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IN THE SUPREME COURT OF THE STATE OF IDAHO

NAMPA HIGHWAY DISTRICT NO. 1, body
politic corporate of the State of Idaho,

Plaintiff- Respondent,

vs.

BRIAN K. KNIGHT and LISA M. KNIGHT,
husband and wife, MANUEL DOMINGUEZ, and
MARIA DOMINGUEZ, husband and wife,
CHICAGO TITLE INSURANCE COMPANY, a
Florida corporation, QUICKEN LOANS INC., a
Michigan corporation, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS,
INC., a Delaware corporation,

Defendants- Appellants

Supreme Court Docket No.

47029-2019

47071-2019

47086-2019

**Canyon County District Court
No. CV14-18-11322**

RESPONDENT'S BRIEF

**Appeal from the Third Judicial District, Canyon County, Idaho
Honorable George A. Southworth, District Judge, Presiding**

E. Don Copple
Davison, Copple, Copple & Copple
P.O. Box 1583
Boise, ID 83701
edcopp@davisoncopp.com

*Attorneys for Appellants Manuel &
Maria Dominguez and Brian & Lisa
Knight*

Kimbell D. Gourley
Jones Williams Fuhrman Gourley, P.A.
225 N. 9th Street, Suite 820
P.O. Box 1097
Boise, ID 83701
kgourley@idalaw.com

*Attorneys for Respondents Nampa Highway
District No. 1*

Wyatt Johnson
Angstman Johnson
199 N. Capital Blvd., Ste. 200
Boise, ID 83702
wyatt@angstman.com

*Attorneys for Appellants Quicken Loans
and Brian & Lisa Knight*

Sheila R. Schwager
Brent R. Wilson
Hawley Troxell Ennis & Hawley LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701
Sschwager@hawleytroxell.com
Bwilson@hawleytroxell.com

Attorneys for Appellant MERS

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES.....iv

I. STATEMENT OF THE CASE 1

II. STATEMENT OF FACTS..... 4

W. Orchard Avenue: 4

Chain of Title on the Knight Deed Property: 5

Chain of Title on the Dominguez Deed Property:..... 6

Overlap of Legal Descriptions: 8

III. RESTATEMENT OF THE ISSUES..... 9

IV. STANDARD OF REVIEW 9

V. ARGUMENT 10

1. Idaho is a Race-Notice State..... 10

2. Burden of Proof..... 12

3. The Shelter Rule..... 12

4. Actual or Constructive Notice-Duty to Investigate and Inquire..... 13

5. Highways are a Minimum of 50-feet wide 15

6. The Deed of Right-of-Way conveyed Fee Simple Title 17

VI. CONCLUSION 19

CERTIFICATE OF SERVICE..... 20

CERTIFICATE OF COMPLIANCE..... 21

TABLE OF CASES AND AUTHORITIES

Cases

<i>Allstate Ins. Co. v. Mocaby</i> , 133 Idaho 593, 990 P.2d 1204 (1999)	9
<i>Barmore vs. Perrone</i> , 145 Idaho 340, 179 P.3d 303 (2008)	19
<i>Bentel vs. Bannock County</i> , 104 Idaho 130, 656 P.2d 1383 (1983).....	17
<i>Brown v. State</i> , 130 Wash. 2d 430, 924 P.2d 908 (1996)	18
<i>C & G, Inc. v. Rule</i> , 135 Idaho 763, 25 P.3d 76 (2001).....	18
<i>Corbridge v. Clark Equip. Co.</i> , 112 Idaho 85, 730 P.2d 1005 (1986).....	10
<i>Dep't of Transp. v. Humphries</i> , 496 S.E.2d 563 (N.C. 1998)	11
<i>Erland v. Nationwide Ins. Co.</i> , 136 Idaho 131, 30 P.3d 286 (2001).....	9
<i>Fajen v. Powlus</i> , 96 Idaho 625, 533 P.2d 746 (1975).....	13
<i>Farm Bureau Fin. Co. v. Carney</i> , 100 Idaho 745, 605 P.2d 509 (1980)	10, 14
<i>Froman v. Madden</i> , 13 Idaho 138, 88 P. 894 (1907).....	11
<i>Halverson vs. N. Latah Highway District</i> , 151 Idaho 196, 254 P.3d 497 (2011)	3, 17
<i>Imig v. McDonald</i> , 77 Idaho 314, 291 P.2d 852 (1955).....	12
<i>JBM, LLC v. Cintorino</i> , 159 Idaho 772, 367 P.3d 167 (2016).....	10
<i>Johnson v. Casper</i> , 75 Idaho 256, 270 P.2d 1012 (1954)	12
<i>Jones v. Independent Title Co.</i> , 23 Cal.2d 859, 147 P.2d 542 (1944).....	13
<i>Kalange v. Rencher</i> , 136 Idaho 192, 30 P.3d 970 (2001)	10, 13
<i>Koupp v. City of Hailey</i> , 110 Idaho 337, 715 P.2d 1007 (Ct. App. 1986)	17
<i>Land and Minerals, Inc. v. Burt</i> , 123 Idaho 862, 853 P.2d 607,613 (1993)	12
<i>Langroise v. Becker</i> , 96 Idaho 218, 220, 526 P.2d 178, 180 (1974).....	3, 11
<i>Meservey vs. Gulliford</i> , 14 Idaho 133, 93 P. 780 (1908)	16, 17
<i>Middlekauff II</i> , 110 Idaho at 916, 719 P.2d at 1176.....	14
<i>Neider v. Shaw</i> , 138 Idaho 503, 65 P.3d 525 (2003)	19
<i>Paurley v. Harris</i> , 75 Idaho 112, 268 P.2d 351 (1954).....	11, 14
<i>Rose v. Knapp</i> , 153 Cal.App.2d 379, 314 P.2d 812	13
<i>Siegel Mobile Home Group, Inc. v. Bowen</i> , 114 Idaho 531, 757 P.2d 1250 (Ct.App.1988)	12
<i>Sopatyk v. Lemhi City</i> , 151 Idaho 809, 264 P.3d 916 (2011).....	16
<i>State of Indiana v. Cinko</i> , 155 Ind. App. 357, 292 N.E. 2d 847 (1973).....	17
<i>State v. Anderson</i> , 241 Ind. 184, 170, N.E. 2d 812(1960)	17
<i>State v. Gonzalez</i> , 165 Idaho 95, 439 P.3d 1267 (2019)	19
<i>Treasure Valley Bank v. Butcher</i> , 117 Idaho 974, 793 P.2d 206 (1990).....	14
<i>Trunnel v. Fergel</i> , 153 Idaho 68, 278 P.3d 938 (2012).....	19
<i>W. Wood Investments, Inc. vs. Acord</i> , 141 Idaho 75, 106 P.3d 401 (2005)	3, 14
<i>W.W. Planning, Inc. v. Clark</i> , 10 Ariz. App. 86, 456 P.2d 406 (1969).....	13
<i>Weitz v. Green</i> , 148 Idaho 851, 230 P.3d 743 (2010)	12

