STATE OF IDAHO)
County of BONNER)ss

FILED_____

AT_____ O'Clock _____M
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

ROY DEAN RAYNOR,

Plaintiffs,

vs.

ROY D. ALEXANDER, et al.

Defendants.

Case No. **S CV 2004 119**

MEMORANDUM DECISION AND ORDER DENYING SUMMARY JUDGMENT

I. BACKGROUND.

This is an action to quiet title to a parcel of property in Bonner County. The plaintiff Roy Raynor owns 2/3 of the parcel that was originally given to his mother Grace Raynor, and his aunts and uncles (Lewis Alexander, Albert Alexander and Virginia Alexander) by plaintiff's grandfather, Roy Alexander. Roy Alexander died January 17, 1990. Plaintiff's mother and aunt and uncles have quitclaimed their interest to plaintiff. See Exhibits G, K, L, M, N, O, and P attached to Affidavit of Plaintiff Roy Raynor. Plaintiff is trying to quiet title in the entire parcel for himself.

Two other aunts of plaintiff were involved: Nancy Jane Peters and Anne Harper Alexander. Nancy Jane Peters is now dead.

On November 2, 2004, Plaintiff Roy Raynor filed his Motion for Summary Judgment against the heirs of Nancy Jane Peters. On April 5, 2005, Summary Judgment was granted against the heirs of Nancy Jane Peters except Marcy Ann Peters who has not been served.

On November 2, 2004, Plaintiff also filed a Motion for Summary Judgment against Anne Harper Alexander. That motion was briefed and oral argument was held May 17, 2005.

II. CLAIMS OF THE PARTIES.

Plaintiff argues that Annie Harper Alexander (AKA Ruth Anne Harper) is one of the six grantees named in a warranty deed recorded in Bonner County on August 28, 1989, in which Roy D. Alexander transferred his interest in the subject property to his six children. Brief in Support of Summary Judgment, p. 2; Raynor Affidavit, Exhibit G. On January 24, 1983, Lewis E. Alexander quitclaimed the subject property to Roy D. Alexander. Brief in Support of Summary Judgment, p. 2; Raynor Affidavit, Exhibit E. Plaintiff claims that before January 24, 1983 Roy and Bessie Alexander were married and, therefore, the January 24, 1983 deed (Exhibit E) created an interest in community property. Brief in Support of Summary Judgment, p. 2; Raynor Affidavit, Exhibit E. Plaintiff claims that since the Warranty Deed (Exhibit G) was not properly acknowledged it is not entitled to recording. Plaintiff argues the deed did not impart constructive notice. Brief in Support of Summary Judgment, pp. 2-3; Raynor Affidavit, Exhibit G.

Plaintiff argues that because Exhibit G was invalid due to improper acknowledgement, the quitclaim deed that is Exhibit H transferred the property to Bessie Alexander. Brief in Support of Summary Judgment, p. 3; Raynor Affidavit, Exhibits G & H. The transfer of Exhibit J then is claimed to have effectively transferred the subject property to the plaintiff. Brief in Support of Summary Judgment, p. 3; Raynor Affidavit, Exhibits J.

The plaintiff's legal argument is as follows. Idaho is a race notice state. Brief in Support of Summary Judgment, p. 5; I.C. § 55-812. Instruments are to be properly acknowledged to be

recorded. Brief in Support of Summary Judgment, p. 5; I.C. § 55-805. The form of the acknowledgement is set out by statute. Brief in Support of Summary Judgment, p. 5; I.C. § 55-710. An instrument that is not properly acknowledged does not provide constructive notice. Brief in Support of Summary Judgment, p. 5; I.C. § 55-811. The plaintiff argues the acknowledgement on Exhibit G transferring the property to the children of Roy Alexander was defective, and thus, it did not give notice and is void against Exhibit H, which transferred the property to Bessie Alexander. *Id.,* pp. 5-6. The plaintiff also argues that per I.C. § 32-906(1) property acquired during a marriage is presumed to be community property.

