

STATE OF IDAHO)
County of BONNER)^{ss}

FILED _____

AT _____ O'Clock _____ 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 BONNER**

JEFFREY L. MARSHALL, et ux,
Plaintiffs,

vs.

JOHN SNEDDEN, et ux.
Defendants.

Case No. **S CV 2007 664**

**ORDER DENYING PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT**

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

This matter came before the Court on the Motion for Summary Judgment filed February 20, 2008, by plaintiffs Jeffrey Marshall and Laurie Ann Marshall (Marshall). This is a quiet title action in which Marshalls assert ownership in a parcel of land in front of their lakefront property under theories of adverse possession, easement by prescription, and boundary by agreement or acquiescence. Complaint, pp. 6-8. Marshalls essentially claim all land in front of their lakefront property as such land is below the natural high water mark. Plaintiffs' Memorandum in Support of Motion for Summary Judgment, p. 3. During the summer months this land is submerged under Oden Bay, part of Lake Pend O'Reille (plaintiffs refer to this as Lake Pend Oreille, which is the spelling of a county in the State of Washington, defendants have adopted that misspelling of Lake Pend O'Reille, Idaho). However, during the winter months the bay in front of plaintiffs' land is exposed in part or entirely. Plaintiffs' Memorandum in Support of Motion for Summary Judgment, p. 3, ¶ 4.

Marshalls purchased their land in 1983, and defendants John and Mary Jo Snedden (Snedden) bought property adjacent to Marshalls' land in 2000. *Id.* ¶¶ 6, 11. Sneddens claim they are the record owners of this property in front of Marshalls' land. *Id.* ¶ 12, p. 4; Answer, p. 7, ¶ 38.

The Court has now reviewed all the briefing submitted by the parties. Oral argument was held on April 14, 2008. The matter was taken under advisement because the Court at the time of oral argument had not been given the opportunity to read "Plaintiffs' Reply Brief in Support of Motion for Summary Judgment". Even though that brief was dated March 13, 2008, a month before oral argument, counsel for plaintiffs did not send the Court a copy in chambers as is required under this Court's "Scheduling Order, Notice of Trial Setting and Initial Pretrial Order", p. 3, ¶ 3. A copy of such brief was provided to the Court at oral argument. The Court has read that brief. The matter is now at issue.

This Court has previously ruled that the applicable period for plaintiffs' claims of adverse possession and easement by prescription is five years (under the version of Idaho Code § 5-203 and § 5-210 in existence prior to July 1, 2006), rather than twenty years under those statutes as they exist post-July 1, 2006. Order Denying Defendant Sneddens' Motion for Summary Judgment Against Plaintiff Marshall, filed November 26, 2007.

The Sneddens brought a counterclaim against the IDL, which was dismissed by stipulation on March 17, 2008, and then by Order of the Court on March 18, 2008.

II. ANALYSIS.

Although Marshalls do not concede that Sneddens hold title to this disputed property (Plaintiffs' Memorandum in Support of Motion for Summary Judgment, p. 5), Marshalls argue that even if Sneddens hold title to this disputed land, Marshalls acquired ownership of that property by adverse possession from Sneddens' predecessors no later

than 1992, because Marshalls built a dock on this land in 1987. *Id.* Marshalls argue the possession had to have been actual, open, visible, notorious, continuous and hostile to the party against whom the claim is made, and claim have paid all taxes levied and assessed on the land. *Id., citations omitted.* Marshalls argue that because Sneddens did not acquire their land until the year 2000, Sneddens have no personal knowledge related to the Marshalls' use of the property during the years 1987-1992, when the Marshalls claim the prescriptive period ran. *Id.* p. 6.

Sneddens argue the Idaho Department of Lands (IDL) granted Marshalls a permit for this dock in 1987, and at that time Marshalls were not adverse possessors. Defendants' Response to Plaintiffs' Motion for Summary Judgment, p. 2. Sneddens argue Marshalls began construction of the Marshalls' dock after the permit was issued.