Statutes

Idaho Code §12-117.....	19
Idaho Code §12-121.....	19
Idaho Code §12-2312.....	3
Idaho Code §39-601.....	3, 15
Idaho Code §40-2312.....	15, 16
Idaho Code §40-701.....	3, 15

Idaho Code §55-812.....	10
Idaho Rules of Civil Procedure 54.....	19
Idaho Rules of Civil Procedure 56.....	9
Rev. Stat. of Idaho §932.....	16

Other Authorities

77 AM.JUR.2d <i>Vendor and Purchaser</i> §§ 720, 721.....	12, 13
<i>Right of One Who, with Knowledge of Outstanding Equity, Derived His Interest to Real Property From or Through a Bona Fide Purchaser, to same Protection as Latter</i> , 63 A.L.R. 1362 (1929).....	13

I. STATEMENT OF THE CASE

This case arrives on appeal from the Honorable George A. Southworth's decision granting summary judgment to the Plaintiff, the Nampa Highway District No. 1 ("NHD"). NHD filed a declaratory judgment action against the Defendants seeking the court to quiet title to a certain 33-foot wide strip of land, commonly known as the south half of W. Orchard Avenue in Canyon County, Idaho, and further seeking the court to decree that NHD holds fee simple title to the 33-foot strip.

The basis for NHD's claim of fee simple ownership of the 33-foot wide strip of land is a deed of right-of-way dated August 4, 1941, executed by J. G. and Ora Lupton (collectively, the "Luptons") in favor of NHD. The deed of right-of-way was recorded with the Canyon County, Idaho Recorder's Office on February 21, 1989, as instrument no. 8903057 (the "Deed of Right-of-Way").¹ The 33-foot wide strip of land is a 2,640-foot long and 33-foot wide rectangular shaped parcel, the northern border of which is on the approximate centerline of W. Orchard Ave. and the southern border of which is 33-feet to the south of the centerline (the "33-Foot Strip").²

Defendants Brian Knight and Lisa Knight (collectively, the "Knights") purchased their property on July 10, 1998, and the legal description in the Knights' deed includes that portion of the 33-Foot Strip adjacent to the Knight property (the "Knight Deed Property").³

Defendant, Manuel Dominguez purchased his property on December 11, 2004, and, like the Knight deed, the legal description in the Manual Dominguez deed includes that portion of the 33-Foot Strip adjacent to the Dominguez property (the "Dominguez Deed Property").⁴

¹ R., pp. 279-280

² R., pp. 269 (paragraph 8), and 279-280

³ R., pp. 269 (paragraph 9), 320, and 338

⁴ R., pp. 270 (paragraph 10), 321, and 338

Both the Knights and Manual Dominguez acknowledge they are not bona fide purchasers who took free of NHD's ownership interest in the 33-Foot Strip because they acquired their properties after the recording of the Deed of Right-of-Way⁵. Rather, the Knights and Manual Dominguez, and their lenders, defended the lawsuit on the basis of the “shelter rule”. The Defendants asserted that prior owners of the Knight Deed Property and the Dominguez Deed Property were bona fide purchasers who acquired the 33–Foot Strip free and clear of NHD's unrecorded ownership interest, and that the “shelter rule” protects Defendants even though they are not themselves bona fide purchasers.

For the “shelter rule” to apply, Defendants must prove a prior owner was a bona fide purchaser. But Defendants submitted no affidavits, declarations, or other evidence to establish any prior owners were bona fide purchasers.

