

Affirmative Defenses, Counterclaim and Demand for Jury Trial, pp. 4-7. Clark now seeks “partial” summary judgment on her counterclaims because the issue of the amount of damages, if any, remains to be proven at trial. Defendant Clark’s Motion for Summary Judgment of Dismissal of Thornton’s Complaint and Motion for Partial Summary Judgment on Clark’s Counterclaims, p. 2. The damages are based in part on allegations that John Thornton, on July 20, 2013, kept Clark and several of her family members from travelling along an access road, to spread ashes of a family member upon land they owned. Affidavit of Terri Boyd-Davis in Support of Defendant Clark’s Motion for Summary Judgment of Dismissal of Thornton’s Complaint and Motion for Partial Summary Judgment on Clark’s Counterclaims, p. 3, ¶¶ 8-10. Thornton’s wife, Valerie Thornton, then allegedly approached Clark and her family members and insisted they sign a document agreeing they could use an easement. *Id.*, pp. 3-4, ¶¶ 11-12.

At the March 14, 2014, hearing, the Court first asked Val Thornton, counsel for John Thornton, and his wife, how it would be possible that Val Thornton would not be a witness at the June 24, 2014, and thus, how Val Thornton would not violate IRPC 3.7 ((a)“A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: * * * (3) disqualification of the lawyer would work substantial hardship on the client.”). Val Thornton answered “I don’t see why I would be a witness and still don’t.” At the hearing, counsel for Kari A. Clark stated that he would be calling Val Thornton as a witness at trial and would be issuing a subpoena for her as a witness. The Court concluded the discussion by informing Val Thornton she “would be a witness in the damage phase of the trial, I can’t reach any other conclusion than that.” After the March 14, 2014, hearing, on March 20, 2014, the Court sent Val Thornton a letter recapitulating the above, and concluded the letter: “If there is a substitution of counsel

in this case by March 31, 2014, I will consider that I have no obligation to report the situation in which you find yourself to the Idaho State Bar.” On March 25, 2014, Val Thornton sent the Court a letter, which stated “...substitution of counsel would cause great hardship on Mr. Thornton” and concluded: “In the meantime, I have consulted with bar counsel, have verified that I may continue my representation during the pre-trial process, and hope that your honor will understand this due to economic necessity alone.” On March 26, 2014, the Court forwarded a copy of that response by facsimile to Brad Andrews, Idaho State Bar Counsel. As of the date of this opinion, no substitution of counsel has occurred.

Also, at the March 14, 2014, hearing, the Court took up the issue of “Clark’s Motion to Strike Pandrea’s Memorandum in Support of Plaintiff’s Response to Defendant’s Motion for Summary Judgment and the Affidavits Filed in Support Thereof.” The basis of that motion was Pandrea is not an adverse party to Clark, and Clark’s motion for summary judgment only pertained to Thornton’s claims against Clark and Clark’s counterclaims against Thornton. Defendant/Counterclaimant Clark’s Motion to Strike Pandrea’s Memorandum in Support of Plaintiff’s Response to Defendant’s Motion for Summary Judgment and the Affidavits Filed in Support Thereof, pp. 2, 3. Pandrea (pro se) had no objection to Clark’s motion to shorten time to hear this motion, and counsel for Thornton objected, stated her client Thornton was prejudiced, but articulated no actual prejudice. Accordingly, this Court granted Clark’s motion to shorten time. The Court then heard argument from the attorneys and Pandrea. At the conclusion of oral argument, the Court granted “Clark’s Motion to Strike Pandrea’s Memorandum in Support of Plaintiff’s Response to Defendant’s Motion for Summary Judgment and the Affidavits Filed in Support Thereof”, because Pandrea is not an adverse party to Clark (thus, the Court stated it did not need to reach the untimeliness

of Pandrea's submissions). An order to that effect has not been submitted, so the Court will include such at the end of this decision. Although the motion to strike was granted, the Court will discuss Pandrea's claims and arguments in this memorandum decision, to provide context. The affidavits submitted by Pandrea have been read by the Court, but will not be considered in this motion for summary judgment between Clark and Thornton.

