STATE OF IDAHO)
County of BONNER)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

JOHN F. THORNTON,)
)
Plaintiff,)
vs.)
)
MARY E. PANDREA, a single woman individually and as Trustee of the Kari A. Clark and Mary E. Pandrea Revocable Trust u/a April 9, 2002, and KARI A. CLARK, a single woman individually and as Trustee of the Kari A. Clark and Mary E. Pandrea Revocable Trust u/a April 9, 2002, and as Trustee of the Kari A. Clark Trust u/a June 21, 2010,)
)
Defendants.)

Case No. **BON CV 2013 1334**

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT PANDREA'S MOTION TO DISMISS (MOTION FOR SUMMARY JUDGMENT)

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

A. Procedural History.

This matter is before the Court on "Defendant Pandrea's Motion to Dismiss Complaint to Quiet Title and for Damages Under I.R.C.P. 12(b)" (Motion to Dismiss) filed by defendant Mary Pandrea (Pandrea) *pro se* on November 7, 2013. Filed by Pandrea that same day were an "Affidavit [of Mary E. Pandrea] in Support of Defendant Pandrea's Motion to Dismiss Complaint to Quiet Title and for Damages", and "Defendant Pandrea's Memorandum in Support of Motion to Dismiss Complaint to Quiet Title and for Damages."

On August 14, 2013, plaintiff John F. Thornton (Thornton) filed a Complaint to quiet title to real property he claims he owns and upon which Pandrea may have an

interest. Complaint to Quiet Title and for Damages, pp. 3-5, ¶¶ 2.7-2.22. The dispute involves a "Well Piece" which is on land Thornton considers he owns and upon which he contends he has exercised control over. *Id.,* p. 3, ¶¶ 2.8-2.9. Thornton alleges Pandrea claims a right to use water from that well. *Id.*

Pandrea filed an Answer on September 3, 2013, and admits there is a dispute over the interest. Defendant Pandrea's Answer to Complaint to Quiet Title and Damages, pp. 2-4, ¶¶ 2.7-2.22. Pandrea admits she claims a right to use water from that well, but denies Thornton has exercised any acts of control over the Well Piece. *Id.,* p. 3, ¶¶ 2.9-2.9.

Thornton also claims that Thornton and Pandrea/Clark are litigating the Well Piece as well as an easement consisting of a narrow dirt driveway through Thornton's property. Complaint to Quiet Title and for Damages, pp. 4-5, ¶¶ 2.13-2.22. Pandrea denies most of these claims. Pandrea's Answer to Complaint to Quiet Title and Damages, pp. 3-5, ¶¶ 2.13-2.22.

After Pandrea filed her Motion to Dismiss, Affidavit, and Memorandum in Support on November 7, 2013, Pandrea filed a "Supplemental Memorandum in Support of Pandrea's Motion to Dismiss" on December 11, 2013. On December 23, 2013, Thornton filed his "Plaintiff's Objection and Memorandum of Law in Opposition to Summary Judgment", and an "Affidavit of John Thornton in Opposition to Summary Judgment." On December 30, 2013, Pandrea filed her "Reply to Plaintiff's Objection in Opposition to Summary Judgment on Defendant's Motion to Dismiss Complaint."

Oral argument on Pandrea's Motion to Dismiss was held January 6, 2014, in a courtroom in Kootenai County. Counsel for Thornton appeared telephonically. Counsel for defendant Kari A. Clark (Clark) appreared personally, as did Pandrea, *pro se*. Counsel for Clark stated Clark took no position on Pandrea's Motion to Dismiss.

Counsel for Thornton failed to follow I.R.C.P. 7(b)(4)(A), by failing to obtain a stipulation of the remaining parties for her to participate telephonically on what became a motion for summary judgment by Pandrea. At oral argument, the Court asked if there were any objection to counsel for Thornton participating telephonically, and Pandrea and counsel for Clark stated they had no objection.

At the conclusion of that hearing the Court took Pandrea's Motion to Dismiss under advisement.

B. Factual Background.

On August 14, 2013, this action was commenced by Thornton against his neighbors Pandrea and Clark to quiet title to real property. Thornton and Pandrea own adjacent parcels of real property in Sandpoint, Bonner County, Idaho, near Tavern Creek. Complaint to Quiet Title and for Damages, pp. 3-5, ¶¶ 2.7-2.22. Thornton and Pandrea share a common boundary border. Affidavit of Mary E. Pandrea p. 2, ¶ 3.

In 1993, prior to owing the land, Thornton rented the property from Robert Wiltse (Wiltse) and Wiltse's wife at the time, Pandrea. Complaint, p. 2, ¶ 2.2. Wiltse and Pandrea divorced in 1996. Affidavit of Mary E. Pandrea, p. 2, ¶ 6. When Thornton first took possession of the property to rent, Thornton claims Wiltse and Pandrea described the physical boundaries of the property. Complaint, p. 2, ¶ 2.3. Thornton contends in his Complaint that he was "informed that the property began at the upper road directly above Plaintiff's shop, then North, along a wire fence beside the road, to the centerline of Tavern Creek, then down to Pack River, the along Pack River to the old county roadway." *Id.,* p. 2, ¶ 2.4. In Thornton's affidavit, he contends "Pandrea told me my property ran along Tavern Creek, from the property corner down to Pack River." Affidavit of John Thornton in Opposition to Summary Judgment, p. 2. However, there is no time period attached to that claim.

