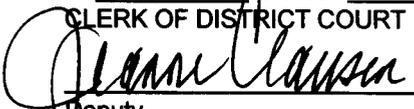


FILED 5/12/2022

AT 5:00 O'Clock P. M
CLERK OF DISTRICT COURT


Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

ESTATE OF MICHEAL E. REAGAN,)
)
 Plaintiff/Counterdefendant,)
 vs.)
)
 MICHAEL J. RUSSELL, an unmarried man,)
 CHRISTINGE M. GRAY, an unmarried)
 woman,)
)
 Defendants/Counterclaimants,)
 vs.)
)
 KENNETH J. PEARSON, and RENA S.)
 PEARSON, husband and wife,)
)
 Defendants.)
)
 _____)

Case No. **CV28-21-3040**

**MEMORANDUM DECISION
GRANTING DEFENDANTS' MOTION
FOR PARTIAL SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on cross motions for partial summary judgment brought by defendants Michael J. Russell ("Mr. Russell") and Christine M. Gray ("Ms. Gray") (collectively "defendants") and plaintiff Estate of Michael R. Reagan ("the Estate"). This case involves a dispute about the validity of an easement over defendants' property.

Michael E. Reagan passed away on September 8, 2019, at which point the Estate took over his property interests. The Estate gained title to four pieces of property by Judgment via adverse possession on October 19, 2020, in Kootenai County Case No. CV28-20-4137, recorded as Kootenai County Instrument No. 2786894000 on

October 27, 2020. Am. Compl. 3, ¶¶ 9-10, Ex. A. These properties are adjacent to Mr. Russell and Ms. Gray's property, and their property is in turn adjacent to the property owned by defendants Kenneth and Rena Pearson. *Id.* 3-4, ¶¶ 5, 11-13. The Estate claims that a road on Mr. Russell and Ms. Gray's property "extend[s] from East Alamo Road on the Pearson Property to the current residence on the Russell Property, which road also extends past the residence on the Russell Property to the Reagan Properties (the "Easement Road"). *Id.* 8-9, ¶ 18. The Estate used what it refers to as the "Easement Road" to access the property that the Estate acquired by way of adverse possession. *Id.* 9, ¶ 20. The Estate claims that "a narrow road extending from the Easement Road through the Reagan Properties" is the only road or access that the Estate has to Alamo Road, the nearest road to the property. *Id.* ¶¶ 22-23. "The Estate sought to improve the Easement Road for access to the Reagan Properties." *Id.* ¶ 24. Defendants allege that, rather than improve the road, the Estate:

used a skid steer or other equipment to attempt to remove the vegetation and level a path between the private driveway on the Property and Neighboring Property. During this unpermitted entry, . . . [the Estate] damaged the Property, including by cutting down and otherwise injuring trees and other foliage and by placing a makeshift "gate" between two trees on the Neighboring Property [without permission].

Id. 4-6, ¶¶ 13-14.

On May 7, 2021, the Estate filed a Complaint against defendants for an action to quiet title and for injunctive relief. The Estate is bringing "an action for declaratory judgment, pursuant to Idaho Code §§ 10-1201 *et seq.*, that the Easement exists, that the Easement burdens the Russell Property and the Pearson Property and benefits the Reagan Properties, and that the Easement is located along the Easement Road. Am. Compl. 10-11 ¶ 37. The Estate is also asking the Court to quiet title and for "an injunction ordering the Defendants . . . to refrain from taking any action to refuse the

Estate . . . access to the Reagan Properties over the Easement Road in its current location on the Russell Property and Pearson Property.” *Id.* at 10-11.

On July 23, 2021, defendants filed an Answer to Complaint and Counterclaim. On August 11, 2021, the Estate filed an Answer to Counterclaim and an Amended Complaint. The Amended Complaint added a claim for declaratory relief. On August 25, 2021, defendants filed an Answer to Amended Complaint and Amended Counterclaim (“Amended Answer and Amended Counterclaim”). Defendants/counter-plaintiffs are countersuing the Estate for civil trespass, civil trespass with damage, and quiet title, claiming that the easement in question is not valid. Defendants have requested a trial by jury. Answer to Am. Compl. and Am. Counterclaim 23. On September 8, 2021, the Estate filed an Answer to Amended Counterclaim.

On March 7, 2022, defendants filed Russell and Gray’s Motion for Partial Summary Judgment, Memorandum in Support of Defendants’ Motion for Partial Summary Judgment, and Statement of Undisputed Material Facts, Declaration of Lynette M. Davis, Declaration of Michael J. Russell, and Affidavit of Judy L. Hodge in support of their motion. On March 18, 2022, the Estate filed Plaintiff’s Memorandum in Opposition to Russell and Gray’s Motion for Partial Summary Judgment, Second Declaration of Jack Mosby, Plaintiff’s Opposition to Russell and Gray’s Statement of Undisputed Facts in Support of Defendant’s Motion for Partial Summary Judgment, and Plaintiff’s Cited Authorities Outside the Idaho Reports. On March 28, 2022, defendants filed their Reply Memorandum in Support of Defendant’s Motion for Partial Summary Judgment.

On March 8, 2022, the Estate filed Plaintiff’s Motion for Partial Summary Judgment, Memorandum in Support of Plaintiff’s Motion for Partial Summary Judgment, and Plaintiff’s Statement of Undisputed Facts, Declaration of Jack Mosby, Declaration

of Renee Schoonover, Declaration of Bill Reagan, and Declaration of Joe Stansell in support of its motion. On March 22, 2022, defendants filed Russell and Gray's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, and Russell and Gray's Statement of Disputed Material Facts, Affidavit of Ann M. Sterner, Affidavit of Gloria A. Neff, and Declaration of Michael J. Russell in support of their motion. On March 28, 2022, the Estate filed its Reply to Russell and Gray's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment and Plaintiff's Objection and Motion to Strike and Motion to Shorten Time and Third Declaration of Jack Mosby in support thereof. On April 1, 2022, defendants filed Russell and Gray's Memorandum in Opposition to Plaintiff's Motion to Strike. The primary issue on summary judgment is whether the easement is valid, thus justifying a claim for declaratory relief, quiet title, and injunctive relief.

On April 4, 2022, a hearing was held on plaintiff's/counter-defendant's motion to shorten time and motion to strike. At the conclusion of that hearing the Court denied plaintiff's motion to strike in all aspects as it pertained to the Declaration of Gloria Neff. The Court granted plaintiff's motion to strike as to any statements attributed to decedent Michael E. Reagan. The Court then heard argument on defendants'/counter-plaintiff's motion for partial summary judgment. At the conclusion of that hearing, the Court took that motion under advisement. The next day, on April 5, 2022, a hearing was held on plaintiff's/counter-defendant's motion for partial summary judgment. At the conclusion of that hearing, the Court denied the plaintiff's/counter-defendant's motion, granted the defendant's/counter-plaintiff's motion for partial summary judgment. As a result of those rulings, the Court found that the defendant's/counter-plaintiff's motion to continue motion for preliminary injunction and the plaintiff's/counter-defendant's motion for preliminary injunction were moot. The Court stated that it would issue a decision setting

forth the reasons for its decisions on summary judgment. The cross-motions for summary judgment are addressed in this memorandum decision and order.

On May 9, 2022, this Court entered an order dismissing Kenneth J. Pearson and Rena S. Pearson from this lawsuit pursuant to stipulation of the parties which was filed on May 6, 2022. The Pearsons were not involved in the present summary judgment motions.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to that Rule, summary judgment must be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by “citing to particular parts of materials in the record” or “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” *Id.*

If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
- (4) issue any other appropriate order.

Id. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168

(1997)). “Such an absence of evidence may be established either by an affirmative showing with the moving party’s own evidence or by a review of all the nonmoving party’s evidence and the contention that such proof of an element is lacking.” *Heath v. Honker’s Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)). “A material fact is one upon which the outcome of the case may be different.” *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998).

Once the moving party meets their burden of establishing the absence of a genuine issue of material fact, the burden shifts to the non-moving party to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party “must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact.” *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). “Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence.” *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep’t of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249,

252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

Where the parties have filed cross-motions for summary judgment relying on the same facts, issues and theories, the parties effectively stipulate that there is no genuine issue of material fact that would preclude the district court from entering summary judgment. However, the mere fact that both parties move for summary judgment does not in and of itself establish that there is no genuine issue of material fact.

The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits.

Intermountain Forest Mgmt., Inc. v. Louisiana Pac. Corp., 136 Idaho 233, 235, 31 P.3d 921, 923 (2001) (internal citations omitted).

III. ANALYSIS

Defendants move for partial summary judgment, "seeking dismissal with prejudice of each of Plaintiff's claims against them and entry of judgment in their favor on their own counterclaim to quiet title" because "the easements Plaintiff alleges are ineffective and do not burden Russell and Gray's land." Mem. in Supp. of Defs.' Mot. for Partial Summ. J. 3. Defendants' primary arguments are: (1) "Any easement purportedly created in the 1972 deed across Russell and Gray's property is void because it was not timely recorded"; and (2) "No easement benefiting plaintiff's property was created by the 1975 deed because the grantors did not own plaintiff's property when the deed was executed". Mem. in Supp. of Defs.' Mot. for P. Summ. J. 9, 12.

A. Partial Summary Judgment is Granted to Defendants Because the 1972 Deed was not Timely Recorded and the Shelter Rule Applies to Defendants.

Defendants first argue that:

As a matter of law, Plaintiff cannot establish an enforceable easement against Russell and Gray. The Hodges were predecessors in interest to Russell and Gray. Davis Decl. Ex. C. The Hodges were bona fide purchasers for value without notice of the alleged easement, and they recorded their deed before the

deed allegedly reserving the easement was recorded. *See generally* Hodge Decl. The easement reservation was therefore not timely and was not properly recorded in the chain of title for Russell and Gray's property. Therefore, it did not bind the Hodges or their successors in interest – including Russell and Gray.

Mem. in Supp. of Defs.' Mot. for Partial Summ. J. at 9 (citation omitted) (citing Hodge Declaration). Defendants continue:

The Neffs conveyed Plaintiff's property to Taylor in the 1972 Deed. Davis Decl. Ex. B. The 1972 Deed purported to reserve an easement over Russell and Gray's property. *Id.* But the 1972 Deed was not recorded until 1981, several years later. *Id.*

In the interim, the Neffs conveyed Russell and Gray's property – the putative servient estate under the 1972 Deed – to the Hodges in 1975 for value, and the Hodges recorded the 1975 Deed in 1977. Hodge Decl. ¶ 2; Davis Decl. Ex. C. At the time of recording, the Hodges thus lacked record notice of the 1972 Deed and purported easement, because the 1972 Deed was not filed until several years later. Additionally, the Hodges lacked actual or other notice of any purported easement; while they owned the property, they had no knowledge or awareness of the 1972 Deed or any alleged easement over the property. Hodge Decl. ¶ 6. Moreover, the Hodges themselves conveyed Russell and Gray's property to the Sterners in 1978 for value, still several years before Taylor recorded her 1972 Deed purporting to create an easement. Hodge Decl. ¶ 7; Davis Decl. Ex. D.

