STATE OF IDAHO)
County of KOOTENAI)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 KOOTENAI

CHRISTINA J. GREENFIELD, *Plaintiff*, vs. **ERIC J. WURMLINGER and ROSALYNN D. WURMLINGER,** *Defendants*.

Case No. **CV 2010 8209**

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S "MOTION FOR RECONSIDERATION FOR NEW TRIAL AND RELIEF FROM JUDGMENT PURSUANT TO I.R.C.P. 59(a)(4)(5)(b)(c)"

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff's "Motion for Reconsideration for New Trial and Relief From Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(c)." No such separate motion itself exists (in contravention of I.R.C.P. 7(b)(1)-(3)), but on October 13, 2015, plaintiff Christina J. Greenfield (Greenfield), *pro se*, filed her "Memorandum in Support of This Motion for Reconsideration for New Trial and Relief From Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(c) and Accompanying Affidavit."

On October 26, 2015, defendant Eric Wurmlinger, *pro se*, and defendant Rosalynd D. Wurmlinger, (Wurmlingers) *pro se*, filed "Defendant Wurmlinger's [sic] Objection to Plaintiff's Motion for Reconsideration, etc." An "Affidavit of John C. Riseborough Re Plaintiff's Rule 59(a), 60(b) Motion", and "Affidavit of Andrew C. Smythe Re Plaintiff's Rule 59(a), 60(b) Motion", were attached to "Defendant Wurmlinger's [sic] Objection."

On November 13, 2015, Greenfield filed "Objection and Response to Defendant's [sic] Unsupported Objection to Plaintiff's Motion for Reconsideration for New Trial and Relief From Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(c) & 62(b) and Motion to Strike Affidavits of John Riseborough and Andrew Smythe." The caption of this brief, for the first time four days before oral argument, purports to add a new claim under I.R.C.P. 62(b), which is a motion for a stay on a motion for new trial. No argument was made in that brief by Greenfield as to any claim under I.R.C.P. 62(b).

Oral argument on Greenfiled's motion for new trial was held on November 17, 2015. To familiarize itself with this litigation, given the fact that the undersigned was only assigned this case on November 3, 2015, the Court has reviewed the extensive filings in this matter. The Court provides the following summary to put Greenfield's current motion in context of this lengthy, acrimonious litigation.

On September 23, 2010, Greenfield filed her Complaint in this matter. At the time she was represented by attorney Ian Smith. Greenfield and Wurmlingers are "neighbors" who share a common property line and who all live in the Parkwood Place subdivision. That subdivision is governed by CC&R's. In her Complaint, Greenfield alleges that Wurmlingers violated the CC&R's because Wurmlingers, 1) operated a bed and breakfast when the CC&R's prohibits businesses, and 2) the CC&R's limit fences to five feet in height, Wurmlingers planted arbor vitas taller than five feet and those shrubs are the equivalent of a fence. Greenfield sued Wurmlingers for declaratory relief, nuisance, negligent infliction of emotional distress and attorney fees. The case was initially assigned to Judge Haynes.

On October 21, 2010, Wurmlingers, through counsel, filed an Answer and Coutnerclaim. Wurmlingers' counterclaim alleged Greenfield had committed intentional infliction of emotional distress, negligent infliction of emotional distress, and tortious

interference with an economic advantage upon Wurmlingers, and Wurmlingers demanded a jury trial.

On December 1, 2010, Judge Haynes at a scheduling conference set the matter for a four day trial to begin on July 18, 2011. A month before that trial date, Greenfield, through counsel, filed a motion to continue the trial, which was granted by Judge Haynes. At that time the trial was not reset. On October 13, 2011, the trial was re-set for May 21, 2012. At this point in time, Wurmlingers were on their third attorney.

On January 26, 2012, Wurmlingers filed a motion or summary judgment, setting the hearing for February 17, 2012. On February 14, 2012, three days before hearing on the Wurmlingers' motion for summary judgment, Greenfield's attorney Ian Smith filed a motion to withdraw as counsel, citing a breakdown in the attorney-client relationship. On February 27, 2012, at a hearing on Ian Smith's motion to withdraw, Judge Haynes granted the motion to withdraw and signed an order to that effect on March 8, 2012. On March 29, 2012, Greenfield filed her "Notice of Self-Representation." Greenfield has remained *pro se* as to her claims against Wurmlingers from March 29, 2012, to the present. On March 30, 2012, Greenfield filed a memorandum in opposition to the Greenfield's motion for summary judgment. By this time, Greenfield had an attorney, Joshua Johnson, representing Greenfield defending her on the counterclaims brought by the Wurmlingers. A hearing was held on April 10, 2012, at which time the hearing on the summary judgment motion was again vacated, to be reset by Wurmlingers, and the trial scheduled for May 21, 2012, was continued to November 26, 2012.