On August 14, 2013, this action was commenced by John F. Thornton (Thornton) against his neighbors Mary E. Pandrea (Pandrea) and Kari A. Clark (Clark) to quiet title to his 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 (Complaint) pp. 3-5, ¶¶ 2.7-2.22. Thornton and Pandrea share a common boundary border. Affidavit of Mary E. Pandrea in Support of Defendant Pandrea's Motion to Dismiss Complaint for Quiet Title and for Damages (First Affidavit of Mary E. Pandrea), p. 2, ¶ 3.

In 1993, prior to owning his land, Thornton rented the property from Robert Wiltse (Wiltse) and Wiltse's wife at the time, Mary Pandrea. Complaint, p. 2, ¶ 2.2. This property Thornton now owns is a two-acre parcel of land. Affidavit of Joel P. Hazel in Support of Defendant Clark's Motion for Partial Summary Judgment (Affidavit of Joel P. Hazel), p. 2 ¶ 3. Wiltse and Pandrea had obtained the two-acre parcel of land from Clark and Pandrea, by Bonner County Quitclaim Deed, Instrument No. 416381, on November 10, 1992. Affidavit of Joel P. Hazel in Support of Defendant Clark's Motion for Partial Summary Judgment (Affidavit of Joel P. Hazel), Exhibit A. That Quitclaim Deed conveyed the property to Wiltse and Pandrea "[s]ubject to and reserving a 30.0 foot easement for a road right of way and utilities" *Id.* Wiltse and Pandrea divorced in 1996. First Affidavit of Mary E. Pandrea, p. 2, ¶ 6.

On May 4, 1998, after he was divorced from Pandrea, Wiltse conveyed the two-acre parcel of land to Thornton by Warranty Deed, Bonner County Instrument No. 525386 (Thornton Property). Affidavit of Joel P. Hazel, Exhibit B. The Warranty Deed has a provision for an easement 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
INSURMENT NO.: 416381

Id. Clark maintains that since the 1940s the road referred to in Warranty Deed, Instrument No. 525386, which goes through the Thornton Property, is the only road her family has used to access approximately twenty acres of land that was jointly owned by Pandrea and Clark. Memorandum in Support of Defendant Clark's Motion for Summary Judgment of Dismissal of Thornton's Complaint and Motion for Partial Summary Judgment on Clark's Counterclaim, p. 3; Affidavit of Terry Boyd-Davis in Support of Defendant Clark's Motion for Summary Judgment of Dismissal of Thornton's Complaint and Motion for Partial Summary Judgment of Clark's Counter Claims (Affidavit of Terri Boyd-Davis), p. 2 ¶ 4. Pandrea disputes that Clark and Pandrea jointly owned the twenty-acre parcel of land. Pandrea's Memorandum in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 9. However, on May 11, 2011, Pandrea sued Clark to partition the twenty-acre parcel of land in Bonner County case number CV-2011-835. Defendant Clark's Answer Affirmative Defenses and Counterclaim, p. 5 ¶ 6; Affidavit of Joel P. Hazel, Exhibit C. On August 16, 2012, District Judge John P. Luster issued a decision in that case, partitioning the parcel in kind, with Clark receiving 10.423 acres and Pandrea receiving 12.739 acres. *Id.*

According to Clark, in 2013, Thornton erected a locked gate across the easement, interfering with Clark's easement rights. Memorandum in Support of Defendant Clark's Motion for Summary Judgment of Dismissal of Thornton's Complaint and Motion for Partial Summary Judgment on Clark's Counterclaim, p. 2; Affidavit of Terry Boyd-Davis, pp. 2-3 ¶¶ 5-6. A sign dated July 5, 2013, was posted next to the gate, which read as follows:

NOITCE
KARI CLARK
IS PROHIBITED FROM ENTERING UPON THIS PROPERTY FOR ANY
REASON UNDER PENALTY OF CRIMINAL TRESPASS. I.C. § 18-7001.

JOHN F. THORNTON
4685 UPPER PACK RIVER ROAD
SANDPOINT IDAHO 83864

OWNER

Affidavit of Terri Boyd-Davis, Exhibit G. Thornton claims that "[s]ince 1993, when I began renting Thornton property, the easement was used solely by Mary Pandrea and her invitees. Mary Pandrea gated and locked the easement at times, and decided who was to have a key to the gate." Affidavit of John Thornton Opposing Summary Judgment (Second Affidavit of John Thornton), p. 1 ¶ 2.