Although the burden of proof lies with Defendants to establish the elements of the “shelter rule” defense, NHD nevertheless submitted evidence through the affidavit of Eric Shannon that W. Orchard Ave. is a section line county road, including that portion of the road adjacent to or overlapping the Knight Deed Property and the Dominguez Deed Property. The road has been used and maintained as a public highway since at least 1921.⁶ Thus, NHD has been in physical possession of W. Orchard Avenue since 1921 and so the prior owners of the Knight Deed Property and Dominguez Deed Property had actual or constructive notice that NHD had ownership of a portion of the Knight Deed Property and Dominguez Deed Property. Those prior owners had a duty to inquire and investigate in order to be bona fide purchasers.

⁵ R., p. 496

⁶ R., pp. 325-327, and 495

Defendants did not submit any evidence rebutting the existence and use of W. Orchard Ave. since 1921. Rather, Defendants submitted affidavits from Mr. Knight⁷ and Mr. Dominguez⁸ stating the paved width of W. Orchard Ave. was 22-feet wide, or 11-feet wide on the south side of W. Orchard Ave. Defendants then asserted that any notice the prior owners of the Knight Deed Property and Dominguez Deed Property had was limited to the paved 11-feet and did not include the entire 33-Foot Strip⁹, and the prior owners were bona fide purchasers of all property outside the 11 feet.

Defendants' argument fails for multiple reasons. First, Defendants submitted no evidence as to what actual knowledge or notice the prior owners did or did not have. Second, NHD's possession and use of W. Orchard Ave. is by law deemed actual or constructive notice to a subsequent purchaser of NHD's claim. Any such subsequent purchaser (i.e. the prior owners of the Knight Deed Property and Dominguez Deed Property) cannot have purchased the property in good faith with notice of this inconsistent claim.¹⁰ Again, Defendants submitted no evidence as to what inquiries or investigations the prior owners did or did not make.

Third, pursuant to Idaho Code §39-601 (1933), §40-701 (1966), and §12-2312 (1985) entitled "Width of Highways", and as confirmed by the court in *Halverson vs. N. Latah Highway District*, 151 Idaho 196, 207, 254 P.3d 497, 508 (2011), all public highways in Idaho are a minimum width of fifty (50) feet wide unless (i) otherwise stated in an applicable deed, plat dedication, other document, etc., or (ii) a bridge, alley, or in a townsite or city. Thus, the Defendants' assertion that the prior owners were only on notice of an 11-foot wide paved portion

⁷ R., p. 406

⁸ R., p. 438

⁹ R., pp. 500-501

¹⁰ *Langroise vs. Becker*, 96 Idaho 218 P.2d 178 (1974); and *W. Wood Investments, Inc. vs. Acord*, 141 Idaho 75, 86, 106 P.3d 401, 412 (2005)

of the public highway is belied by the law that NHD's ownership claim on the Knight Deed Property and the Dominguez Deed Property was 25 feet or more.

Finally, NHD asked the court to interpret the Deed of Right-of-Way and decree whether the deed conveyed to NHD fee simple title, or some lesser title. The Honorable George A. Southworth decreed the Deed of Right-of-Way conveyed fee simple title to NHD.¹¹ Defendants did not brief or argue this issue to the trial court, and did not specifically identify this issue in any notice of appeal, and so have waived this issue on appeal.

II. STATEMENT OF FACTS

W. Orchard Avenue:

1. W. Orchard Avenue adjacent to or overlapping the Knight Deed Property and the Dominguez Deed Property is a section line road and has been shown on NHD Maps as Segment No. 143 since 1921.¹²

2. W. Orchard Avenue adjacent to or overlapping the Knight Deed Property and Dominguez Deed Property has been used by the public as a public highway since at least 1921.¹³

3. W. Orchard Avenue adjacent to or overlapping the Knight Deed Property and the Dominguez Deed Property has been maintained and repaired at public expense continuously since at least 1921, by NHD or its predecessors in interest.¹⁴

4. In 1941, NHD discussed improving W. Orchard Ave. and began working to secure a 66-foot wide right-of-way in order to eventually pave the highway. After an engineer

¹¹ R., pp. 502-503

¹² R., p. 327

¹³ R., p. 327

¹⁴ R., p. 327

established the centerline, NHD asked for right-of-way deeds for 33-feet on each side of the centerline before making improvements.¹⁵

5. On August 4, 1941, the Luptons dedicated a 33-foot strip of land to NHD via a Deed of Right-of-Way. The Deed of Right-of-Way contained a legal description of the parcel stretching from the centerline of W. Orchard Ave. onto the Luptons' farm "necessary that a public highway be laid out and opened for public use."¹⁶

Chain of Title on the Knight Deed Property:

6. W.A. & Lou Dedman transferred their interest in the Knight Deed Property and the Dominguez Deed Property to Ora Lupton on or about April 5, 1920, by a deed recorded as instrument no. 106303, records of Canyon County¹⁷;

7. Ora Lupton then transferred her ownership interest in the 33-Foot Strip of land, bordering the centerline of W. Orchard Ave, for both the Knight Deed Property and Dominguez Deed Property to NHD by a deed (i.e. the Deed of Right-of Way) executed on August 4, 1941, and recorded on February 21, 1989, as instrument no. 8903057, records of Canyon County¹⁸;

8. The Probate of the Estate of Ora Lupton transferred the Estate's ownership interest in the Knight Deed Property to James G. Lupton on or about May 10, 1945, by a decree recorded as instrument no. 298481, records of Canyon County¹⁹;

9. The Probate of the Estate of James G. Lupton transferred the Estate's ownership interest in the Knight Deed Property to Howard Wayne Lupton and Marvin Carroll Lupton on or

