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Namps Highway District No. a v. Knigth Appellant's Reply Brief Dckt. 47071

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Idaho Supreme Court
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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. QUICKEN LOANS INC., a Michigan corporation; Defendant-Appellant, and CHICAGO TITLE INSURANCE, et al., Defendants.	Supreme Court No. 47071-2019

DEFENDANT-APPELLANT QUICKEN LOANS INC.'S REPLY BRIEF

Appeal from the District Court of the Third Judicial
District of the State of Idaho, in and for the County of Canyon
The Honorable George A. Southworth

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CASES

STATUTES

Appellant Quicken Loans Inc. submits the following points and authorities in reply to the arguments in the Respondent's Brief filed on October 21, 2019.

1. **The District Court erred in ruling that the Knights, and thus MERS and Quicken Loans Inc. were not protected under the Shelter Rule.**

Nampa Highway District did not dispute the law of the Shelter Rule. Instead, its only argument that the Shelter Rule does not apply is that Howard Lupton and/or the Downs were not bonafide purchasers. But Nampa Highway District's only argument that Howard Lupton and/or the Downs are not bona fide purchasers is that Lupton and the Downs cannot be because the only way to prove that Howard Lupton or the Downs[1] had no knowledge of the unrecorded conveyance is through direct testimony. (Respondent's Brief at 19). Nampa Highway District's logic is that, because the Appellants bear the initial burden of proof in establishing there were bonafide purchasers in the chain of title, the absence of such direct testimony is fatal to the Appellant's position. But that position is not legally supportable and is contrary to the rules of evidence.

There is no rule that direct testimony from purported bonafide purchasers is indispensable evidence to establish their knowledge. Rather, such knowledge can be established by any relevant evidence, i.e. anything that "has any tendency to make a fact more or less probably than it would be without the evidence[.]" IRE 401(a). *See*, for example, *State v. Betancourt*,[2] (where the Idaho Supreme Court established that even blood test evidence can be used to establish defendant's knowledge).

In this case, the evidence of Howard Lupton and the Downs' actual knowledge can be established by the information that was presented to and available to them. The evidence in

[1]Howard Lupton and/or the Downs were owners of the property at issue before the recording of the deed. R. p 269, para 6.
[2]151 Idaho 635, 262 P.3d 278 (Ct. App. 2011).

record, and previously discussed, is: (1) the physical boundaries of W. Orchard Ave[3]; (2) the deeds presented to and signed by Howard Lupton and the Downs[4]; and (3) the lack of any recording of the conveyance to Nampa Highway District in the public records at the relevant time[5]. None of the evidence shows that Howard Lupton or Downs had any information that would lead to actual knowledge of the transfer to Nampa Highway District. Given this evidence, it is clear that Lupton and the Downs were bonafide purchasers, and as such, the Knights (and Quicken Loans and MERS) are protected under the Shelter Rule.

2. **The District Court erred in finding that Howard Lupton and/or the Downs had constructive notice of a deeded right of way extending 22 feet beyond the edge of W. Orchard Ave.**

Appellants have previously explained the factual and legal reasons why there should be no constructive notice of a right of way beyond the physical boundaries of W. Orchard Ave.[6] Nampa Highway District, for the first time on appeal, now asserts that all parties should have had constructive notice that all highways are deemed not less than 50 feet wide, regardless of the physical roadway.

While the Court will allow parties to "evolve" issues that have been raised below,[7] there are limits. The *State v. Gonzalez* Court explained the difference between being permitted to evolve an argument on appeal and the prohibition against an entirely new position on appeal (like Nampa Highway District has done):

> To be clear, both the issue and the party's position on the issue must be raised before the trial court for it to be properly preserved for appeal. In other words, *Brooke View* portrays a party riding on a horse that has been groomed and reshod for the appellate process, whereas *Garcia-Rodriguez* exemplifies a party entering the appellate process riding a similar-looking but entirely new horse. A groomed horse is expected on appeal, but a different horse is forbidden.[8]

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[3] R. p. 406.
[4] R. p. 475; R. pp. 262-63, 272; p. 388, p. 272, 367, 388-89; p 269, 281-82.
[5] R. p. 323-24, 331-32.
[6] Appellants Opening Br. P. 10-11.
[7] *Ada Cty. Highway Dist. v. Brooke View, Inc.*, 162 Idaho 138, 142 n. 2, 395 P.3d 357, 361 n. 2 (2017).
[8] 165 Idaho 95, 439 P.3d 1267, 1271 (2019).