On August 14, 2013, Thornton brought this present action to quiet title to a parcel of land, approximately one tenth of an acre in size, which contains a well, against Pandrea and Clark. Complaint to Quiet Title and for Damages, pp. 3-5, ¶¶ 2.7-2.22. Thornton contends that in 2012 he had the Thornton Property surveyed, and apparently that survey is how and when Thornton discovered the physical property description on his Deed did not include about one-tenth acre (Well Piece). *Id.* at 3, ¶ 2.6. Thornton attaches as Exhibit 2 to his Complaint to Quiet Title and for Damages, a property description. *Id.*, Exhibit 2. However, 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.* When this Court issued its Memorandum Decision and Order Granting in Part and Denying in Part Defendant Pandrea's Motion to Dismiss (Motion for Summary Judgment) on February 14, 2014, the Court had not at that time been provided a copy of Thornton's deed. Two weeks after that decision was issued, when Clark filed the instant motion for summary judgment, was the first time the Court was provided a copy of Thornton's deed. Affidavit of Joel P. Hazel, Exhibit B. It is now apparent that at all times Thornton was deeded this parcel, the metes and bounds description of which did not include the "Well Piece". However, Thornton claims he only discovered that fact in 2012 through a survey he had performed on his property. Clark maintains that following the Revised Judgment and Decree of Partition issued by Judge Luster on January 24, 2014, in Bonner County case number CV 2011 835, the twenty-acre parcel of land was divided so that Clark no longer has an ownership interest in the Well Piece. Memorandum in Support of Defendant Clark's Motion for Summary Judgment of Dismissal of Thornton's Complaint and Motion for Partial Summary Judgment on Clark's Counterclaim, p. 2.

On January 29, 2014, Clark filed the instant motion for summary judgment, which was accompanied by a "Memorandum in Support of Defendant Clark's Motion for Summary Judgment of Dismissal of Thornton's Complaint and Motion for Partial Summary Judgment of Clark's Counter Claims", the "Affidavit of Joel P. Hazel in Support of Defendant Clark's Motion for Summary Judgment of Dismissal of Thornton's Complaint and Motion for Partial Summary Judgment of Clark's Counter Claims", and the "Affidavit of Terri Boyd-Davis in Support of Defendant Clark's Motion for Summary Judgment of Dismissal of Thornton's Complaint and Motion for Partial Summary Judgment of Clark's Counter Claims."

In response, on February 27, 2014, Pandrea filed “Pandrea’s Memorandum in Support of Plaintiff’s Response to Defendant’s Motion for Summary Judgment”, which was accompanied by the “Affidavit of Mary Pandrea in Support of Plaintiff’s Response to Defendant’s Motion for Summary Judgment,” the “Affidavit of James Gillette in Support of Plaintiff’s Response to Defendant’s Motion for Summary Judgment,” the “Affidavit of Debbie Gadbow in Support of Plaintiff’s Response to Defendant’s Motion for Summary Judgment,” the “Affidavit of John Pandrea in Support of Plaintiff’s Response to Defendant’s Motion for Summary Judgment,” and the “Affidavit of Nellie Gilbertson in Support of Plaintiff’s Response to Defendant’s Motion for Summary Judgment.” As mentioned above, the Court will not consider those affidavits, but will make mention of Pandrea’s claims and arguments.

On February 28, 2014, Thornton filed “Plaintiff’s Objection to Defendant Kari Clark’s Motion for Summary Judgment,” which was accompanied by “Plaintiff’s Memorandum of Law in Opposition to Defendant Kari Clark’s Motion for Summary Judgment” and the “Affidavit of John Thornton in Opposition to Summary Judgment.”

Hearing on Clark’s motion for summary judgment was held March 14, 2014. At the conclusion of that hearing, the Court stated the motion for summary judgment was granted and that a written decision would issue as soon as possible. The Court stated it was declaring its decision on the record on March 14, 2014, as it was important for the parties to know that decision as soon as possible, given the upcoming jury trial date of June 24, 2014, and the need for the parties to not prepare for matters that would no longer be an issue at that jury trial.

II. STANDARD OF REVIEW.

“Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the

moving party is entitled to a judgment as a matter of law.” *Brewer v. Washington RSA No. 8 Ltd. Partnership*, 145 Idaho 735, 738 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing 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. *Rouse v. Household Finance 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)). “The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial.” *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 707, 99 P.3d 1092, 1097 (2004) (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)).