¹⁵ R., p. 495

¹⁶ R., p. 495

¹⁷ R., pp. 269 and 366

¹⁸ R., pp. 269, 279-280, and 366

¹⁹ R., pp. 366 and 495

about May 18, 1958, by a deed and decree recorded as instrument nos. 457191 and 457276, records of Canyon County, Idaho, respectively²⁰;

10. Marvin Carroll Lupton transferred his ownership interest in the Knight Deed Property to Howard Wayne Lupton on or about May 21, 1958, by a deed recorded as instrument no. 457369, records of Canyon County, Idaho²¹;

11. Howard Wayne and Maxine Lupton transferred their ownership interest in the Knight Deed Property to Billy J. and Vonda L. Downs, husband and wife on or about June 21, 1963, by a deed recorded as instrument no. 535645, records of Canyon County, Idaho²²;

12. Billy J. and Vonda L. Downs transferred their ownership interest in the Knight Deed Property to Brian K. and Lisa M. Knight on or about July 9, 1998 (the “Knight Deed”).²³

13. The Knight Deed conveyed the Knight Deed Property subject to all public rights-of-way of record.²⁴

Chain of Title on the Dominguez Deed Property:

14. W.A. & Lou Dedman transferred their interest in the Knight Deed Property and the Dominguez Deed Property to Ora Lupton on or about April 5, 1920, by a deed recorded as instrument no. 106303, records of Canyon County²⁵;

15. Ora Lupton transferred her ownership interest in the 33-Foot Strip of land, bordering the centerline of W. Orchard Ave, for both the Knight Deed Property and Dominguez

²⁰ R., pp. 367, and 380-385

²¹ R., pp. 367, and 386-387

²² R., pp. 367, and 388-389

²³ R., pp. 269, 281-282, 366, and 369-370

²⁴ *Id.*

²⁵ R., pp. 269, 366, 412, and 414

Deed Property to NHD by a deed (i.e. the Deed of Right-of Way) executed on August 4, 1941, and recorded on February 21, 1989, as instrument no. 8903057, records of Canyon County²⁶;

16. The Probate of the Estate of Ora Lupton transferred the Estate's ownership interest in the Dominguez Deed Property to James G. Lupton on or about May 10, 1945, by a decree recorded as instrument no. 298481, records of Canyon County²⁷;

17. The Probate of the Estate of James G. Lupton transferred the Estate's ownership interest in the Dominguez Deed Property to Howard Wayne Lupton and Marvin Carroll Lupton on or about May 18, 1958, by a deed and decree recorded as instrument nos. 457191 and 457276, records of Canyon County, Idaho, respectively²⁸;

18. Marvin Carroll Lupton transferred his ownership interest in the Dominguez Deed Property to Howard Wayne Lupton on or about May 21, 1958, by a deed recorded as instrument no. 457369, records of Canyon County, Idaho²⁹;

19. Howard Wayne and Maxine Lupton transferred their ownership interest in the Dominguez Deed Property to Roy and Judith Beets, husband and wife, on or about August 31, 1983, by deed recorded as instrument no. 985106, records of Canyon County, Idaho³⁰;

20. Roy and Judith Beets transferred their ownership interest in the Dominguez Deed Property to Calvin B. and Julie D. Wilkinson, husband and wife, on or about May 26, 1999, by deed recorded as instrument no. 9920726, records of Canyon County, Idaho³¹;

²⁶ R., pp. 269, 279-280, 366, 412, 415-416

²⁷ R., pp. 366, 412, 418-419, and 495

²⁸ R., pp. 367, 380-385, 412, and 420-425

²⁹ R., pp. 367, 388-389, 412, 426-427

³⁰ R., pp. 273, 412, and 428

³¹ R., pp. 273, 412, and 429

21. Calvin B. and Julie D. Wilkinson transferred their ownership interest in the Dominguez Deed Property to Manuel Dominguez, an unmarried man, on or about January 3, 2005, by a deed recorded as instrument no. 200500135, records of Canyon County, Idaho³²;

22. The deed to Manuel Dominguez conveyed the Dominguez Deed Property subject to all public right-of-ways of record³³; and

23. Manuel Dominguez, an unmarried man, then transferred his ownership interest in the Dominguez Deed Property to Manuel and Maria Dominguez, husband and wife, on or about July 24, 2018, by a deed recorded as instrument no. 2018-032388, records of Canyon County, Idaho.³⁴

Overlap of Legal Descriptions:

The legal description per the Knight Deed borders on the approximate centerline of W. Orchard Ave. The 33-Foot Strip of land conveyed to NHD pursuant to the Deed of Right-of-Way also borders on the same approximate centerline of W. Orchard Ave. Thus, the overlap of these two legal descriptions and the property at issue is the 33-Foot Strip of land bordering on the approximate centerline of W. Orchard Ave. and a point 33 feet south towards or on the Knight Deed Property.³⁵

The legal description for the Dominguez Deed Property per the Dominguez Deed borders on the approximate centerline of W. Orchard Ave. The 33-Foot Strip of land conveyed to NHD pursuant to the Deed of Right-of-Way also borders on the same approximate centerline of W. Orchard Ave. Thus, the overlap of these two legal descriptions in the property at issue is the 33-

³² R., pp. 270, 283-285, 412, and 430-432

³³ *Id.*

³⁴ R., pp. 273, 412, and 433-435

³⁵ R., pp. 270-271, 327, and 496

Foot Strip of land bordering on the approximate centerline of W. Orchard Ave. and a point 33 feet south towards or on the Dominguez Deed Property.³⁶

III. RESTATEMENT OF THE ISSUES

1. Whether the district court correctly granted summary judgment in favor of NHD, quieting title to the 33-Foot Wide Strip of land in NHD and denying the Defendants' asserted "shelter rule" defense; and

2. Whether the district court correctly decreed that NHD is the owner in fee simple of the 33-Foot Wide Strip of land commonly referred to as W. Orchard Avenue in Canyon County, Idaho, as described in the Deed of Right-of-Way.