Applying Idaho Code § 55-812, for the alleged easement reserved in the 1972 Deed from the Neffs to Taylor to be enforceable against the Hodges, Taylor would have had to record her 1972 Deed prior to the Hodges recording their 1975 Deed. But Taylor indisputably did not do so. She did not record the 1972 Deed until 1981, several years after the Hodges recorded the 1975 Deed in 1977. Davis Decl. Ex.s B, C. Thus, the easement became ineffective and unenforceable (if it was ever enforceable) no later than the moment at which the Hodges recorded the 1975 Deed, in 1977. I.C. § 55-812. The easement was never effective against the Hodges.

Moreover, through the application of the Shelter Rule, any of the Hodges' successors in interest who purchased for value are likewise not subject to the reservation in the 1972 Deed to Taylor that was not recorded until after the Hodges' own 1975 Deed was recorded. This includes Russell and Gray, who purchased for value. Russell Decl. ¶ 2, Ex. A; Davis Decl. Ex. G (stating the conveyance of the property to Russell and Gray was "For Value Received"). Thus, the easement purportedly reserved in the Neffs' 1972 Deed to Taylor was never effective against the Hodges, and it is not effective against Russell and Gray. Accordingly, the Court should grant summary judgment on the basis that Plaintiff cannot, as a matter of law, establish the enforceability of any alleged easement over the property of Russell and Gray arising from the 1972 Deed from the Neffs to Taylor.

Id. 10-12 (footnotes omitted).

The Estate responds that (1) “Neff presumptively conveyed title to Hodge in the Neff-to-Hodge Deed before conveying title to Taylor in the Neff-to-Taylor Deed”; and (2) “even if delivered before the Neff-to-Hodge deed, the Neff-to-Taylor Deed is enforceable against Russell as there is no bona fide purchaser in the Russell property chain of title”. Pls.’ Mem. in Opp’n to Russell and Gray’s Motion for Partial Summ. J. 6, 10. The Estate argues:

Russell’s arguments that the Neff-to-Taylor Deed is ineffective because it was not recorded until 1981 and the Neff-to-Hodge Deed is ineffective as a reservation for a stranger to the deed both rest on the assumption that Neff delivered title to Taylor before Neff delivered title to Hodge. Idaho law does not support that assumption – not without evidence that Russell has not presented. In that regard, the Idaho Supreme Court states as follows:

“Delivery in some form is absolutely essential” to the validity of a deed. *Bowers v. Cottrell*, 15 Idaho 221, 228, 96 P. 936, 938 (1908). “[D]elivery includes surrender and acceptance, and both are necessary to its completion.” *Estate of Skvorak v. Sec. Union Title Ins. Co.*, 140 Idaho 16, 20-21, 89 P.3d 856, 860-61 (2004) (quoting *Bowers*, 15 Idaho at 228, 96 P. at 938). “[W]hether a deed has been delivered so as to pass title depends upon the intention of the parties.” *Flynn v. Flynn*, 17 Idaho 147, 161, 104 P. 1030, 1034 (1909). “The mere placing of a deed in the hands of the grantee does not necessarily constitute a delivery. The question is one of intention: whether the deed was then intended by the parties to take effect according to its terms.” *Estate of Skvorak*, 140 Idaho at 21, 89 P.3d at 861 (quoting *Crenshaw v. Crenshaw*, 68 Idaho 470, 475, 199 P.2d 264, 267 (1948)). “[T]he evidence of delivery of a deed must come from without the deed. In other words, a deed does not upon its face show delivery, and therefore parol evidence is admissible to show such fact.” *Bowers*, 15 Idaho at 228, 96 P. at 938. “[T]he real test of the delivery of a deed is this: Did the grantor by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered.” *Estate of Skvorak*, 140 Idaho at 21, 89 P.3d at 861 (quoting *Flynn*, 17 Idaho at 160, 104 P. at 1034).

Riley v. W.R. Holdings, LLC, 143 Idaho 116, 123, 138 P.3d 316, 323 (2006).¹

¹ Defendants respond in a footnote: “Plaintiff contends that because the Neffs waited until 1976 to record the 1970 deed vesting title in them, they “did not exhibit clear intent (or perhaps legal ability) to accept their own legal title” until 1976. Plf.’s Opp’n 7. This is inaccurate. Delivery of a valid deed conveys title and is immediately enforceable as between the grantor and grantee. I.C. § 55-606 (“Every grant or conveyance of an estate in real property is conclusive against the grantor . . .”). . . . The fact that the Neffs did not record their own vesting deed from the McCuistons until 1976 says nothing whatsoever about when they took title to the property, other than that they took title no later than the date of recordation. Reply Mem. in Supp. of Defs.’ Mot. for Partial Summ. J. 3 n.1.

We do not have any evidence of when, exactly, Neff manually placed either deed into the possession of its respective grantee (or that, even when Neff did, Neff intended to part title by that act alone). There is no evidence to show Neff's intent to divest title by affecting delivery of the Neff-to-Taylor Deed.

We do know from the recorder stamp thereon, that the Neff-to-Hodge Deed was recorded in 1977 at Daniel Hodge's request. *Lynnette Davis Declaration* ¶ 4, Ex. C. Hodge would not have been able to record the deed without then possessing it. The law therefore presumes that the Neff-to-Hodge Deed was delivered and accepted by that date. See *Estate of Skovorak v. Security Union title Insurance Co.*, 140 Idaho 16, 20-21, 89 P.3d 856, 860-61 (2004).

So, too with Taylor. We know that the Neff-to-Taylor Deed was recorded in 1981 at the request of Taylor's immediate successor, Utah State University. It is axiomatic that Utah State University could not record the deed without possessing it. The law therefore presumes that the Neff-to-Taylor Deed was delivered and accepted by that date. *Id.*

Russell has not cited any evidence that would rebut either presumption that establishes the sequence of Neff's deliveries of title to Hodge (in 1977) and to Taylor (in 1981) and their respective acceptances of same. In fact, the undisputed facts suggest the contrary:

(1) The Neff's own deed of title, the McCuiston-to-Neff Deed executed July 1970, was not recorded at Neff's request until March 1976. *Decl. Mosby* ¶ 6, Ex. B. Neff themselves, therefore, did not exhibit clear intent (or perhaps legal ability) to accept their own legal title until four years after the date of executing the Neff-to-Taylor Deed and one year after the date of executing the Neff-to-Hodge Deed. It seems unlikely that Neff would have intended to (or perhaps was even able to) part with legal title to either Taylor or Hodge before accepting title themselves.

(2) Hodge purchased the Russell Property from Neff in 1975 under the terms of a recorded land-sale contract. *2nd Decl. Mosby* ¶ 3, Ex. P. At the time, an installment land-sale contract (entitled "Purchase Agreement," in the Hodge's case) was in common use in credit transactions for real estate. See Luker, *The Installment Land Contract in Idaho: A Game of Chance*, 15 Idaho L. Rev. 89 (1978- 1979) ("The installment land contract has been, and remains, a common method of conveying in Idaho"). Using that method of finance, "[t]he vendor generally, but not invariably, deposits a deed in escrow, but title does not pass to the purchaser until all installments are paid in accordance with the contract." *Ellis v. Butterfield*, 98 Idaho 644, 646, 570 P.2d 1334, 1336 (1977).

Hodge recorded the Purchase Agreement on December 23, 1975 (only a few months after it was executed by the Neffs on August 21, 1975). *2nd Decl. Mosby* ¶ 3, Ex. P; *Decl. Mosby*, ¶ 7, Ex. C. This Purchase Agreement was the contract for sale of the Russell Property from Neff to Hodge which was then fulfilled upon performance by the Neff-to-Hodge Deed recorded November 29, 1977. *2nd Decl. Mosby* ¶ 3, Ex. P. Notably, the Neff-to-Hodge Deed and the Purchase Agreement were both executed on the same date. However, the deed was recorded over a year and a half later.

...

(3) The Neff-to-Taylor Deed refers to "Vendor's land," (*Decl. Mosby* ¶ 8,

Ex. D) which suggests that the Neff-to-Taylor Deed was also likely executed along with a land-sale contract and not released before its performance.

(4) In her declaration, Judy Hodge says that until 1978 when Hodge sold the Russell Property to Sterner, “we believed the Neffs owned all the surrounding real property, including the adjacent real property to the east, south and west of the [Russell] Property. Thus, we were not aware of any deed conveying the parcel of real property immediately to the west of the [Russell] Property to any third party.” Her testimony supports the conclusion that Neff treated the Estate Property essentially as their own and waited for a significant period of time after executing the Neff-to-Taylor Deed (and delivering the Neff-to-Hodge Deed) before relinquishing title.

(5) The language used in Neff-to-Hodge Deed – purporting to reserve an easement rather than merely notifying the grantee of an exception to the grantor’s warranty of title – itself suggests an intention as to the order in which the two deeds would be given legal effect. Otherwise, the words “the reservations of” in the Neff-to-Hodge Deed become meaningless and as this case well demonstrates, introduces an ambiguity where otherwise there would be none.

In short, Neff presumptively delivered title to Hodge in 1977 before Neff presumptively delivered title to Taylor in 1981. The totality of the evidence supports, rather than contradicts, these presumptions. Seen in that light, the Neff-to-Hodge Deed unmistakably reserves a valid easement for the benefit of Neff and Neff’s successors. And the delivery of the Neff-to-Taylor Deed unmistakably includes a grant of that reserved easement for the benefit of Taylor and Taylor’s successors, including the Estate.

Taking these facts and viewing all reasonable inferences in the light most favorable to the Estate (i.e., the non-moving party), which is this Court’s obligation on this motion for summary judgment, this Court should deny the Defendants’ motion on the basis that there is a genuine issue of material fact as to a key point underpinning the Defendants’ argument. That is, the Defendants’ argument falls flat if Neff did not deliver the deed to Taylor before delivery of the deed to Hodge. There being a genuine issue as to whether this material fact is established, summary judgment in favor of the Defendants is not appropriate and must be denied.

Pls.’ Mem. in Opp’n to Russell and Gray’s Motion for Partial Summ. J. 6-10 (footnotes omitted).

Defendants reply:

Plaintiff’s chief argument against Russell and Gray’s motion for partial summary judgment is that “[t]he hyper-technicalities lurking in Russell’s argument, however, rest on an assumed fact that is presumptively untrue and certainly not in evidence: that Neff delivered title to Taylor before delivering title to Hodge.” Aside from disagreeing that a straightforward application of binding Idaho law is somehow a “hypertechnicality,” Russell and Gray also refute Plaintiff’s perspective on both the evidence and the evidentiary burden implicated in Plaintiff’s opposition.

First, the record discloses that Plaintiff's predecessor Taylor took title to Plaintiff's property in 1972. In particular, Ms. Gloria Neff, the grantor of the 1972 deed to Taylor, testified that "[i]n approximately 1972, my husband and I conveyed" Plaintiff's property "to Geraldine G. Taylor." She went on to say: "Ms. Taylor became the owner of, and took title to" Plaintiff's property "in 1972." Thus, Plaintiff's argument that "[w]e do not have any evidence of when, exactly, Neff manually placed either deed into the possession of its respective grantee," is inaccurate. The undisputed affidavit of the grantor is competent evidence that Taylor took title in 1972, well before Hodge took title in 1975.

Plaintiff speculates that because the Neffs sold *other* property to third parties by way of a land-sale contract, it is "likely" the Neffs also sold Plaintiff's property to Taylor under a similar agreement. But Plaintiff cites no evidence whatsoever that establishes, or comes close to establishing, any such agreement. To the contrary, the scant "evidence" Plaintiff cites undermines rather than supports its theory that Taylor took title sometime later than 1972.

