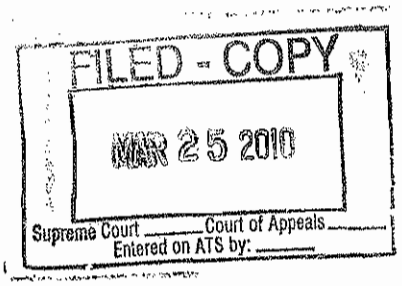
3-25-2010

Kennedy v. Schneider Respondent's Brief Dckt. 36853

IN THE SUPREME COURT OF THE STATE OF IDAHO

VERNON KENNEDY and DOROTHY KENNEDY,	)	Supreme Court No. 36853
Plaintiffs/Respondents,	)	RESPONDENTS BRIEF
Vs.	)	
SAMUEL SCHNEIDER, JR. and LAURIE SCHNEIDER, et. al,	)	
Defendants/Appellants.	)	



APPEAL FROM THE DISTRICT COURT
OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF IDAHO

THE HONORABLE JOHN BRADBURY, DISTRICT JUDGE

Attorney for Respondents:

Dennis L. Albers
Attorney at Law
P.O. Box 314
Grangeville, ID 83530
ISB No. 1437

Attorney for Appellants:

Jonathan D. Hally
Clark & Feeney
P.O. Drawer 285
Lewiston, ID 83501
ISB No. 4979

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATUTES/RULES

I. STATEMENT OF THE CASE
(Supplemented and Corrected)

A1) NATURE OF THE CASE

It is necessary to supplement Mr. Hally's statement of the case appearing on pages 1-4 on the appellants opening brief to give the court a more accurate picture of how the District Judge interpretated the facts and made his initial decision, which appears at (R. 16-25). Those additional facts are also relevant in analyzing the appropriateness of the District Judge's award of attorney fees and his explanation therefore appearing in (R. 56-64). The initial Complaint was filed by the plaintiffs, Kennedy, against not only Samuel E. Schneider, Jr. this appealing defendant, but also Fred J. Stuart and wife, if any, and the heirs, devisees, assigns or statutory trustees of the Steen Meat Company. Consequently, the Complaint originally filed by the plaintiffs was seeking to quiet the title on not only the Schneider property but also two additional, adjacent parcels, one belonging to Fred J. Stuart lying on the west side of the Southfork of the Clearwater River, and one belonging to the Steen Meat Company, which later became known in the trial evidence as the slaughter house property, which turned out to be tax assessor's Tax #30. The evidence surrounding the Stuart property, the slaughter house property, and the undisputed two adjoining, already owned, Kennedy properties is critical to the determination of the number of acres historically attributed to the Kennedy family for which they had been assessed, and upon which they paid taxes for many, many years.

A2) SUPPLEMENTED STATEMENT OF FACTS

The Kennedys agree that the relevant legal descriptions for the assessment for Mr. Schneider appear on page 1 of the appellants brief, and is supported by defendants' Exhibit E. They agree also that the legal description for the Kennedys assessments for the relevant period is reflected in their list on page 1 of the appellants' brief and is supported both by plaintiffs Exhibit

20 and also plaintiffs Exhibit 5. In 1999, the Kennedys acquired a 50 foot strip of old railroad right of way along the west side of their home property, Tax #28, and his acreage on his tax bill increased to 15.066 acres from a pre 1999 tax bill showing 14.588 acres. See Exhibit No. 23.

Plaintiffs' surveyor, Elaine Pearsons, testified and, that evidence was uncontroverted, that the Kennedys occupied Tax #28, which was their home property, and it constituted 8.1 acres. (Tr. 22 Ln. 3). Within the area that was surveyed separately for which the Kennedys did not have vested title, there were 4.04 acres. See Pearsons testimony (Tr. 22 Ln 14). The Kennedy ownership of Tax #16 amounted to 2.01 acres. (See Tr. 25 Ln. 5). The slaughter house property, Tax #30, was included with the Schneider property, by Ms. Pearson in the 4.04 acreage because the Kennedys did not own it at the time this suit began. See the testimony of Pearsons (Tr. 28 Ln. 13-16). (Tax #30 had been, however, assessed to the Kennedys since 1947, see Exhibit 25).

