STATE OF IDAHO)
County of KOOTENAI)ss
FILED July 21, 2020
AT 8:10 O'Clock A M
CLERK, DISTRICT COURT
Deputy

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

ERIC KITTELSON and KRISTI KITTELSON, husband and wife,

Plaintiffs,

vs.

MARK STEVEN HERNDON and KIMBERLY A. HERNDON, husband and wife,

Defendants.

Case No. **CV28-19-7131**

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

A. Summary of Facts

This matter is before the Court on a Motion for Summary Judgment filed by defendants Mark Herndon and Kimberly Herndon (the Herndons).

This case revolves around an easement sought by Eric Kittleson and Kristi Kittelson (the Kittelsons) over the Herndons' property, Parcel 5650, to access the Kittelsons property, Parcel 6200, from East Hooker Hill Road. Compl. 7. The Kittlesons claim five causes of action and attorneys' fees (see Compl. generally). Those causes of action claimed by the Kittelsons are Declaration of Express Easement,

Implied Easement by Prior Use, Easement by Necessity, Covenant Running with the Land, and Common Law Private Dedication. *Id.*

Kittlesons claim, "The plaintiffs took title to Parcel 6200 under a Warranty Deed recorded on January 25, 2013 under Kootenai County Instrument No. 2678595000." Compl. 2. Herndons claim "[T]he Herndons acquired title to their property by Warranty Deed, Kootenai County Record Instrument No. 2433442000 dated October 16, 2013." Answer and Counterclaim 2.

The Herndons have filed a Counterclaim to Quiet Title on Parcel 6200 free of an easement because they assert that, "[w]hen the Herndons acquired fee title to the Herndon Parcel in October 2013, the half-acre triangular piece of their parcel located to the south of E. Hooker Hill Road was not encumbered by any access easement, whether express, implied or prescriptive, for the benefit of the property described herein as the Kittelson Parcel." *Id.* at 15.

B. Procedural History

The Kittelsons filed their Complaint on October 4, 2019. The Herndons filed their Answer and Counterclaim on December 9, 2019. The Kittelsons filed their Reply to Defendants' Counterclaim on January 2, 2020. On

On June 9, 2020, the Herndons filed a Motion for Summary Judgment, Defendants Statement of Undisputed Facts in Support of Motion for Summary Judgment, Defendants' Memorandum in Support of Motion for Summary Judgment, Declaration of Brian Hooker, Declaration of Nancy Murren, Declaration of Scott McArthur, and Declaration of Kimberly Herndon. On June 26, 2020, the Kittelsons filed Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, Declaration of Mathew B Mayberry, Declaration of Eric Kittelson, and Declaration of Terry Gordon.

Also on June 26, 2020, the Herndons filed a Motion for Preliminary Injunction, Memorandum in Support of Motion for Preliminary Injunction, Amended Declaration of Nancy Murren, Amended Declaration of Brian Hooker, Amended Declaration of Kimberly Herndon, Amended Declaration of Scott McArthur, and Declaration of Kimberly Herndon in Support of Defendants' Motion for Preliminary Injunction. On June 29, 2020, the Herndons filed a Supplimental Declaration of Kimberly Herndon in Support of Defendants' Motion for Preliminary Injunction (Ex. X, DD, AA, BB, CC-1, CC-2 and DD submitted via disc).

On June 30, 2020, Herndon filed Defendants' Reply Memorandum in Support of Motion for Summary Judgment.

Oral argument on the Motion for Summary Judgment and Preliminary Injunction was held on July 7, 2020. At the conclusion of that hearing, the Court granted defendants' Motion for Preliminary Injunction, and on July 9, 2020, this Court signed its Order for Preliminary Injunction. The Court also stated that it was granting defendants' Motion for Summary Judgment as to express easement, but was denying summary judgment on all other grounds. The Court stated it would issue a written decision to more thoroughly explain its reasoning on summary judgment.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to Rule 56, 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." I.R.C.P. 56(c).

> 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.

I.R.C.P. 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)). "Once the moving party establishes 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).

The moving party may also meet "the 'genuine issue of material fact' burden. . . by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). "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* at 311, 882 P.2d at 478).

> Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under [I.R.C.P. 56(d)]. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994) (alteration added).

Dunnick at 311, 882 P.2d at 478; *see also Heath* at 712, 8 P.3d at 1255.