Plaintiff refers to two other subsequent conveyances, from the Neffs to the Hodges and from the Neffs to the McCabes, to show that the Neffs had a "habit" of conveying property by way of land-sale contracts. But in both those instances, as Plaintiff itself recognizes, the land-sale contract to the grantee was recorded in the county land records. Plaintiff offers no evidence, and not even any speculation, as to why the Neffs would have recorded other land-sale contracts but not a hypothetical land-sale contract with Taylor. The only reasonable inference is that there was no *recording* of a land-sale contract with Taylor because there was no land-sale *contract* with Taylor.

In addition, Ms. Neff herself testified that there was no land-sale contract with Taylor. Moreover, Plaintiff itself has previously taken the position that the Neffs "conveyed" Plaintiff's property to Taylor "[o]n July 28, 1972," and it offers no explanation or evidence justifying its change in that position. Plaintiff's attempt to infer the "likely" existence of an unrecorded land-sale contract between the Neffs and Taylor is not supported by the evidence or even its own allegations.

Furthermore, even if there were some evidence of such an agreement, there is no evidence that it was paid off after the Hodges took title to Russell and Gray's property, which Plaintiff would have to show in order to defeat the application of the Stranger Rule. That is, if there were a land-sale contract with Taylor, and Taylor fully performed under the contract and took title prior to the Hodges taking title of their own land, the Stranger Rule would still apply.

Plaintiff asks the Court to infer the existence of an entire contract, including a critically important payoff date, with literally no evidence supporting the existence of the hypothetical contract. Plaintiff cites no consideration, no mutual assent, and no key terms. Moreover, as an agreement that would necessarily relate to an interest in land, the Statute of Frauds applies. Per Idaho Code § 9-505, an "agreement is invalid, unless the same or some note or memorandum thereof, be in writing . . ." As such, "[e]vidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents." The statute applies specifically, through paragraph (4), to agreements "for the sale[] of real property, or of an interest therein." Thus, absent a copy or acceptable substitute of the hypothetical land-sale contract itself, Plaintiff is barred from establishing its existence by reference to other, unrelated contracts

with other, unrelated persons. There is no inference to be had in Plaintiff's favor on this issue.

Examining the issue more broadly, Plaintiffs chief argument is based on speculation rather than inference. Plaintiff uses variations of the word "presumptive" ten separate times in its opposition, including by saying "Neff presumptively conveyed" or "presumptively delivered title" multiple times. But in light of the affirmative and undisputed evidence supplied by grantor Gloria Neff, there is simply no presumption that applies.

Plaintiff speculates there might have been a land-sale contract between the Neffs and Taylor, with not even a scintilla of evidence to support that hypothesis. Because speculation is not sufficient to create a genuine issue of fact, and because, at any rate, the evidence affirmatively shows Taylor did not purchase Plaintiff's property subject to a land-sale contract, Plaintiff's attempt to manufacture a fact dispute based on the delivery date of the Taylor deed must be rejected. Taylor took title before Hodge, and thus the dominant estate of the purported easement in the 1975 Hodge deed was not then owned by the grantors – which means the attempted reservation of an easement benefiting Plaintiff's property is ineffective under binding Idaho law. *Hodgins v. Sales*, 139 Idaho 225,232, 76 P.3d 969, 976 (2003).

Reply Mem. in Supp. of Defs.' Mot. for Partial Summ. J. 3-7 (emphasis in original)

(footnote omitted) (citations omitted).

The Idaho Supreme Court has held that:

An easement is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner. *Akers v. D.L. White Const., Inc.* 142 Idaho 293, 301, 127 P.3d 196, 204 (2005). An express easement, being an interest in real property, may only be created by a written instrument. *Shultz v. Atkins*, 97 Idaho 770, 773, 554 P.2d 948, 951 (1976) (citing I.C. § 9–503; *McReynolds v. Harrigfeld*, 26 Idaho 26, 140 P. 1096 (1914)). "No particular forms or words of art are necessary [to create an express easement]; it is necessary only that the parties make clear their intention to establish a servitude." *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006) (quoting *Seccombe v. Weeks*, 115 Idaho 433, 436, 767 P.2d 276, 279 (Ct. App.1989)). An express easement may be created by a written agreement between the owner of the dominant estate and the owner of the servient estate. It may also be created by a deed from the owner of the servient estate to the owner of the dominant estate.

Tower Asset Sub Inc. v. Lawrence, 143 Idaho 710, 714-15, 152 P.3d 581, 585-86

(2007). However, it is not enough for an express easement to be valid. Easements must be timely recorded in order to be enforceable against subsequent purchasers:

Purchasers of real property must record their interests in order to protect them from other claimants. In Idaho, the first recorded conveyances of real property, taken in good faith and for valuable consideration, except leases not exceeding one year, have priority over subsequent purchasers or mortgagees of the same property. I.C. § 55-812. Our Supreme Court has stated:

The purpose of the recording act in a race-notice jurisdiction, like Idaho, is to allow recorded interests to be effective against unrecorded interests when the recorded interest is taken for a valuable consideration and in good faith.

Langroise v. Becker, 96 Idaho 218, 220, 526 P.2d 178, 180 (1974); see also *Farm Bureau Finance Co. v. Carney*, 100 Idaho 745, 605 P.2d 509 (1980).

Sun Valley Land and Minerals, Inc. v. Burt, 123 Idaho 862, 866, 853 P.2d 607, 611 (Ct. App. 1993).

The design of the recording statutes compels the recording of instruments affecting title, for the ultimate purpose of permitting purchasers to rely upon the record title. In addition to giving notice to others that an interest is claimed in real property, the recording statutes give protection against *bona fide* third parties who may be dealing in the same property.

Kalange v. Rencher, 136 Idaho 192, 196, 30 P.3d 970, 974 (2001) (citations omitted).

Idaho's recording statute only protects *bona fide* purchasers for value.

In order to claim the protection of being a [*bona fide* purchaser for value], 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." *Imig v. McDonald*, 77 Idaho 314, 318, 291 P.2d 852, 855 (1955).

Weitz v. Green, 148 Idaho 851, 858-59, 230 P.3d 743, 750-51 (2010).

"One who purchases land expressly subject to an easement, or with notice, actual or constructive, that is burdened with an existing [valid] easement, takes the land subject to the easement." *Checketts v. Thompson*, 65 Idaho 715, 721, 152 P.2d 585, 587 (1944) (internal quotation omitted); *Fitzpatrick Trustees of Fitzpatrick Revocable Trust v. Kent Trustees of Alan & Sherry Kent Living Trust*, 166 Idaho 365, 372, 458 P.3d 943, 950 (2020) (holding that the easement must be valid to be enforceable).

"Actual notice" is defined as notice expressly and actually given while "constructive notice" is defined as information or knowledge of a fact imputed by

law to a person, although he or she may not actually have it, because he or she could have discovered the fact by proper diligence, and his or her situation was such as to cast upon him or her the duty of inquiring into it. "Actual notice" is defined as knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts. A notice is regarded in law as "actual notice" where the person sought to be charged therewith either knows of the existence of the particular fact in question or is conscious of having the means of knowing it even though such means may not be employed by him or her. "Actual notice" has also been defined as that which is directly and personally given to the one to be notified. Actual notice rests upon personal information or knowledge while constructive notice is notice that the law imputes to a person not having personal information or knowledge. Indeed, "actual notice" is synonymous with knowledge. Actual notice embraces those things that a reasonably diligent inquiry and the exercise of the means of information at hand would disclose.

Equity recognizes both actual and implied, or inquiry, notice. "Inquiry notice" is that notice that a plaintiff would have possessed after due investigation. "Inquiry notice," which is recognized as a form of actual notice, is knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate and ascertain as to ultimate facts. Under the doctrine of inquiry notice, a good-faith failure to seek out the ultimate facts constitutes no defense, and a party asserting this argument is still chargeable with the undiscovered facts as long as a reasonably diligent inquiry would have uncovered them.

58 Am.Jur.2d, Notice, § 4.

Imputed or constructive knowledge is the law's substitute for actual knowledge. It is a legally postulated notice of facts not otherwise perceived and recognized. Such notice may arise from official records and other documents by which a person is legally bound, from communications to an agent or predecessor in interest, or from knowledge of certain facts which should impart notice of the ultimate fact in issue.

Kaupp v. City of Hailey, 110 Idaho 337, 340, 715 P.2d 1007, 1010 (Ct. App. 1986).

When the conveyance of real property is properly recorded, Idaho's recording statutes provide "constructive notice of its contents to subsequent purchasers and mortgagees from the time it is filed. Constructive notice imparted from the record, therefore, is a matter of statute." *Id.* at 195, 30 P.3d at 973 (citing I.C. § 55-811) (internal citation omitted).

It has long been established that a purchaser is charged with every fact shown by the records and is presumed to know every other fact which an examination suggested by the records would have disclosed. One claiming title to lands is

chargeable with notice of every matter affecting the estate, which appears on the face of any recorded deed forming an essential link in his chain of title, and also with notice of such matters as might be learned by inquiry which the recitals in such instruments made it a duty to pursue.

Id. at 195-96, 30 P.3d at 973-74 (citations omitted).

Where a subsequent purchaser is not a *bona fide* purchaser because they are aware of the adverse claim, they may still be “vicariously” sheltered if the person they purchased the property interest from was a *bona fide* purchaser for value. *Nampa Hwy Dist. No. 1 v. Knight*, 166 Idaho 609, 615, 462 P.3d 137, 143 (2020). This is called the “Shelter Rule.” *Id.* “The ‘Shelter Rule’ is a common law doctrine that exists to ‘prevent the stagnation of property, and because the first purchaser, being entitled to hold and enjoy, must be equally entitled to sell.’ *Nampa Hwy Dist. No. 1 v. Knight*, 166 Idaho 609, 615, 462 P.3d 137, 143 (2020) (quotation omitted).

The Shelter Rule was recognized by the Idaho Court of Appeals in *Sun Valley* . . . [for the first time]:

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. 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. When construing their own statute, the California courts have established that a *bona fide* purchaser can transfer good title to a person who has notice of a prior adverse equity or right.

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.

Id. at 615-16, 462 P.3d at 143-44 (affirming the appellate court’s adoption of the Shelter Rule).

First, regarding delivery of the deeds, the Court finds the Estate’s recitation of

the law above from *Riley v. W.R. Holdings, LLC*, 143 Idaho 116, 123, 138 P.3d 316, 323 (2006) regarding the delivery of deeds is correct. The Court repeats it for convenience:

“Delivery in some form is absolutely essential” to the validity of a deed. *Bowers v. Cottrell*, 15 Idaho 221, 228, 96 P. 936, 938 (1908). “[D]elivery includes surrender and acceptance, and both are necessary to its completion.” *Estate of Skvorak v. Sec. Union Title Ins. Co.*, 140 Idaho 16, 20-21, 89 P.3d 856, 860-61 (2004) (quoting *Bowers*, 15 Idaho at 228, 96 P. at 938). “[W]hether a deed has been delivered so as to pass title depends upon the intention of the parties.” *Flynn v. Flynn*, 17 Idaho 147, 161, 104 P. 1030, 1034 (1909). “The mere placing of a deed in the hands of the grantee does not necessarily constitute a delivery. The question is one of intention: whether the deed was then intended by the parties to take effect according to its terms.” *Estate of Skvorak*, 140 Idaho at 21, 89 P.3d at 861 (quoting *Crenshaw v. Crenshaw*, 68 Idaho 470, 475, 199 P.2d 264, 267 (1948)). “[T]he evidence of delivery of a deed must come from without the deed. In other words, a deed does not upon its face show delivery, and therefore parol evidence is admissible to show such fact.” *Bowers*, 15 Idaho at 228, 96 P. at 938. “[T]he real test of the delivery of a deed is this: Did the grantor by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered.” *Estate of Skvorak*, 140 Idaho at 21, 89 P.3d at 861 (quoting *Flynn*, 17 Idaho at 160, 104 P. at 1034).