“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)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). “[I]f the nonmoving party fails to provide a sufficient showing to establish the essential elements of his or her case, judgment shall be granted to the moving party.” *Porter v. Bassett*, 146 Idaho 399, 403, 195 P.3d 1212, 1216 (2008) (citing *Atwood v. Smith*, 143 Idaho 110, 113, 138 P.3d 310, 313 (2006)). In construing the facts, the court must draw all reasonable factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). If reasonable people can reach different conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979).

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. Volkswagon of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving 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. I.R.C.P. 56(e); 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.* If the non-moving party does not provide such a response, summary judgment, if appropriate, shall be entered against the party. See *id.*

III. ANALYSIS.

A. There is No Genuine Issue of Material Fact That Clark Has an Easement Appurtenant to the Thornton Property.

Clark seeks a determination by the Court that she has an easement appurtenant across the Thornton Property according to the language of Warranty Deed, Bonner County Instrument No. 525386 and Quitclaim Deed, Bonner County Instrument No. 416381. Memorandum in Support of Defendant Clark's Motion for Summary Judgment of Dismissal of Thornton's Complaint and Motion for Partial Summary Judgment on Clark's Counterclaim, pp. 5-6.

Pandrea claims the twenty acres of land owned in part by Pandrea and in part by Clark has been divided throughout the years into Tax Lot 40 and Tax Lot 49. See Pandrea's Memorandum in Support of Plaintiff's Response to Defendant's Motion for

Summary Judgment, pp. 9-12. Pandrea claims that she is the owner of Tax Lot 40 and Clark is the owner of Tax Lot 49. *Id.* Pandrea claims that Tax Lot 40 and Tax Lot 49 have never been one twenty-acre parcel of land. *Id.* at 9. Specifically Pandrea claims the following:

Pandrea purchased Tax Lot 40 in March of 1980, which consisted of approximately 5 acres, and in 1981 Pandrea quit claimed ½ interest to Clark.

Eleven years later, in August of 1991, Clark purchased Tax Lot 49, which Pandrea co-owned by quitclaim deed in 1992. Tax Lot 49 was 18.72 acres of which Pandrea received 8.297 acres in January 2014, with Clark receiving 10.423 acres. Clark's Tax Lot 49 was ordered to be contiguous to her individually owned Tax Lot 47 which is also accessed by way of the "existing road" easement described by Tucker Engineering (1975) (See map below on next page)...

Id. (original emphasis removed) (internal citations omitted). Pandrea has provided Instrument No. 170365 as evidence she claims grants the "existing road" easement to Tax Lot 49 in the language quoted above. Pandrea's Memorandum in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 9; Second Affidavit of Mary Pandrea, Exhibit P-1. Pandrea further maintains that the easement described in Warranty Deed, Instrument No. 525386, conveying property from Wiltse to Thornton reserves an easement for "Tax Lot 40". Pandrea's Memorandum in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment, pp. 9-12. Pandrea does not describe Tax Lot 40 by a metes and bounds description. Instead, Pandrea mentions that Tax Lot 40 is Instrument No. 226223, a copy of which has not been submitted to the Court, and includes copies of two maps in her memorandum opposing this motion for summary judgment. *Id.*, pp. 6-7, 10. The maps are not very legible, but do contain the language "Tax Lot 40". *Id.*, pp. 7, 10. However, the maps are not supported by affidavit, nor have they been provided to the Court as certified copies of recorded documents. *Id.* It is unclear who created these maps or when they

were created. The maps are inadmissible and will not be considered by the Court. A map was attached as Exhibit A to the Revised Judgment and Decree issued by Judge Luster in Bonner County case CV-2011-835, which depicts parcels of land with instrument numbers. Affidavit of Joel P. Hazel, Exhibit C. This map shows that Instrument No. 226223 is land conveyed to Pandrea. *Id.* That map does not, however, include the language "Tax Lot 40". *Id.*

Regardless, Pandrea claims that as of August 2012 she is the individual owner of Tax Lot 40 pursuant to a court order issued in Bonner County case CV 2011 835. Pandrea's Memorandum in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 5. Pandrea claims this conveyance was finalized on January 24, 2014, by Judge Luster in a Revised Judgment and Decree of Partition. *Id.* Pandrea contends any right Clark had to the easement ended when that decision was entered. *Id.* Pandrea further claims the following:

There is no evidence on the record to support Clark's claim that Tax Lot 40 and Tax Lot 49 are a '20 acre parcel' (singular) that had been accessed by way of the driveway to Tax Lot 40. *Id.* at 10. In support of this, she claims Instrument Number 525386, which is the Thornton Warranty Deed, and includes an 'EXHIBIT A' that references Instrument Number 416381. Instrument Number 416381 gives more detailed description of Tax Lot 40 (and the easement through the Thornton 'driveway') and of tax Lot 49 (and the easement by way of the 'existing road').