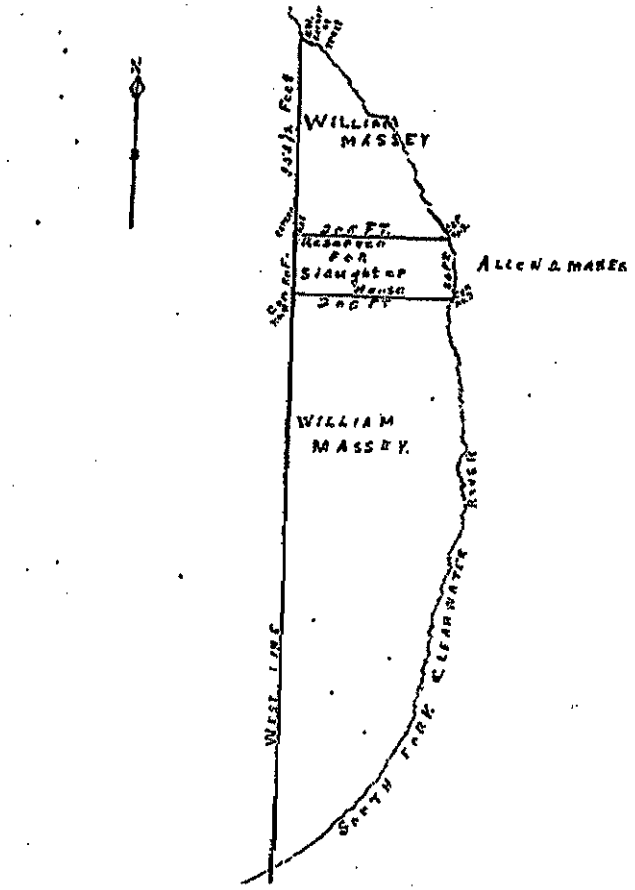
Finally, the Stuart property, while not important in the Schneider suit, was important in the total acreage assessed to the Kennedys and amounted to only .56 to .59 acres. See the uncontested testimony of Carolynn Park, (Tr. 111 Ln. 10-11). Those four acreages, Tax #16, Tax #28, Tax #19, and the Schneider/Slaughter House property all add up to 14.71 acres.

Exhibit 23 demonstrates the pre 1999 tax assessment of 14.588 acres, almost identical to the acreage set forth above that was being exclusively occupied by Kennedys.

(For example, prior to Mr. Kennedy's construction of the perimeter dike road around the hayfield, the only road access to that hayfield was from the south across tribal land directly pass the "greenhouse". (Tr 56-57).

The Kennedys did not have an unencumbered correct deed to the 14.588 acres for which they were assessed. What the Kennedys did have was a faulty chain of title springing from Exhibit 11, the 1924 deed to Mr. Kennedy's ancestors.

The legal description of Tax #16 in that deed is inconsistent with the attachment to that deed. The attachment to that deed is reprinted here:



The above diagram shows that the Kennedy family had reason to believe that they were acquiring property downstream and north of the slaughter house property, which we now know was vested in the Schneiders, the Stuarts, and the Steen Meat Co. (Of course Tax #30, although assessed to Kennedys, was vested in the Steen Meat Co., See Exhibit 6, the title report).

It is likewise important to note that within Exhibit 11, the 1924 deed, the slaughter house property was a rectangle lying perpendicular to the river, and is shown above in the re-print. However, the Idaho County Assessor's Office, for many years, drew Tax #30 parallel to the river, as is depicted in plaintiff's Exhibit 24, which is reproduced on page 2 of the appellant's brief. (In fact the District Judge was mistaken in his initial opinion (Tr. Ln. 16) by concluding

that the public record placed Tax #30 parallel to the river rather than perpendicular to it). The Assessor's Office, in plaintiff's Exhibit 24, also failed to note that the accurate description of Tax #16 caused an offset of approximately 34.5 feet north and 50 feet east of the east boundary of the neighboring tribal property. That offset was repeatedly ignored by the Idaho County Assessor's Office until only recently. See Exhibits 24 and 24a on page 2 of appellants' brief.

A3) SUPPLEMENT TO COURSE OF PROCEEDINGS

Respondents generally agree with the recitation of the course of proceedings appearing on page 4 of appellants' brief except it is important to likewise note that the Order Approving Cost Bill and Judgment against defendant, Samuel E. Schneider, which is (Tr. 47-50) incorporates on (R. 50 Ln. 10-12) the court's oral findings made in open court on August 6, 2009. Those oral findings and the transcript of the hearing relating to the attorney fees, that occurred on August 6, 2009, was added to this record and becomes a separate reporter's transcript entitled "Transcript of a Motion for Attorney Fees had on the 6th day of August, 2009 at 10:49 a.m."