"On or around June of 1998", Thornton claims he purchased the land he had been renting. (hereafter referred to as "Thornton Property"). Complaint to Quiet Title and for Damages, p. 2, ¶¶ 2.1, 2.2, Exhibit 1. At no point in Thornton's Complaint or his affidavit does Thornton specifically state when he acquired title to this property. Thornton attaches as Exhibit 1 to his Complaint, a property description which he claims describes his property located at 4685 Upper Pack River Road, Sandpoint, Bonner County, Idaho. *Id.,* p. 2, ¶ 2.1, Exhibit 1. However, that property description is simply printed on a piece of paper and attached to his Complaint; it is not a certified copy of Thornton's deed. *Id.*

Thornton contends the warranty deed for the purchase of the Thornton Property "does not include any language reflecting the conveyance, or otherwise referencing the right to use the water from the well." Affidavit of John Thornton in Opposition to Summary Judgment, pp. 1-2. Neither in his Complaint nor his affidavit does Thornton state the basis for the property description attached as Exhibit 1 to his Complaint. At no time does Thornton tell us when he acquired this property, at no time does Thornton produce any evidence of his actual ownership of the land he claims to own in his Complaint. In any event, Pandrea denies this allegation that Thornton owns the property he describes in his Complaint. Defendant Pandrea's Answer to Complaint to Quiet Title and Damages, p. 2, ¶ 2.1. Thornton further contends that "[t]he property was taxed and financed as an improved residence with a well; and, neither the title insurance company, the real estate agency, the real estate appraiser, or the mortgagee, gave any indication that they knew of any such conveyance." *Id.*, p. 2. As such, he contends that the warranty deed from Wiltse does not contain any language regarding a conveyance to Pandrea or Clark that would suggest he should look to other documents

for a more complete description of the purchased land. *Id*., pp. 1-2. However, once again, the Court does not have before it in evidence, the deed from Wiltse to Thornton.

On August 14, 2013, Thornton brought this action to quiet title to a parcel of land, approximately the tenth of an acre in size, which contains a well (Well Piece). Complaint, pp. 3-5, ¶¶ 2.7-2.22. Thornton contends that in 2012 he had the Thornton Property surveyed; and apparently that is when Thornton discovered the physical property description on his Deed did not include about one-tenth acre, hereinafter the "Well Piece", where the well providing water to his residence is located; legally described in EXHIBIT TWO." *Id.,* p. 3, ¶ 2.6. Thornton attaches as Exhibit 2 to his Complaint, a property description. *Id.,* Exhibit 2. However, once again that property description is simply printed on a piece of paper and attached to his Complaint; it is not a certified copy of any recorded document. *Id.* Thus, it *seems* (the Court is unsure as the Court has not been provided a copy of Thornton's deed) that at all times Thornton was deeded a parcel, the metes and bounds description of which did not include the "Well Piece", but Thornton only discovered that fact in 2012 through a survey he had performed on his property.

Thornton now claims the physical property description contained in his deed did not, but should have, included the Well Property. *Id.,* p. 3, ¶ 2.7. Thornton asserts that the Well Property is naturally enclosed within the Thornton Property. *Id.*, p. 4, ¶ 2.21. Thornton claims he has used the well and the land surrounding it for more than twenty (20) years. Affidavit of John Thornton in Opposition to Summary Judgment, p. 2. Specifically, Thornton contends that at all times of his occupation of the Thornton Property, Thornton has operated and maintained the disputed well and well house, and

cleared brush and timber from the Well Property. *Id.*, p. 3, ¶ 2.9. Thornton also claims there are two (2) wells on opposite sides of Tavern Creek. Complaint, p. 3, ¶ 2.12.

Next, Thornton claims, "When confronted, July 2013, Defendant Mary Pandrea disclosed a deed, hereinafter the 'Quitclaim,' purporting to transfer the Well Piece to herself and Defendant Kari Clark, dated 1993, attached and referenced as EXHIBIT THREE." *Id.,* p. 3, ¶ 2.7. Thornton then attaches to his Complaint what appears to be a copy (not certified) of a recorded deed. *Id.,* Exhibit 3. Exhibit 3 describes a parcel which is also part of the overall property description contained in Exhibit 1. Thus, if Thornton were deeded by Wiltse, all the property shown in Exhibit 1 (keeping in mind Exhibit 1 is not a deed but simply a document prepared by someone, the Court has been presented no copy of any recorded document showing what Thornton claims he owns), then it would appear that under Exhibit 3, the "Well Piece" was deeded twice. Once in 1993 by Wiltse and Pandrea to Pandrea and Clark, and recorded in 1993, and again in 1998 from Wiltse to Thornton (but again, we have never seen that deed). Because Thornton has provided no copy of his deed, the Court has no way of knowing whether the Well Piece was excepted out of his metes and bounds property description on that deed, or whether the Well Piece was included in that deed when he purchased the property from Wiltse.

Pandrea, in her *pro se* Answer on September 3, 2013, admits there is a dispute over the interest. Defendant Pandrea's Answer to Complaint to Quiet Title and Damages, pp. 2-4, ¶¶ 2.7-2.22. Pandrea claims she transferred the Well Property to herself and Clark by quitclaim deed in 1993, prior to Thornton's purchase. *Id.* p. 3, ¶ 2.7. The quitclaim deed specifically states, "[s]ubject to and reserving to the grantors the right and use of the existing well, situated on the above describe property."

Complaint, Exhibit 3. Thornton acknowledges that Pandrea has an easement across the Thornton Property and Thornton classifies it as an easement in gross. Complaint, p. 4, ¶¶ 2.13-2.20. On the other hand, Pandrea contends she has an easement appurtenant through the Thornton Property, although this contention is not supported by affidavit or admissible evidence. Defendant Pandrea's Answer to Complaint to Quiet Title and Damages, p. 4, ¶ 2.17.