III. ANALYSIS

The Herndons ask this Court to rule on summary judgment on all five of the Kittelsons' causes of action. Each cause of action will be discussed separately.

A. Express Easement over Defendants' Real Property

The Herdons argue that there is no express easement because:

> There is no language found in either the Memorandum of Contract, Instrument # 964582, or Warranty Deed, Instrument # 1730823, that

grants and (sic) easement over Parcel 5650 for the benefit of Parcels 6200, 6250 or 6400. Therefore, there is no express easement over that area labeled "Access Driveway" as alleged in the Plaintiffs' Complaint.

Defs' Mem. is Supp. of Mot. for Summ. J. 6. The Kittelsons argue that:

> On the record before the court and construing the facts in favor of the plaintiffs, it is reasonable to assume that Hooker intended to both reserve an easement over the defendants' parcel for E. Hooker Hill Road, and to grant an easement over E. Hooker Hill Road for the property originally conveyed to Terry Gordon et al. In fact, Hooker's intent was expressly stated in the 1984 Warranty Deed to Gordon:
>
> > "Said rights of way are for the benefit of and appurtenant to the property described herein and shall inure to the benefit of and maybe used by all persons who may hereafter become the owners of said appurtenant property or any parts or portions thereof."
>
> The plaintiffs' parcel is a part or portion of the original property conveyed by Hooker to Gordon et al. By their summary judgment motion, the defendants ask this court to declare that Hooker did not intend to reserve or grant any easement rights over E. Hooker Hill Road to Gordon even though E. Hooker Hill Road is (and was) the only means to get to the County Road. It would be a strange interpretation of the deeds to conclude that Hooker granted an easement to Gordon over N. Ginger Lane, but did not grant Gordon any easement to use E. Hooker Hill Road. Under the summary judgment standard of review, the defendants are not entitled to such an extreme interpretation.

Pls'. Mem. in Opp. to Defs'. Mot for Summ. J. 4-5. In their Reply Brief the Herndons argue that:

> What the Herndons and their predecessors have recognized is that Hooker intended to provide access to the property located West of the centerline of N. Ginger Lane (i.e. Parcels 6200, 6250 and 6400) from the County Road (i.e. Garwood Road) to E. Hooker Hill Road and to N. Ginger Lane. (See Dec]. Brian Hooker, 1] 8). And this makes sense when you look at the lay of the land at the time of both the Hooker to Walker and Hooker to Gordon Memorandums of Contract. Notably, there is no dispute that the eastern boundary of Parcel 6200 originally bordered much of N. Ginger Lane. Therefore, access to Parcel 6200 only became an issue following the Gordon lot-line adjustment and subsequent severance of the Gordon's title to revised Parcels 6200 (i.e. Kittelson) and 6250 (Le. Byrd). The Herndons' point merely being is that the grant of right of way does not expressly grant an easement over Parcel 5650, let alone, that specific area labeled the "Access Driveway."

Defs'. Reply in Supp. of Mot. for Summ. J. 4.

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. Where the owner of the dominant estate is selling the property to be subjected to the servitude, an express easement may be created by reservation or by exception. "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." *Akers,* 142 Idaho at 301, 127 P.3d at 204.

Tower Asset Sub Inc. v. Lawrence, 143 Idaho 710, 714–15, 152 P.3d 581, 585–86 (2007).

In this Case, this Court finds that no genuine issue of material fact exists as to the creation of an express easement for access to Parcel 6200 through Parcel 5650.

The Memorandum of Contract executed on May 3, 1981 (comp. Ex. 5), and Warranty Deed, Executed October 8, 1981 (*Id.* Ex. 6), conveyed a Warranty Deed from Everett L. Hooker and Neva A. Hooker (Hooker) to Merk Walker (Walker), "[T]OGETHER WITH a right of way from the County Road to the above described property, and SUBJECT TO an easement to use road ways in their present location as ingress and egress to property to the East thereof." Compl. Ex. 5 and 6. This Court agrees with the Herndons, there is no language found in either the Memorandum of Contract,