II. ISSUES ON APPEAL

A) Since the Appellants' are limiting their appeal to the issue of whether there was payment of taxes by the Kennedys and the proof thereof, the arguments briefed are thus limited.

B) As an additional issue there is the question of whether the Plaintiffs, Vernon Kennedy and Dorothy Kennedy, should be entitled to their attorney fees on this appeal, pursuant to Idaho Code §12-121, as it is their position that just as the trial was frivolous so is this appeal.

C) Of course the Kennedys desire to have award of attorney fees and costs by the District Court sustained.

III. ARGUMENT

A. STANDARDS OF REVIEW

The Respondents, Kennedy, generally agree with the Standards of Review that are set out in the appellant's brief. That brief suggests the Standard of Review for claims of adverse possession "on appeal". This court will not set aside findings of fact unless they are clearly erroneous. Thus, if the District Court's findings of fact are supported by substantial competent evidence, though conflicting, the court will not disturb those findings. Furthermore, Supreme Court exercises free review over the District Court's conclusions of law to determine whether the court correctly stated the applicable law and whether the legal conclusions are sustained by the facts found.

The final Standard of Review for the issues of attorney fees is as follows:

The District Court has wide discretion to determine and decide whether fees are warranted and only if an abusive discretion is found can that order be set aside. *Win of Michigan, Inc. v. Yreka United Inc.* 137 Idaho 747, at 754, (2002); *McGrew v. McGrew* 139 Idaho 551, at 562, (2003).

B. ARGUMENT

I.

Apparently the appellants have limited their appeal in the case in chief to the issue of whether the plaintiffs proved that they had paid the taxes for the relevant time. The response will thus be limited to that issue.

It is **rare** that a case taken on appeal from the District Court will be "all fours" with a previous pronouncement of the Idaho Supreme Court. This case as it relates to the tax payment issues could not be closer to the precedent and the factual circumstance appearing in *White v.*

Boydstun, 91 Idaho 615, 1967. The similarities between the two cases are "spooky". In *White v. Boydstun* the successful plaintiffs, the Whites, had vested record title to parcel A, which was only .98 acres. In the current case the Kennedy family has vested title to Tax #16, Tax #28, and a tiny piece of railroad right of way. (Tax #30 was included in their assessment but they didn't own it). The acreage now in Tax #28 is 8.1 acres. See Elaine Pearsons testimony (Tr. 22 Ln. 3). The acreage for Tax #16 is 2.01 acres. See the testimony of Elaine Pearson (Tr. 25 Ln. 5). Finally, the railroad right of way added .478 acres after 1999. (See for example the assessment notice for 2007, which is Exhibit 20 and compare the same to the assessment notice shown in Exhibit 23 for 1999). Thus, the total acreage vested in the Kennedys is now only 10.588 acres.

Next, in the *White* case, supra, the Whites occupied also the adjoining Parcel B which, at 91 Idaho 618, shows a drawing of 1.12 acres. Thus, the Whites occupied a total of approximately 2 acres. In this case, Kennedy occupied the 10.588 acres that they owned, and the 4.04 acres which is the surveyed conclusion of Elaine Pearsons (Tr. 22 Ln. 14). (A drawing of the 4.04 acres that includes the slaughter house acreage appears at (R. 11). Additionally, the Kennedys occupied the Stuart property of .56 to .59 acres, as reflected in the testimony of Carolynn Park (Tr. 111 Ln. 7-11). Based upon analysis of Carolynn Park and Elaine Pearsons the Kennedys were actually occupying 15.118 acres and received an assessment notice after 1999, Exhibit 20, showing they were assessed and billed for 15.066 acres.

The *White* case then turns to a discussion concerning the testimony from the Valley County Assessor's Office that "he assessed everything within the perimeter of this fence [bounding tract a and b] which would have been the 2 acres, half of which the Whites did not own". In the Kennedy case Leah Mager testified at (Tr. 136 Ln. 4-13) as follows:

> Q....Did I ask you at that time whether or not you included the value of the hay field with the green house?

A....Yes I did.

Q....Did you in fact do that?

A....Yes.

Q....Why?

A....Just by the way the land is sitting. You come around there and you just assume everything from the green house up is Kennedys.

Mager even had a specific memory that there was a pheasant standing on the hay field when she made her 2003 assessment. (Tr. 137 Ln. 4). She further reiterated her testimony at (Tr. 138 Ln. 18-23) as follows:

Q....And you indicated that it looked to you like it all belonged together. Can you tell the Court whether or not the scene that's shown in Exhibit 36 is what you would have appraised back in 2003 and looked the same?