Although Nampa Highway District has argued constructive notice throughout the case, its argument based upon the legal definitions of the width of highways that is set forth in I.C. 40-2312 and its predecessor statutes[9] is a "similar-looking but entirely new horse." The reason is because Nampa Highway District is not using the statutes to flesh out the legal substance of arguments that have previously been asserted. Rather, it is being used to embellish the factual record because the statute is being used as evidence to change their argument. Respondent's original theory was the Knights had constructive knowledge because the Knights could physically see the highway's limits and could review the recorded right-of-way deed, and thus were on notice of its boundaries. The Respondent's new argument is that the Knights had constructive knowledge because of a previously undisclosed statute. The result has the effect of changing Nampa Highway District's requested relief from a 33-foot wide strip of land to a 50-foot wide strip of land. Nampa Highway District is attempting to argue evidence on appeal that was not presented to the district court. Under the facts of this case, Nampa Highway District should be prevented from raising such a new argument given the prejudice to the Appellants.

Notwithstanding, to the extent the Court considerers the new argument, the statutory definition of 50-foot wide highways does not justify Nampa Highway District's argument that it can avoid the consequences of the Recording Act. First, even assuming that I.C. 40-2312(2) does impose some constructive notice, it would only do so to the extent the total width of the highway was 50-feet, which would be 25 feet on each side of the centerline. In this case, the unrecorded Right of Way Deed granted 33 feet from the center line of the highway.[10] There could be no constructive notice of the total 33-foot width. At least eight feet of the strip of land

[9] Rev. Stat. of Idaho 937 (1887), I.C. 39-601 (1933), and I.C. 40-701 (1966).
[10] R. p. 331-32.

identified within the unrecorded Right of Way Deed falls outside the bounds of any possible constructive notice.

Second, the statute does not actually define roadways constructed under these circumstances to be 50 feet wide. Idaho Code 40-2312 was enacted in 1985. Critically, the Road at issue was created in 1921 when Nampa Highway District built W. Orchard Avenue over a strip of land along the front of the Property.[11] W. Orchard Avenue only occupies the front eleven (11) feet of the Property.[12] In 1921, the Idaho statute defining the width of highways said, in total "[a]ll highways, except alleys and bridges and streets located within townsites, must be not less than 50 feet wide and not to exceed 100 feet wide, except those now existing of a different width."[13] At this time, the apparent practice was for public entities to lay out and maintain streets for the prescriptive period to acquire an easement by adverse possession.[14] Such highways, notwithstanding the statute, only had the width "reasonably necessary for the reasonable convenience of the traveling public . . . such width must be determined from a consideration of the facts and circumstances peculiar to each case."[15] Although the statute is a factor, it is not dispositive.

In this case, nearly one hundred years after the creation of the road, it is no more than 22 feet wide (11 feet on each side of the center line).[16] Occupation sufficient to establish adverse possession under an oral claim of title requires enclosure or usual cultivation or improvement. I.C. 5-210. Nampa Highway District must establish that by clear and satisfactory evidence.[17]

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[11] R. p. 325, para. 9 a-c.
[12] R. p. 406.
[13] Because the statute is not current, the 1919 version of the statute (Compiled Statutes of Idaho Title 11, sec. 1350) is attached as **Exhibit A** to this brief, and the 1932 version of the statute (Idaho Code § 39-601) is attached as **Exhibit B**. The language in both versions is identical.
[14] *Meservey v. Gulliford,* 14 Idaho 133, 144, 93 P. 780, 783 (1908) ("The public use of a highway for the statutory period and the keeping of it in repair at the public expense is all that is necessary to establish it as a highway.")
[15] 14 Idaho at 148, 93 P. at 785.
[16] R. p. 406.
[17] *Swanson v. State*, 83 Idaho 126, 133, 358 P.2d 387, 391 (1960); *Berg v. Fairman*, 107 Idaho 441, 443, 690 P.2d 896, 898 (1984).