Pls.’ Mem. in Opp’n to Russell and Gray’s Motion for Partial Summ. J. 6 (citing *Riley v. W.R. Holdings, LLC*, 143 Idaho 116, 123, 138 P.3d 316, 323 (2006)). However, the Court rejects the notion that the Idaho Supreme Court in any way stated or even implied that there is a presumption of deed delivery at the date of recording. Defendants are correct in their assertion that the only thing the Court can infer is that “they took title no later than the date of recordation.” Reply Mem. in Supp. of Defs.’ Mot. for Partial Summ. J. 3 n.1. That is not the same as a presumption, which would shift the burden of proof. See, e.g. 29 Am. Jur. 2d, Evidence, § 169. Likewise, the Estate’s citation to *Est. of Skovorak v. Sec. Union Title Ins. Co.*, 140 Idaho 16, 20-21, 89 P.3d 856, 860-61 (2004) as support for this argument is incorrect. *Estate of Skovorak* dealt with whether a third-party mortgagee’s quitclaim deeds to mortgagors extinguished a mortgage in foreclosure proceedings, which is nothing like the present case. The only presumption

applicable here is, as defendants have stated, a rebuttable presumption that the deeds were be delivered no later than the date of recording. *Hiddleson v. Cahoon*, 37 Idaho 142, 214 P. 1042, 1042 (1923) (“Many courts hold that a deed is presumed to have been delivered on the date of the instrument. When, however, the date of the acknowledgment . . . is subsequent to the date of the instrument, it seems reasonable to presume, in the absence of any evidence to the contrary, that it was delivered not later than the date of the acknowledgment.”).

Defendants have brought forth evidence that the deeds were delivered in 1972 by way of Ms. Neff’s affidavit, whereby she states that she conveyed the property to Ms. Taylor in 1972 and that Ms. Taylor “became the owner of, and took title to” her property in 1972. Reply Mem. in Supp. of Defs.’ Mot. for Partial Summ. J. 4. The Estate has offered no convincing evidence to rebut this statement. This statement by Ms. Neff was enough both to overcome the rebuttable presumption that the deed was not delivered until it was recorded and to rebut the Estate’s assertion that the Neffs did not “exhibit clear intent (or perhaps legal ability) to accept their own legal title until four years after the date of executing the Neff-to-Taylor Deed and one year after the date of executing the Neff-to-Hodge Deed”. Ms. Neff has stated that she conveyed the property in 1972, which indicates that she had accepted legal title prior to that date. The Estate’s speculative assertion that the Neffs did not intend to accept title until they recorded their deed in 1976 is wholly unsupported by the record and is, in fact, contrary to her statement in her affidavit, as she could not pass title to the Hodges if she had not yet accepted title herself.

Likewise, the Estate’s assertion that Ms Hodge’s statement that she believed the Neffs owned the property that now belongs to the Estate is not enough. Pls.’ Mem. in Opp’n to Russell and Gray’s Motion for Partial Summ. J. 9. Ms. Hodge offered no

evidence of what made her believe that the Neffs owned that property or held themselves out to own the property. Without more, this is merely a speculative statement that is not enough to overcome the Estate's burden of refuting Ms. Neff's testimony. The Estate has therefore offered no evidence to controvert Ms. Neff's statements in her affidavit. Further, the Estate's theory that there might have been a land-sale contract is unconvincing. The Estate offers no evidence beyond the speculation that land-sale contracts were common at the time and "Neff was in the habit of executing instruments well before Neff intended for them to take effect". Pls.' Mem. in Opp'n to Russell and Gray's Mot. for Partial Summ. J. 9 This is simply not enough to overcome summary judgment. Ms. Neff stated in her affidavit that, although she and her husband had entered into installment contracts, she is sure that she and her husband did not enter into such a contract with Geraldine Taylor. Neff Aff. ¶ 5. The Estate has offered no evidence to rebut this testimony, and the Court agrees with defendants' reply to the Estate's assertions, also quoted above in detail. Therefore, the Court agrees with defendants that the "undisputed affidavit of the grantor is competent evidence that Taylor took title in 1972, well before Hodge took title in 1975." Reply Mem. in Supp. of Defs.' Mot. for Partial Summ. J. 4.

Next, regarding the issue of whether defendants or any of the prior owners of their property had proper notice of the easements, defendants have satisfied their burden of proving that they and their predecessor owners had no actual or inquiry notice of the easements. Both Ms. Neff and Ms. Hodge asserted in their affidavits that they and their respective husbands did not know of an easement crossing their property and that they did not agree that any third party may use their private driveway to access the property to the west of their property. Hodge Aff. ¶ 6; Neff. Aff. ¶ 7; Reply Mem. in Supp. of Defs.' Mot. for Partial Summ. J. 9. Ms. Neff also stated that she was not

aware of any portion of the private driveway was used to access the Estate's property. Neff. Aff. ¶ 9. The Estate has offered no evidence to rebut these statements made by Ms. Neff and Ms. Hodge. If there was no evidence that someone had been using their property to cross into their adjacent property, there was no actual or inquiry notice. Accordingly, the Court finds that there was no actual or inquiry notice of the easements.

Similarly, the Court finds that there was no record or constructive notice of the easements because of the recording statute and the shelter rule. As stated above, the recording statutes are meant to protect against *bona fide* third parties who may be dealing in the same property, and the Shelter Rule is meant to encourage *bona fide* purchaser's free transfer of property. The Court agrees with defendants that the 1972 Neff-to-Taylor deed and the 1975 Neff-to-Hodge deed have different language, which do not make it obvious that they refer to the same easement. The 1972 deed refers to a "twenty foot easement for road purposes across the Vendors' adjoining land on the East along a route to be agreed upon the by parties". Mosby Decl. Ex. D. The 1975 deed contains the language "BUT SUBJECT to the reservations of a road easement on and long a route to be agreed upon by the parties". *Id.* Ex. C. The Estate has made no convincing argument to show that the two deeds referred to the same easement, let alone which route had been agreed upon by the parties. Therefore, the Neff-to-Hodge deed did not impute notice on the Hodges. Such notice must come from record or constructive notice. However, since the Neff-to-Taylor deed was recorded after the Neff-to-Hodge deed, no such record notice was available to the Hodges. Accordingly, there was also no record or constructive notice.

Since the Hodges had no notice of the easements, they were *bona fide* purchasers. They were purchasers for value because they paid fair market value for the property, which is valuable consideration. Hodge Decl. ¶ 2. Since the Hodges were

bona fide purchasers for value, the Shelter Rule protects anyone the Hodges chose to sell their property to, regardless of whether the purchaser had notice of the easements.

Neither exceptions to the Shelter Rule are applicable here, so the Russells are protected by the Shelter Rule, and the Court need not determine whether they were also *bona fide* purchasers without notice. Accordingly, defendants' motion for summary judgment is granted because the Hodges were *bona fide* purchasers for value without notice of the easements, and the Russells are protected under the Shelter Rule, thus making the easements unenforceable.

B. The Court finds that the Stranger-to-the-Deed Rule is still the law of the State of Idaho.

Defendants next argue that:

. . . when the Neffs attempted to reserve an easement for the benefit of Plaintiff's land in the 1975 Deed conveying the Russell and Gray property, the reservation was ineffective because the Neffs no longer owned the land to be benefited by the putative easement. Because Taylor was not a party to the 1975 Deed, or in other words, was a stranger to the 1975 Deed, between the Neffs and the Hodges, no interest was created benefiting Taylor's land – what is now Plaintiff's land.

. . . .

In short, Plaintiff's assertion of an easement based on the 1975 Deed from the Neffs to the Hodges must fail as a matter of law because at the time of conveyance the owner of Plaintiff's property, Taylor, was a stranger to the deed. Russell and Gray are therefore entitled to summary judgment holding that the 1975 Deed – Instrument No. 750829 – does not and cannot establish the existence of an enforceable easement burdening Russell and Gray's property and benefiting Plaintiff's property.

Mem. in Supp. of Defs.' Mot. for Partial Summ. J. 12, 14.

The Estate responds that, if the Court finds the Neff-to-Hodge Deed was delivered to Hodge after the Neff-to-Taylor Deed was delivered to Taylor, there may well be a "stranger to the deed" issue. Pls.' Mem. in Opp'n to Russell and Gray's Mot. for Partial Summ. J. 13. The Estate argues, however, that this "shouldn't be enough to

defeat the clear grantor intent that Russell readily concedes² is self-evident in both the Neff-to-Taylor Deed and the Neff-to-Hodge Deed. *Id.* The Estate then “respectfully invite[s] the court to reject the [stranger-to-the-deed rule] without analysis in *Davis* and instead approve the reservation of the easement in the Neff-to-Hodge Deed for the benefit of the Estate Property as being a permissible exercise of clear grantor intent.” *Id.* at 15. Its justification for this request is that the stranger-to-the-deed doctrine is “an anachronistic rule that should no longer apply”:

It is unclear whether the rule has been applied in any other Idaho case since *Davis*, but the few recent cases that have touched on it have found creative ways to avoid applying it. See, e.g., *Benninger v. Derifield*, 142 Idaho 486, 129 P.3d 1235 (2006) (trial court’s findings supported imposition of an easement by prescription, so no need to determine whether grantee was a stranger to a deed reserving an express easement); *Hodgins v. Sales*, 139 Idaho 225, 76 P.3d 969 (2003)(stranger-to-the-deed not relevant because the language of the deed was too vague to grant an express easement in any event). This is due, no doubt, to the widespread and vigorous criticism of the stranger-to-the-deed rule—criticism that has led courts in numerous jurisdictions, many of them in the West, to reject or abandon the doctrine altogether. See, e.g., *Azmus v. Nelson*, 743 P.2d 377 (Alaska 1978) (**Alaska**); *Shulansky v. Michaels*, 14 Ariz. App. 402, 484 P.2d 14 (1971)(**Arizona**); *Willard v. First Church of Christ, Scientist*, 7 Cal. 3d 473, 498 P.2d 987, 102 Cal. Rptr. 739 (1972) (**California**); *Uhes v. Blake*, 892 P.2d 439 (Colo. App. 1985) (**Colorado**); *Townsend v. Cable*, 378 S.W.2d 806, 808 (Ky. 1964)(**Kentucky**); *Medhus v Dutter*, 184 Mont. 437, 603 P.2d 669 (1979) (**Montana**); *Malloy v. Boettcher*, N.D., 334 N.W.2d 8 (1983)(**North Dakota**); *Garza v. Grayson*, 255 Or. 413,467 P.2d 960 (1970) (**Oregon**); *Simpson v. Kistler Investment Co.*, 713 P.2d 751 (Wyo. 1986)

² Defendants assert in their reply that they “do not concede that the grantor intent in the Hodge deed . . . is “clear”. Reply Mem. in Supp. of Defs.’ Mot. for Partial Summ. J. 12 n.3. They further argue, “Plaintiff’s argument . . . is not persuasive that the Neffs’ intent in the 1975 Hodge deed is clear. By its terms, the attempted reservation in that deed was “for access by Grantors and their successors.” But as discussed at length, by the time of this deed, the Grantors – the Neffs – had long since conveyed Plaintiff’s property to Taylor. Thus, the Neffs were trying to reserve a right to access property they did not even own, which is and was inconsistent with Idaho law and which therefore makes their intent far from clear. At a minimum, this language is incompatible with the notion of “clear grantor intent” on which Plaintiff relies. For the deed to disclose clear grantor intent, it would have needed to refer to Taylor or simply to the dominant estate with no indication of owner. Its inclusion of the words “for access by Grantors . . .” completely vitiates the idea that the grantors’ intent was clearly stated, in light of the undisputed fact the Neffs no longer owned the dominant estate by 1975. And, regardless, even if the deed had expressed clear grantor intent, the mandatory Stranger Rule would nonetheless apply to render the attempted reservation of an easement void.” Reply Mem. in Supp. of Defs.’ Mot. for Partial Summ. J. 12 (footnote omitted).