Thornton's Complaint, Pandrea's Memorandum in Support of Motion to Dismiss Complaint to Quiet Title and for Damages, and Pandrea's Repoly to Plaintiff's Objection in Opposition to Summary Judgment on Defendant's Motion to Dismiss Complaint, all have attachments stapled to the back of those filings. Those attached documents are not admissible evidence. Additionally, Pandrea's Memorandum in Support of Motion to Dismiss Complaint to Quiet Title and for Damages, Pandrea's Supplemental Memorandum in Support of Motion to Dismiss and Pandrea's Repoly to Plaintiff's Objection in Opposition to Summary Judgment on Defendant's Motion to Dismiss Complaint, all contains additional "facts" not supported by any affidavit or otherwise admissible evidence.

Pandrea moves to dismiss the instant action claiming she is not the proper party defendant to this lawsuit and Thornton has failed to state a claim upon while relief can be granted pursuant to Idaho Rule of Civil Procedure 12(b)(6). Memorandum in Support of Motion to Dismiss, pp. 3-4.

II. STANDARD OF REVIEW.

In considering a motion to dismiss under Idaho Rule of Civil Procedure 12(b), the court may examine only those facts that appear in the complaint and any facts that are appropriate for the court to take judicial notice of. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct.App. 1990). Where matters outside the pleadings are

submitted in support of a party's motion to dismiss, a court must treat the motion to dismiss as a motion for summary judgment. *Masi v. Seale*, 106 Idaho 561, 562, 682 P.2d 102, 103 (1984); *Hellickson*, 118 Idaho 273, 276, 796 P.2d 150, 153.

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996). To withstand a motion for summary judgment, the non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). Liberal construction of the facts in favor of the non-moving party requires the court to draw all reasonable factual inferences in favor of the non-moving party. *See Williams v. Blakley*, 114 Idaho 323, 324, 757 P.2d 186, 187 (1988); *Blake v. Cruz*, 108 Idaho 253, 255, 698 P.2d 315, 317 (1985). An adverse party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. *Id*.; *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994).

"[E]vidence presented in support of or in opposition to motions for summary judgment must be admissible evidence . . . ." *Hecla Min. Co. v. Star-Morning Min. Co.*, 122 Idaho 778, 784, 839 P.2d 1192, 1198 (1992). "The question of admissibility is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to the admissible evidence." *Id.*

III. ANALYSIS OF PANDREA'S MOTION TO DISMISS.

A. Pandrea has turned her Motion to Dismiss into a Motion for Summary Judgment.

In this case, while Pandrea has filed a motion to dismiss under I.R.C.P. 12(b), she also filed an affidavit in support of her motion. In considering a motion to dismiss under Idaho Rule of Civil Procedure 12(b), the court may examine only those facts that appear in the complaint and any facts that are appropriate for the court to take judicial notice of. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct.App. 1990). Where matters outside the pleadings are submitted in support of a party's motion to dismiss, a court must treat the motion to dismiss as a motion for summary judgment. *Masi v. Seale*, 106 Idaho 561, 562, 682 P.2d 102, 103 (1984); *Hellickson*, 118 Idaho 273, 276, 796 P.2d, 150, 153. As such, this Court must treat Pandrea's motion to dismiss as as a motion for summary judgment. Indeed, this Court indicated it would do so in its December 9, 2013, decision. Memorandum Decision and Order Granting Plaintiff's Motion to Compel, p. 9.

B. Pandrea is a Proper Party to this Action.

Pandrea claims that because the transaction for the sale of the Thornton Property occurred between Wiltse and Thornton after the dissolution of her marriage to Wiltse, and that, until now, she was unaware of any boundary disputes regarding the Well Property, she is not a proper defendant to this quiet title action. Memorandum in Support of Motion to Dismiss, pp. 3-4. As a result, she contends Thornton's claims of unjust enrichment, constructive fraud and fraudulent concealment are moot. *Id.* Pandrea seemed to tumble to the fact that she was a real party in interest when she wrote: "This supplementation is being submitted as it has become apparent from the recent Order to Compel discovery that Pandrea is considered 'a party in interest' to this litigation as per Idaho Code §63-201." Supplemental Memorandum in Support of

Pandrea's Motion to Dismiss, p. 1. That was short lived, as Pandrea most recently claims, "Based on the undisputed facts and as a matter of law, Pandrea cannot be considered a proper party defendant in any issues relating to the property transaction between Mr. Wiltse and Thornton in 1988." Reply to Plaintiff's Objection in Opposition to Summary Judgment on Defendant's Motion to Dismiss Complaint, p. 5.

First of all, Pandrea utterly fails to state what the "law" is when stating she cannot be an a proper party "as a matter of law." Second, contrary to Pandrea's claim, there are not many "undisputed facts." In their briefing, Pandrea and Thornton disagree about most everything. The parties cannot even agree whether Wiltse is still alive. *Id.* In ruling on summary judgment, about all the Court has before it is "argument", as both parties have completely failed to provide admissible evidence to the Court.

Title 6, Chapter 4 of the Idaho Code govern quiet title actions. Any person, whether in actual possession of property or not and whether holding legal or equitable title, may bring and maintain an action to quiet title against another who claims an interest adverse to him. I.C. § 6-401; *The Mode v. Myers,* 30 Idaho 159, ___, 164 P. 91, 92 (1917).