IV. STANDARD OF REVIEW

An Idaho appellate court reviewing a ruling on summary judgment employs the same standard as the district court below. *Erland v. Nationwide Ins. Co.*, 136 Idaho 131, 133, 30 P.3d 286, 288 (2001). Under Idaho Rules of Civil Procedure 56(c), summary judgment is proper "if 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 a judgment as a matter of law." Idaho R. Civ. P. 56(c). In order to demonstrate a genuine issue of material fact, the party opposing the motion must present more than a conclusory assertion that an issue of fact exists. *Allstate Ins. Co. v. Mocaby*, 133 Idaho 593, 596, 990 P.2d 1204, 1207 (1999). Instead, the party opposing summary judgment must respond to the motion with specific facts showing there is a general issue for trial. *Id.*; *see also* Idaho R. Civ. P. 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing

³⁶ R., pp. 270-271, and 327

that there is a genuine issue for trial.”). A mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986). Where the evidence reveals no disputed issues of material fact, then only a question of law remains, the Supreme Court exercises free review. *JBM, LLC v. Cintonino*, 159 Idaho 772, 367 P.3d 167, 170 (2016) (citations omitted).

V. ARGUMENT

1. Idaho is a Race-Notice State

Idaho is a race-notice state as set forth in Idaho Code §55-812, which states:

Every conveyance of real property other than a lease for a term not exceeding one (1) year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded.

Recording statutes exist to provide a place and method for a would-be purchaser to determine what kind of title he or she is obtaining. *Farm Bureau Fin. Co. v. Carney*, 100 Idaho 745, 749, 605 P.2d 509, 513 (1980)³⁷. By design, recording statutes compel buyers to record instruments affecting title, for the ultimate purpose of permitting subsequent purchasers to rely upon the record title. *Kalange v. Rencher*, 136 Idaho 192, 196, 30 P.3d 970, 974 (2001)³⁸. In addition to giving notice to others that an interest is claimed in real property, the recording statutes protect against bona fide third parties who may be dealing in the same property. *Id.*³⁹.

³⁷ R., pp. 498-499

³⁸ *Id.*

³⁹ *Id.*

In a pure-race jurisdiction, a purchaser for value who records first-with or without actual or constructive notice of a prior unrecorded conveyance-takes priority. *Dep't of Transp. v. Humphries*, 496 S.E.2d 563, 566 (N.C. 1998)⁴⁰. In a race-notice jurisdiction like Idaho, recorded interests are effective against unrecorded interests when the recorded interest is taken for a valuable consideration and in good faith-i.e., without knowledge, either actual or constructive, that unrecorded interests exist. *Froman v. Madden*, 13 Idaho 138, 88 P. 894 (1907)⁴¹.

A buyer with notice of inconsistent claims does not take in good faith, and one who fails to investigate the obvious inconsistent claim cannot take in good faith. *Langroise v. Becker*, 96 Idaho 218, 220, 526 P.2d 178, 180 (1974)⁴². A buyer cannot be a good faith purchaser when a reasonable investigation of the property would have revealed the existence of the conflicting claim in question. *Id.* at 221⁴³. One buying property occupied by a third party is put on notice of any adverse claim or right of possession by such third party, which a reasonable investigation would reveal. *Paurley v. Harris*, 75 Idaho 112, 117, 268 P.2d 351, 353 (1954)⁴⁴. The prevailing view is that Idaho's Legislature did not intend to allow a buyer with actual knowledge of an adverse claim or possession to eliminate all rights inconsistent with those in his deed merely by recording. *Langroise*, 96 Idaho at 220⁴⁵.

Defendants acknowledge they are not bona fide purchasers⁴⁶ and, thus, rely solely upon the "shelter rule" to support their assertion that they acquired their properties, as applicable, free and clear of NHD's ownership in the 33-Foot Strip of land.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ R., p. 496

2. Burden of Proof

In order to claim the protection of being a bona fide purchaser, a party “must show that at the time of the purchase he paid a valuable consideration and upon the belief and the validity of the vendor's claim of title without notice, actual or constructive, of any outstanding adverse rights of another.” *Weitz v. Green*, 148 Idaho 851, 858–59, 230 P.3d 743, 750–51 (2010) citing *Imig v. McDonald*, 77 Idaho 314, 318, 291 P.2d 852, 855 (1955).⁴⁷

3. The Shelter Rule

The “Shelter Rule” was adopted by the Idaho Court of Appeals in the case of *Sun Valley Land and Minerals, Inc. v. Burt*, 123 Idaho 862, 868, 853 P.2d 607,613 (1993), which states:

The “Shelter Rule” provides that one who is not a bona fide purchaser, but who takes an interest in property from a bona fide purchaser, may be sheltered in the latter’s protective status. This rule is established in many jurisdictions. *See* 77 AM.JUR.2d *Vendor and Purchaser* § 718 (1975); ANNOT., *Right of One Who, with Knowledge of Outstanding Equity, Derived His Interest to Real Property From or Through a Bona Fide Purchaser, to same Protection as Latter*, 63 A.L.R. 1362 (1929) . However, it has not been articulated in Idaho. Idaho Code § 55–606, describing a bona fide purchaser, was adopted from a nearly identical section of the California Civil code, therefore it is presumed to carry the construction given by the jurisdiction from which the statute was taken. *Siegel Mobile Home Group, Inc. v. Bowen*, 114 Idaho 531, 757 P.2d 1250 (Ct.App.1988) *citing Johnson v. Casper*, 75 Idaho 256, 270 P.2d 1012 (1954). When construing their own statute, the California courts have established that a bona fide purchaser can transfer good

⁴⁷ R., p. 500

title to a person who has notice of a prior adverse equity or right. *Jones v. Independent Title Co.*, 23 Cal.2d 859, 147 P.2d 542 (1944); *Rose v. Knapp*, 153 Cal.App.2d 379, 314 P.2d 812 (1957). See also *W.W. Planning, Inc. v. Clark*, 10 Ariz. App. 86, 456 P.2d 406 (1969).

There are two exceptions to the rule: (1) where the interest held by a bona fide purchaser was obtained from a grantor with notice of an outstanding interest in the property, and the property is reconveyed to the grantor; and (2) when the property is reconveyed from a bona fide purchaser to a person guilty of a violation of a trust or duty with respect to the property. 77 AM.JUR.2d *Vendor and Purchaser* §§ 720, 721. The exceptions do not apply in this case. Therefore, Sun Valley is entitled to take the property, even if it knew of DCI's adverse claims, because it is cloaked in First Federal's status as a bona fide purchaser.

For the "shelter rule" to apply, Defendants must prove that one of the prior owners of the Knight Deed Property and Dominguez Deed Property were bona fide purchasers. As previously stated, none of the Defendants submitted such proof⁴⁸.

4. Actual or Constructive Notice-Duty to Investigate and Inquire

The Idaho Supreme Court has consistently held that possession by a person other than the grantee of record is constructive notice to the world. In *Kalange v. Rencher*, the court specifically stated:

We have held that possession by other than the grantee of record is constructive notice to a subsequent purchaser of the claim of the person in possession. *Fajen*

⁴⁸ Some of the Defendants assert the court refused to apply the "shelter rule". This is not correct. The trial court applied the "shelter rule" but correctly found the Defendants submitted no evidence that any prior owner was a bona fide purchaser.

v. Powlus, 96 Idaho 625, 533 P.2d 746 (1975). We have also held that actual knowledge of a prior encumbrance by a subsequent purchaser or mortgagee renders his interest inferior to that encumbrance though not recorded. *Treasure Valley Bank v. Butcher*, 117 Idaho 974 793 P.2d 206 (1990); *Farm Bureau Fin. Co., Inc. v. Carney*, 100 Idaho 745, 605 P.2d 509 (1980).

136 Idaho 192, 196, 30 P.3d 970, 974 (2001). See also, *Paurley v. Harris*, 75 Idaho 112, 117-118, 268 P.2d 351, 353-54 (1954) (“One buying property in the possession of a third party is put upon notice of any claim of title or right of possession by such third party, which a reasonable investigation would reveal.”); *Langroise v. Becker*, 96 Idaho 218, 220–21, 526 P.2d 178, 180–81 (1974) (one cannot be a good faith purchaser or encumbrancer when a reasonable investigation of the property would have revealed the existence of the conflicting claim in question.); *W. Wood Investments, Inc. v. Acord*, 141 Idaho 75, 86, 106 P.3d 401, 412 (2005) (“One who purchases or encumbrances with notice of inconsistent claims does not take in good faith, and one who fails to investigate the open and obvious inconsistent claim cannot take in good faith.” Citing *Middlekauff II*, 110 Idaho at 916, 719 P.2d at 1176 (quoting *Langroise v. Becker*, 96 Idaho 218, 220, 526 P.2d 178, 180 (1974)).

Defendants did not satisfy their burden of proof.⁴⁹ W. Orchard Ave. existed since prior to 1921⁵⁰ and the prior owners of the Knight Deed Property and Dominguez Deed Property all had notice that NHD had possession of a portion of the Knight Deed Property and Dominguez Deed Property and so had a duty to investigate and inquire. Defendants have not submitted any evidence as to whether the prior owners actually knew about the Deed of Right-of-Way or

⁴⁹ R. p., 500

⁵⁰ R., p. 327

whether they inquired or investigated about the ownership interest asserted by NHD. Thus, the court has no evidentiary basis to decree such prior owners are bona fide purchasers, and, accordingly, the “shelter rule” is not applicable.

5. Highways are a Minimum of 50-feet wide

Because there is no evidentiary record as to what the prior owners did or did not know and as to what inquiry or investigation the prior owners did or did not make, Defendants next assert prior owners would only have been on notice as to an eleven (11) foot width (the south half) paved portion of W. Orchard Avenue. This argument fails pursuant to Idaho law.