(Wyoming).

The evolving view (and effectively the prevailing view even at the time of *Davis – Harris*, *supra*, 6 Okla. L. Rev. at 132) is that a grantor should be free to reserve an easement in a deed for the benefit of a third party. See, e.g., Restatement (Third) of Property, Servitudes § 2.6(a) (1998) (commenting, “[A] servitude benefitting a third party may be created in a document that simultaneously conveys the burdened estate to another.”); See also *Minton v. Long*, 19 S.W.3d 231, 238, 1999 Tenn. App. LEXIS 830, *19 (1999) (“Clearly, the modern trend is toward abandonment of the common law rule.”); *Bolan v. Avalon Farms Property Owners Ass’n, Inc.*, 735 A.2d 798, 804, 250 Conn. 135, 144-145 (1999) (“We conclude, therefore, that the unity of title doctrine should be abandoned and that the intent of the deed creating an easement should be effectuated even if no unity of title exists between the servient estate and the dominant estate the easement is intended to serve.”). No clearer case than this one can explain why: A common grantor with clear, unambiguous intent conveys two parcels nearly simultaneously but, due only to the fortuitousness in the sequence of subsequent recordation, neither instrument is deemed enough to avoid landlocking one of the two parcels. Surely, this is not the outcome that the law intends.

Id. at 14-16 (emphasis and alteration in original).

Defendants reply:

Plaintiff’s final argument in opposition to Russell and Gray’s motion for partial summary judgment is that the Court should ignore mandatory jurisprudence and the prevailing rule of law to give effect to the grantors’ intent. This argument must be rejected, both because Plaintiff has not illustrated a path that would allow this Court to rule contrary to binding precedent and because Plaintiff’s reliance on “grantor intent” is misplaced on the facts of this case.

Plaintiff acknowledges that “Idaho embraced the common law ‘stranger-to-the-deed doctrine’ in 1961,” . . . and it cites no Idaho case overturning, abrogating, limiting, or even calling into question its applicability. To be sure, Plaintiff string cites a host of cases criticizing the Stranger Rule – but not a single one of those cases is from Idaho.

Moreover, despite what Plaintiff refers to as “widespread and vigorous criticism” of the Rule and the “evolving view” that it should not apply, . . . a respected secondary source current as of October 2021 states that “the prevailing view still appears to be that a reservation or exception of an easement may operate only in favor of the grantor.” The Law of Easements & Licenses in Land § 3:9 (“Reservation or exception in favor of third party”). One important rationale for the Stranger Rule which directly applies to this case is “the importance of certainty in land titles and protection for bona fide purchasers.” *Id.* (citing *Estate of Thomson v. Wade*, 509 N.E.2d 309,310 (1987)). Even if this Court had the authority to depart from binding precedent, it should decline to do so because of the uncertainty that would arise from a district court decision rejecting binding precedent. It is up to Idaho’s appellate courts, in an appropriate case, to consider whether to change course on the Stranger Rule. But even

then, a change in this area of the law would be ill-advised because it could call into question the certainty or validity of a substantial number of historical deeds, potentially engendering a host of unnecessary litigation.

Plaintiff has offered no persuasive argument, let alone authority, that would permit this Court to decline to apply the Stranger Rule, which is binding precedent in Idaho. As such, Russell and Gray are entitled to summary judgment holding that the 1975 Hodge deed does not create an easement enforceable by Plaintiff over Russell and Gray's property.

Reply Mem. in Supp. of Defs.' Mot. for Partial Summ. J. 11-13 (footnotes omitted).

The Court agrees with defendants that it is not appropriate for the Court to overrule the Idaho Supreme Court decision, *Davis*. The Court is also astounded that the Estate would ask the Court to overrule such a decision "without analysis". Moreover, the Estate's assertion that if the Court applied the stranger-to-the-deed doctrine it would "apparently be the first time in Idaho since 1961 (and only second time ever)", Pls.' Mem. in Opp'n to Russell and Gray's Mot. for Partial Summ. J. 15, is simply untrue. The Idaho Supreme Court has applied or referenced the doctrine at least three times since its decision in *Davis*. *Hodgins v. Sales*, 139 Idaho 225, 232-33, 76 P.3d 969, 976-77 (2003) ("The district judge rejected the Property Owners' claim for an easement by express grant on the basis of current Idaho law, which provides that the reservation of an easement in a deed creates an easement on behalf of the grantor only. This is based on the rule that a reservation to a stranger to the instrument is void for all purposes. We need not address the *Davis* issue . . .") (citing *Davis*, 83 Idaho at 209-10, 360 P.2d at 408-09) (citations omitted); *Benniger v. Derifield*, 142 Idaho 486, 490, 129 P.3d 1235, 1239 (2006) (not addressing the "stranger rule" because the Court found that there was no valid express easement but noting that instruments that "contain reservations to strangers" are "void for all purposes") (citing *Hodgins, supra*); *Lorenzen, Trustee of Phyllis E. Lorenzen Revocable Trust v. Pearson*, 167 Idaho 385,

393-94, 470 P.3d 1194, 1202-03 (2020) (“Inasmuch as the Lorenzens were strangers to the conveyance between Williamses and Vaughn, the Vaughn Deed could not expand, or otherwise create an interest in the Lorenzens. . . . Considering the long history of the easement’s undisputed and unbroken use from 1946, the differing language in the two deeds demonstrates that the Williamses intended to create a right in Lorenzen and his ‘heirs, successors and assigns,’ as the Vaughn Deed states. Accordingly, the district court concluded that Williams intended to attach the easement to the estate and make it inheritable and assignable, either of which would make the easement appurtenant. This conclusion was supported by substantial and competent evidence from the record. It also corresponds with the law’s presumption that easements are appurtenant in cases of doubt.”) (citing *Davis*, 83 Idaho at 209-10, 360 P.2d at 406 and *Nelson v. Johnson*, 106 Idaho 385, 387-88, 679 P.2d 662, 664-65 (1984)). Accordingly, the Court finds that the “Stranger Rule” is still the law of Idaho, despite its scant application since *Davis*. The Court will briefly address the law as it currently stands in Idaho but declines to analyze whether the “Stranger Rule” applies in this case since it has already determined that the easements are unenforceable against the Russells due to the recording statute’s protection.

The “Stranger Rule”, also known as the stranger-to-the-deed doctrine or the stranger-to-the-conveyance doctrine, holds that “no estate or interest is created in a stranger to a deed by a reservation therein. If in a conveyance any reservation is made in the property conveyed, the part reserved remains in the grantors therein, and does not inure to the benefit of a stranger to the instrument.” *Davis v. Gowen*, 83 Idaho 204, 209-210, 360 P.2d 403, 406 (1961).

In *Davis*, the Idaho Supreme Court found that the plaintiff did not have any right

to the easement in question because he was a “stranger to the instrument”. *Id.* The plaintiff had acquired four adjacent tracts of land (D3(1), D3(2), D3(3), and D3(4)), which were in turn adjacent to two other tracts of land (G1 and D2). *Id.* at 207-08, 360 P.2d at 404-05. Tracts G1, D3(1), and D3(2) had access to a nearby boulevard; tracts D2 and D3(4) did not. *Id.* However, tract D3(4) had access to the boulevard by crossing through his other properties, D3(1), D3(2), or D3(3). *Id.* The plaintiff obtained title to all four D3 tracts between 1947 and 1950, and did not have an easement benefitting tract D3(4). *Id.* The defendant purchased tract G1 in 1952, including for the first time the language, “Expressly Subject, however * * * Right of way or easement in common with the owners of the adjoining premises for a private road 25 feet wide, adjacent and paralleled [sic] to the West and Northwest boundary of the within described tract of land”, in the deed. *Id.* In 1953, the defendant purchased tract D2, and vacated and terminated the same easement. *Id.* The defendant purchased both tracts from the same person. *Id.* The Idaho Supreme Court found that since (1) the plaintiff had not received the benefit of an easement prior to the 1952 deed; (2) the defendant created the easement for the prior owner of tracts D2 and G1; and (3) the defendant subsequently extinguished the easement when he acquired title to both tracts D2 and G1, the plaintiff was a stranger to the deed and was not meant to be benefitted from the easement. *See Id.* at 209-10, 360 P.2d at 406 (finding that “since the [prior owners of tracts D2 and G1] were the sole owners of whatever rights were reserved under the deed conveying tract G1 to respondents all such reserved rights terminated and became non-existent when they executed and delivered said deed dates February 17, 1953”).

As stated above, the Court declines to analyze whether the “Stranger Rule”

applies in this case since it has already determined that the easements are unenforceable against the Russells due to the recording statute's protection.

C. Plaintiff's Motion for Partial Summary Judgment is denied as a matter of law.

The Estate requests that the Court "declare that departure [sic] point off East Alamo Road for the easement for the Estate's 20-foot access road cannot be anywhere along the stretch of East Alamo Road west of the property line dividing the Russell Property and the Pearson Property." Mem. in Supp. of Pls.' Partial Summ. J. 13. The Estate does not request the Court to determine where the easement is located at the summary judgment phase, but rather it asks the Court to (1) "determine as a matter of law that there is an easement that benefits the Estate Property and burdens the Russell Property" and (2) determine that such easement originates off of East Alamo Road before East Alamo Road enters the Russell Property." *Id.* at 14.

The Estate argues that the easements are valid because (1) both deeds satisfy the "*Machado* test"; (2) the Neff-to-Hodge deed provided actual notice to Hodge and the recordation of the Neff-to-Taylor deed provides constructive notice of the easement; and (3) the access road to the Estate's property is different than the portion of East Alamo Road that crosses the Russell/Gray property. Although the majority of the Estate's arguments are rendered moot by the Court's granting of the defendants' motion for summary judgment, the Court will nevertheless address each of these arguments in turn.

1. The "*Machado* test" is not enough to establish an enforceable easement, and the Estate has failed its burden to establish that the easement is valid.