Id. at 11 (internal citations omitted). Based on this, Pandrea maintains the easement attaches to Tax Lot 40 only, which Clark no longer has an interest in. *Id.*, p.12.

Pandrea also mentions that Clark does not have an easement by implication, easement by necessity, or a prescriptive easement, but in her Memorandum in Support of Defendant Clark's Motion for Summary Judgment of Dismissal of Thornton's Complaint

and Motion for Partial Summary Judgment on Clark's Counterclaim, Clark only seeks summary judgment on whether she has an easement appurtenant. *Id.* at 12-16.

Thornton claims Clark does not have an easement across the Thornton Property because "[t]he language upon which Kari Clark relies does not describe a dominant estate, and does not pretend to pass on to the heirs and assigns of the grantors." Plaintiff's Memorandum of Law in Opposition to Defendant Kari Clark's Motion for Summary Judgment, p. 2. Thornton claims the language of Warranty Deed, Instrument No. 525386 creating the easement "consists of a reservation by the grantors of the right to use the road on the conveyed portion of Tax Lot 40 in order to access the grantors' remaining portion of Tax Lot 40." *Id.* at 4. Since the Warranty Deed references the easement created by the Quitclaim Deed, it "provides the sole basis for Kari Clark's claim of entitlement to use the easement." *Id.* Thornton argues the Quitclaim Deed conveyed two portions of property, part of Tax Lot 40 and part of Tax Lot 49. *Id.* Thornton maintains the conveyance of Tax Lot 40 was subject to a "thirty (30) foot easement for a road right of way and utilities" and the conveyance of Tax Lot 49 was not subject to any "easement or right of way of any kind". *Id.* at 4-5. Like Pandrea, Thornton does not describe Tax Lot 40 or Tax Lot 49 by a metes and bounds description. Rather, Thornton claims the Quitclaim Deed, Instrument No. 416381 contains a metes and bounds description of both Tax Lot 40 and Tax Lot 49. *Id.* Thornton has provided no admissible evidence supporting that claim.

Thornton further alleges Clark does not have an easement by necessity. *Id.* As stated above, Clark in her Memorandum in Support of Defendant Clark's Motion for Summary Judgment of Dismissal of Thornton's Complaint and Motion for Partial Summary Judgment on Clark's Counterclaim only seeks summary judgment on whether

she has an easement appurtenant. Memorandum in Support of Defendant Clark's Motion for Summary Judgment of Dismissal of Thornton's Complaint and Motion for Partial Summary Judgment on Clark's Counterclaim, pp. 12-16.

"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, 387-88, 679 P.2d 662, 664-65 (1984)).

In this case, the Warranty Deed conveying the two acre parcel of land to Thornton contained the following language establishing an 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
INSURMENT NO.: 416381

Affidavit of Joel P. Hazel, Exhibit B.

Contrary to the contention of Pandrea and Thornton, the above language does not grant an easement specifically to "Tax Lot 40". Neither Pandrea nor Thornton have submitted any admissible evidence depicting Tax Lot 40 or describing Tax Lot 40 by a metes and bounds description. Pandrea claims that she is now the owner of Tax Lot 40 based on a court order issued by Judge Luster in Bonner County case number CV-2011-835. However, this order provides a metes and bounds description and does not refer to "Tax Lot 40". All of the admissible evidence refers to the properties in this case by metes and bounds descriptions. But even if there was admissible evidence describing Tax Lot 40, the *easement* at issue in this case simply does not refer to Tax Lot 40. It grants a thirty-foot easement for a road right of way and utilities to Mary E. Pandrea and Kari Clark for a right of way and use of utilities which serves *their* land, not specifically the land of Tax Lot 40. Both Thornton and Pandrea are very mistaken in their argument linking the easement in favor of Pandrea and Clark to Tax Lot 40. The link simply does not exist. As a result, the partition lawsuit between Pandrea and Clark before Judge Luster has absolutely nothing to do with Pandrea's and Clark's easement rights across Thornton's land. Thornton is grievously mistaken to argue otherwise.