On May 1, 2012, Greenfield's attorney on the counterclaims, Joshua Johnson, moved to withdraw as Greenfield's attorney, citing in his affidavit that Greenfield had withdrawn her request for insurance coverage on her counterclaims. On May 16, 2012, Greenfield filed a Notice of Self-representation following Joshua Johnson's withdrawal.

On May 24, 2012, Judge Haynes granted Wurmlingers' motion for summary judgment dismissing Greenfield's claims of intentional infliction of emotional distress, but denying summary judgment on Greenfield's claims of negligent infliction of emotional distress.

On November 26, 2012, the jury trial began. At the conclusion of Greenfield's case, Judge Hanes granted Wurmlingers' motion for a directed verdict that there was no evidence of manifestation of emotional distress by Greenfield's gynecological conditions or her heart conditions, but allowed the jury to consider evidence of Greenfield's fatigue, exhaustion, sleeplessness and trouble walking. The jury returned a special verdict form, which found: as to Greenfield's claims, Wurmlingers' arbor vitae and bed and breakfast were not a nuisance, and were not a negligent infliction of emotional distress to Greenfield; as to Wurmlinger's claims, Greenfield's conduct was negligent infliction of emotional distress upon Wurmlilngers, proximately causing Wurmlingers $52,000.00 in damages, Greenfield committed trespass but no damages; that Wurmlingers' arbor vitae were trees, that Greenfield committed timber trespass causing Wurmlingers damage in the amount of $17,000.00. On January 7, 2013, a Judgment was signed in favor of Wurmlingers against Greenfield, in the amount of $103,000.00 (the timber trespass damages were tripled by operation of statute).

On March 20, 2013, Judge Haynes denied Greenfield's motion for judgment notwithstanding the verdict and motion to set aside judgment. Judge Haynes used trial testimony to decide non-jury issues, and on March 25, 2013, issued a Post Court Trial Memorandum Decision and Order which denied Greenfield's claims of declaratory judgment and injunctive relief. Based on that Post Court Trial Memorandum Decision and Order, Judge Haynes entered a Final Judgment on March 26, 2013. This contained all decisions by the jury and by Judge Haynes.

On April 9, 2013, Greenfield filed a Motion to Reconsider. At a hearing on May 1, 2015, Judge Haynes denied that motion. On May 2, 2013, Judge Haynes entered an Order Denying Plaintiff's Motion to Alter or Amend Judgment.

Greenfield appealed to the Idaho Supreme Court on June 12, 2013. Judge Haynes made decisions on attorney fees, which were granted and addressed in subsequent judgments.

On May 21, 2015, the Idaho Supreme Court filed its opinion in this case, 2015 Opinion No. 47. That decision affirmed the judgment of the district court, awarded Wurmlingers attorney fees and costs on appeal against Greenfield under I.C. § 12-121, specifically finding Greenfield's "…remaining issues on appeal were pursued frivolously, unreasonably, or without foundation." *Id.,* p. 20. On May 29, 2015, Judge Haynes disqualified himself, and assigned Judge Christensen. In the Idaho Supreme Court's opinion, the Idaho Supreme Court addressed an issue Greenfield raised on appeal; Judge Haynes' affiliation and Eric Wurmlinger's affiliation with the Knights of Columbus, albeit at different parishes. The Idaho Supreme Court noted that Greenfield at no time made a motion to disqualify Judge Haynes, but instead, brought the issue up post-trial in her motion for reconsideration and motions to set aside the judgment and to grant a judgment notwithstanding the verdict. 205 Opinion No. 47, p. 19. The Idaho Supreme Court found that even if Greenfield's, "…raising the issue could be construed as a motion for disqualification, Judge Haynes did not err in denying that motion." *Id.,* p. 20. Remittitur was filed by the Idaho Supreme Court on June 16 2015. On July 6, 2015, the Idaho Supreme Court entered an Order Awarding Costs and Fees on Appeal against Greenfield and in favor of Wurmlingers.