Instrument # 964582, or Warranty Deed, Instrument # 1730823, that grants an easement over Parcel 5650 for the benefit of Parcels 6200, 6250 or 6400. That fact answers the question on summary judgment as to an express easement. Therefore, there is no express easement over that area labeled "Access Driveway" as alleged in the Plaintiffs' Complaint. As noted above, Kittlesons' claim, "On the record before the court and construing the facts in favor of the plaintiffs, it is reasonable to assume that Hooker intended to both reserve an easement over the defendants' parcel for E. Hooker Hill Road, and to grant an easement over E. Hooker Hill Road for the property originally conveyed to Terry Gordon et al. In fact, Hooker's intent was expressly stated in the 1984 Warranty Deed to Gordon." Pls'. Mem. in Opp. to Defs'. Mot for Summ. J. 4. Such argument is misplaced. "Intent" is not an issue in determining whether there is an express easement. There is no ambiguity created by the language in the Memorandum of Contract or the Warranty Deed, both executed on October 8, 1981. Under that language, there is no express easement for access to Parcel 6200 through parcel 5650.

This Court agrees with Herndons, that, "The Memorandum of Contract, Instrument # 964582, does not contain any language that grants an easement over Parcel 5650 for the benefit of Parcels 6200, 6250 and 6400 the subject property of the Hooker to Gordon conveyance." Defs.' Mem. in Supp. of Mot. for Summ. J. 5, citing Compl Ex. 9, 15, 16, 17 and 18.

What is stated in a Warranty Deed issued in 1984 is not relevant in determining whether an express easement was created (or not) in 1981. The May 3, 1984, Warranty Deed, conveyed the property in question from Hooker to Terry E. Gordan and Joanne F. Gordan and states that the property is conveyed:

ALSO TOGETHER with a right of way over and across the existing drive for access purposes.

Said rights of way are for the benefit of and appurtenant to the property described herein and shall inure to the benefit of and may be used by all persons who may hereafter become the owners of said appurtenant property or any parts or portions thereof.

Compl. Ex. 18, page 2. This Court agrees with Herndon's argument that:

> Accordingly, it would be a non-sequitur to argue that Hooker granted an easement over Parcel 5650 any time after October 8, 1981. *Capstar Radio Operating Co.*, 153 Idaho at 417, 283 P.3d at 734.
>
> As the Plaintiffs recognize in their Complaint, on May 3, the Gordons (and Wrights) quitclaimed their property back to Hooker for the purpose of correcting an erroneous description of 6250 that had carried forward in subsequent conveyances. (See Pls.' Compl., 9 h, Ex. 16). While Hooker obliged by issuing corrected deeds to Gordon; by 1984, Hooker had already sold Parcel 5650 to Mark Walker and, therefore, as a matter of law, could not have granted an easement over Parcel 5650 for the benefit of Parcels 6200, 6250 and 6400. *Capstar Radio Operating Co.*, 153 Idaho at 41 7, 283 P.3d at 734. There is no language found in either the Memorandum of Contract, Instrument #964582, or Warranty Deed, Instrument # 1730823, that grants and easement over Parcel 5650 for the benefit of Parcels 6200, 6250 or 6400. Therefore, there is no express easement over that area labeled "Access Driveway" as alleged in the Plaintiffs' Complaint.

Defs.' Mem. in Supp. of Mot. for Summ. J. 6. For the reasons described above, this Court finds that no genuine issue of material fact exists as to the existence of an express easement over parcel 5650 for access to parcel 6200. There is no express easement.

B. Easement Implied by Prior Use

The Herndons argue that:

> [T]he Plaintiffs cannot prove any of the elements required for an implied easement by necessity. First, there is no dispute that the Gordons had unity of title in both Parcels 6200 and 6250 when the Gordons adjusted Parcel 6200 to become a ±5-acre parcel with its eastern boundary no longer contiguous to N. Ginger Lane. There is no dispute that prior to the Gordons lot line adjustment of Parcels 6200 and 6250, they regularly accessed their property from a private drive, off N. Ginger Lane—that existing road running North and South. Prior to the Gordons' adjustment of Parcel 6200, it was easily accessed from N. Ginger Lane. When the

Gordons adjusted Parcel 6200, they had the means to provide access to Parcel 6200 by reservation of an easement. When the County took Parcel 6200 by Tax Deed, it severed unity of the Gordons title in Parcels 6200 and 6250 and without having obtained a grant of easement over Parcel 6250 for the benefit of Parcel 6200. At the time Hooker sold Parcels 6200, 6250 and 6400 to the Gordons and Parcel 5650 to Mark Walker, there was access to Parcels 6200, 6250 and 6400 from Garwood Road, to E. Hooker Hill Road, and to N. Ginger Lane.