Pandrea clearly has an interest in the Well Property that is adverse to Thornton. She refers to the property as "my property" and "her property" in both her affidavit and memorandum in support of her motion to dismiss. Affidavit of Mary E. Pandrea p. 2, ¶ 7; Defendant Pandrea's Memorandum in Support of Motion to Dismiss Complaint to Quiet Title and for Damages, p. 4-5. She further attests that she owns the disputed land where the well is located. Affidavit of Mary E. Pandrea p. 3, ¶ 11. Based on her claims over the disputed property, this Court specifically finds Pandrea is a necessary and proper party to this action. Accordingly, any claims by Pandrea that she should be dismissed because she is not a proper party, are without merit. Pandrea's Motion to

Dismiss (now Motion for Summary Judgment) based on her claim that she is not a proper party to this action, is denied. Instead, the Court finds as a matter of law that Pandrea is a proper party to this lawsuit.

C. A Genuine Issue of Material Fact Exists as to Whether Thornton is a Bona Fide Purchaser and Whether Pandrea Concealed her Claim to the Well Property.

In her "Supplemental Memorandum", Pandrea claims Thornton is not a bona fide purchaser of the Well Property and as such he cannot now bring a claim to quiet title. Supplemental Memorandum in Support of Motion to Dismiss, pp. 6-7. Pandrea claims that by filing the quitclaim deed, Thornton had constructive notice of her interest in the Well Property, and thus, cannot be a bona fide purchaser. *Id.* Pandrea also claims that since the Well Property is not contained in Thornton's property description, Thornton cannot consider himself to be a bona fide purchaser for value. *Id.* But just as Thornton has failed to provide the Court with admissible evidence of his deed for his property, Pandrea has likewise failed to provide this Court with admissible evidence regarding Thornton's deed. Thus, this Court is completely unable to determine Pandrea's claim that "since the Well Property is not contained in Thornton's property description, Thornton cannot consider himself to be a bona fide purchaser for value."

Pandrea further claims she has not intentionally mislead Thornton into thinking that the Well Property belongs to him, and she also claims that because she did not sell the property to Thornton (Wiltse did after Wiltse and Pandrea were divorced), she had no legal duty or obligation to disclose information to Thornton when he purchased the property, and thus she could not have "concealed" or "failed to disclose" her claim to the well property. Reply to Plaintiff's Objection in Opposition to Summary Judgment, p. 6. This seems to be Pandrea's response to Thornton's claim that Pandrea concealed her claim to the Well Property. Plaintiff's Objection and Memorandum of Law in

Opposition to Summary Judgment, pp 2-3. Thornton apparently claims Pandrea owed him a duty not to conceal her claim to the well because "…she was a neighbor and frequently conversed with John Thornton, when he, an unsuspecting third party, purchased the property sold as a result of her divorce…" *Id.* He contends that whether this concealment was fraudulent is a question of fact for a jury to decide. *Id.,* p. 6. Thornton has cited no authority that a neighbor who frequently converses with a neighboring landowner, has a duty to tell the neighboring landowner what the neighbor who is speaking might own or have easements upon. The Court finds that argument of Thornton completely without merit. The Court assumes Thornton simply failed to articulate the correct argument, which is if Pandrea made representations to Thornton *before* Thornton purchased his property, there would have been a duty by Pandrea to not mislead.

"A bona fide purchaser is one who takes real property by paying valuable consideration and in good faith, i.e., without knowing of adverse claims. The theory behind the rule is to protect innocent purchasers and to allow them to obtain and convey unsullied interests. " *Sun Valley Land & Minerals, Inc. v. Burt*, 123 Idaho 862, 866, 853 P.2d 607, 611 (Ct.App. 1993) (citing I.C. §§ 55–606, 55–812). An interest in real property must be recorded by the purchaser to protect them from other claimants. *Id.* "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." *Id.*

"The primary purpose of the recording statutes is to give notice to others that an interest is claimed in real property." *Kalange v. Rencher*, 136 Idaho 192, 195, 30 P.3d 970, 973 (2001). Under Idaho's recording statutes, "[e]very conveyance of real property

acknowledged or proved, and certified and recorded as prescribed by law, is constructive notice of its contents to subsequent purchasers and mortgag(e)es" beginning when the recording is filed. I.C. § 55-811. A person who records such an instrument is not required to give additional notice to anyone who deals with other persons about the property. *Eastwood v. Standard Mines & Milling Co.*, 11 Idaho 195, 81 P. 382, 383 (1905). He or she may rely on the constructive notice. *Id*. This is because "[o]ne 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." *Kalange,* 136 Idaho at 195, 30 P.3d at 973 (citing *Glover v. Brown*, 32 Idaho 426, 184 P. 649 (1919)).

However, if "he [or she] becomes active, [their] actions, declarations, and conduct with reference to the title must not be such as to deceive or mislead a reasonable person, or deter, prevent, or dissuade [them] form [sic] examining the record and learning the true condition of the title." *Eastwood*, 11 Idaho 195, 81 P. 382, 383. Moreover, if it is determined that the conduct "amount[s] to a fraud upon one dealing with or in reference to the property, the one to whom such conduct is imputable will be estopped from thereafter asserting title in himself contrary to his previous declarations, action, or conduct." *Id.* Finally,"[w]hether a party has notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and whether by prosecuting such inquiry he might have learned such fact, are questions of fact for the court or jury." *Pflueger v. Hopple,* 66 Idaho 152, 158, 156 P.2d 316, 318 (1945).