A....Yes.

The point of the analysis above between the *White v. Boydstun* case, supra, and the Kennedy case is that the holding in *White* absolutely controls this case. The Whites won even though they did not have the vested title to the 1.12 acres, with the court finding essentially as follows at 91 Idaho, 622:

"It should be noted that in the analogous situation concerning adverse occupation of land next to a boundary line between the property of the adverse claimant and his opponent continuous adverse occupation will extend a true boundary line beyond the occupiers deed limits so that the payment of taxes assessed on the property deeded is deemed the payment of taxes on lands in the claimants possession."

Citing also *Egen v. Colwell*, 86 Idaho, 525, (1964); *Beneficial Life Insurance Company v Wakamatusu*, 75 Idaho, 232, (1954); and others. Based upon the clear analysis available in the *White* case and its comparison to the Kennedy case, the argument should be ended in the Kennedys favor. That position is even more strongly supported in Idaho law when the language

from *Wilson v Gladish*, 103 P.3d 5574, 140 Idaho, 861 (2004) is applied to the Kennedy case. The *Wilson* case, which was approved also in *Flynn v Allison*, 97 Idaho 620, noted that Idaho has adopted a liberal construction of the payment of taxes requirement.

The cases holding such liberal interpretations include *White v Boydstun*, supra, *Wilson v Gladish*, supra, and *Flynn v Allison*, supra. Those cases provide several means for satisfying that tax payment requirement. The theory for allowing such liberal interpretation is based on the idea that adverse possessors, in good faith, that have paid all taxes that they have been billed, satisfied the tax payment requirement in each instance. The Kennedy family would certainly be entitled to the benefit of a liberal construction as the overall evidence in this case shows without a doubt that Mr. Kennedy believed he owned the property, (see Exhibit 11) and believed his family had owned the property since 1924. The picture of his mother, (Exhibit 52) taken in 1965 while she was picking up "loose hay" with a pitchfork is further support for the overwhelming evidence demonstrated by the Kennedys that they had exercised complete dominion over the entirety of the property for many, many years. This instance all Mr. Kennedy was initially trying to do was to clear up the issue of the slaughter house property, Tax #30, when it was discovered by virtue of the title commitment, Exhibit 6, that there was a potential ownership of the Schneider family and the potential ownership of Fred Stuart, as to Tax #19.

C. RESPONSE TO APPELLANTS' ARGUMENTS

It is appropriate in a respondents' brief to comment upon the specific factual arguments raised in the appellants' brief.

1) CAROLYNN PARK TESTIMONY

Appellant argues with the District Court's interpretation of Carolynn Park's testimony. Carolynn Park, an employee of the Idaho County Assessor's Office Mapping Department,

described her expertise at (Tr. 93 and 94) including her time as a title officer at Inland Title Company. In her testimony, as the District Judge found, she unequivocally states at (Tr. 108 Ln. 1-5) as follows:

> Q...Did it appear to you that while the acreage for Mr. Kennedy was bigger and the acreage for Mr. Schneider was bigger than what you had, that they both, perhaps, paid tax on the same piece?
>
> A...Yes.

Again, it is very clear from the overall testimony of Elaine Pearsons, the surveyor, added to the testimony of Carolynn Park, the mapper, that the Kennedys were receiving an assessment for 15.066 acres after they acquired the railroad property in 1999. See for example Exhibit 20 among others. The Schneiders were also receiving a tax bill and assessment for more acres than they actually had titled to. See Exhibit 17 showing that Schneiders were being assessed at 60.03 acres. See also the Park testimony at (Tr. 102 Ln. 8). Additionally, and very importantly, the court found that Carolynn Park had testified that given the number of acres for which Mr. Kennedy was taxed the assessment had to include the disputed property. (See the court's opinion at the bottom of R. 21 and again on R. 61). The Idaho cases, again, applying the liberal construction concept, then overwhelmingly hold that if two tax payers are paying taxes and are both assessed upon the disputed piece of property the adverse possessor, in good faith, wins. The Idaho Court of Appeals in *Gage v Davis*, 104 Idaho 48 stated it most succinctly at page 51:

> "When both the record owner and the adverse occupant have paid taxes on the subject parcel during the alleged period of adverse possession the adverse occupant prevails".
>
> Citing *Trappett v Davis*, 102 Idaho 527

2) KENNEDYS' ACTUAL PAYMENT OF TAXES

Appellant argues that there is insufficient proof that the Kennedys have paid the taxes on the disputed parcel. This argument is simply nonsense. Once again, relying on the testimony of Carolynn Park at (R. 102 and Exhibit 18) she answered:

> "relating to Exhibit 18 I am assuming this is from the tax collector Sharon Cox showing that taxes were paid on Vernon Kennedy's parcel".