Second, the Plaintiffs cannot show any apparent continuous use of that area labeled "Access Driveway" prior to the time the Gordons adjusted Parcel 6200 to show that the use was intended to be permanent. To the contrary, there is no evidence that the area labeled "Access Driveway" was ever a driveway or otherwise used to regularly access Parcel 6200. Indeed, the evidence is that when Hooker logged the property that is Parcels 6200, 6250 and 6400 in the early 1970s there were skid trials and a log deck created near E. Hooker Hill Road for the purposes of transporting logs to the mill. The remnants of Hooker's historical logging activity are still readily visible today. There was no driveway. And, the alleged "blockage" of the driveway by the Herndons after October 21, 2013 has no basis in fact as the gate and fence found along the southern boundary of Parcel 5650 had been in place well before the Herndons acquired Parcel 5650.

Finally, there simply is no showing that the location the Kittelsons clearly covet an easement is reasonably necessary. The Kittelsons can access the property through Parcel 6250 (Byrd) or by easement from their western neighbor, Jacqueline Beaty. Indeed, it reasonably appears the Gordons regularly accessed adjusted Parcel 6200 from Parcel 6250 and there is a visible gate that was installed to the south of the private drive the Gordons used to access their property. As demonstrated, the Kittelsons have no claim against the Hemdons for an implied easement by necessity and, as a practical matter, this claim is better made against the Byrds as the successors to Gordon Parcel 6250.

Defs' mem. in Supp. of Mot. for Summ J. 7-8.

The Kittelsons argue that:

The declaration of Terry Gordon filed herewith contains factual allegations that directly contradict the defendants' Statement of Undisputed Facts submitted in support of their motion for summary judgment. Mr. Gordon testifies that the Access Driveway existed when he purchased the land in 1980, and that he improved and regularly used the Access Driveway from E. Hooker Hill Road to access the land that eventually became the plaintiffs' parcel. Gordon's use of the Access Driveway was necessary because he could not access the plaintiffs' parcel from N. Ginger Lane due to the topography of the land. Gordon built a residence on Parcel 6250 that he accessed via N. Ginger Lane, but the western portion of his land (now the plaintiffs' parcel) could only be accessed from the Access Driveway on E. Hooker Hill Road. Gordon built a fence along the

> southern edge of E. Hooker Hill Road and installed two gates that still exist today to provide ingress and egress through that fence at the Access Driveway location. All of these facts support the plaintiffs' implied easement claim and none of the defendants' Witnesses are competent to contradict the testimony of Mr. Gordon. On the record before the court, genuine issues of material fact preclude summary judgment for the defendants on the plaintiffs' implied easement claim.

Pls'. Mem. in Opp. to Defs'. Mot for Summ. J. 5.

The Herndons argue in their Reply Brief that:

> Mr. Gordon's declaration testimony is undermined by the fact that his most immediate successors- the County and the Henkoskis—never made any use of the alleged "access driveway." And it can be reasonably inferred that the Henkoskis acknowledged a lack of access over the Herndon Triangle Piece.

Reply Mem. in Supp. of Mot. for Summ. J. 5

This Court finds that there exists is a genuine issue of material fact as to an Easement Implied by Prior Use.

The Idaho Supreme Court has held that an easement implied by prior use requires that:

> the party asserting the easement must prove three elements: (1) unity of title or ownership and a subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate. *Davis v. Peacock,* 133 Idaho 637, 991 P.2d 362 (1999).

Thomas v. Madsen, 142 Idaho 635, 638, 132 P.3d 392, 395 (2006)

In this Case, first, "there is no dispute that the Gordons had unity of title in both Parcels 6200 and 6250 when the Gordons adjusted Parcel 6200 to become a ±5-acre parcel with its eastern boundary no longer contiguous to N. Ginger Lane." Defs' Mem. in Supp. of Mot. for Summ J. 7.