Inquiry notice of the law incident to the existence of the roadway does not give notice beyond the bounds of the roadway. The 50-foot statutory designation of the highway width is not binding on an adversely possessed easement. The only evidence of use or enclosure is that of the 11 feet of pavement on the property. The District Court erred concluding that there was constructive notice beyond the boundaries of the highway. Further, even if the Court believes that the statute did give constructive notice of a 50-foot wide strip of land for the freeway, it is clear that the State of Idaho waived the right to any 50-foot highway by only asking for a 33 foot wide strip of land and confirming the same in writing in the Right of Way Deed.[18]

3. **The District Court erred by finding that the Nampa Highway District owns the 33 feet of land in fee simple. If Nampa Highway District has any property interest, it is an easement.**

Nampa Highway District responds that Appellants did not raise the argument, below, that Nampa Highway District's interest, if anything, is an easement. While that is true, it is equally true that Nampa Highway District did not assert its arguments, either.

Nampa Highway District offered no argument or authority to support its claim of fee simple title in its memorandum in support of its summary judgment motions, or its reply in support of its motion.[19] On review, a district court decision will not be upheld on a legal theory that was not properly presented by either party below. "[T]he theory on which the lower court decides the issue must not reroute the course of proceedings so that the alternate base does not have a chance to be litigated. That is, the affected party must have the reason and the opportunity to properly respond to the alternate grounds."[20] Nampa Highway District's bald request for "fee

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[18] *Seaport Citizens Bank v. Dippel,* 112 Idaho 736, 739, 735 P.2d 1047, 1050 (Ct. App. 1987) (discussing waiver of claims).

[19] R. pp. 344 – 352; 468 – 472. Likewise, the issue was not raised by Nampa Highway District in its response to Knights, Quicken Loans Inc.'s or Dominguezes summary judgments. (R. pp. 451-60.)

[20] *State v. Hoskins*, 443 P.3d 231, 236 (Idaho 2019) (analyzing whether to apply the "right result, wrong theory doctrine.)

simple" title in its motion, without argument, does not constitute argument of a theory.[21] It is well recognized that "[t]o properly preserve an issue for appellate review, 'both the issue and the party's position on the issue must be raised before the trial court ....'"[22] Because Nampa Highway District never argued its claim for fee simple title, below, and the court, basically, made the finding at its own direction, the first opportunity for the appellants to address the legal underpinnings has been on appeal. Nampa Highway District should not be allowed the benefit of a ruling on a theory that it did not properly advance.[23]

The only substantive response to the Appellants' argument that the interest conveyed, if any, is that of an easement, is to distinguish one case, *Neider v. Shaw,* 138 Idaho 503, 507, 65 P.3d 525, 529 (2003). Respondent argues that in *Neider v. Shaw,* the deed at issue in that case used the language "right of way."[24] Nampa Highway District misreads *Neider v. Shaw.* In that case, the Supreme Court was examining a roadway dedicated to the public on a plat when it stated that the public dedication of a roadway creates an easement, not fee simple.[25] Tellingly, the Idaho Supreme Court did not arrive at its conclusion because of the specific language of the deed. Instead, it cited to case law and the Idaho Code in support of its general rule and broad proposition that land dedicated for public use only creates an easement:

> When land is dedicated as a street for public use, the landowner owns to the center of the street and the public acquires an easement, not a title in fee simple. *Id.* at 682–83, 107 P. at 400–01 (citing Idaho Rev. Code § 3091 (1908)) (current version with amendments at Idaho Code § 55–309 (2002)).[26]

In addition, further research has clarified that the road established by adverse possession, as this one was in 1921, only established an easement, as a matter of law. "All the right acquired

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[21] *Gordon v. Hedrick,* 159 Idaho 604, 613, 364 P.3d 951, 960 (2015) (rejecting arguments Plaintiff only asserted in caption).
[22] *Id.* (citations omitted).
[23] *Obenchain v. McAlvain Const., Inc.*, 143 Idaho 56, 57, 137 P.3d 443, 444 (2006) (appellate courts will not consider new arguments raised for the first time on appeal).
[24] Respondent's Br. p. 19.
[25] 138 Idaho at 507, 65 P.3d at 529.
[26] 138 Idaho at 507, 65 P.3d at 529.

by the public is an easement in the land consisting of a right to pass over the same and keep the road in repair."[27]

Lastly, if Nampa Highway District was to obtain title in fee simple, its title would constitute an illegal taking and it would need to compensate Appellants for its taking.[28]

In substance, Nampa Highway District presents no contrary legal reason for it to have acquired fee simple title. The Appellants have presented the most compelling and justifiable case for reversing the district court's finding of title in fee simple. As such, Appellants respectfully request that the Supreme Court reverse the order of the trial court and remand for further proceedings consistent with Appellant's briefing.