Once again, Vernon Kennedy only got one tax bill under one county parcel number, RP32NO4E20126A, see Exhibit 19. That parcel number included Tax #28, Tax #16, and Tax #30, even though he did not have vested ownership of Tax #30. Furthermore, Mr. Kennedy indicates that he prepared the deed that conveyed the property to his wife, Exhibit 5. At (Tr. 72 Ln. 4-11), Mr. Kennedy wanted his wife to be included on all the property including Tax #30, the slaughter house property, and (Tr. 72 Ln. 11-13) states as follows:

Q...You also conveyed all the other descriptions that were referred to in your tax bill?

A...Yes.

And (Tr. 72 Ln. 16-18):

Q...And that's – is that how you got the descriptions by looking at your tax bill?

A...Yes.

Then moving to (Tr. 75) the discussion had continued that the property was all one piece and ending at (Tr. 75 Ln. 19-23) the following was stated:

Q...Have you paid all the taxes that were billed to you for this property?

A...Yes, I did.

Q...Every bill that you got?

A...Yes.

This testimony, coupled with the earlier stated Park testimony demonstrates **without contest** that he paid every bill for the entirety of the property for his tax assessment, always. There was no questioning by defense counsel that this testimony is untrue. The finder of fact believed it. It is substantial competent evidence and cannot be set aside on appeal. *Lyce v Marble*, 142 Idaho 264, (2005).

Thus the Kennedys demonstrated that they paid all of the taxes that were billed to them for all the years that he owned the property. That time certainly included the time when he was receiving the bill for 15.066 acres after 1999 and 14.588 acres prior to 1999. We know from Exhibit 25 that Tax #30 was added to his assessment and the families' tax bill in 1947 and consequently based upon his uncontroverted testimony he paid all the taxes for all the bills he received. His family had paid all the bills since, at least, 1947, 62 years.

Further evidence of the fact that the Kennedys had paid all the taxes can be gleaned from the fact that there was never anything in the evidence indicating that there have ever had been a delinquency in the payment of taxes. As all property owners in Idaho know, pursuant to Title 63 Chapter 10 of the Idaho Code, if taxes remain delinquent for more than three (3) years the County Treasurer can begin the collection process. There is absolutely no evidence in this record that there ever had been a delinquency and in fact, as aforesaid, Mr. Kennedy testified that he paid all of the tax bills that he got for this property and we know it was all collected in one tax parcel number. Again, looking at Exhibit 18, which is the receipt showing the payment of taxes for one of the later years, there is no reference to any delinquencies nor any unpaid interest nor penalty for nonpayment.

3) ACREAGE ANALYSIS.

The appellants' brief on page 9 apparently makes an error wherein the appellant says that

Carolynn Park recalculated the Kennedy property which was assessed at 15.066 acres, and determined that it was actually 14.588 acres.