Sneddens claim there are issues of material fact as to: the amount of property used by Marshalls (its boundaries); exclusivity of any use; adversity of any use; visibility of any use; hostility of any use; whether Marshalls had permission to use the property; and whether Marshalls paid taxes on the property, such as to prohibit summary judgment on the claims of adverse possession (oral claim), adverse possession (written claim) and prescriptive easement. *Id.* p. 4. Sneddens argue the public use exception (*Hughes v. Fisher*, 142 Idaho 474, 129 P.3d 1223 (2006)) applies to any adverse claim since these lands are submerged a portion of the year by Lake Pend O'Reille, and during that time the waters are used by the public. *Id.* p. 6. Similarly, Sneddens claim any use of the land for swimming and boating is on waters open to the public, and thus Marshalls' use is permissive, and Marshalls claimed use of picking up debris and constructing a dock during low water are uses "within the normal expectation of submerged lands." *Id.* Sneddens argue that Marshalls dock permit from the Idaho Department of Lands "was issued without

notice to the property owners and was therefore without opportunity to object to the dock on their property”, and “A use granted by IDL and without the ability of the property owners to object, should not ripen into adverse possession.” *Id.* p. 7. Sneddens argue Marshalls must have paid all taxes levied on the property sought to be adversely possessed, and the Marshalls have only alleged they paid taxes on their own property, not the property sought to be adversely possessed. *Id.* p. 8. Sneddens claim Marshalls’ use is not exclusive since the property sought to be adversely possessed has been used by the general public, and because the IDL granted permission to build the dock, that is a permissive use. *Id.* p. 9. Sneddens claim that since Marshalls claim their deed conveys to “the mean high water mark”, and there is no evidence of where that boundary is located, there is an issue fact as to where the boundary is located. *Id.* Sneddens argue that in a prior pleading the Marshalls themselves argued the boundary was “uncertain and disputed”. *Id.* p. 10, *citing* Plaintiffs’ Brief in Opposition to Summary Judgment, p. 10, ¶ 2. As to Marshalls’ adverse use and visible use, Sneddens claim the public use exception applies to rebut the presumption of adversity. Defendants’ Response to Plaintiffs’ Motion for Summary Judgment, p. 11. Finally, Marshalls argue that Marshalls’ actions amount to mere “use” of the land, not “possession”, which if such “use” were proven, could still amount to a prescriptive right. *Id.* p. 12, *citing Oakely Valley Stone, Inc. v. Alastra*, 110 Idaho 265, 268, 715 P.2d 935, 938 (1983).

Marshalls reply Sneddens have provided no evidence of the general public using this property, so the “public use exception” does not apply. Plaintiffs’ Reply Brief in Support of Motion for Summary Judgment, pp. 2, 4-5. Marshalls argue Sneddens have provided no evidence that their predecessor in interest gave permission to Marshalls to use the property, and the IDL’s permit cannot amount to permission to use that property since it

does not come from the owner of the property being sought to be adversely possessed. *Id.* pp. 2-3, 5-7. Marshalls argue that adverse possession based upon a written instrument does not require Marshall's to possess all the property described in the Sneddens' instrument, but only that they "possessed part of the property described in the instrument in order to convey possession of the entire parcel." *Id.* p. 3, 7-8. Finally, Marshalls argue that Jeffrey Marshall's affidavit that he has paid taxes on the property in dispute is "undisputed". *Id.* pp. 3, 8-9.

This Court finds that even though "Snedden has not submitted any evidence in opposition to Marshall's Motion for Summary Judgment" (*Id.* p. 2), there are issues of material fact that preclude summary judgment on any of Marshalls' theories to quiet title against Sneddens. However, there is no evidence in dispute as to one issue.

This Court agrees with Marshalls that Sneddens have not created an issue of permissive use. There is no record that the Marshalls, or even their predecessors in interest, received permission from Sneddens or their predecessors in interest the Rooses. There is no ability to imply that permission from the fact that the IDL issued a permit for Marshalls to build their dock in 1987. Permission cannot come from someone who is not the owner of the land sought to be adversely possessed. Marshalls are correct that permission from a third party does not defeat the elements of adversity or hostility. *Id.* p. 6.