At oral argument, Thornton's attorney echoed the claim made by Thornton in his affidavit that: "At the time the easement was created, the only acreage adjacent to my property was the 5-acre parcel, formerly Mary Pandrea's sole and separate property

also known as Tax Lot 40.” Affidavit of John Thornton in Opposition to Summary Judgment, p. 1, ¶ 1. At oral argument, Thornton’s attorney argued that an easement appurtenant had to be adjacent to the property burdened. Thornton’s attorney stated: “The easement, if any, appertaining to the adjacent parcel only appertains to the adjacent parcel.” No legal authority supporting such circular argument has ever been submitted by Thornton. No legal authority for Thornton’s argument exists. Clark is named in the easement. The easement exists and is recorded, so for Thornton’s attorney to state on March 14, 2014, that “The easement, if any...”, ignores the uncontroverted evidence. For Thornton’s counsel to make the claim that an easement appurtenant depends on “adjacency” to the burdened land, without any legal support for that claim, is irresponsible. Clark’s easement does not depend on adjacency of her property to Thornton’s. Clark’s easement depends on the fact that her name is on a recorded easement that burdens Thornton’s land.

Furthermore, Thornton is completely misguided in restricting Clark, but not Pandrea, from crossing Thornton’s land. The easement, quoted immediately above, is in favor of Pandrea *and* Clark. Thornton’s inability to read and understand what is of record, is quite mystifying. As this Court stated in its January 14, 2014, Memorandum Decision and Order Granting in Part and Denying in Part Pandrea’s Motion to Dismiss (Motion for Summary Judgment):

[T]here 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. However, even if the Court finds that there is doubt whether this language creates an easement appurtenant, the presumption in Idaho rests in favor of finding that an easement appurtenant was created.

Memorandum Decision and Order Granting in Part and Denying in Part Pandrea's Motion to Dismiss (Motion for Summary Judgment), p. 25. As such, the Court must now grant partial summary judgment in favor of Clark on this issue. The only reason these issues were not addressed in this Court's earlier decision is Pandrea and Thornton for some reason refused to submit admissible evidence to the Court. Clark has now rectified the failure of the other parties.

B. Thornton Interfered With Clark's Right to Use the Easement When He Erected a Locked Gate Across the Easement.

Clark claims that since she has an easement appurtenant, Thornton wrongfully interfered with her easement rights when he erected a locked gate across the road.

Memorandum in Support of Defendant Clark's Motion for Summary Judgment of Dismissal of Thornton's Complaint and Motion for Partial Summary Judgment on Clark's Counterclaim, p. 7. Thornton claims that he:

...has a right to question those who claim to have the right to cross his property, and it is not unreasonable to ask for identification and verification of such claims. . . . When he learned that Kari Clark claimed a right to use the easement, he immediately requested to be informed of the basis thereof, and notified Rickard Kuck, her attorney in the partition matter (CV-2011-835) that she would be trespassed from the property unless she provided a legal basis for her claim.

Plaintiff's Memorandum of Law in Opposition to Summary Judgment, p. 6 (citing Affidavit of John Thornton in Opposition to Summary Judgment).

"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." *Johnson v. Highway 101 Investments, LLC*, No. 39160, 2014 WL 497442, at *2 (Idaho Feb. 7, 2014) (citing *Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 420, 283 P.3d 728, 737 (2012); quoting *Hughes v. Fisher*, 142 Idaho 474, 480, 129 P.3d 1223, 1229 (2006)).

The law is well settled with respect to the correlative rights of dominant and servient owners of easements. The owner of the servient estate is entitled to use the estate in any manner not inconsistent with, or which does not materially interfere with, the use of the easement by the owner of the dominant estate. In other words, the servient estate owner is entitled to make uses of the property that do not unreasonably interfere with the dominant estate owner's enjoyment of the easement.