The question before the Court is whether Thornton had notice of claims that could adversely affect his interest in the Well Property. The relevant evidence properly before the Court at this time is as follows: Thornton has resided on the Thornton Property since 1993. Prior to his purchase of the Thornton Property, he rented it from Pandrea and Wiltse. Thornton claims that both Pandrea and Wiltse verbally described the boundaries of the rental property and he believed he subsequently purchased all of the land within that description. At the time Pandrea filed the quitclaim deed, Thornton was still residing on the property as a tenant. The quitclaim deed specifically states, "[s]ubject to and reserving to the grantors the right and use of the existing well, situated on the above describe property." Exhibit 3, attached to Complaint. Thornton claims that there are two (2) wells on the Thornton Property. He contends that the disputed Well Property is naturally enclosed within the land he purchased. It is not fenced off or visually designated as belonging to another in any way.

Thornton further contends that the warranty deed for the purchase of the Thornton Property does not contain any language that would suggest to him he should look to other documents for a more complete description of the purchased land. Specifically, he asserts that "[t]he property was taxed and financed as an improved residence with a well; and, neither the title insurance company, the real estate agency, the real estate appraiser, or the mortgagee, gave any indication that they knew of any such conveyance." Affidavit of John Thornton in Opposition to Summary Judgment, p. 2. He asserts that at the time the quitclaim deed was recorded, he was never notified of the transfer of property; property that was included as part of his rental at the time the deed was recorded. Pandrea claims that since she properly recorded the quitclaim deed, Thornton had constructive notice of her interest in the Well Property.

Since this is a motion for summary judgment, at this stage in the proceedings, Pandrea must demonstrate the absence of a genuine issue of material fact. A question of fact remains surrounding what notice Thornton had or should have had when he purchased the property, and as such, it follows that a question of material fact remains regarding his status as a bona fide purchaser. Additionally, there is a genuine issue of material fact as to whether Pandrea's actions and declarations to Thornton about the property while he was a tenant would have dissuaded a reasonable person from learning the true condition of the title at the time of purchase. Viewing the evidence in the light most favorable to the non-moving party, Pandrea has failed to meet her burden and it would be erroneous for the Court to grant Pandrea summary judgment on these issues. Accordingly, summary judgment as to Thornton's claims of being a bona fide purchaser and Thornton's claims related to any concealment by Pandrea, are denied.

D. Adverse Possession Claims.

In his Complaint, Thornton appears to claim ownership over the Well Property by adverse possession. Thornton fails to make a specific claim of adverse possession in his Complaint. However, jumbled in with Thornton's claims of Pandrea's concealment, in his Complaint Thornton makes allegations which certainly sound like he is claiming adverse possession both as to the Well piece and as to the roadway. Complaint, p. 3, ¶¶ 2.9, 2.10; p. 4, ¶¶ 2.17, 2.20; p. 5, ¶ 3.6. In her motion to dismiss (now summary judgment) Pandrea contends Thornton cannot make a claim for adverse possession over the Well Property because his possession was not hostile, was not for a period of twenty (20) years, and Thornton failed to comply with the tax requirement set forth in Idaho Code § 5-210. Memorandum In Support of Motion to Dismiss, p. 4; Supplemental Memorandum In Support of Pandrea's Motion to Dismiss p. 5-6. Each of these arguments will be discussed in turn below.

Idaho Code § 5-210 governs oral claims for adverse possession. This section requires that, to orally claim title by adverse possession, a person must possess or occupy the land by (1) protecting the land by a substantial enclosure or (2) cultivating or improving the land. I.C. § 5-210. Additionally, adverse possession cannot be established unless the land was also occupied and claimed continuously for twenty (20) years and that the persons claiming adverse possession and their predecessors and grantors have paid all taxes assessed on the land. *Id.* Where, as alleged in the Complaint here, both the record owner and the adverse possessor pay taxes on the disputed property, the adverse possessor prevails. *Roark v. Bentley,* 139 Idaho 793, 796, 86 P.3d 507, 510 (2004). The person claiming adverse possession must satisfy the above requirements by clear and convincing evidence. I.C. § 5-210.

Moreover, the adverse possessor must also demonstrate that the possession was actual, open, visible, continuous, notorious, and hostile to the other party. *Winn v. Easton,* 128 Idaho 670, 673, 917 P.2d 1310, 1313 (Ct.App. 1991) (citing *Kolough v. Kramer,* 120 Idaho 65, 67-68, 813 P.2d 876, 878-79 (1991)). Hostile intent is demonstrated by "the existence of physical facts which openly evince a purpose to hold dominion over the land in hostility to the title of the real owner and such as will give notice of the hostile intent." *Hamilton v. Vill. of McCall*, 90 Idaho 253, 258, 409 P.2d 393, 396 (1965).

1. Pandrea failed to demonstrate an absence of material fact that Thornton's occupation of the disputed property is hostile.

Pandrea claims that Thornton's use of the Well Property was not hostile, because she permitted him to have access to the well. However, Pandrea has failed to submit any *admissible evidence* on this issue by affidavit or otherwise. Rather, Pandrea wrote the following statement:

> Pandrea has not prevented the Plaintiff from accessing the well that is located on her property near Tavern Creek. Pandrea was also unaware that timber had been removed from her property by the Plaintiff....

Memorandum In Support of Motion to Dismiss, p. 4 (footnote omitted).