First, the Estate argues that the easements are valid because they satisfy the "*Machado* test": The Estate writes:

In short, a valid grant or reservation of an easement requires [1] a writing that [2] identifies the land subject to the easement and [3] expresses clear grantor intent to create a servitude – the *Machado* test, so to speak. Both deeds at issue in this case easily satisfy all three elements of the *Machado* test.

...

The Neff-to-Taylor Deed, a recorded instrument, unquestionably satisfies the requirement of [1] a writing. That writing conveys to Taylor “[t]he Northeast Quarter of the Northeast Quarter (NE ¼ NE ¼) of Section 14, Township 48 North, Range 4, W.B.M. [i.e., the Estate Property].” It then adds:

TOETHER with a twenty foot easement for road purposes across the Vendor’s adjoining land on the East along a route to be agreed upon by the parties . . .”

(Bold emphasis added [in brief].) The granting instrument thus [2] identifies the land subject to the easement – specifically, those parcels within the Neff Parcel Group (specifically, the Russell Property and the northern half of the Pearson Property – see **Figure 1** above) adjoining and to the east of the Estate Property.

Likewise, the phrase, “TOGETHER with . . . an easement,” is a commonly seen and easily understood [3] expression of grantor intent accompanying a conveyance of a property interest. The express grant of easement included within the Neff-to-Taylor Deed thus easily meets all three elements of the *Machado* test, without credible dispute.

...

The Neff-to-Hodge Deed, also obviously a recorded instrument, again unquestionably satisfies the requirement of [1] a writing. That writing conveys to Hodge “The Northwest Quarter of the Northwest Quarter (NW 1/4) NW ¼) of Section 13, Township 48 N., Range 4, W.B.M. [i.e., the Russell Property].” It then goes on to say:

“BUT SUBJECT to the reservations of a road easement on and along ~~the existing road~~ a route to be agreed upon by the parties across the above-described property hereby conveyed to Grantees for access by Grantors and their successors to and from the Northeast Quarter of the Northeast Quarter (NE ¼ NE ¼) of Section 14, Township 48 North, Range 4, W.B.M., Kootenai County, Idaho [i.e., the Estate Property] . . .

(Bold emphasis added [in brief]; bracketed language added for clarification [in brief]; the strikeout and italics represent hand-written and initialed interlineations and additions made in the original [added in brief].) The Neff-to-Hodge Deed thus [2] identifies the land – the Russell Property – which, in turn, was [3] expressed unambiguously to be for a “road easement” benefitting the Estate Property. All three elements of the *Machado* test are thus present in the Neff-to-Hodge Deed as well.

Mem. in Supp. of Pls.’ Partial Mot. for Summ. J. 7-8 (citing *Machado v. Ryan*, 153 Idaho 212, 218, 280 P.3d 715, 721 (2012) (emphasis in original)). The Estate then adds in a footnote: “The Neff-to-Hodge Deed would convey a valid reservation of an easement benefitting the Estate, full stop, but for the possibility that Idaho still adheres to the

stranger-to-the-deed doctrine – an issue we address in our opposition to Russell’s competing motion for summary judgment.” *Id.* at 8 n.9 (emphasis in original).

Defendants respond:

Russell and Gray do not dispute that *Machado* does require each of those three elements as necessary – but not sufficient – components of an express easement. Indeed, Plaintiff conveniently omits critical language in *Machado* on this precise point. In context, the full quotation provides that “[b]ecause an express easement is an interest in real property, it may only be created by a written instrument. *At a minimum*, a valid express easement must identify the land subject to the easement and express the intent of the parties.” *Machado*, 153 Idaho at 218, 280 P.3d at 721 (emphasis added [in brief]; internal quotation marks and citations omitted [in brief]). Russell and Gray do not dispute that the Neff to Taylor deed and the Neff to Hodge deed may satisfy the “*Machado* test,” but doing so is insufficient as a matter of law to establish the express easement(s) argued by Plaintiff. This is especially so in light of Russell and Gray’s earlier-filed motion for partial summary judgment, which highlights legal issues precluding enforceability of the easements in both deeds on grounds that have nothing to do with the “*Machado* test.”

Even if the Neff to Taylor deed (conveying Plaintiff’s property) created a valid and enforceable express easement (it did not), the fact that Taylor did not timely record the deed before Hodge recorded her own deed as a good faith purchaser for value means that the easement as a matter of law cannot be enforced against subsequent purchasers for value, including Russell and Gray. I.C. § 55-812. That is, regardless of whether Neff had the requisite intent to create an express easement in the Taylor deed, any easement that document may have created burdening Russell and Gray’s property became ineffective and unenforceable as a result of the subsequent actions of the *grantee Taylor*, not the grantor Neff – namely, Taylor’s holding onto the deed for more than eight years and failing to record it before Hodge recorded her own deed.

And the Neff to Hodge deed (conveying Russell and Gray’s property) never created an easement in the first place, because Neff did not then own Plaintiff’s property and Idaho law is clear that an easement may not be reserved over land owned by a stranger to the deed. . . . Plaintiff suggests that the deed “expresses clear grantor intent sufficient as a matter of Idaho law to establish a servitude over the Russell Property for the benefit of the Estate Property.” . . . But grantor intent, alone, is never sufficient to establish a servitude. In this case, the intended creation of the servitude failed because of a separate rule of Idaho law – the so-called “Stranger Rule.” The intent of the grantor Neff to create a deed is irrelevant, given that the intent was inconsistent with Idaho law.

. . . Plaintiff’s failure to even attempt to address these issues [regarding the Stranger-to-the-Deed doctrine] effectively nullifies its request for affirmative relief in the form of an order holding that it has an express easement over Russell and Gray’s land. Indeed, Plaintiff’s filings in support of its motion for partial summary judgment do not even mention the issue of whether any express

easement is enforceable as against Russell and Gray's property. Russell and Gray read much into this, as should the Court.

Russell and Gray's Mem. in Opp'n to Pls.' Mot. for Partial Summ. J. 5-7 (footnote omitted) (emphasis in original).

The Estate responds to the merits of defendants' stranger-to-the-deed doctrine argument for the first time in its reply to its own cross motion for partial summary judgment. The Court therefore did not consider these arguments in its above consideration of defendants' initial motion for partial summary judgment since the Estate was required to include this in its brief in response to that motion and chose not to do so. Thus, the Court will address the Estate's arguments pertaining to the "Stranger Rule" separately. The Estate in its argument informs the Court that if it chooses to apply the stranger-to-the-deed doctrine that it must apply it "correctly," which it describes as "giving effect to the 'reservation' (or more accurately, the exception) in the Neff-to-Hodge Deed that benefits the Estate Property. Reply to Russell and Gray's Mem. in Opp'n to Pls.' Mot. for Partial Summ. J. 10. The Estate argues that the Court should adopt law from other jurisdictions and differentiate between being a stranger to the deed and a stranger to the title, as well as differentiate between reservations and exceptions,³ without giving any reasoning for that position beyond referring to the stranger-to-the-deed doctrine as "feudalistic." *Id.* at 8-10. As above, the Court declines to adopt these viewpoints and the Court will not apply other jurisdiction's law because the Idaho Supreme Court has so far only applied the stranger-to-the-deed doctrine.

³ The Idaho Supreme Court has in fact recognized a distinction between a reservation and an exception, which is similar to the language cited by the Estate. However, the Court fails to see how that is relevant to this case. *Machado*, 153 Idaho at 218, 280 P.3d at 721 ("An express easement by reservation reserves to the grantor some new right in the property being conveyed; an express easement by exception operates by withholding title to a portion of the conveyed property.").

When this Court interprets or construes a deed, “the primary goal is to seek and give effect to the real intentions of the parties.” *Porter v. Bassett*, 146 Idaho 399, 404, 195 P.3d 1212, 1217 (2008) (quoting *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006)). If the deed is ambiguous, the trier of fact must “determine the intent of the parties according to the language of the conveyance and the circumstances surrounding the transaction.” *Id.* (citing *Neider v. Shaw*, 138 Idaho 503, 508, 65 P.3d 525, 530 (2003)). However, “[i]f the language of a deed is plain and unambiguous, the intention of the parties must be ascertained from the deed itself and extrinsic evidence is not admissible.” *Benninger*, 142 Idaho at 489, 129 P.3d at 1238 (citing *Simons v. Simons*, 134 Idaho 824, 11 P.3d 20 (2000)). “Ambiguity may be found where the language of the deed is subject to conflicting interpretations.” *Read v. Harvey*, 141 Idaho 497, 499, 112 P.3d 785, 787 (2005) (citing *Neider*, 138 Idaho at 508, 65 P.3d at 530).

Machado, 153 Idaho at 218, 280 P.3d at 721.

In *Machado*, the Idaho Supreme Court found the language of the deed in question unambiguous because it contained “the identity of the parties, a description of the property to be conveyed, and words of conveyance.” *Id.* It found that the easement was invalid because there was “no language that clearly establishe[d] an intention to burden the property with an easement.” *Id.* The language in the deed in that case was:

SUBJECT TO: Easement of record, which allows joint useage [sic] of a road over and across the described property which runs with the land, for ingress and egress from the described property as recorded Easements for public highways, if any, as the same are now laid out or constructed over and across said lands.

Reservation by Benewah County of right to build and construct a road across this land at any time in the future and saving sna [sic] excepting to the county all rights of way and easements for roads or other purposes appearing of record and excepting public roads, if any, across the land having been used by the public for a period of five years whether appearing of record or not.

Id. at 218-19, 280 P.3d at 721-22. The Idaho Supreme Court found that this language was not sufficient to find an express easement because:

The easement referred to in this provision grants ingress and easement over a road that did not cross Section 19 at the time Timberland conveyed the property to Clifton. Therefore, it cannot clearly establish the parties’ intention to burden property located entirely within Section 19.

While the deed does state that the conveyance is “subject to” an easement, we have held that this kind of language is “not evidence of a grantor’s

intent to reserve or except an easement,” but merely “an attempt to create an exception to the grantor’s warranties of title and quiet enjoyment and thereby limit the grantor’s potential liability.” *Akers* [], 142 Idaho at 301, 127 P.3d at 204; *Birdwood Subdiv. V. Homeowners’ Ass’n, Inc. v. Bulotti Const., Inc.*, 145 Idaho 17, 21, 175 P.3d 179, 183 (2007). Thus, language in a deed providing that the conveyance is “subject to” easements of record does not in itself reserve an easement. We therefore hold that the district court erred in finding an express easement.

Id. at 219, 280 P.3d at 722.

The Court agrees with defendants that the Estate misinterprets the holding of the Idaho Supreme Court in *Machado* by identifying the three points as the only required “elements” needed to establish a valid and enforceable easement. The Estate claims that *Machado* requires only “a writing that identifies the language subject to the easement and expresses clear grantor intent to create a servitude.” Mem. in Supp. of Pls.’ Partial Mot. for Summ. J. 7 (internal numerals omitted). While the Estate did include the language, “at a minimum” in its recitation of the law from *Machado*, it then erroneously declared that once these three “elements” are met, a valid, enforceable easement is created. That is simply not true—sometimes more is needed. Merely because an express easement was created does not mean that it is enforceable, as this Court discussed in detail above.