DATED this 12th day of November, 2019.

WYATT JOHNSON
Attorney for Appellant Quicken Loans Inc.

[27] *Meservey v. Gulliford*, 14 Idaho at 144, 93 P. at 783 (Discussing ownership of land over which a highway passes).
[28] *Brown v. Legal Found. of Washington*, 538 U.S. 216, 233, 123 S. Ct. 1406, 1418, 155 L. Ed. 2d 376 (2003). ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner ... Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes…").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of November, 2019, I caused to be served a true copy of the foregoing DEFENDANT-APPELLANT QUICKEN LOANS INC.'S REPLY BRIEF by the method indicated below, and addressed to those parties marked served below:

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Wyatt Johnson

THE

COMPILED STATUTES OF IDAHO

VOLUME I

POLITICAL CODE

Prepared by
B. W. Oppenheim, Code Commissioner,
and adopted at the 1919 session of the legislature under
the title of Compiled Laws.

Revised by
I. W. Hart, Clerk of the Supreme Court,
to incorporate the permanent laws of the 1919 session under
the authorized title of Compiled Statutes.

1919
Syms-York Co., Printers and Binders
Boise, Idaho

EXHIBIT A

Hist. R. S. § 906, reen. R. C. § 913, reen. C. L. ib.
Attempted repeal, '09, S. B. 108, p. 274, declared unconstitutional. Cunningham v. Thompson, 18 I. 149, 108 P. 898.

Comp. leg.—Cal. Similar: Pol. C. 1872, § 2686; repealed 1880.

§ 1348. [914] Settlements for money on hand. The road overseers must accompany their reports with all moneys remaining in their hands at the date of the report. In addition to the reports required of road overseers in section 1346, each road overseer shall, on the first Monday of each month, report to the auditor of his county all moneys that may have come into his hands as such road overseer during the preceding month, stating therein, particularly, the source from which the same was derived. Upon receiving such report the auditor shall certify to the treasurer the amount due from such road overseer and to what fund or funds the same may belong. Within five days the road overseer making such report shall pay over to the county treasurer the whole amount specified in his report for the preceding month. The treasurer shall then make and file with the auditor a receipt for the amount paid, and the auditor shall give to the road overseer a release for the amount and charge the treasurer with the same. ['90-91, p. 190, § 5.]

Hist. R. S. § 907; am. '90-91, p. 190, § 5, reen. '99, p. 127, § 6, reen. R. C. § 914, reen. C. L. ib.

Attempted repeal, '09, S. B. 108, p. 274, declared unconstitutional. Cunningham v. Thompson, 18 I. 149, 108 P. 898.

§ 1349. [915] Penalty for failure to report. A failure to make a report as required, or to pay over according to law, or on the order of the commissioners, any moneys in his hands, subjects the overseer to a penalty of $25 to be recovered in an action on his bond, together with any balance due from him; suit therefor may be instituted by the prosecuting attorney under order of the board of commissioners. ['90-91, p. 190, § 6.]

Hist. '90-91, p. 190, § 6, reen. '99, p. 127, § 7, reen. R. C. § 915, reen. C. L. ib.
Attempted repeal, '09, S. B. 108, p. 274, declared unconstitutional. Cunningham v. Thompson, 18 I. 149, 108 P. 898.

ARTICLE 5.

LAYING OUT, ALTERING AND DISCONTINUING HIGHWAYS.

§ 1350. Width of highways. All highways, except alleys and bridges and streets located within townsites, must be not less than 50 feet wide and not to exceed 100 feet wide, except those now existing of a different width. [C. L. § 928.]

Hist. (See '85, p. 162, § 10.) R. S. § 932, reen. R. C. § 928; am. '11, c. 133, p. 419, approved March 1, 1911, but effect of amendment partially destroyed by '11, c. 60, § 1, approved March 8, 1911, enacting R. C. § 928a, and fixing width at 50 feet, and § 5, repealing inconsistent legislation; compiled and reen. C. L. § 928.
Attempted repeal, '09, S. B. 108, p. 274, declared unconstitutional. Cunningham v. Thompson, 18 I. 149, 108 P. 898.