In order for Pandrea to prevail on this issue at summary judgment, she must present admissible evidence to show the absence of a genuine issue of fact. Pandrea has failed to do so. Since this is her motion for summary judgment, Pandrea must show that Thornton's occupation of the disputed land was not hostile. While the above quoted language is not admissible evidence, if it was contained in an affidavit, such evidence would actually cut against Pandrea and work in favor of Thornton, as the above language indicates Thornton openly exhibited a purpose to hold dominion over the disputed land, hostile to Pandrea, when he removed timber from the land. It is Thornton's contention that at all times he has occupied his property he has operated and maintained the disputed well and well house and cleared brush and timber from the Well Property. Complaint to Quiet Title and for Damages, p. 3, ¶ 2.9. While Thornton failed to cover this topic in his affidavit, Thornton's Complaint is "verified". A verified complaint may be treated as an affidavit for summary judgment. *Camp v. Jiminez,* 107 Idaho 878, 693 P.2d 1080 (Ct.App. 1984). As a result, Pandrea has failed to shift to Thornton the burden of showing that there is a genuine issue of material fact on hostile intent. Accordingly, the Court must deny summary judgment on that issue.

2. Pandrea has Failed to Demonstrate an Absence of Material Fact that Thornton did not Pay Taxes on the Disputed Property.

Pandrea argues that Thornton's defense of adverse possession fails because he cannot meet the tax requirement set forth in Idaho Code § 5-210. Generally, Idaho Code § 5-210 requires that the claimant actually pay the taxes assessed on the disputed property. *Baxter v. Craney,* 135 Idaho 166, 170, 16 P.3d 263, 267 (2000).

However, there are exceptions to this requirement that an adverse possessor can rely on to meet the tax payment requirement. *Luce v. Marble,* 142 Idaho 264, 272, 127 P.3d 167, 175 (2005). In *Trappett v. Davis,* 102 Idaho 527, 633 P.2d 592 (1981), the Idaho Supreme Court explained one such exception to the tax payment requirement:

> This Court frequently "wrestles" with property disputes involving the tax payment requirement. *Flynn v. Allison*, 97 Idaho 618, 621, 549 P.2d 1065, 1068 (1976). Decades of judicial gloss have steadily chipped away at a literal application of the tax requirement. A good deal of that judicial gloss has evolved mechanically and without benefit of supporting rationale, a criticism which might well be leveled at the tax payment requirement itself. In any event, given the state of case law, it may be better to commence our analysis by stating the obvious rule and then attempting to list the exceptions and qualifications to that rule.
>
> In the general case (which is by no means the most typical case), I.C. § 5-210 requires actual payment of taxes which are assessed to the disputed property. *Fry v. Smith*, 91 Idaho 740, 430 P.2d 486 (1967); *White v. Boydstun*, 91 Idaho 615, 428 P.2d 747 (1967); *Larsen v. Lindsay*, 80 Idaho 242, 327 P.2d 775 (1958); *Balmer v. Pollak*, 67 Idaho 494, 186 P.2d 217 (1947). Of critical importance is the assessor's actual basis for valuation of the property in question, i.e., whether his assessment was based on estimated acreage derived from physical inspection, value based on frontage feet, area calculated from a metes and bounds description, or some other method of valuation. The general tax rule focuses on actual payment as evidenced by the assessor's actual valuation. However, this Court has fashioned several corollaries and exceptions to the general rule which, when applied, have the effect of satisfying the tax requirement (by fiction or otherwise), even though it cannot be determined that the adverse claimant actually paid property tax on the disputed land.
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> > The first and most frequent example is the "lot number" corollary. "[I]n the case of boundary disputes between contiguous landowners, where one landowner can establish continuous open, notorious and hostile possession of an adjoining strip of his neighbor's land, and taxes are assessed by lot number or by government survey designation, rather than by metes and bounds description, payment of taxes on the lot within which the disputed tract is enclosed satisfies the tax payment requirement of the ... statute." *Scott v. Gubler*, 95 Idaho 441, 443-44, 511 P.2d 258, 260-61 (1973) (emphasis added, footnote omitted).
>
> The following cases apply the lot number corollary in one form or another: *Nesbitt v. Wolfkie*l, 100 Idaho 396, 598 P.2d 1046 (1979); *Standall v. Teater*, 96 Idaho 152, 525 P.2d 347 (1974); *Scott v. Gubler*, supra; *Beneficial Life Ins. Co. v. Wakamatsu*, 75 Idaho 232, 270 P.2d 830

> (1954); *Calkins v. Kousouros*, 72 Idaho 150, 237 P.2d 1053 (1951); *Bayhouse v. Urquides*, 17 Idaho 286, 105 P. 1066 (1909). The primary reason behind the lot number corollary is as follows: when taxes are assessed according to some generic description, "it [is] impossible to determine from the tax assessment record the precise quantum of property being assessed ...." *Flynn v. Allison*, 97 Idaho at 621, 549 P.2d at 1068. In the instant case, the properties of all parties involved were assessed on the basis of metes and bounds descriptions found in the respective deeds. Hence, Ogborn and the Trappetts cannot take advantage of the lot number corollary.

102 Idaho 527, 530-31, 633 P.2d 592, 595-96.

Here, Pandrea argues there is no genuine issue of fact on this issue. However, Pandrea has failed to submit any admissible evidence on this issue by affidavit or otherwise. Pandrea claims:

> Pandrea has paid all property taxes associated with tax 49, including the well, for more than (20) years. On the other hand, Thornton lacks any competent or substantial evidence to support his claim of tax payments on any part of tax 49.

Supplemental Memorandum In Support of Pandrea's Motion to Dismiss, p. 5-6. Moreover, while Pandrea attached tax records in Exhibit 6 to the Reply to Plaintiff's Objection in Opposition to Summary Judgment on Defendant's Motion to Dismiss Complaint, these documents are inadmissible as provided. Specifically, there is a three-page document entitled "TAX PAYMENT RECORDS FROM 1996 THROUGH 2011." This document appears to be a typed list of payments made to the Bonner's County Treasurer's Office. It is not supported by an affidavit. It is not certified. There is no indication of who created this document. As such, this document cannot be considered by the Court in making its determination on summary judgment. While Pandrea does present a copy of what *appears* to be an original tax assessment notice for 2013 in Exhibit 6, even if that were admissible (it is not), that document alone does not establish the absence of a genuine issue of material fact.