Defendant Anne Harper Alexander argues the warranty deed executed by Roy Alexander, Exhibit G, is properly acknowledged. Brief in Opposition to Summary Judgment, p. 2. However, defendant has offered no legal or factual basis is set forth to support this claim. Defendant argues the quitclaim deed to Bessie Alexander, Exhibit J, was not valid because Bessie Alexander had nothing left to transfer to the plaintiff. *Id.* Defendant claims the marriage of Roy Alexander and Bessie Alexander does cause Roy's real property to become community property, and that plaintiff has no more than an undivided interest with the other co-owners. *Id.*

Defendant Anne Harper Alexander submitted her affidavit and the affidavit of Bessie L. Alexander in Opposition to Motion for Summary Judgment. The Court has reviewed those affidavits, and finds that they go beyond the face of the documents the Court has been asked to interpret on plaintiff's Motion for Summary Judgment against Anne Harper Alexander.

Plaintiff's argument is fairly straightforward: the documents we are dealing with, primarily Exhibits G and H to the Raynor Affidavit, do not create an issue of fact, and Exhibit G was not entitled to be recorded, thus, Exhibit H prevails. At oral argument, counsel for Anne Harper Alexander claimed these affidavits create an issue as to whether Exhibit H should have ever been

recorded. However, no legal basis has been stated, either in briefing or in oral argument, as to that claim.

III. ANALYSIS.

A. The Issues Briefed by the Parties.

The plaintiff is correct as to the community property issue. Property acquired after marriage by either the husband or wife is community property. I.C. § 32-906. It is assumed that property acquired during marriage is community property, and the party that claims the property is separate has the burden of proving that status. *Eliasen v. Fitzgerald*, 105 Idaho 234, 239, 668 P.2d 110, 115 (1983). Defendant has offered no proof that the property is separate.

The defendant's assertion that the quitclaim deed (Exhibit K) from Lewis Alexander to is also not properly acknowledged may be true, however, that deed is not in the defendant's title chain and is not an issue in this summary judgment motion.

The defendant has not supported her argument that what she claims suffices as an "acknowledgement" on Exhibit G to the Raynor Affidavit is proper. Defendant's counsel made the same claim in oral argument, but offered no evidence or law in support of that claim.

The certificate on the deed that is Exhibit G to the Raynor Affidavit simply does not include words that comply with I.C. § 55-710. The actual words used in that certificate do comply with I.C. § 51-109(2) as a notarial act for an "oath or affirmation", which are: "Subscribed and sworn to before me this 27th day of August, 1989." Idaho Code § 51-109(2). However, to satisfy Idaho Code § 55-710, the certificate of acknowledgement…must be substantially in the following form:

> State of Idaho, county of ……., ss.
> On this …… day of ……., in the year of ……, before me (here insert the name and quality of the officer), personally appeared ……, known or identified tome (or proved to me on the oath of ……), to be the person whose name is subscribed to the within instrument, and acknowledged to me that they executed the same.

Idaho Code § 55-710. Substantial compliance, not strict compliance with the form described in the statute is all that is required of an acknowledgement. *Benjamin Franklin Sav. & Loan Ass'n v. New Concept Realty & Dev. Inc.*, 107 Idaho 711, 713, 692 P.2d 355, 357 (1984). There is a presumption of regularity as to official acts performed by public officials. *Id*., at 712, 692 P.2d at 357. Notaries are bonded public officials. *Id.* In the *Benjamin Franklin* case the words "known or identified to me . . ." were not in the certificate. *Id.* The record in that case did disclose that the notary knew the person who executed the certificate and the acknowledgment was effective. *Id.* Where evidence in the record showed that the notary knew the persons who executed the acknowledgement, the Idaho Supreme Court held that to hold the acknowledgment ineffective to give constructive notice would be raising form over function. *Id.* It is evident that there must be some indication that the notary knew the identity of the person signing. That is what the form indicates. Idaho Code § 55-710. That is what *Benjamin Franklin* indicates. There is absolutely no language in what defendant claims is the "acknowledgment" on Exhibit G which even comes close to "substantial compliance" with Idaho Code § 55-710. It is simply not an "acknowledgment". Even with the presumption of regularity in official acts described in *Benjamin Franklin*, this Court cannot find anything close to "substantial compliance" with Idaho Code § 55-710. What is on Exhibit G is an "oath or affirmation" under Idaho Code § 51-109(2), it is not an acknowledgement as required under Idaho Code § 55-804 for recordation as defined in that statute by chapter 7, title 55 of the Idaho Code. Since there has been no substantial compliance with Idaho Code § 55-710 in Exhibit G, that deed does not impart constructive notice of its contents to subsequent purchasers and mortgagees. *Harris v. Reed,* 21 Idaho 364, 121 P. 780 (1912).