Highways by prescription: The width of highways established by prescription or public use must be determined from a consideration of the circumstances peculiar to each case, and is presumed to be 50 feet, unless the facts clearly indicate that the owner limited the width of said road prior to the time it became a highway by user. Meservey v. Guilliford (1908) 14 I. 133, 93 P. 780.

§ 1351. County commissioners may lay out highways. The board of county commissioners may lay out such new roads within the county as they determine to be necessary (under the advice of the county road supervisor in counties wherein a road supervisor shall have been appointed). The right of way of any road shall be not less than 50 feet wide, except in exceptional cases, at the discretion of the board of county commissioners. Said board may also change the width or location or straighten lines of any road under which they take jurisdiction, with the advice of the road supervisor, if there be a road supervisor in such county. If, in the laying out, widening, changing or straightening of any road,

IDAHO CODE

1932

CONTAINING THE

GENERAL LAWS OF IDAHO
ANNOTATED

PUBLISHED BY AUTHORITY OF
LAWS 1931, CHAPTER 213

Compiled by
T. BAILEY LEE, CHIEF JUSTICE
C. BEN ROSS, GOVERNOR
FRED E. LUKENS, SECRETARY OF STATE
OF THE
STATE OF IDAHO

IN FOUR VOLUMES
VOLUME TWO

INDIANAPOLIS
THE BOBBS-MERRILL COMPANY
PUBLISHERS

EXHIBIT B

39-511, each road overseer shall, on the first Monday of each month, report to the auditor of his county all moneys that may have come into his hands as such road overseer during the preceding month, stating therein, particularly, the source from which the same was derived. Upon receiving such report the auditor shall certify to the treasurer the amount due from such road overseer and to what fund or funds the same may belong. Within five days the road overseer making such report shall pay over to the county treasurer the whole amount specified in his report for the preceding month. The treasurer shall then make and file with the auditor a receipt for the amount paid, and the auditor shall give to the road overseer a release for the amount and charge the treasurer with the same.

Hist. R. S., § 907; am. 1890-1891, p. 190, § 5, reen. 1899, p. 127, § 6, reen. R. C. & C. L., § 914; C. S., § 1348.

Attempted repeal, 1909, S. B. 108, p. 274, declared unconstitutional. Cunningham v. Thompson, 18 Idaho 149, 108 Pac. 898.

39-514. Penalty for failure to report.—A failure to make a report as required, or to pay over according to law, or on the order of the commissioners, any moneys in his hands, subjects the overseer to a penalty of twenty-five dollars to be recovered in an action on his bond, together with any balance due from him; suit therefor may be instituted by the prosecuting attorney under order of the board of commissioners.

Hist. 1890-1891, p. 190, § 6, reen. 1899, p. 127, § 7, reen. R. C. & C. L., § 915; C. S., § 1349.

Attempted repeal, 1909, S. B. 108, p. 274, declared unconstitutional. Cunningham v. Thompson, 18 Idaho 149, 108 Pac. 898.

CHAPTER 6

LAYING OUT, ALTERING, AND DISCONTINUING HIGHWAYS

39-601. Width of highways.—All highways, except alleys and bridges and streets located within townsites, must be not less than fifty feet wide and not to exceed one hundred feet wide, except those now existing of a different width.

Hist. (See 1885, p. 162, § 10) R. S., § 932, reen. R. C., § 928; am. 1911, ch. 183, p. 419, approved March 1, 1911, but effect of amendment partially destroyed by 1911, ch. 60, § 1, approved March 8, 1911, enacting R. C., § 928a, and fixing width at fifty feet, and § 5, repealing inconsistent legislation; compiled and reen. C. L., § 928; C. S., § 1350.

Attempted repeal, 1909, S. B. 108, p. 274, declared unconstitutional. Cunningham v. Thompson, 18 Idaho 149, 108 Pac. 898.

Highways by Prescription.

Width of highways established by prescription or public use must be determined from a consideration of circumstances peculiar to each case, and is presumed to be fifty feet, unless facts clearly indicate that owner limited width of said road prior to time it became a highway by user. Meservey v. Gulliford, 14 Idaho 183, 93 Pac. 780.