In order for Pandrea to prevail on this tax payment issue, she must present admissible evidence to show the absence of a genuine issue of fact. Since this is her motion for summary judgment, it is incumbent upon Pandrea to show that Thornton did not make the tax payments. Pandrea has failed to do this. The statement and documents provided by Pandrea are inadmissible. But even if they were supported by affidavit or presented in an admissible manner, what has been provided is insufficient to establish the absence of a genuine issue of fact as to whether the tax payments were made by Thornton. As a result, Pandrea has failed to shift the burden of showing that there is a genuine issue of material fact to Thornton. Accordingly, the Court must deny Pandrea's motion for summary judgment regarding adverse possession on the tax payment issue alone.

3. Thornton has Failed to Demonstrate a Material Fact Exists that Thornton Occupied the Disputed Property for the Twenty (20) Year Statutory Period.

Finally, Pandrea argues that Thornton cannot show he has occupied the land for twenty (20) years. The Court agrees.

Thornton obliquely makes the following two arguments regarding his adverse possession of the land in question for the requisite number of years:

> If the jury were to find that the "Quitclaim Deed" effectively conveyed the Well Piece, John Thronton alternatively argues that he adversely possessed the property for more than five years before the law changed in 2006, and also that he adversely possessed the "Well Piece" against the owners of Tax Lot 49, and their heirs and assigns, first as a tenant of Mary and Bob Wiltse, then as a tenant of Bob Wiltse, and then as owner of Thornton Property, since 1993, for more than 20 years to date.

Plaintiff's Objection and Memorandum of Law in Opposition to Summary Judgment, p. 2.

The Court will address Thornton's argument that the time Thornton spent renting the property from Pandrea/Wiltse should somehow begin the running of the limitations period. It is undisputed Thornton purchased the Thornton Property from Wiltse in 1998. Prior to that, he rented the property from Pandrea and Wiltse, beginning in 1993. Thornton's argument that the time period he was renting the property should be included when calculating whether he has satisfied the statutory period for occupation is completely misplaced. "When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord . . . ." I.C. § 5-211. Idaho Code § 5-211 specifically answers this question regarding adverse possession claims under I.C. § 5-210 when they involve a renter, and clearly answers the question contrary to Thornton's argument. Pandrea cites I.C. § 50-1301 to support her argument that Thornton's years as a tenant should not count. Reply to Plaintiff's Objection in Opposition to Summary Judgment on Defendants's Motion to Dismiss Complaint, p. 14. However, that statute does not apply as it specifically governs plats. Moreover, by Thornton's own admissions, the use of the Well Property while Thornton was renting the property from Wiltse and Pandrea was a permissive use, not hostile use. This is based on his assertion that while he was renting the property, Wiltse and Pandrea described the rental property and their description included the Well Property. Thus it could not be used to comply with the statutory requirement for adverse possession.

The Court next addresses Thronton's argument that the five year period which existed until July 2006, should apply, as opposed to the twenty year period that has existed since that time. I.C. § 5-210. Apparently, Thornton's argument is that since he purchased the property in 1998, five years would have run in 2003, thus, Thornton adversely possessed against Wiltse, and now Pandrea as of 2003. The Court is

unaware of any Idaho appellate court case determining which version of I.C. § 5-210 to apply in such a situation, and the parties have certainly failed to cite the Court to any authority on this topic. Unfortunately, the Idaho Legislature in making the change, did not include language to clarify the situation. In Colorado, their legislature made it very clear its changes to Colorado's adverse possession law (increasing the burden of proof to clear and convincing evidence), would apply only to civil actions filed after the effective date of the statutory change. C.R.S.A. § 38-41-101.

Thornton's claim that he can now at the present time apply a statute that is no longer in force, has two huge public policy concerns. First, it would countenance a party to sit on their rights. That certainly should not be conduct encouraged by the Courts. Second, it would allow the landowner seeking to claim another's land by adverse possession, to wait years, perhaps decades, until all opposing witnesses (land owners of the property sought to be acquired by adverse possession who owned prior to 206) had died or moved away, leaving the party seeking to obtain land as the only living or at least available witness.

Also, a reading of *Smith v. Long,* 76 Idaho 265, 281 P.2d 483 (1955), convinces this Court that Thornton's claim that he can avail himself of the pre-2006 version of Idaho Code § I.C. § 5-210, is without merit. In that case, the Idaho Supreme Court found that the lawsuit was filed thirty days before the five year period for adverse possession would have expired. 76 Idaho 265, 268. 281 P.2d 483, 485. "…[I]t follows that this action was commenced thirty days before the expiration of the five year period of adverse possession, which otherwise would have matured and perfected defendants' title." *Id.* The Idaho Supreme Court concluded: "Defendants' title by adverse possession not having matured at the time this action commenced, plaintiffs are entitled to a decree quieting title as against the claims of the defendants." 76 Idaho 265, 276,

281 P.2d 483, 491. Based on the holding and language used in *Smith v. Long*, this Court finds that an adverse possession claim "matures" upon the passage of the statutory time period in effect at that time, be it five years before July 2006, or twenty years thereafter, and nothing more. Moreover, this Court finds that an adverse possession claim becomes "perfected" only upon the adverse possessor actually doing something, specifically, filing a lawsuit, after the applicable time period has run. "Perfect" is defined as follows: "To take all legal steps needed to complete, secure, or record (a claim, right, or interest); to put in final conformity with the law. Black's Law Dictionary, 7th Ed., p. 1157 (1999). Since the date of filing the complaint that controls the ability to perfect a mature claim, the Court must apply the law in place on the date the lawsuit is filed, in order to determine if that alleged mature claim can be perfected, at least as against the other owner.