This Court finds that the Estate has not done enough to show that the “*Machado* test” is met here, even if that were enough for the Estate to prevail on its motion. The Estate simply states that the “*Machado* test” is satisfied for the Neff-to-Hodge deed because the deed had the language “BUT SUBJECT to the reservations of a road easement on and along a route to be agreed upon by the parties across the [Russell/Gray] property . . . for access by Grantors and their successors to and from [the Estate’s property].” Mem. in Supp. of Pls.’ Partial Mot. for Summ. J. 8. However, the Estate does not make any indication that the route was ever agreed upon by the

parties. While it is true that the Neff-to-Taylor deed contained the language, “TOGETHER with a twenty foot easement for road purposes across the Vendor’s adjoining land on the East along a route to be agreed upon by the parties[.]” *Id.* (citing Mosby Decl. Ex. D), there is also no indication that the parties agreed upon the location of such a road, and in order for the twenty-foot easement to be enforceable against the Hodges, they must have had notice of it, as discussed above.

The Court finds that the easements in the deed are not ambiguous because the language is not subject to conflicting interpretations, so the Court must determine “the intention of the parties . . . from the deed itself and extrinsic evidence is not admissible.” *Machado*, 153 Idaho at 218, 280 P.3d at 721 (quoting *Benninger*, 142 Idaho at 489, 129 P.3d at 1238 and *Read v. Harvey*, 141 Idaho 497, 499, 112 P.3d 785, 787 (2005) (internal citations omitted). In order to prove the grantor’s intent, more is needed. Since no extrinsic evidence is permitted, the Estate would have to provide a subsequent easement agreement or some other agreement in writing demonstrating the location of the easement agreed upon by the parties.

The Court finds that the easements were not enforceable absent notice to the Hodges (which the Court discussed above) or agreement between the parties to locate such easement. That Neff intended there to be an easement is irrelevant here because the language of the deed makes it clear that Neff’s intent was for the parties to agree together where the road easement would be located for Neff’s benefit, not that there be an easement somewhere on the property. The Estate has not shown enough to prove the intention of the parties to create an easement that would bind Hodge and their successors.

/

2. The deeds did not provide actual notice to the Hodges, and the recordation of the deeds did not provide constructive notice.

Although the Court has already found the easement to be unenforceable, the Court will address the Estate's remaining arguments. The Estate next argues that the Neff-to-Hodge deed provided actual notice to Hodge and that the recordation of both deeds provided constructive notice of the easement. Specifically, it argues:

Here, Hodge acquired the Russell Property in an instrument that clearly notified Hodge – “**SUBJECT TO,**” [sic] in the words of the instrument – of an easement benefitting the Estate Property and whose routing across the Russell Property was to be agreed upon. The very instrument by which Hodge took title to the Russell Property thus constituted actual notice to Hodge of the Estate's easement. See, e.g., *Davis v. Peacock*, 133 Idaho 637, 644, 991 P.2d 362, 369 (1999) (servient estate owner had notice of an easement by virtue of his own deed including a provision that notified him that there was a road over his land). And by its subsequent recording in Kootenai County, the Neff-to-Hodge Deed (as well as the later recording of the Neff-to-Taylor Deed) now provides constructive notice of the easement to all subsequent owners of the Russell Property, including Russell.

Mem. in Supp. of Pls.' Partial Mot. for Summ. J. 8-9 (emphasis in original).

Defendants respond that, because the “Stranger Rule” applies, the easement was “void ab initio” and “did not notify anyone of anything.” Russell and Gray's Mem. in Opp'n to Pls.' Mot. for Partial Summ. J. 7. They further argue:

... [W]hen Neff conveyed to Hodge, there was no road or driveway across the property. Moreover, Ms. Hodge testified that she had no knowledge of any easement across the driveway on the Russell and Gray property and that she never agreed with anyone to locate an easement on the driveway or anywhere else on the Russell and Gray property. Likewise, Ms. Neff and Ms. Sterner testified that they never agreed with anyone about a location for a route across the Russell and Gray property to access the Estate property.

Plaintiff is trying to bootstrap the mention of an invalid easement in the Hodge deed as somehow providing notice to Hodge of an easement in an entirely unrelated deed (the Taylor Deed) that was not even recorded until after Hodge had conveyed the Russell and Gray property to a third party. This attempt necessarily fails. Hodge did not know about Neff's prior grant to Taylor; Ms. Hodge stated that she “believed that the Neffs owned all of the surrounding real property, including the adjacent real property to the east, south and west of the Property. Thus, we were not aware of any deed conveying the parcel of real property immediately to the west of the Property to any third party.” If she did not know about the unrecorded Taylor deed, and if there was no driveway, road, or

other physical feature of the land to provide any notice, there is simply no way consistent with the facts or law to impute actual, constructive, or any other form of notice.

Separately, Plaintiff ignores that both the Taylor deed and the Hodge deed contain language providing that the road easement would be “along a route to be agreed upon by the parties.” Plaintiff has cited no evidence of any agreement, at any time, between any owners of Plaintiff’s property and Russell and Gray’s property. As such, the express easement referred to in the deeds is, at most, a future contingent interest which cannot become a present interest until the condition precedent of agreement as to location is satisfied.

....

Here, the language in the deeds conditions the conversion of the future express easement into a present express easement upon the “parties” agreeing upon the route. There is affirmative evidence in the summary judgment record that neither Neff nor Hodge ever agreed with Taylor (or anyone else) regarding a route for such easement. Nor does Plaintiff cite evidence or argue that any subsequent owners of each property ever agreed to locate the easement – and event that would only matter if such subsequent owners could be deemed “parties” under the deeds (which Russell and Gray do not concede). Thus, at most, the deeds may have created a future express easement subject to a condition precedent that has never been satisfied. For this reason, in addition to the [sic] all the others, Plaintiff has failed to show a present enforceable easement.

In sum, Plaintiff’s filings in support of its motion for partial summary judgment fall far short of establishing its entitlement to a valid and enforceable express easement over Russell and Gray’s property. Its motion should therefore be denied in full.

Id. at 7-9 (internal citations omitted) (emphasis in original) (footnote omitted).

The Estate replies:

... Russell’s argument that an allegedly invalid instrument of conveyance is therefore an ineffective instrument of notice defies credulity. There is no support in the law for such an argument and Russell cites none. Notice is not conveyance; notice is notice.

Russell instead offers the testimony of Judy Hodge, but what she says (i.e., that she wasn’t aware that the Neffs were not the owners of the adjoining parcel in her affidavit is much less powerful than what she doesn’t say: that against all logic and the plain language of the instruments she signed, she did not know (and could not have known) there was to be an easement crossing the Russell Property at a location to be agreed upon later. Hodge could not so testify because the Neff-to-Hodge Deed and the Neff-to-Hodge Purchase Agreement (bearing the Neffs’ and Hodges’ parties’ initials) plainly demonstrate that both Judy Hodge and her husband were aware of (or absolutely should have been aware of) the easement benefitting the Estate Property and specifically approved it in the Purchase Agreement.

Simply, Hodge was not a “bona fide purchaser” that would free the Russell Property of the burden of the Estate’s easement. ...

Just like in the *Davis v. Peacock* case [133 Idaho 637, 644, 991 P.2d 362, 369 (1999)], the Hodges took title with notice of the easement benefiting the Estate Property because the Neff-to-Hodge Deed expressly included a provision notifying them of the easement over their land providing access to the neighboring Estate Property. The previously recorded Neff-to-Hodge Purchaser Agreement, bearing the Hodges' initials next to the easement language "BUT SUBJECT to the reservations of a road easement on and along a route to be agreed upon by the parties," flatly refutes Judy Hodge's testimony (i.e., that "[a]t the time we purchased the Property, and except for the Road discussed above, my husband and I had no knowledge of any easement across the Property."

Therefore, Hodges were not bona fide purchasers and their successors cannot take "shelter" under the Hodges' bona fide purchase of the Russell Property from the Neffs.

Reply to Russell and Gray's Mem. in Opp'n to Pls.' Mot. for Partial Summ. J. 3-5

(internal citations omitted) (footnotes omitted). The Estate continues:

Russell cites *Kirk v. Westcott*, 160 Idaho 893, 895, 382 P.3d 342, 344 (2016), as if that somehow matters to the competing motions for summary judgment. It does not. In that case, the Court decided that an instrument whose express terms said that the easement "shall become 'in effect' only upon . . ." a specified future event amounted to a contingent future easement – a circumstance that the Court decided had no bearing on the enforceability of the instrument regardless. *Id.*, at 901, 382 P.3d at 350, FN 2 (emphasis added [in brief]). There is no such contingency language ("shall become *in effect*") in either instrument at issue here. Even if there were, neither easement would be rendered unenforceable as a result. *See id.*

Simply, the easement here is like the ones involved in Idaho's leading case, *Quinn v. Stone*, and its progeny, *NW Pipeline v. Forrest Weaver Farm* and *Bethel v. Stone*. *See also Gribble v. Bostian*, 864 S.E.2d 370, 372, 279 N.C. 17, 19 (NC Ct. App. 2021) (laying out the manner for routing an easement whose location is to be "agreed upon" in much the same manner as Idaho follows); *USA Cartage Leasing LLC v. Baer*, 32 A.3d 88, 112, 202 Md. App. 138, 178 (MD Ct. Spec. App. 2011) (same). In each of those cases, the Court made clear that the easements were enforceable and laid out clear instructions on how to go about locating it if the parties could not. As *Bethel* said, "to the extent that [the parties] are unable or unwilling to [agree], the court shall determine a reasonable location [for the easement] that is convenient and suitable." *Bethel v. Van Stone*, 120 Idaho 522, 528, 817 P.2d 188, 194 (1991). That is an issue for another day and not part of either party's motions now before the court. However, this Court should determine that the easement (whether by Neff-to-Taylor [sic] Deed or Neff-to-Hodge Deed) is valid and not subject to an unfulfilled contingency.

Id. at 11 (emphasis in original).

The Court has already addressed the issue of constructive notice above in detail. The Court will therefore only address the arguments specific to the Estate's motion that the Court has not already addressed above. The Court agrees with defendants' assertion that:

Plaintiff has cited no evidence of any agreement, at any time, between any owners of Plaintiff's property and Russell and Gray's property. As such, the express easement referred to in the deeds is, at most, a future contingent interest which cannot become a present interest until the condition precedent of agreement as to location is satisfied.

Russell and Gray's Mem. in Opp'n to Pls.' Mot. for Partial Summ. J. 7. The Court does not find compelling the Estate's argument that Judy Hodge was incorrect in her testimony when she stated that "she did not know (and could not have known) there was to be an easement crossing the Russell Property at a location to be agreed upon later". Reply to Russell and Gray's Mem. in Opp'n to Pls.' Mot. for Partial Summ. J. 3. Apart from this one line in the Estate's brief, which the Court does not find to be enough to satisfy the Estate's burden, the Estate has provided no evidence to the Court to demonstrate that she had knowledge or notice of an existing *easement*, rather the Estate has merely shown that Judy Hodge had notice of an agreement to create a future easement with Neff. As above, the Court finds that the language of the deed makes it clear that Neff's intent was for the parties to agree together where the road easement would be located for Neff's benefit, not that there necessarily be an easement somewhere on the property. Since the Estate has not provided a subsequent easement agreement or some other agreement in writing demonstrating the location of the easement agreed upon by the parties, there is no evidence that Judge Hodge had notice of any existing easement. The Court finds that the deeds did not provide actual notice to the Hodges, and, as discussed above in detail, the

recording of the deeds did not provide constructive notice because it was not timely recorded.