Id. (citing *Ruddy–Lamarca v. Dalton Gardens Irrigation Dist.*, 153 Idaho 754, 758, 291 P.3d 437, 441 (2012), quoting *Nampa & Meridian Irrigation Dist. v. Washington Fed. Sav.*, 135 Idaho 518, 522, 20 P.3d 702, 706 (2001)). “An easement owner is entitled to relief upon a showing that he is obstructed from exercising privileges granted by an easement.” *Boydston Beach Ass'n v. Allen*, 111 Idaho 370, 377, 723 P.2d 914, 921 (Ct. App. 1986) (*Connecticut Light and Power Co. v. Holson Co.*, 185 Conn. 436, 440 A.2d 935 (1981)).

As stated above, Clark has an easement appurtenant to the Thornton Property. Thornton claims he was unaware of the easement rights of Clark, yet the Warranty Deed conveying the two acre parcel of land to Thornton contained the following language establishing an 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
INSURUMENT NO.: 416381

Affidavit of Joel P. Hazel, Exhibit B (emphasis added). The Warranty Deed conveying the Thornton Property to Thornton put Thornton on notice that Clark had an easement. In spite of this, Thornton erected a locked gate across the easement road and posted a sign dated July 5, 2013, next to the gate, which read as follows:

NOTICE
KARI CLARK
IS PROHIBITED FROM ENTERING UPON THIS PROPERTY FOR ANY
REASON UNDER PENALTY OF CRIMINAL TRESPASS. I.C. § 18-7001.

JOHN F. THORNTON
4685 UPPER PACK RIVER ROAD
SANDPOINT IDAHO 83864

OWNER

Memorandum in Support of Defendant Clark's Motion for Summary Judgment of Dismissal of Thornton's Complaint and Motion for Partial Summary Judgment on Clark's Counterclaim, p. 2; Affidavit of Terri Boyd-Davis, pp. 2-3 ¶¶ 5-6, Exhibit G. As mentioned above, Thornton's failure to read and comprehend what is of record (or if he read his deed at the time, his refusal to abide by the language in his deed), the written easement, is troubling to the Court. Nearly a year ago, Thornton's in July 2013 of excluding Clark from using her easement, was simply wrong. Thornton had no legal right to do so. But *today*, Thornton has obviously read his deed. Thornton can no longer claim ignorance. And for Thornton to *today* claim that "John Thornton has a right to question those who claim to have the right to cross his property, and it is not unreasonable to ask for identification and verification of such claims..." (Plaintiff's Memorandum of Law in Opposition to Summary Judgment, p. 6, citing Affidavit of John Thornton in Opposition to Summary Judgment), is absolutely incredible. Even more recently, after Thornton's affidavit and brief were filed, Thornton's attorney, at the March 14, 2014, hearing argued: "Thornton was never on any notice there was a right to use." Such argument completely ignores the purpose of Idaho's recording statutes. I.C. § 55-801 *et seq.* Once the easement was recorded in 1992, that easement is constructive notice to Thornton and the entire world, of Clark's easement rights. I.C. § 55-811. How Thornton's attorney can make such a statement to the Court, is not capable of being

understood. The fact that Thornton refused to submit proof of the fact of the recorded easement in the earlier motion for summary judgment brought by Pandrea, only illustrates the untenable position Thornton took not only on July 20, 2013, but throughout this litigation, and Thornton, and his attorney, obviously continue to adhere to up to the present time. Thornton cannot make the written recorded easement go away by pretending it does not exist. Thornton's attorney cannot pretend Idaho's recording statutes do not exist. At the March 14, 2014, hearing, Thornton's attorney in concluding her oral argument, that Thornton's actions on July 20, 2013, and opposition to Clark's claims in this lawsuit "...were not frivolous." The Court disagrees. Thornton's attorney also argued at the March 14, 2014, hearing that "A landowner has a right to approach a person that you have never met before." Such argument is disingenuous given the fact that fifteen days before meeting Clark and confronting Clark, Thornton, on July 5, 2013, put up the following sign:

NOITCE
KARI CLARK
IS PROHIBITED FROM ENTERING UPON THIS PROPERTY FOR ANY
REASON UNDER PENALTY OF CRIMINAL TRESPASS. I.C. § 18-7001.

Memorandum in Support of Defendant Clark's Motion for Summary Judgment of Dismissal of Thornton's Complaint and Motion for Partial Summary Judgment on Clark's Counterclaim, p. 2; Affidavit of Terry Boyd-Davis, pp. 2-3 ¶¶ 5-6, Exhibit G.