Even viewing the facts in the light most favorable to Thornton, he cannot establish possession of the property for a period greater than fifteen (15) years. As such, the Court finds in favor of Pandrea on this issue. Failing to establish a necessary element of adverse possession, the Court finds as a matter of law that Thornton has not adversely possessed the Well Property.

E. Pandrea has Failed to Submit Admissible Evidence for the Court to Determine Whether She has an Easement Appurtenant to the Thornton Property.

Pandrea contends that she has an easement appurtenant to the Thornton Property. In support of this, she attached Exhibit 1 to the Reply to Plaintiff's Objection in Opposition to Summary Judgment on Defendant's Motion to Dismiss Complaint. Exhibit 1 is not supported by affidavit and is not a certified document. As such, it is not properly before the Court. However, if it were properly before the Court, the language establishing the easement is as follows:

EASEMENT AND CONDITIONS THEREOF RESERVED BY INSTRUMENT:
IN FAVOR OF: MARY E. PANDREA WILTSE, A MARRIED WOMAN DEALING IN HER SOLE AND SEPARATE PROPERTY; AND KARI A. CLARK, A SINGLE WOMAN
FOR: A 30.0 FOOT EASEMENT FOR A ROAD RIGHT OF WAY AND UTILITIES
RECORDED: DECEMBER 1, 1992
INSURYMENT NO.: 416381

Exhibit 1 to Reply to Plaintiff's Objection in Opposition to Summary Judgment on Defendant's Motion to Dismiss Complaint, Exhibit A, p. 2.

"There are two general types of easements: easements appurtenant and easements in gross. An easement appurtenant is a right to use a certain parcel, the servient estate, for the benefit of another parcel, the dominant estate." *Hodgins v. Sales*, 139 Idaho 225, 230, 76 P.3d 969, 974 (2003) (citing *Abbott v. Nampa School Dist. No. 131,* 119 Idaho 544, 550, 808 P.2d 1289, 1295 (1991)). "In contrast, an easement in gross benefits the holder of the easement personally, without connection to the ownership or use of a specific parcel of land." *Id.* (citing *King v. Lang,* 136 Idaho 905, 909, 42 P.3d 698, 702 (2002)). The difference between the easements has been described by the Idaho Supreme Court in the following way:

> An easement..."appurtenant" is one whose benefits serve a parcel of land. More exactly, it serves the owner of that land in a way that cannot be separated from his rights in the land. It in fact becomes a right in that land and, as we shall see, passes with the title. Typical examples of easements appurtenant are walkways, driveways, and utility lines across Blackacre, leading to adjoining or nearby Whiteacre.
>
> Easements..."in gross" are those whose benefits serve their holder only personally, not in connection with his ownership or use of any specific parcel of land...Examples are easements for utilities held by utility companies, street easements, and railroad easements.

Abbott v. Nampa Sch. Dist. No. 131, 119 Idaho 544, 550, 808 P.2d 1289, 1295 (1991). If there is a doubt as to whether an easement is appurtenant or in gross, Idaho courts

presume the easement is appurtenant. *Id.* (citing *Nelson v. Johnson,* 106 Idaho 385, 387-388, 679 P.2d 662, 664-665 (1984)).

If the Court were to consider Exhibit 1 attached to the Reply to Plaintiff's Objection in Opposition to Summary Judgment on Defendant's Motion to Dismiss Complaint, it could find in favor of Pandrea as there is indisputable evidence that the language provided above created an easement appurtenant. While the language of the easement identifies no dominant or servient estate, it gives a right of access to Pandrea and Clark for a road right of way and for utilities, which serves the land directly as opposed to Pandrea and Clark personally. Even if there were doubt whether this language creates an easement appurtenant, the presumption in Idaho rests in favor of finding that an easement appurtenant was created. However, the Court makes no determination on this issue at the present time as there is no admissible evidence before the Court.

IV. CONCLUSION AND ORDER.

For the above stated reasons, this Court must grant in part and deny in part "Defendant Pandrea's Motion to Dismiss Complaint to Quiet Title and for Damages Under I.R.C.P. 12(b)".

IT IS HEREBY ORDERED defendant Pandrea's Motion to Dismiss (motion for summary judgment), is GRANTED as to Thornton's claims based on adverse possession.

IT IS FURTHER ORDERED defendant Pandrea's Motion to Dismiss (motion for summary judgment), is DENIED as to: 1) Pandrea's claims that she is not a proper party to this action (the Court specifically finds Pandrea is a proper party as a matter of law); 2) Pandrea's claims that Thornton is not a bona fide purchaser of the Well Property, as there is a genuine issue of material fact on that issue; 3) Pandrea's claim that due to the recorded deed (which is not in evidence) she could not have concealed Pandrea's

actions and declarations to Thornton about the property while he was a tenant, as those actions would not have dissuaded a reasonable person from learning the true condition of the title at the time of purchase, as there is a genuine issue of material fact; and 4) Pandrea's claim that she has an easement appurtenant because Pandrea has submitted no admissible evidence on this issue.

Entered this 14th day of January, 2014.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Val Thornton	208-255-2327	Joel P. Hazel	208-667-8470
Mary E. Pandrea, Pro Se			

_____
Jeanne Clausen, Deputy Clerk