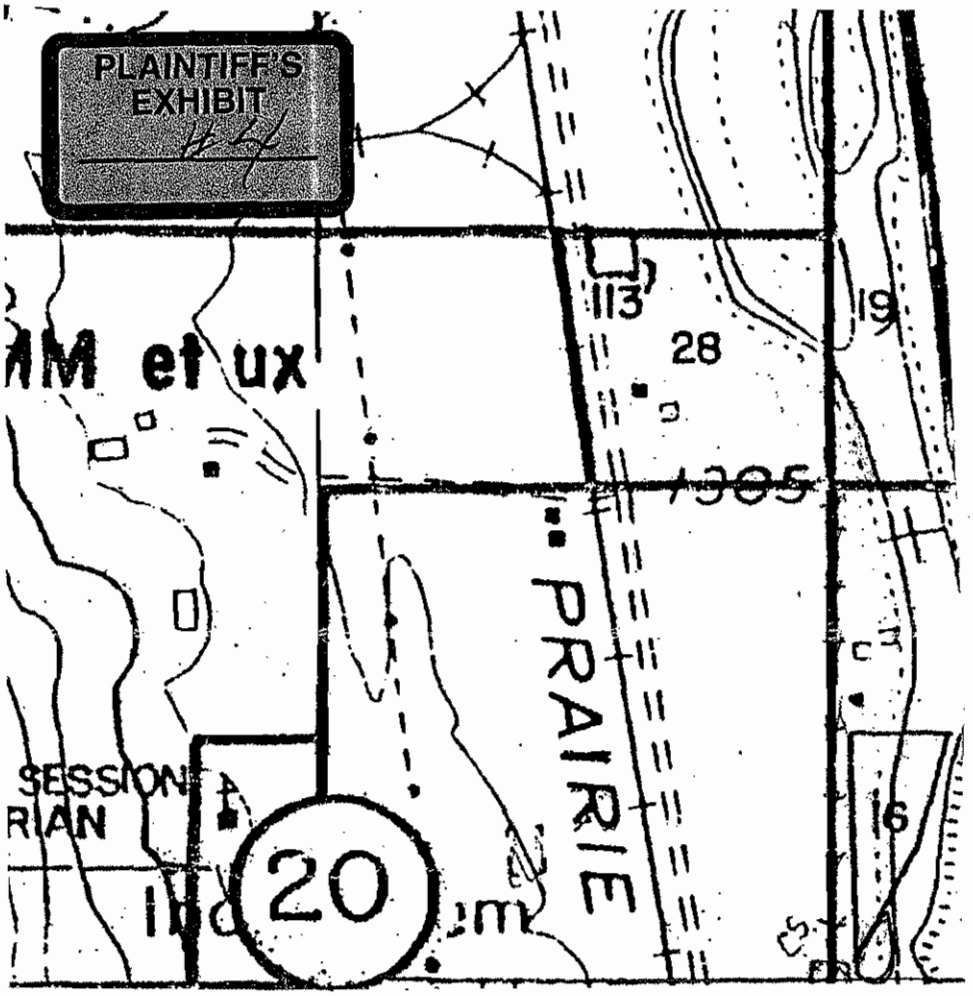
The brief then contradicts itself on page 12 when it says that:

The acreage started at 15.066 acres and was reduced to 13.521 acres.

That is the accurate testimony. (See Tr. 107 Ln. 7-8). It is clear that the reason the property would be reduced is based upon the discovery of the true ownership, including the true ownership of the Tax #30 acreage. The best analysis, however, which is what the Judge relied upon in making his determination as finder of fact, was just as earlier suggested on page 2 of this brief that Tax #28 amounted to 8.1 acres, Tax #16 amounted to 2.01 acres, Tax #19, the Stuart property, amounts to .56 to .59 acres and consequently the difference as stated by Carolynn Park had to be the disputed Schneider property plus the slaughter house, particularly the hayfield, which according to Elaine Pearsons was 4.04 acres. Truly the occupation of the hayfield, the strip and the triangle, as is demonstrated by the following blow up of Exhibit 4, which was found by the court to be a good faith possession by the Kennedy family.

THE RELEVANT PORTION OF EXHIBIT 4

ON NEXT PAGE FOR CLARITY



Thus, the acreage analysis set forth above, makes this case essentially identical to *White v. Boydstun*, supra, and the plaintiffs have thus proven that they have paid the taxes for the entire disputed area of 4.04 acres.

4) APPELLANTS ERRONEOUS ACREAGE ANALYSIS

That at the bottom of page 13 of the appellants' brief, there is a reference to Tax #28 being 12 acres. Appellants' analysis of Exhibit 5 is simply in error. Mr. Kennedy, as he prepared Exhibit 5, used the descriptions on his tax bill and assessment for preparation of that deed. Furthermore, the attachments to Exhibit 5 that relate to his Tax #28 were records from the Assessor's Office similar to Exhibit 25 in evidence. By looking at the attachments to the Quitclaim Deed (Exhibit 5) beginning on the upper left hand corner with the number 28, it is

clear that that is the tax book record and chain of title in the Assessor's Office was created in the way that Exhibit 25 was created. On the far right of Exhibit 25, Harry Kennedy acquired the whole property in 1932. Looking to the far left of the exhibit there was a reduction of .113 acres, which was the well site described in Mr. Kennedy's testimony that he sold, see Exhibit 4, above, but more importantly there is the discussion by Mr. Kennedy on (Tr. 47) that his father sold the eastern side of the original 12 acre parcel sometime prior to 1948. Louie Gagnen (Tr. 48 Ln. 14-20) ended up with that property. Then in 1948, when the Southfork straightened its course that portion of Tax #19 on the west side of the river, which is now in dispute, was not, then, owned by the Kennedys. Thus, a portion of the original 12 acres had already been conveyed away and then it was returned by the flood but it wasn't then owned by the Kennedys. This explains why there is currently only 8.1 acres in what is the remainder of Tax #28.