3. The Court declines to determine the location of an easement for the benefit of the Estate.

Finally, the Estate argues:

The language in the Neff-to-Taylor Deed (and similar language in the Neff-to-Hodge Deed) for a “twenty foot easement for road purposes . . . *along a route to be agreed upon*” is, under well-established Idaho law, an enforceable expression of grantor intent. See, e.g., *Argosy Trust v. Winner*, 141 Idaho 570, 572, 114 P.3d 128, 130 (2005) (validating an easement whose granting instrument failed to describe the location or dimensions of a road easement, but simply stated that it was for “ingress and egress”). This follows *Quinn v. Stone*, 75 Idaho 243, 270 P.2d 825 (1954), where the Idaho Supreme Court approved an easement grant that contemplated the future construction of a ditch whose location was not precisely specified in the granting instrument. . . .

. . . .
The Estate acknowledges, therefore, that the question of the routing of the Estate’s access road is one for later determination by the Court sitting in equity, upon its examination of extrinsic evidence and consideration of all appropriate facts and circumstances. By this motion, the Estate is NOT asking the Court to determine where the easement for the access road IS located. However, the Estate IS asking the Court to determine where the access road IS NOT located. Specifically, the Estate seeks determination that the access road IS NOT located along the portion of East Alamo Road that crosses the Russell Property.

Importantly, East Alamo Road does not touch the Estate Property. This fact is undisputed. For there to be access to the Estate Property, then, there must be a second road diverging off East Alamo Road somewhere along its way.

Russell, in blocking the Estate’s access to the road that diverges off East Alamo Road at about the midpoint of the northern half of the Pearson Property, asserts that the Estate can simply continue south and then west along East Alamo Road until reaching parcels M1 and B1, and then build a new access road that drops down to the Estate Property from there. In the second issue on this motion, the Estate asks this Court to determine, as a matter of law based on undisputed facts, that the point the Estate Access Road diverges off East Alamo Road is located somewhere before East Alamo Road turns toward the west and crosses into the Russell Property.

The language of three different deeds from Neff to various grantees of parcels within the Neff Parcel Group compel this conclusion, starting with the Neff-to-Hodge Deed:

“BUT SUBJECT to the **reservations** [two, not just one] of a road easement on and along ~~the existing road~~ *a route to be agreed upon by the parties* across the above-described property hereby conveyed to Grantees for access by Grantors and their successors to and from the

Northeast Quarter of the Northeast Quarter (NE ¼ NE ¼) of Section 14, Township 48 North, Range 4, W.B.M., Kootenai County, Idaho [i.e., the Estate Property] **and also the reservation of a road easement on along the existing road across the South portion thereof** [i.e., the Russell Property] **for access by Grantors and their successors to and from the Southeast Quarter of the Northeast Quarter (SE¼ NE ¼) of Section 14 [i.e., the Bissaillon Property] and the Southwest Quarter of the Northwest Quarter (SW ¼ NW ¼) of Section 13 [i.e., the McCabe Property], Township 48 North, Range 4, W.B.M., Kootenai County, Idaho.**"

(Emphasis in bold added [in brief]; bracketed language added for clarification [in brief]; the strikeouts and italics represent hand-written and initialed interlineations and additions made in the original [annotation in brief].) Plainly, the Neff-to-Hodge Deed reserves easements for two roads, the first of which expressly benefits the Estate Property (but not the Bissaillon Property or the McCabe Property) and the second of which benefits the Bissaillon Property and the McCabe Property (but not the Estate Property). Therefore, this second road, *along the existing road across the South portion* of the Russell Property, does not benefit the Estate Property.

The deed in which Neff conveyed the McCabe Property (the "Neff-to-McCabe Deed") in 1978 confirms Neff's intention for the intended use of East Alamo Road across the south of the Russell Property:

TOGETHER with an easement for ingress and egress to and from said property [i.e., the McCabe Property as conveyed in the instrument] on and across the existing road **(or as said road may be modified)** on the NE ¼ of the NW ¼ of said Section 13 [i.e., the northern half of the Pearson Property], which lands are owned by Eugene R. Neff and Gloria A. Neff, husband and wife, and on the NW ¼ of the NW ¼ of Section 13, Township 48 N., Range 4 W.B.M. [i.e., the Russell Property], across which lands a road easement was reserved by the Neffs and successors),

...
SUBJECT, also, to a reserved easement by the said Neffs and their successors to use the existing road **(or as modified)** on and across the above described property for access to the said Neffs' adjacent property **to the South thereof.**

(Emphasis in bold added [in brief]). The Estate Property is not to the south of any of the other parcels within the Neff Parcel Group – the reference to the portion of East Alamo Road across the McCabe Property being reserved for use of the "adjacent property to the South thereof" is therefore exclusive of the Estate Property.

Completing the picture, the deed in which Neff conveyed the Bissaillon Property (the "Neff-to-Bissaillon Deed") in 1985 includes this:

SUBJECT to a reserved easement on and across the above described property [i.e., the Bissaillon Property as conveyed in the instrument] on the existing road **(or as said road may be modified)**, for access to adjacent properties **to the East and South thereof.**

(Emphasis in bold added [in brief].) The Estate Property is neither to the south nor to the east of any other parcels within the Neff Parcel Group – meaning the

reference to the portion of East Alamo Road being reserved for use of adjacent property to the East and South is exclusive of the Estate Property.

It is, therefore, appropriate for the court to declare that the point of divergence for the Estate Access Road extending to the Estate Property, cannot be located anywhere along the stretch of East Alamo Road west of the property line dividing the Russell Property and the Pearson Property[.]

Mem. in Supp. of Pls.' Partial Mot. for Summ. J. 10-13 (footnote omitted) (emphasis and alterations in original).

Defendants respond:

. . . Plaintiff's contention that the access must not lie on Alamo Road is both illogical and unsupported by Idaho law.

Fundamentally, both the Taylor and the Hodge deed contain language leaving the placement of the access under any easement "along a route to be agreed upon by the parties." That alone is enough to deny summary judgment on this issue, as any mutual owners of the Plaintiffs property and the Russell and Gray property, at any time in the last 40+ years, could have agreed to place the easement access on Alamo Road. Alternatively, any present or future owners could conceivably likewise so agree.

Plaintiff acknowledges that the location of any easement is an equitable issue to be decided by the Court, and it further acknowledges "that the question of the routing of the Estate's access road is one for later determination by the Court." But it paradoxically, and improperly, then asks the Court to engage in "examination of *extrinsic* evidence and consideration of all appropriate *facts* and circumstances." Summary judgment is not an appropriate forum for Plaintiff to ask the Court to make factual determinations, and at any rate Plaintiff has not shown an ambiguity in either of the key deeds that would justify consideration of any extrinsic evidence. . . .

Plaintiff reiterates that Alamo Road does not touch its property, and it argues that means that "[f]or there to be access to the Estate Property, then, there must be a second road diverging off East Alamo Road somewhere along its way." It then argues this "second road" must diverge "somewhere before East Alamo Road turns toward the west and crosses into the Russell Property." But it does not explain why that must be so.

Significantly, Plaintiff wants to use Russell and Gray's private driveway to access its land. But doing so would traverse literally the entire width of Russell and Gray's property (approximately a quarter mile) and would pass right by the homesite on the property. A far more sensible location for Plaintiff's access to its land via an easement over Russell and Gray's land – assuming, again, there is any enforceable easement at all – is near the southwest corner of Russell and Gray's property, where the nearest point between Alamo Road and Plaintiff's land is approximately 200 feet.

Thus, Plaintiff has failed to show that any express easement it could conceivably enforce against the Russell and Gray property must necessarily lie somewhere other than on Alamo Road.

Russell and Gray's Mem. in Opp'n to Pls.' Mot. for Partial Summ. J. 10-12 (citations omitted) (emphasis in original) (footnotes omitted).

The Estate replies:

. . . In the second of two issues that the Estate seeks to resolve by partial summary judgment, the Estate asks the Court to read the two deeds and determine that a routing on East Alamo Road along the South of the Russell Property is outside the scope of the grant. This is not merely an academic exercise.

East Alamo Road rises along a ridge line on the South of the Russell Property meaning that its omission from the language in each instrument was almost certainly purposeful. Navigating up the ridge line and then back down to the Estate Property is neither convenient, nor reasonable, nor accessible. The limits of the grant is also critical to Pearson. Routing the easement further south results in increased traffic around the home situated on P3. The plain language of each deed excludes this routing. The court can determine therefore, as a matter of law, that the scope of the grant excludes the southern run of East Alamo Road as a possible "convenient, reasonable, and accessible way within the limits of the grant."

Mem. in Supp. of Pls.' Partial Mot. for Summ. J. 12.

The Estate's citations to *Quinn v. Stone*, 75 Idaho 243, 270 P.2d 825 (1954); *NW Pipeline Corp. v. Forrest Weaver Farm, Inc.*, 103 Idaho 180, 646 P.2d 422 (1982); and *Bethel v. Van Stone*, 120 Idaho 522, 817 P.2d 188 (Ct. App. 1991) are misplaced. *Quinn* involved an easement agreement; indeed, the Idaho Supreme Court specifically indicated that an easement description in a deed is treated differently from "a description in an easement [agreement] clearly authorizing the future construction of a northwesterly ditch," thus making the holding inapplicable to this case. 75 Idaho at 249, 270 P.2d at 828. *NW Pipeline* involved language granting a single party the "right to select the route for and construct . . . [a] pipeline or pipelines." 103 Idaho at 181, 646 P.2d at 423. *Bethel* involved a deed that incorporated by reference a prior valid easement that had been timely recorded. The Estate has provided no case law for any cases similar to this one, nor has it provided any reasoning convincing the Court that

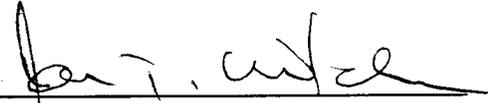
these cases are applicable to the current case. The Court agrees with defendants' argument that the Estate has failed to show that the easement must lie somewhere other than on Alamo Road. Likewise, the Estate's reliance on *Argosy Trust* is misplaced. Although *Argosy Trust* involved an easement that granted "the right of ingress and egress" over the property[,] there was no question of the validity of the easement itself, but rather the location of the easement was at issue. 141 Idaho at 130, 114 P.3d at 572. This case is different from the cases the Estate has cited, and the Estate has failed to convince the Court that those cases should apply in this instance. Accordingly, even if the Court had not determined that the easement is unenforceable, the Court would decline to declare where any such easement is or is not located.

IV. CONCLUSION AND ORDER.

For the foregoing reasons, IT IS HEREBY ORDERED Defendant's Motion for Partial Summary Judgment is **GRANTED**.

It is **FURTHER ORDERED** Plaintiff's Motion for Partial Summary Judgment is **DENIED**.

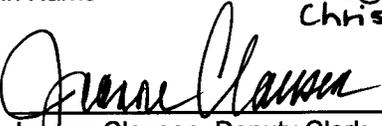
Entered this 12th day of May, 2022.


John T. Mitchell, District Judge

Certificate of Service

I certify that on the 13th day of May, 2022, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

- | | | | |
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Jeanne Clausen, Deputy Clerk