Within a week of the Idaho Supreme Court decision, the Wurmlingers, *pro se*, began filing pleadings for collection proceedings against Greenfield. Wurmlingers failed

to wait until the Remmittitur was filed, which occurred on June 16, 2015. On July 1, 2015, attorney John Riseborough filed a Motion for Limited Withdrawal and an affidavit in support thereof. That motion to withdraw was based on Wurmlingers filing supplemental proceedings *pro se* without attorney Riseborough's knowledge or advice, and upon Wurmlingers' directive to Riseborough that he withdraw. Affivavit of John C. Riseborough, p. 2. On July 21, 2015, Eric Wurmlinger filed a "Notice of Appearance." That Notice of Appearance was premature, as on July 22, 2015, a hearing was held and Judge Haynes signed an order allowing attorney Riseborough to withdraw. Rosalynn Wurmlinger has not filed a "Notice of Appearance", and unless Eric Wurmlinger is an attorney, he cannot represent Rosalynn Wurmlinger. On October 30, 2015, James S. Macdonald filed a Notice of Appearance on behalf of Wurmlingers.

On September 30, 2015, Judge Christensen entered a Second Amended Judgment which added costs of $1,582.00 and attorney fees of $26,000.00 incurred by Wurmilgers on Greenfield's appeal, bringing the total judgment to $186,337.37, exclusive of interest. On October 29, 2014, Greenfield moved to disqualify Judge Christensen pursuant to I.R.C.P. 40(d)(2) because Judge Christensen knew an attorney who took a deposition in preparation for the aforementioned jury trial. On November 2, 2015, Judge Christensen entered an Order of Voluntary Disqualification pursuant to I.R.C.P. 40(d)(4). On November 3, 2015, the undersigned was assigned to this case.

II. STANDARD OF REVIEW.

"[T]he trial court is vested with broad, although not absolute, discretion in granting a new trial, and its determination will not be overturned absent an abuse of discretion." *Quick v. Crane*, 111 Idaho 759, 771, 727 P.2d 1187, 1199 (1986) (citing *Luther v. Howland,* 101 Idaho 373, 375, 613 P.2d 666, 668 (1980); *Tibbs v. City of Sandpoint,* 100 Idaho 667, 669, 603 P.2d 1001, 1003 (1979); *Smith v. Great Basin*

Grain Co., 98 Idaho 266, 275, 561 P.2d 1299, 1307 (1977). In making its determination, the trial court must set forth the statutory grounds for its order. *Id. "*All motions for a new trial under I.R.C.P. 59(a) must be filed within fourteen days after the entry of judgment. A trial court acts within its discretion in denying an untimely motion for new trial." *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 247-48, 245 P.3d 992, 999-1000 (2010) (internal citations omitted).

III. ANALYSIS.

A. GREENFIELD'S MOTION FOR NEW TRIAL IS UNTIMELY.

A "Final Judgment" was entered on March 26, 2013, following jury trial and court trial, said judgment dismissing plaintiff's claims in law and equity, awarding the Wurmlingers $103,000.00 against Greenfield,. On July 8, 2013, an "Amended Final Judgment" was entered dismissing plaintiff's claims in law and equity, awarding the Wurmlingers $103,000.00 against Greenfield, and awarding the Wurmlingers $65,755.37 against Greenfield for costs and reasonable attorney fees. On September 30, 2015, a "Second Amended Judgment" was entered dismissing plaintiff's claims in law and equity, awarding the Wurmlingers $103,000.00 against Greenfield, and awarding the Wurmlingers $65,755.37 against Greenfield for costs and reasonable attorney fees, and awarding the Wurmlingers $27,582.00 for costs and reasonable attorney fees on appeal.

As mentioned above, Greenfield filed her "Motion for Reconsideration for New Trial and Relief From Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(c)" (Motion for Reconsideration) on October 13, 2015, as part of her memorandum filed October 13, 2015.

The Wurmlingers, in their *pro se* response entitled "Defendant Wurmlinger's [sic] Objection to Plaintiff's Motion for Reconsideration, etc.", posit that "According to the

Rules, Ms. Greenfield's Motion is untimely." "Defendant Wurmlinger's [sic] Objection to Plaintiff's Motion for Reconsideration, etc." p. 1. The Wurmlingers are correct.