5) SLAUGHTER HOUSE PROPERTY.

Respondent concedes that the court misinterpreted Exhibit 11, the old 1924 deed, with relation how the slaughter house property was to sit on the ground. The drawing, which was the attachment to Exhibit 11, which is reproduced in this brief on page 3, shows that the slaughter house property was to lie perpendicular to the Southfork of the Clearwater River. Although the court misunderstood that deed analysis it is really a harmless error. It is only the acreage of the slaughter house property, coupled with the acreage of the hayfield, the strip, and the triangle, see Exhibit 4 above, all amounting to 4.04 acres that is relevant. It is suggested that the turning by the court of the slaughter house property by 90° is nothing but "harmless error" in this matter.

Harmless error as defined in *Wohrle v Kootneai County*, 147 Idaho 267, Idaho (2009) describes "harmless error" as error that is not prejudicial and could not have effected or did not

effect the outcome of the proceeding. See also *Umutia v Blaine County*, 134 Idaho, 353 (2000). As set forth above, it really doesn't matter which way the slaughter house property should have been properly turned. It is only the fact that the Tax #20 acreage when added to the Schneider ownership acreage adds up to 4.04 acres in total. Once again, review the testimony of Elaine Pearsons where she testified that she surveyed the hayfield, the strip, and the triangle and it included what the number of acres in the slaughter house property, Tax #30.

6) MAGER TESTIMONY.

The argument appearing under D page 15 of the appellants' brief urges that the reliance on Leah Mager's testimony is misplaced. Respondent, once again, refers to the Valley County Assessor's testimony in *White*, supra, wherein that assessor did basically what Leah Mager did in this case. Each assessor looked at the property occupied by the taxpayer and assessed a value for it. Specifically, again, Leah Mager went to the property, she looked at it, she remembered it because of the pheasant, she assigned a value to the buildings, a value to the Kennedy home, a value to the green house, and **a value to the land**. She indicated that the value was probably increased from previous years. That testimony was **uncontroverted**. Since the value of the hayfield is assessed to Kennedy and is included in his tax bill within the 15.066 acres after 1999, the Kennedys simply win.

7) ASSESSOR'S OFFICE ERRORS.

As a further support for the liberal construction of the tax payment requirement the courts have said if the adverse claimant is in good faith the errors of the Assessor's Office should not be held against those adverse possessors. See *White*, supra, also *Calkins v Kousourus*, 72 Idaho 150, (1951). Here, again the District Court overwhelmingly found that the Kennedys did everything in good faith, paid all the tax bills they received, and the bill they received included

approximately 4 acres more than they owned. The Assessor's Office had a map wherein the strip owned by Schneiders was omitted and Tax #30 was wrongly depicted. Those errors under the *White* case and *Calkins*, supra, are not to be held against the Kennedys because of their good faith. Look at Exhibits 24, which is reproduced on page 2 of the appellants' brief to see the omission of the strip, Tax #30.

IV. RESPONDENTS' WERE AWARED ATTORNEY FEES BY JUDGE BRADBURY PURSUANT TO HIS DECISION MEMORANDUM BEGINNING AT (Tr. 56-64 and the minor correction appearing on page 66)

The District Judge analyzed his wide discretion pursuant to *Win of Michigan Inc. v Yreka United Inc.* 137 Idaho 747, (2002). His analysis appears at (R. 57) with a particularly important footnote on the bottom (R. 58). The court found (R. 61) as follows:

> "Mr. Schneider produced no evidence of any kind to refute the testimony of Mrs. Mager and Ms. Park. The value of the disputed property was included in the Kennedys tax assessment. A simple inquiry of them would of disclosed that. The law is clear that when the title holder and the adverse possessor both pay taxes the adverse possessor prevails".

The Judge cited *Wilson v Gladish*, 140 Idaho 861, (2004) and *Trappett*, supra. The Judge also was obligated, however, to take into account the entirety of the evidence. The Judge found that Mr. Schneider and Ms. Bybee both gave false testimony. See (R. 62). As an example of Mr. Schneider's testimony which is either intentionally false or reckless with regard to the truth, consider the following:

Mr. Schneider says that (Tr. 186 Ln. 18) the event he was describing occurred in 1978 and he was 13 at that time. If he was 13 in 1978, that would have meant that he was born in 1965. However, he says at (Tr. 194 Ln. 22) that he was riding a tricycle in 1965 in his grandmother's yard and yet again at (Tr. 196 Ln. 7) indicates he was born in 1962. With

testimony of that quality it is easy to see why the Judge, as the trier of fact, hearing both sides of the conflict found he was being lied to.