Next, the Kittelsons have put forward evidence through Terry Gordon's Declaration that there was apparent continuous use long enough before separation of

the dominant estate to show that the use was intended to be permanent. Decl. of Terry Gordon in Opp. of Mot. for Summ. J. 3-4. Gordon Testifies that "[f]or 30+years, my use of the Access Driveway for ingress and egress to the western portion of my land (now the plaintiffs' Parcel 6200) was regular, frequent and obvious. I would use the Access Driveway whenever it was necessary or convenient and I never asked for permission from the various owners of the land on the North side of E. Hooker Hill Road." Id.

Finally, the Kittelsons have presented evidence through the Declaration of Mathew Mayberry that the easement through use of the Access Driveway is reasonably necessary to the proper enjoyment of the dominant estate. Decl. of Mathew Mayberry in Opp. to Defs' Mot. for Summ. J. 4. Mayberry states that, "[b]ased on my inspection of the plaintiffs' parcel the adjacent Byrd and Beatty parcels; and based on my land use and development experience and knowledge of residential access requirements, it is my professional opinion that the only feasible and practicable point of ingress and egress to the plaintiffs' parcel is through the existing gates and via the existing Access Driveway from E. Hooker Hill Road near the northwest corner of the plaintiffs' parcel." *Id.*

For the reasons described above, this Court finds that a genuine issue of material fact exists as to the Kittelsons claim of Easement Implied by Prior Use.

C. Easement by Necessity

The Herndons argue that:

> [B]ecause the Gordons retained title to both Parcels 6200 and 6250, they did not need an easement over their own property. However, as the adjustment to Parcels 6200 and 6250 was under taken by the Gordons, it was necessarily incumbent on the Gordons to provide access to Parcel 6200 upon the severance of title. And, Gordon could do just that by either grantor reservation of an easement over Parcel 6250. The fact that Gordon failed to do so prior to the County taking Parcel 6200 by Tax Deed did not shift the burden of providing access to revised Parcel 6200 onto the Murrens or the Herndons. To the contrary, it necessarily shifted it

onto the Gordons' successors in interest and, frankly, that is whom the Plaintiffs should be looking to provide revised Parcel 6200 Parcel 6250. Notably, the Plaintiffs where offered an easement by their western neighbor, Jacqueline Beaty further evidencing the lack of any great present necessity for an easement over Herndon Parcel 5650.

Mem. in Supp. of Mot. for Summ. J. 9-10.

The Kittelsons argue that:

The declarations of Matthew B. Mayberry, Eric Kittelson and Terry Gordon filed herewith create genuine issues of material fact regarding the plaintiffs' claim of an easement by necessity over the defendants' parcel. The defendants allege that there was access to the plaintiffs' parcel Via N. Ginger Lane when Hooker first conveyed the defendants' parcel to Mark Walker in 1991. However, this claim is contradicted by the undisputed testimony of the plaintiffs and their witnesses. According to Matthew B. Mayberry, there is no feasible means to access the plaintiffs' parcel from N. Ginger Lane due to the steep topography of the land. Terry Gordon declares that he did not access the plaintiffs' parcel Via N. Ginger Lane because physical features of the land prevented such access. According to Mr. Gordon, "The only feasible way to access the plaintiffs' parcel 6200 is Via the Access Driveway originally built by Everett Hooker and maintained and improved by me over 30+years." Mr. Kittelson also declares that he has never accessed the plaintiffs' parcel Via N. Ginger Lane because there is no road across the Byrd Parcel that a normal passenger vehicle could use. The defendants also suggest that the plaintiffs could access their property with an easement from their western neighbor, Jacqueline Beaty (sic), but the plaintiffs have not been offered an access easement by Ms. Beatty or any of their other neighbors.

Pls'. Mem. in Opp. to Defs'. Mot for Summ. J. 6.

In their Reply Brief the Herndons argue that:

While the Herndons will stand on their prior Memorandum in Support, they point out that. Mr. Kittelson's own declaration testimony cuts against any claim for easement by necessity over the Herndon Triangle Piece. Mr. Kittelson states: "Since purchasing the Plaintiffs" Parcel", my wife and I have not used any road or trail over the Byrd Parcel to access our property" with a standard passenger vehicle. While Mr. Kittelson may not have used a "standard passenger vehicle" to access his property from the Byrd Parcel (i.e. revised Parcel 6250), he has clearly been accessing his property from the Byrd Parcel. And this makes the point: The Plaintiffs clearly can access their property from the Byrd Parcel. As noted, this shows the Plaintiffs' focus has, and continues to be, in a wrong place as the obvious location for access is and should be over and through the Byrd Parcel regardless if that location would be expensive or perhaps inconvenient.