Greenfield, in her untimely filed "Objection and Response to Defendant's [sic] Unsupported Objection to Plaintiff's Motion for Reconsideration for New Trial and Relief From Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(c) & 62(b) and Motion to Strike Affidavits of John Riseborough and Andrew Smythe", argues:

> What "Rules" are the Defendant's referring too [sic]? What is "untimely" about Plaintiff's Motion? Where is the argument regarding the Defendants incomplete response? Plaintiff timely filed her Motion within the Idaho Rules of Procedure guidelines under 59(a)(4)(5)(b)(c).

Objection and Response to Defendant's [sic] Unsupported Objection to Plaintiff's Motion for Reconsideration for New Trial and Relief From Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(c) & 62(b) and Motion to Strike Affidavits of John Riseborough and Andrew Smythe, p. 2. Greenfield's questions do nothing to assist the Court in understanding the legal and factual basis as to why Greenfield thinks she is timely in her motion for new trial. The Court specifically finds Greenfield's motion to reconsider and motion for a new trial is not timely under I.R.C.P. 59(b). The Court appreciates this is a matter committed to its sound discretion and, in making that decision that Greenfield is untimely, the Court determines that it is acting within those bounds.

Idaho Rule of Civil Procedure 59(b), provides, "A motion for a new trial shall be served not later than fourteen (14) days after the entry of the judgment." I.R.C.P. 59(b). Three judgments have been filed in this case. The last, which is entitled "Second Amended Judgment", was filed on September 30, 2015. Greenfield's motion for new trial was filed on October 13, 2015. While her motion for new trial was filed within fourteen days of the filing of the "Second Amended Judgment" (filed on September 30, 2015), Greenfield's motion for new trial is not timely. The relevant date for the purposes of

calculating timeliness under Idaho Rule of Civil Procedure 59(b) is the date of the original judgment. The original "Final Judgment" was entered back on March 26, 2013. "While postjudgment orders relating to the final judgment are independently appealable under I.A.R. 11(a)(7), the entry of supplemental orders does not affect the time to file either a motion for a new trial or a motion to amend the original judgment." *Christensen v. Ransom,* 123 Idaho 99, 104, n. 1, 844 P.2d 1349, 1354, n. 1, (Ct. App. 1992) (*citing Ziemann v. Creed,* 121 Idaho 259, 260, 824 P.2d 190, 191 (Ct. App. 1992)). The Court finds that the "Second Amended Judgment" relates to the "Final Judgment" entered March 26, 2013. The "Final Judgment" set forth the award of damages based on the findings of the jury at trial. The subsequent judgments merely added costs and fees to that jury award, but in no way did they alter the amount of damages awarded by the jury. Since Greenfield seeks a new trial based on the underlying award of damages, her motion for new trial was required to be filed within fourteen days of the "Final Judgment". Accordingly, Greenfield's "Motion for Reconsideration for New Trial and Relief From Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(c)" is dismissed as it is untimely.

B. EVEN IF GREENFIELD'S MOTION FOR NEW TRIAL WAS TIMELY, GREENFIELD FAILS TO PREVAIL ON THE MERITS OF HER MOTION.

Idaho Rule of Civil Procedure permits the trial court to grant a new trial when, among other things, there is newly discovered evidence. I.R.C.P. 59(a)(4). Specifically, that rule provides:

> A new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons:
> ....
> 4. Newly discovered evidence, material for the party making the application, **which the party could not, with reasonable diligence, have discovered and produced at the trial**.

I.R.C.P. 59(a)(4) (emphasis added). "Newly discovered evidence must be information

in existence at the time of trial but not discoverable with due diligence." *Obendorf v. Terra Hug Spray Co*., 145 Idaho 892, 902, 188 P.3d 834, 844 (2008) (citing *Savage Lateral Ditch Users Ass'n v. Pulley,* 125 Idaho 237, 245, 869 P.2d 554, 562 (1993)). "To obtain a new trial on grounds of newly discovered evidence, it must be shown that the evidence: (1) is such as will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material to the issues; and (5) is not merely cumulative or impeaching." *Id.* (citing *Hanf v. Syringa Realty, Inc.,* 120 Idaho 364, 368, 816 P.2d 320, 324 (1991)). "The party seeking a new trial on the grounds of newly discovered evidence bears the burden of establishing that the party could not have discovered the evidence before the trial by the exercise of due diligence." *Idaho Judicial Council v. Becker*, 122 Idaho 288, 295, 834 P.2d 290, 297 (1992) (citing *Grasser v. First Security Bank of Idaho,* 96 Idaho 754, 757, 536 P.2d 749, 752 (1975)). Idaho Rule of Civil Procedure 59(c) governs the form and time for serving affidavits in support of a motion for new trial. In pertinent part, it provides: "When a motion for a new trial is based upon affidavits they shall be served with the motion. . . . All affidavits filed under this rule must meet the requirements of Idaho Rule of Civil Procedure 56(e)." I.R.C.P. 59(c). Idaho Rule of Civil Procedure 56(e) mandates:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond,