Idaho Code §40-2312 entitled “Width of Highways” and its predecessor statutes⁵¹ set forth that public highways shall have a minimum width of 50 feet unless (i) otherwise set forth in the plat, dedication, deed, other document, etc., or (ii) a bridge, alley, or in a townsite or city.

Idaho Code §40-2312 states in part:

- (1) Where the width of a highway is stated in the plat, dedication, deed, easement, agreement, official road book, determination or other document or by an oral agreement supported by clear and convincing evidence that effectively conveys, creates, recognizes or modifies the highway or establishes the width, that width shall control.
- (2) Where no width is established as provided for in subsection (1) of this section and where subsection (3) of this section is not applicable, such highways, except bridges and those located within cities⁵², shall be not less than fifty (50) feet wide... .

⁵¹ Rev. Stat. of Idaho §932 (1887), I.C. § 39-601 (1933), and I.C. §40-701 (1966) (the statutory language changed slightly with each renumbering of the statutes)

⁵² The Nampa HD acknowledges there is no specific testimony in the record that the Knight Deed Property and Dominguez Deed Property are not within city or townsite limits, but Defendants have the burden of proof and no evidence has been submitted by Defendants

This minimum width of highways is further supported by Idaho Code §40-109(5)⁵³ and Idaho Code §40-605⁵⁴.

The Court in *Sopatyk v. Lemhi City*, 151 Idaho 809, 817, 264 P.3d 916, 924 (2011) acknowledged the legislative intent as to this minimum 50-foot width for public highways, and stated:

From 1887 forward, the Legislature mandated: “All highways, except alleys and bridges, must be at least fifty feet wide except those now existing of a less width.” Rev. Stat. of Idaho § 932 (1887). This 1887 statute is the progenitor of today's I.C. § 40–2312, which similarly states: “All highways, except bridges and those located within cities, shall be not less than fifty (50) feet wide, except those of a lesser width presently existing.”

Therefore, all highways are fifty feet wide unless a lesser width is established. Neither side presented any evidence establishing the road's width. As discussed in Part V.A, ACR was likely seventy-five feet wide in 1881. Therefore, the Board did not exceed its statutory authority to validate Anderson Creek Road at fifty-feet wide.

The court in *Meservey vs. Gulliford*, 14 Idaho 133, 93 P. 780, 785 (1908), substantiated the reasoning for this minimum 50-foot width, stating:

And, where the right is so acquired, such width must be determined from a consideration of the facts and circumstances peculiar to each case. However, it must be borne in mind that the statute fixes the width of highways at not less than 50 feet, and common

⁵³ "Highways" mean roads, streets, alleys and bridges laid out or established for the public or dedicated or abandoned to the public. Highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, adjacent lands or interests lawfully acquired, pedestrian facilities, and any other structures, works or fixtures incidental to the preservation or improvement of the highways.

⁵⁴ Commissioners may lay out new highways within the county as they determine to be necessary. The right-of-way of any highway shall not be less than fifty (50) feet wide, except in exceptional cases... .

experience shows that width no more than sufficient for the proper keeping up and repair of roads generally.

The court in *Halverson vs. N. Latah Highway District*, 151 Idaho 196, 207, 254 P.3d 497, 508 (2011), further affirmed the ruling in *Meservey vs. Gulliford*, *supra*, and held:

More recently, the Court reaffirmed the finding in *Meservey* that the 50-foot width was “no more than sufficient for the proper keeping up and repair of roads generally.”⁵⁵

Defendants’ assertion that they were only on notice that NHD asserted an interest in eleven (11) paved feet of W. Orchard Ave.⁵⁶ is belied by Idaho law. To the contrary, Idaho law provides that the width of W. Orchard Ave. is a minimum of 50 feet and width, gravel shoulders, barrow pits, storm drainage water ditches, etc. Defendants’ assertion that they only had constructive notice of an eleven (11)-foot paved surface lacks merit.

6. The Deed of Right-of-Way conveyed Fee Simple Title

NHD in its motion for summary judgment requested the court decree whether the Deed of Right-of-Way conveyed to NHD fee simple title to the 33-Foot Strip of land or some lesser title⁵⁷. The Honorable George A. Southworth addressed this issue in his Order on Motions for Summary Judgment, and stated:

Although some courts vary as to the interpretation of deeds purporting to convey land referencing a "right-of-way," where the deed does not contain language about its purpose or otherwise limiting the conveyance and conveys a definite parcel of land, courts

⁵⁵ *Bentel vs. Bannock County*, 104 Idaho 130, 133, 656 P.2d 1383, 1386 (1983) (quoting *Mersevey*, 14 Idaho at 148, 93 P. at 785)

⁵⁶ Defendants have cited to the court three cases, all of which are distinguishable. First, *Koupp v. City of Hailey*, 110 Idaho 337, 340-41, 715 P.2d 1007, 1010-11 (Ct. App. 1986)(case involved underground sewer pipes not visible upon inspection with only a manhole visible from the surface); *State v. Anderson*, 241 Ind. 184, 191-192, 170 N.E. 2d 812, 815-16 (1960)(Buyer was on constructive notice of the public right-of-way and investigated and made inquiries to become a BFP); and *State of Indiana v. Cinko*, 155 Ind. App. 357, 358, 292 N.E. 2d 847, 848 (1973)(Court relied upon the *State v. Anderson* decision, *supra*)

⁵⁷ R., pp. 148 and 351

consistently hold that the deed will be construed to convey fee simple title. *C & G, Inc. v. Rule*, 135 Idaho 763, 767, 25 P.3d 76, 80 (2001).