Reply Mem. in Supp. of Mot. for Summ. J. 6-7.

This Court finds that a genuine issue of material fact exists pertaining to Kittelsons claim of easement by necessity.

The Idaho Supreme Court has found that:

> "An easement by necessity requires (1) unity of ownership prior to division of the tract; (2) necessity of an easement at the time of severance; and (3) great present necessity for the easement." *Bob Daniels & Sons,* 106 Idaho at 542, 681 P.2d at 1017 (citing *Cordwell,* 105 Idaho at 79, 665 P.2d at 1089). If an alternate access exists, even one which is thought to be expensive or inconvenient, then an easement by necessity must not be granted. *Id.*

Capstar Radio Operating Co. v. Lawrence, 153 Idaho 411, 419, 283 P.3d 728, 736 (2012).

In this case, as shown above, evidence of unity of ownership prior to division of the tract has been shown by the Kittelsons. Additionally, as described above, evidence has been presented through Mayberry's Declaration regarding the necessity of the easement at the time of severance. Finally, the Kittelsons have arguably presented evidence of, "great present necessity for the easement" through the Declaration of Eric Kittelson stating "[t]he plaintiffs' Parcel ... does not currently enjoy any easement rights for access over the Beatty Parcel located to the West or over the Byrd Parcel located to the East. Decl. of Eric Kittelson in Opp. of Mot. for Summ. J. 1-2. Additionally, Eric Kittelson testifies that "[t]he plaintiffs" Parcel also does not have easement rights for access over the parcel to the South owned by the James and Melody Bohall Famfly Trust. We haven't been offered an access easement by Beatty, Byrd or the Banal Family Trust." *Id.* at 2.

For the reasons described above, this Court finds that a genuine issue of material fact exists relating to the Kittelsons' claim of Easement by Necessity.

D. Covenant Running with the Land

The Herndons argue that:

> As discussed herein, there simply is no language found in any of the title instruments that supports (a) express easement; (b) covenant running with the land, or (c) private dedication. The record and evidence plainly show that when Hooker sold Parcel 5650 to Mark Walker, there was already access to Parcels 6200, 6250 and 6400 from Garwood Road, to E. Hooker Hill Road, and to N. Ginger Lane. There simply is no language in an instrument of title whereby there was ever any 'private dedication made over any part of Parcel 5650 for the purpose of establishing a driveway for the benefit of revised Parcel 6200.

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

The Kittelsons argue that:

> In response to the plaintiffs' claim that Hooker created covenants running with the land for access over E. Hooker Hill Road, the defendants admit, ". .. Hooker intended that Parcels 5650, 6200, 6250 and 6400 were to be accessed by means of Garwood Road to E. Hooker Hill Road and that Parcels 6200, 6250 and 6400 were intended to be accessed by N. Ginger Lane." The chain of title documents in the record, and common sense, supports the conclusion that Hooker intended E. Hooker Hill Road to provide access to all of the parcels created by Hooker, and any part or portion thereof. The defendants correctly admit that the plaintiffs have the right to drive across the defendants' parcel on E. Hooker Hill Road. What the defendants dispute is the plaintiffs' right to enter the plaintiffs' parcel from E. Hooker Hill Road at the Access Driveway admittedly created by Hooker for that express purpose. The defendants took title to their property "SUBJECT TO all easements, right of ways, covenants, restrictions, reservations, applicable building and zoning ordinances and use regulations and restrictions of record. . ." Among the covenants or record in the defendants' chain of title is the easement to use "roadways in their present location as ingress and egress to property to the East thereof" reserved in the Memorandum of Contract between Hooker and Mark Walker recorded in 1981, and a similar reservation in the Warranty Deed from Hooker to Walker recorded in 1991. According to the declaration of Terry Gordon, the Access Driveway that exists today also existed in 1981 and in 1991 as a roadway to the plaintiffs' parcel on the record before the court, summary dismissal of the plaintiffs' claim of a covenant running with the land is not appropriate.

Pls'. Mem. in Opp. to Defs'. Mot for Summ. J. 6-7.