One final piece of evidence, which is very telling, about the truthfulness of the Schneider testimony is the rebuttal testimony of Russell Vessey appearing at (Tr. 218 beginning at Ln. 8). Summarization of that testimony is that Mr. Schneider inquired of Mr. Vessey about what property Schneider may have had on the east side of the river. Specifically, Mr. Schneider inquired about what he had at (Tr. 218 Ln. 14). The question was "did he know what he had"? Mr. Vessey's answer was "No. He said he never knew what they had over there....." With that overall presentation striking the court as untruthful, the exercise of discretion was appropriate and unless should be sustained on appeal.

Furthermore, it is inconceivable to this author, as is reflected in the reporter's transcript of a Motion for Attorney Fees had on the 6th day of August, 2009, that counsel for the Schneiders essentially acknowledged that the plaintiffs' case was as strong a quiet title case as that lawyer, Mr. Hally, had ever seen. See the language at (R. 6 of the Motion Hearing Ln. 12) where this author said "I think overall I would be terrified to go to court with a position where the lawyer thinks that the other side's case is as strong as he has ever seen it". That assertion by this author was uncontested and essentially admitted. The Judge at that hearing stated as follows at (R. 15 Ln. 12):

> "And, Mr. Hally, I would be the first to tell you that I think that you did the best you had with what you had, but I do think it was frivolous. I really do think it was frivolous..... The evidence was overwhelming that the assessor valued the property and included those values in Mr. Kennedy's bill. I mean, that was the testimony that I heard during the trial...But, I think they rolled the dice, and they lost..."

With essentially an admission of appellants' counsel that plaintiffs' case was as strong as it gets, one does not take a case to trial without exposing one's client to attorney fees. Likewise,

you don't take that case on appeal without exposing the client to attorney fees on appeal for a frivolous appeal.

V. REQUESTED RELIEF

Respondents respectfully ask the court to sustain the District Court's initial opinion concerning the title to the property and the outcome of the case. They further ask that this court sustain the District Court's award of attorney fees and costs finding that there is no abuse discretion on the part of the District Judge in awarding such fees and costs.

Finally, the Respondents ask that this Appellate Court grant them attorney fees upon this appeal because if the trial of the initial cause was frivolous the appeal to this court likewise is frivolous. As pointed out by Judge Bradbury, if there had been an inquiry of Leah Mager and others in the Assessor's Office, the inescapable conclusion was that the acres for the hayfield, the strip, and the triangle were included in the Kennedy assessment and had been included for many, many years.

It appears in this case that the defense is asking the court to substitute its judgment for that of the District Court. Appellant simply argues with the testimony of Leah Mager and argues with the testimony of Carolynn Park. However, their testimony was uncontroverted and essentially uncontested. Because their testimony is uncontroverted and uncontested the respondents' case for attorney fees on appeal is even stronger. This court awarded attorney fees to the respondent in *Downey v Vavold*, 144 Idaho 592 (2007). In the *Downy* case this court awarded fees to the appellant based upon the following analysis:

> An award of attorney fees is appropriate if the appellant simply invites the appellate court to second-guess the trial court on conflicting evidence, citing *Gustaves v Gustaves*, 138 Idaho 64 (2002).

In the *Downy* case, supra, there was conflicting evidence and fees were awarded. In the Kennedy case there is no conflicting evidence.

Just as the District Court said if the appellants' attorney had made an inquiry of the people who made the assessment, particularly Leah Mager, there would not have been a frivolous trial and there would not be a frivolous appeal wherein this court is being asked to simply second guess the trial judge. Appellants rolled the dice again and they should lose again.

RESPECTFULLY SUBMITTED this 23 day of March, 2010.

DENNIS L. ALBERS

Certificate of Delivery:

I, the undersigned, do hereby certify that a true and correct copy of the foregoing RESPONDENTS' BRIEF was delivered on the 23 day of March, 2010, as follows:

Jonathan D. Hally
Clark & Feeney
P.O. Drawer 285
Lewiston, ID 83501

(xx) U.S. Mail

DENNIS L. ALBERS