"On one hand 'right-of-way' can mean to qualify or limit the interest granted in a deed to the right to pass over a tract of land (an easement)." *Id.* (quoting *Brown v. State*, 130 Wash. 2d 430, 436, 924 P.2d 908, 914 (1996)). On the other, the phrase can describe the parcel of land being conveyed for the purpose of constructing its road. *Id.*

Again, the Deed is unambiguous:

Now, Therefore, in consideration of the location and establishment of said public highway as above described and the benefits to accrue to us . . . we do hereby grant and dedicate so much of the lands owned and claimed by us and each of us as aforesaid lying within the boundaries of said strip to the public and to said Nampa Highway District, Canyon County, Idaho, for use as a public highway ...

Here, there is no language in the Deed that limits the use of the property, or indicates that the Luptons intended any type of reversionary interest such as a right of re-entry or possibility of reverted. The Deed expressly "grant[s] and dedicate[s]" the 33-foot strip from the centerline "to the public" and "for use as a public highway." The term "right-of-way" in this Deed merely describes the land generally, and does not serve to limit or restrict the land to an easement.⁵⁸

NHD agrees with the Honorable George A. Southworth's analysis and conclusion. First, Defendants did not address or brief this issue with the trial court despite NHD having included the issue in its motion for summary judgment and memorandum in support. Thus, the issue was

⁵⁸ R., p. 502

not preserved by the Defendants for appeal and is deemed waived.⁵⁹ Second, Defendants’ notices of appeal do not specifically list this issue. Third, Defendants rely upon the decision in *Neider v. Shaw*⁶⁰ for their assertion that the Deed of Right-of-Way conveyed an easement instead of fee simple title, but this case is distinguishable. The Deed of Right-of-Way⁶¹ does not limit the conveyance to a grant of a right-of-way, but rather grants and dedicates the 33-Foot Strip for use as a public highway. *Neider* focused on the actual conveyance language that limited the grant to only a “right-of-way” to the Railroad. The Deed of Right-of-Way does not contain this limitation. NHD respectfully asserts the Honorable Judge Southworth correctly analyzed and decided the issue and his decision should be affirmed.

VI. CONCLUSION

For the above reasons, NHD respectfully requests that the Court uphold the decision of the district court granting summary judgment in NHD’s favor. NHD further requests that the court award NHD attorney’s fees on appeal pursuant to Idaho Code §12-117, §12-121, and I.R.C.P 54.

DATED this 21st day of October, 2019.

Jones ♦ Williams ♦ Fuhrman ♦ Gourley, P.A.

/s/ Kimbell D. Gourley
Kimbell D. Gourley

⁵⁹ *State v. Gonzalez*, 165 Idaho 95, 439 P.3d 1267, 1271 (2019), reh’g denied (May 17, 2019); *Barmore vs. Perrone*, 145 Idaho 340, 343, 179 P.3d 303, 306 (2008)(the longstanding rule of this court is that we will not consider issues that are raised for the first time on appeal); *Trunnel v. Fergel*, 153 Idaho 68, 71, 278 P.3d 938, 941 (2012)(Issues not raised below but raised for the first time on appeal will not be considered or reviewed- cites omitted)

⁶⁰ 138 Idaho 503, 507, 65 P.3d 525, 529 (2003)

⁶¹ R., pp. 279-280

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of October, 2019, a true and correct copy of the above and foregoing document was forwarded addressed as follows:

<p>E. Don Copple Davison, Copple, Copple & Copple 199 N. Capitol Boulevard P.O. Box 1583 Boise, ID 83701 <i>Attorneys for Brian and Lisa Knight, Manuel Dominguez and Maria Dominguez</i></p>	<p>Hand Delivered <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Fax <input type="checkbox"/> Fed. Express <input type="checkbox"/> Icourt <input checked="" type="checkbox"/> edcopples@davisoncopples.com</p>	<p><input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/></p>
<p>Sheila R. Schwager Brent R. Wilson Hawley Troxell Ennis & Hawley LLP 877 Main Street, Suite 1000 P.O. Box 1617 Boise, ID 83701 <i>Attorneys for MERS</i></p>	<p>Hand Delivered <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Fax <input type="checkbox"/> Fed. Express <input type="checkbox"/> Icourt <input checked="" type="checkbox"/> sschwager@hawleytroxell.com Bwilson@hawleytroxell.com</p>	<p><input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/></p>
<p>Wyatt Johnson Angstman Johnson 199 N. Capitol Blvd., Ste 200 Boise, ID 83702 <i>Attorneys for Quicken Loans and Brian and Lisa Knight</i></p>	<p>Hand Delivered <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Fax <input type="checkbox"/> Fed. Express <input type="checkbox"/> Icourt <input checked="" type="checkbox"/> wyatt@angstman.com</p>	<p><input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/></p>

/s/ Kimbell D. Gourley

 Kimbell D. Gourley

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

Idaho Supreme Court	sctbriefs@idcourts.net
E. Don Copple	edcopp@davisoncopp.com
Sheila R. Schwager	sschwager@hawleytroxell.com
Brent R. Wilson	Bwilson@hawleytroxell.com
Wyatt Johnson	wyatt@angstman.com

DATED this 21st day of October, 2019.

/s/ Kimbell D. Gourley
Kimbell D. Gourley