B. Actual Notice.

Neither party has briefed the issue as to whether plaintiff Roy Raynor had actual notice. The Idaho Supreme Court has clearly explained the purpose of our race-notice recording act:

> The purpose of the recording act in a race-notice jurisdiction, like Idaho, is to allow recorded interests to be effective against unrecorded interests when the recorded interest is taken for a valuable consideration and in good faith, i. e., without knowledge, either actual or constructive, that unrecorded interests exist. *Froman v. Madden*, 13 Idaho 138, 88 P. 894 (1907).
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> . . .
>
> One who purchases or encumbrances with notice of inconsistent claims does not take in good faith, and one who fails to investigate the open or obvious inconsistent claim cannot take in good faith. *Amerco, Inc. v. Tullar*, 182 Cal.App.2d 336, 6 Cal.Rptr. 71 (1960).

Langroise v. Becker, 96 Idaho 218, 220, 526 P.2d 178, 180 (1974). More recently the Idaho Supreme Court restated these same principles:

> This Court recently addressed the purposes of our recording statutes in *Haugh v. Smelick*, 1993 WL 16386. In *Haugh*, the Court said:
>
> > We have explained that "[t]he primary purpose of the recording statutes is to give notice to others that an interest is claimed in real property, and thus give protection against bona fide third parties who may be dealing in the same property." *Matheson v. Harris*, 98 Idaho 758, 761, 572 P.2d 861, 864 (1977). It follows that whenever constructive notice is imparted to a subsequent purchaser of real property by a recording statute, the subsequent purchaser cannot claim that he or she is a bona fide purchaser for value and receive protection against the contents of the recorded instruments. *Merchants Trust Co. v. Davis*, 49 Idaho 494, 290 P. 383 (1930). *Id.*
> >
> > The purpose and effect of I.C. § 55-811 is to protect persons with a recorded claim or lien on the property from claims by other persons who acquire an interest in the property after the interest is recorded. A purchaser of real property is obliged to make a reasonable search of the record to discover any liens and claims affecting the property to be purchased. If the purchaser fails to make an actual search of the record, I.C. § 55-811 gives the purchaser constructive notice of the contents of the recorded interests and prevents the subsequent purchaser from claiming an interest in the property adverse to the recorded interests.

Large v. Cafferty Realty, Inc., 123 Idaho 676, 679-80, 851 P.2d 972, 975-76 (1993). If the purchaser does not search, then the properly recorded instrument gives notice of recorded interests. *Id.* Constructive notice is simply the effect of a properly recorded interest when a purchaser failed to make a reasonable search that would have resulted in actual notice. *Id.*

However, in the present case, the plaintiff Roy Raynor may have known of the deed from Roy Alexander to his children (an unresolved factual issue of fact), and now Roy Raynor wants to

claim that because there was no constructive notice he takes the property based on the February 2003 Quit Claim deed from Bessie Alexander to R.D. Raynor. Exhibit J to the Raynor Affidavit. However, there also must be no actual notice. As explained below, the fact that a deed is not properly acknowledged and recorded is of no consequence if there was actual notice. As the Idaho Supreme Court stated in *Ralls v. Fouraker,* 109 Idaho 488, 708 P.2d 897 (1985):

> Appellant Ileda Fouraker finally argues that, since she recorded the final deed to her from Gerald Fouraker, and since the Ralls' recordation of their deed is void since done in violation of the automatic bankruptcy stay, her claim to the property is superior to that of the Ralls.
>
> As stated in *Farm Bureau Finance Company, Inc. v. Carney,* 100 Idaho 745, 747-748, 605 P.2d 509, 511-512 (1980):
>
> > "When a subsequent encumbrancer or purchaser [Ileda Fouraker] has actual knowledge of a prior interest [deed to Ralls], it makes no difference whether the prior interest was properly acknowledged and recorded. I.C. §§ 55-606, 55-812. A duly recorded interest is effective against prior unrecorded interests only where the recorded interest is taken for a valuable consideration and in good faith, i.e., 'without knowledge, either actual or constructive, that unrecorded interests exist.' *Langroise v. Becker,* 96 Idaho 218, 220, 526 P.2d 178, 180 (1974); *Garmo v. Clanton,* 97 Idaho 696, 551 P.2d 1332 (1976)."