This Court disagrees with Marshalls that there are no issues of fact as to the payment of taxes by the Marshalls. Jeffrey Marshall in his affidavit stated: "I have been paying taxes on both my property and the Subject Property since 1983." Marshall Affidavit, p. 2, ¶10. This is a statement of fact, and Jeffrey Marshall is competent to testify on such issue. However, John Snedden states in his affidavit that "Since my purchase [in 2000], I have paid taxes on my property" and "Said tax payments from 2000 to 2006 are included

herein and incorporated by reference as Exhibit “A.” Affidavit of John Snedden in Support of Defendants’ Motion for Summary Judgment, p. 3, ¶ 9. Thus, there is an issue of fact which cannot be resolved at summary judgment. Marshalls make the argument that it is only during the period of adverse possession (1987-1992) that is relevant, and thus, John Snedden’s affidavit is not relevant and does not address that time period. The Court is not persuaded by Marshalls’ argument for two reasons. First of all, Marshalls may be correct in that legal argument, but they have offered no case law or other to support that claim. Marshalls have cited no authority for that proposition that it is only during the period of adverse possession that payment of property taxes is relevant. Second, the fact that John Snedden’s Affidavit is diametrically opposed to Jeffrey Marshall’s affidavit, at least as to the years 2000 to the present, creates the following problem. If Snedden is later proven to be right on that point, then all of Jeffrey Marshall’s affidavit may become suspect.

This Court disagrees with Marshalls’ proposition that there are no issues of fact as to the quantum of property adversely possessed by Marshalls. *Id.* p. 7. Marshalls argue that Jeffrey Marshall’s affidavit states that “he and his family have had sole and exclusive possession of all of the Subject Property since at least 1983.” *Id. citing* Marshall Affidavit, ¶ 6. Sure enough, that is what Jeffrey Marshall’s affidavit says. While this Court arguably knows the outer boundaries of this property (see Exhibit A to Exhibit B to the Answer, Affirmative Defenses and Counterclaim), the Court does not know whether Marshalls had “sole and conclusive possession” of all that property. Just because Jeffrey Marshall says such things does not make them so. The affidavit must set forth such facts as would be admissible in evidence. I.R.C.P. 56(e). The statement by Jeffrey Marshall that the Marshalls have been in “sole and conclusive possession” of all that property is conclusory, not based on any foundation found in the affidavit, and is not based on any facts. Nowhere

in that affidavit does Jeffrey Marshall state exactly what he claims is his property, nor does he state he has any knowledge of what exactly Sneddens claim is theirs, nor does he state he has any familiarity with Exhibit A to Exhibit B to the Answer, Affirmative Defenses and Counterclaim. This Court does not know of which property Jeffrey Marshall speaks of in his affidavit. Furthermore, Jeffrey Marshall's use of the words "sole and conclusive possession" are an impermissible lay opinion and is not admissible on that ground alone. *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990). The use of those words is not supported by facts pursuant to I.R.C.P. 56(e). Those words are conclusory, and cannot be allowed to support summary judgment. *Hecla v. Star-Morning Mining Co.*, 122 Idaho 778, 839 P.2d 1192 (1992). The Answer, Affirmative Defenses and Counterclaim is verified. That has the same probative force of an affidavit if it meets the requirements of I.R.C.P. 56(e). *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Ct.App. 1984).

This Court disagrees with Marshall that Sneddens' "attempt to rely upon the public use exception is misplaced." Plaintiffs' Reply Brief in Support of Motion for Summary Judgment, p. 4. Because the public can use the water above this land that is in dispute, there is at least a genuine issue of material fact here as to the public use exception. More importantly, the law is unsettled, at least in Idaho. Neither side has found any case law that would either prohibit or allow the public use exception to be applied to lands submerged under water. It would seem that under the exact language of *Hughes v. Fisher*, 142 Idaho 474, 481, 129 P.3d 1223 (2006), the public, even though they can use all water over the disputed land, the public would in no way be engaging in "the same degree of use upon which the adverse claim is based". If that is the case, the public use exception would not be available to Sneddens as a defense in this case. Furthermore, it is not the public's use of the **land** in question, but rather the **water** above that land. While those issues alone

may be insurmountable to Sneddens, due to the unique nature of submerged lands, this Court at this juncture requires more authority as to the applicability or inapplicability of the public use exception in regard to submerged lands.

III. ORDER.

IT IS HEREBY ORDERED the Plaintiffs' Marshalls' Motion for Summary Judgment is DENIED in all respects except as to Sneddens' defense of permissive use.

IT IS FURTHER ORDERED the Plaintiffs' Marshalls' Motion for Summary Judgment as to the limited issue of the defense of permissive use is GRANTED, because Defendants Sneddens have not shown any facts which would support such a defense.

Entered this 30th day of April, 2008.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of April, 2008, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
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