This Court finds that a genuine issue of material fact exists regarding the Kittelsons' claim of Covenant Running with the Land. The Kittelsons have presented

evidence through the 1981 and 1984 Warranty Deeds that the right of way described in these deeds run with the land. The Herndons assertion that this chain of title was broken when the County took ownership by tax deed does not destroy the Kittelsons' evidence that the easement across Parcel 5650 to access Parcel 6200 still runs with the land.

For these reasons, this Court finds that a genuine issue of material fact remains regarding the Kittelsons' claim of Covenant Running with the Land.

E. Common Law Private Dedication

The Herndons argue that:

> In this case, just as the Plaintiffs cannot cite any express grant or reservation of easement in the respective chains of title, they also cannot cite to any specific language from any instrument of title to Parcel 5650 that could be construed as a covenant running with the land that would, in effect, create a right of access over Parcel 5650 for the benefit of revised Parcels 6200. In short, there is no such covenant and, therefore, the claim must be dismissed.

Defs' Mem. in Supp. of Mot. for Summ. J. 11.

The Kittelsons argue that:

> The evidence that supports the plaintiffs' claim of a covenant running with the land also supports their claim of a common law private dedication of E. Hooker Hill Road for access to the plaintiffs' parcel. Through the Memorandum of Contract and subsequent warranty Deed from Hooker to Mark Walker, Mr. and Mrs. Hooker clearly indicated their intent to dedicate existing roadways for ingress and egress to neighboring parcels. And, based on the record before the court, it appears that intention was accomplished. The Access Driveway that existed in 1981 was used, maintained and improved by Terry Gordon without interference for over 30 years.

Pls'. Mem. in Opp. to Defs'. Mot for Summ. J. 7-8.

This Court finds that the same reasons found by this Court regarding the existence of a genuine issue of material fact regarding the Kittesons' claim of Covenant

Running with the Land applies to the Kittelsons' claim of Common Law Private Dedication.

F. Quiet Title Counter Claim

To support the Herndons argument to Quiet Title, the Herndons lay out a chronological argument of the events as it pertains the property in question. Defs' Mem. in Supp. of Mot. for Summ. J. 13-16.

The Kittelsons argue that:

> The defendants took title to their property with constructive notice of all previously recorded instruments including the deeds and other documents set forth in the plaintiffs' complaint. LC. §55-81 1. Those recorded documents contain express easements and covenants that should be fully litigated at trial before any final determination of the respective rights and obligations of the parties. As set forth above, the genuine issues of material fact that preclude summary dismissal of the plaintiffs' claims herein also preclude entry of summary judgment granting the defendants' quiet title claim.

Pls'. Mem. in Opp. to Defs'. Mot for Summ. J. 8.

In their Reply Brief the Herndons argue that:

> Regarding the Plaifitiffs' argument of the Herndons having constructive notice of previously recorded instruments, this argument also cuts both ways. Indeed, it strains credulity to think the Plaintiffs did not know about the lack of access to revised Parcel 6200 prior to purchasing the property from Henkoski. As shown the Henkoskis and their realtor were well advised of the lack of access which was plainly noted in the MLS listing for the property and can be reasonably inferred by their attempts to purchase the Herndon Triangle Piece or an easement from the Herndons. And while the Plaintiffs make much about the gate that was visible and located on the Herndon Triangle Piece, the evidence is that the gate was locked, and the Plaintiffs were not provided a key. As the record shows, the Herndons went to some length to communicate these issues the Plaintiffs. As demonstrated, the Herndons have shown that their title was free from any encumbrance for an "access driveway" over their Triangle Piece and, therefore, are entitled to a judgment quieting title to Parcel 5650.

Defs'. Reply Brief in Supp. of Mot. for Summ j. 8-9.

As shown above, this Court finds that numerous genuine issues of material fact remain regarding the claims of an easement over Parcel 5650, and this obviously precludes the Court from ruling to quiet title on the property.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, defendant Herndons' Motion for Summary Judgment is granted as to express easement (finding there is no express easement) and denied on all other aspects.

IT IS HEREBY ORDERED that defendant Herndons' Motion for Summary Judgement is **GRANTED** as to express easement (finding there is no express easement) and **DENIED** as to all other aspects.

DATED this 21st day of July, 2020.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 21st day of July, 2020, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail, email or facsimile to each of the following:

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By Jeanne Clausen
Jeanne Clausen, Secretary