Ralls v. Fouraker, 109 Idaho 488, 492, 708 P.2d 893, 897 (1985). In the present case, this Court finds no statement by the plaintiff Roy Raynor where he states he had no actual knowledge of the August 1989 Warranty Deed (Exhibit G to the Raynor Affidavit) in which Roy Alexander transferred the property to his six children (including the plaintiff's mother). Constructive notice works <u>against</u> a purchaser who does not search the records. A deed that is not acknowledged is effective between the parties.

> Similarly, we conclude that the lack of an acknowledgement did not render the assignment ineffective to transfer the lease. The purpose of an acknowledgement is to allow an instrument to be recorded. I.C. § 55-805. A recorded conveyance which is not acknowledged does not provide constructive notice to subsequent purchasers and mortgagees. *Harris v. Reed,* 21 Idaho 364, 121 P. 780 (1912). However, the lack of an acknowledgement does not affect a document's validity as between the parties. See *Mollendorf v. Derry,* 95 Idaho 1, 4, 501 P.2d 199, 202 (1972). See

> generally W. Burby, Real Property § 118, at 287 (3rd Ed.1965). Thus, the fact that the assignment was not acknowledged did not render it ineffective as between the parties themselves.

Hunt v. Hunt, 110 Idaho 649, 652-53, 718 P.2d 560, 563-64 (Ct. App. 1985). The transfer of the property to the children of Roy Alexander is effective against all but a good faith purchaser for value who records first. I.C. § 55-812. The early Idaho case, *Froman v. Madden,* 13 Idaho 138, 88 P. 894 (1907), clearly states the duty of a purchaser to investigate:

> The plaintiff testifies that he caused the company to furnish him an abstract of title, for which he paid the sum of $10, and, of course, that abstract failed to show the conveyance to defendant, for the reason that the same had never been recorded, and the plaintiff testifies that he had no knowledge whatever of the sale or conveyance to the defendant, and did not have for some two months after his purchase. This constitutes him clearly a purchaser "in good faith and for a valuable consideration," and, his conveyance having been first placed of record, gave him the title and a constructive possession with a right of immediate actual possession of the premises.

Froman v. Madden, 13 Idaho 138, 88 P. 894, 895 (1907). The words of the Idaho Supreme Court make it the duty of a purchaser to investigate. This duty was reiterated in *Large v. Cafferty Realty, Inc.,* 123 Idaho at 680, 851 P.2d at 972. The effect of constructive notice is that the law deems a party has notice of properly recorded deeds. Constructive notice prevents a party that made no investigation and has no actual notice, from claiming to be a bona fide purchaser for value and, thereby, receiving protection against the contents of recorded instruments. *Id.* Being a bona fide purchaser for value protects you in the case where you buy property, conduct a title search, find a clear title and then record your title ahead of the “true owner”. The plaintiff here is trying to turn this around and use lack of constructive notice as a sword to terminate the rights of the children of Roy Alexander. Constructive notice works against a purchaser, not for the purchaser.

The purchaser in good faith for a valuable consideration mentioned in *Froman* is also referred to as a bona fide purchaser for value without notice.

> The analogy of the mortgage as passing title is universally retained to the extent that the mortgagee may be recognized as a bona fide purchaser for value without notice,

provided there are present the elements of valuable consideration, good faith and want of notice.

Sun Valley Land and Minerals, Inc. v. Burt, 123 Idaho 862, 866, 853 P.2d 607, 611 (1993); citing Thompson on Real Property, § 4778 at 501-02 (1963).

There is a question of fact as to whether or not the plaintiff Roy Raynor had actual notice.

IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED Plaintiff's Motion for Summary Judgment is Denied. This Order does not concern defendants' "Motion to File Supplemental Briefs in Summary Judgment Motion Currently Under Advisement." Such motion remains pending and remains set for hearing on July 7, 2005 at 3:30 p.m. in Coeur d'Alene.

Entered this 10th day of June, 2005.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June 2005, 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 #
John A. Finney	208-263-8211	Savi Grewal	208-263-4367

_____
Secretary