, the legislature would not have commanded that such notice by served in an "exclusive manner" to the record owner's "last known address." The only preceding, statutory task the tax collector has to achieve before serving written notice is to find the record owner's last known address in the public record.

The district court committed clear err by adopting the statutory construction advocated by Boise County below and now on appeal.

C. The Phelps Do Not Urge This Court To Find Idaho Statutory Law Pertaing To The Manner Of Giving Notice With Respect To The Issuance of Tax Deeds To Be Unconstitutional.

On this appeal, the Phelps also assert that Boise County violated their fundamental right to due process guaranteed under the Idaho and United States' Constitutions. *See Appellants' Opening Brief, pp. 18-22.* Along these lines, the Phelps argued the district court erred as follows:

> 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.*

See Appellants' Opening Brief, p. 19 (Emphasis added).

In turn, the Respondents characterized the Phelps' appeal on constitutional due process grounds in the following manner:

> Having missed the mark in asserting that Idaho Code was not complied with, the Phelpses urge this Court to find that this compliance – and therefore the statute itself – is unconstitutional.

See Respondents' Brief, pp. 12-13 (Emphasis added).

As noted above, the Phelps do not urge this Court to find the applicable sections of Idaho Code to be unconstitutional. Rather, the Phelps contend the giving of such notice is not only compulsory under Idaho statutory law, but is compelled as well by the constitutional mandates of due process. *See Salladay v. Bowen* 161 Idaho 563, 388 P.3d 577 (2017). In *Salladay*, the Idaho Supreme Court recognized the application of constitutional due process to the taking of real property via tax deeds:

> Idaho Code section 43-716 states that the taxing district is not entitled to a tax deed until the notice requirements of Idaho Code section 43-717 have been satisfied. According to Idaho Code section 43-717, "[t]he treasurer of the district wherein the property for which a tax deed may issue, or the owner of the tax certificate, shall serve or cause to be served written notice of pending issuance of tax deed upon the record owner or owners and parties in interest of records . . . ." I.C. § 43-717(1). The giving of such notice is not only mandated by Idaho Code section 43-717 but is required by the constitutional requirements of due process. U.S. Const. amend. XIV; Idaho Const. art. 1, § 13; *Fuentes v. Shevin*, 407 U.S. 67, 81-82, 92 S.Ct. 1983, 1994-95, 32 L.Ed.2d 556, 570-71 (1972) (holding both notice and a hearing are required under the Fourteenth Amendment before the taking of an individual's property); *Rudd v. Rudd*, 105 Idaho 112, 115, 666 P.2d 639, 642 (1983) ("The right to procedural due process guaranteed under both the Idaho and United States Constitutions requires that a person . . . be given meaningful

> notice and a meaningful opportunity to be heard."). The failure of such notice is a fatal defect. *Sines v. Blaser*, 100 Idaho 50, 52, 592 P.2d 1367, 1369 (1979) ("The giving of such notice is mandatory and the lack of it a fatal defect[.]").

Id. at 161 Idaho 566-567, 388 P.3d 580-581 (Emphasis added). Thus, the Phelps do not contend Idaho statutory law is unconstitutional. They simply contend the county tax collector must satisfy a property owner's fundamental right to due process before taking their property via the tax deed process.

D. The Phelps Urge This Court To Follow Not Ignore U.S. Supreme Court Precedence.

The Respondents next incorrectly state that the Phelps urge this Court to "ignore U.S. Supreme Court precedent by requiring actual notice before any tax deed may be issued." *See Respondents' Brief,* p. 9. Again, the Phelps plainly do not so urge. The Phelps recognize due process does not always require that a property owner receive "actual notice before the government may take his property." *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (citing *Dusenbery v. United States*, 534 U.S. 161, 170). The same, recent precedence from the U.S. Supreme Court has, however, made it equally clear that deciding "to take no further action" when notice has returned unclaimed is not what someone desirous of actually informing a property owner would do when further reasonable steps, if any, were available. *Jones,* 547 U.S at 231. Similarly, in *Giacobbi v. Hall,* 109 Idaho 293, 297, 707 P.2d 404, 408 (1985), this Court announced that notice by publication is sufficient only when an interested party is not "reasonably identifiable." *See also Mennonite Board of Missions v. Adams*, 462 U.S 791, 796 (1983)("[U]nless the [owner] is not reasonably identifiable, constructive notice alone does not satisfy the mandate of Mullane."). In *Giacobbi*, this Court went on to conclude 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 the case at bar, the Boise County Tax Collector failed to follow-up on an obvious lead contained within the county's own records:

> 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?
>
> 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)*].

The factual record clearly establishes that at the point in time when the notices returned undelivered, the Phelps and their location remained "reasonably identifiable." As such, resorting to service by publication as Boise County did here was not yet constitutionally permissible. *Giacobbi v. Hall*, 109 Idaho 293, 707 P.2d 404 (1985). The record shows 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. Yet, the county failed to follow-up on an obvious lead contained within their own 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.* A county desirous of 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. *Jones,* 547 U.S at 231. In this case at bar, additional steps of notifying the Phelps were plainly available to Boise County.

In sum, the Phelps do not urge this Court to ignore legal precedent addressing the question of what steps a taxing agency must take to comply with due process when written notice has returned to the agency undelivered. The germane precedence from both the Idaho Supreme Court and U.S. Supreme Court cited above – *Salladay, Giacobbi, Mennonite, Mullane, Jones* – all support the Phelps' position here on appeal.

When applying the relevant precedence to the facts of this case, it becomes clear that Boise County violated the Phelps' fundamental right to due process by resorting to service of notice by publication before following up on obvious leads to help serve reasonably identifiable property owners.

E. Attorney Fees On Appeal.

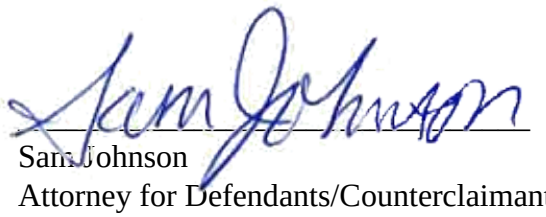
The respective requests from Respondents for an award of attorney fees on appeal should be flatly denied by this Court. The Phelps' position on appeal arises from a reasonable basis in both fact and law and comes before this Court in good faith. *Manwaring Investments, L.C. v. City of Blackfoot,* 162 Idaho 763, 773 (2017). Thus, no fee award should be granted to either Boise County or the Hardys.

CONCLUSION

Based upon the foregoing, the Phelps respectfully seek a reversal of the district court's judgment, and either a declaration that all seven (7) of 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 __4__ day of December, 2018.

JOHNSON & MONTELEONE, L.L.P.



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I CERTIFY that on December 4, 2018, I caused a true and correct copy of the foregoing document to be:

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