Why would Thornton place such a sign if he had never met Kari Clark or at least knew who Kari Clark was, and *knew Kari Clark claimed some right to cross his property?*

Clark has demonstrated she has a right to the express easement of record and Clark has proven that Thornton interfered with that right when he erected the locked gate. Clark has shifted the burden to Thornton, who has failed to state a lawful basis

for preventing Clark from exercising privileges granted by the easement. As such, Clark is entitled to judgment as a matter of law on this issue.

At the end of the March 14, 2014, hearing, when the Court announced its decision granting Clark's summary judgment motion, the Court ordered Thornton to immediately remove the gate on Thornton's property.

C. Clark no Longer has an Interest in the Well Property.

"The general rule of mootness doctrine is that, to be justiciable, an issue must present a real and substantial controversy that is capable of being concluded through a judicial decree of specific relief." *Freeman v. Idaho Dep't of Correction*, 138 Idaho 872, 875, 71 P.3d 471, 474 (Ct. App. 2003) (citing *Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 128 Idaho 276, 281-82, 912 P.2d 644, 649-50 (1996)). The controversy must exist at the time of the court hearing and the parties must have a "cognizable interest in the outcome" otherwise the issue is moot. *Id.* "A party lacks a legally cognizable interest in the outcome when even a favorable judicial decision would not result in relief." *Id.* (citing *See Murphy v. Hunt*, 455 U.S. 478, 481-82, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353, 356-57 (1982)).

On August 14, 2013, Thornton brought this action to quiet title against Pandrea and Clark regarding ownership rights of the Well Piece. Clark claims that pursuant to the Revised Judgment and Decree of Partition issued by Judge Luster on January 24, 2014, in Bonner County case number CV 2011 835, the twenty-acre parcel of land formerly owned by Clark and Pandrea was divided so that Clark no longer has an ownership interest in the Well Piece. Memorandum in Support of Defendant Clark's Motion for Summary Judgment of Dismissal of Thornton's Complaint and Motion for Partial Summary Judgment on Clark's Counterclaim, p. 2. Clark argues any dispute

about the ownership interest of the Well would be solely between Thornton and Pandrea. *Id.* As such, Clark claims that Thornton's claims against her regarding the Well Piece are moot. Thornton claims that the issue is not moot because Bonner County case number CV 2011 835 is under appeal. Plaintiff's Memorandum of Law in Opposition to Defendant Kari Clark's Motion for Summary Judgment, p. 2.

No evidence has been properly put before the court demonstrating that Bonner County case number CV 2011 835 is under appeal or that any appeal affects the Well Piece. The only evidence properly before the Court is the decision by Judge Luster in Bonner County case number CV 2011 835. Affidavit of Joel P. Hazel, Exhibit C. Based on that decision, it is clear that Clark does not have an interest in the Well Piece. As such, there is no controversy between Thornton and Clark regarding an interest in the Well Piece, and the issue between Thornton and Clark is moot.

IV. CONCLUSION AND ORDER.

For the above stated reasons, this Court grants summary judgment in favor of Clark as against Thornton's claims, and grants partial summary judgment in favor of Clark as against Thornton on all of Clark's counterclaims, except for the issue of damages to Clark by Thornton, if any, which will be tried to a jury.

IT IS HEREBY ORDERED Clark's Motion to Shorten Time to hear Clark's Motion to Strike Pandrea's Memorandum in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment and the Affidavits Filed in Support Thereof is GRANTED.

IT IS FURTHER ORDERED Clark's Motion to Strike Pandrea's Memorandum in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment and the Affidavits Filed in Support Thereof is GRANTED.

IT IS FURTHER ORDERED Clark's motion for summary judgment in favor of Clark as against Thornton's claims is GRANTED, and partial summary judgment in favor of Clark as against Thornton on all of Clark's counterclaims (except for the issue of damages which will be tried to a jury) is GRANTED.

IT IS FURTHER ORDERED the gate on Thornton's property which obstructs Clark's easement across Thornton's property is to be removed effective March 14, 2014.

Entered this 9th day of April, 2014.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of April, 2014, 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>
Val Thornton	208-255-2327	Joel P. Hazel	208-667-8470
Mary E. Pandrea, Pro Se			

Linda Oppelt, Deputy Clerk