summary judgment, if appropriate, shall be entered against the party. I.R.C.P. 56(e).

In support of her motion for new trial, Greenfield filed "Plaintiff's Affidavit in Support of Motion for Reconsideration for New Trial and Relief from Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(e)". The majority of this affidavit does not comply with Rule 56(e). There are eighteen exhibits attached to the "Memorandum in Support of this Motion for Reconsideration for New Trial and Relief from Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(e) and Accompanying Affidavit". "Plaintiff's Affidavit in Support of Motion for Reconsideration for New Trial and Relief from Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(e)" is a separately filed document. The exhibits are not referenced in "Plaintiff's Affidavit." Greenfield fails to not attest that they are true and correct copies. Of importance to Greenfield's request for new trial is Exhibit 8, a letter from the Board of Licensure of Professional Surveyors to Greenfield and Jon P. Monaco's Response to Greenfield's Complaint. However, Greenfield has failed to present this document to the Court as admissible evidence.

However, even if Exhibit 8 were admissible, it would fail to help Greenfield meet her burden for a new trial. As stated above, "[n]ewly discovered evidence must be information in existence at the time of trial **but not discoverable with due diligence**." *Obendorf,* 145 Idaho at 902, 188 P.3d at 844 (emphasis added). Greenfield's entire request for a new trial rests on her assertion that "an incomplete, unsigned survey [was fraudulently admitted] into trial evidence in an attempt to persuade the jury that Greenfield was guilty of 'Timber Trespass' and Trespass'". Memorandum in Support of this Motion for Reconsideration for New Trial and Relief from Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(e) and Accompanying Affidavit, p. 24. However, Greenfield knew, prior to trial, that Jon Monaco did not sign his survey. In "Plaintiff's Affidavit in

Support of Motion for Reconsideration for New Trial and Relief from Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(e)", Greenfield attests that:

> On November 13, 2012, I had a meeting with my witness, Dusty Obermayer, who was a licensed surveyor . . . . It was brought to my attention that Jon Monaco had not signed his survey . . . . Dusty Obermayer commented that the survey was improperly designated as a final survey when it was obvious that it was simply a preliminary draft. Dusty Obermayer stated that a final survey should be offered before trial with the appropriate findings, conclusions and obvious mistakes corrected. . . .

Plaintiff's Affidavit in Support of Motion for Reconsideration for New Trial and Relief from Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(e), pp. 3-4, ¶ 15. On November 29, 2012, during the trial, Greenfield "informed the Judge that under Idaho Law, the Defendants [sic] survey was not legal as Jon Monaco had not signed the survey and it contained several errors." *Id.*, p. 4, ¶ 17. After argument from the parties Judge Haynes admitted Monaco's survey into evidence. *Id.*

Based on Exhibit 8, Greenfield now claims that the, "Defendants [sic] attorney defrauded the court by knowingly submitting the incomplete 'unsigned' survey, without permission from their expert witness, surveyor Jon Monaco. Lies were told under oath, at depositions and in affidavits, and in various filings with the courts, and schemes were concocted to attempt to cover-up certain falsified documents and or statements." Memorandum in Support of this Motion for Reconsideration for New Trial and Relief from Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(e) and Accompanying Affidavit, p. 20. Greenfield contends "[e]very time Greenfield 'objected' to the Defendants [sic] survey throughout the civil proceedings, stating that the survey was 'unsigned' and therefore not valid, Riseborough would repeatedly argue '*At the most, the lack of signature reflects inadvertence or oversight'* even though Riseborough knew that this statement was false." *Id*., p. 24.

Even if Greenfield's assertions were true, Greenfield would still fail to meet her burned for a new trial based on newly discovered evidence. As stated above, Greenfield has the burden of demonstrating that the evidence: "(1) is such as will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material to the issues; and (5) is not merely cumulative or impeaching." *Obendorf,* 145 Idaho at 902, 188 P.3d at 844 (citing *Hanf v. Syringa Realty, Inc.,* 120 Idaho 364, 368, 816 P.2d 320, 324 (1991)). Not only did Greenfield know the survey was unsigned prior to trial, but Exhibit 8, if admissible would contradict her claim that the result of the trial would change. While the copy of Jon P. Monaco's Response to Greenfield's Complaint does not appear to be complete, that document provides in pertinent part:

> 3. We show thirty-three (33) Arborvitae trees located and shown on the map. The additional four (4) trees Greenfield claims are trees are labeled correctly as a fence with "X" fence symbols. If we were allowed to finish the map with a detail this could have been made clearer. **However, everything shown and testified to is accurate.**

Memorandum in Support of this Motion for Reconsideration for New Trial and Relief from Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(e) and Accompanying Affidavit, Exhibit 8. As such, Greenfield's request for new trial pursuant to Idaho Rule of Civil Procedure 59(a)(4) fails on the merits.

C. PLAINTIFF CITES TO I.R.C.P. 59(a)(5) IN THE HEADING OF HER MEMORANDUM, BUT DOES NOT PROVIDE ANY ARGUMENT.

Idaho Rule of Civil Procedure 59(a)(5) provides that a court may grant a motion for a new trial if "Excessive damages or inadequate damages, appearing to have been given under the influence of passion or prejudice." Greenfield cited I.R.C.P. 59(a)(5) in the caption of her "Memorandum in Support of this Motion for Reconsideration for New Trial

and Relief From Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(e) and Accompanying Affidavit", but Greenfield has failed to brief such claimed basis for a new trial. Any motion for new trial pursuant to I.R.C.P. 59(a)(5) is denied.

D. ANY MOTION UNDER I.R.C.P. 60(b) IS ALSO UNTIMELY.

Greenfield repetitively argues that a fraud was committed upon the Court. Memorandum in Support of this Motion for Reconsideration for New Trial and Relief from Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(e) and Accompanying Affidavit, pp. 18, 20-29. "Fraud" is not mentioned in I.R.C.P. 59. "Fraud" is discussed in I.R.C.P. 60.

According to the register of actions for the instant case, on October 19, 2015, Greenfield called the Court and requested that the November 17, 2015, hearing previously scheduled to be heard on an Idaho Rule of Civil Procedure 60(b) motion be changed to a hearing on an Idaho Rule of Civil Procedure 59(a) motion. Throughout her memoranda in support of the instant motion, Greenfield argues for a new trial "based on newly discovered evidence, fraud, or other reason justifying relief". Memorandum in Support of this Motion for Reconsideration for New Trial and Relief from Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(e) and Accompanying Affidavit, p. 1. That language is found in I.R.C.P. 60(b), subsections (2) and (3).

Idaho Rule of Civil Procedure 60(b) governs, among other things, newly discovered evidence and fraud as grounds for relief from judgment on an order. It provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party. . . .

I.R.C.P. 60(b). If a motion is made pursuant to subsections 2 or 3, it must be made "not

more than six (6) months after the judgment, order, or proceeding was entered or taken." *Id.*

Greenfield claims:

> The Defendants [sic] attorney(s) defrauded the court by knowingly submitting the incomplete 'unsigned' survey, without permission from their expert witness, surveyor Jon Monaco. Lies were told under oath, at depositions and in affidavits, and in various filings with the courts, and schemes were concocted to attempt to cover-up certain falsified documents and or statements.

Memorandum in Support of this Motion for Reconsideration for New Trial and Relief from Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(e) and Accompanying Affidavit, p. 20. However, a claim of this nature was required to be brought before the Court no later than six months after entry of the final judgment. As stated above, the final judgment on the award of damages was entered on March 26, 2013. Greenfield waited until October 13, 2015, to file the instant motion. She has not directed the Court to any case law, statute or rule that would allow the Court to toll the six month time frame. As such, any motion brought by Greenfield pursuant to Idaho Rule of Civil Procedure 60(b) based upon general "fraud" is untimely.

The Court can at any time "…set aside a judgment for fraud upon the court." I.R.C.P. 60(b). Greenfield cites case law from other jurisdictions as to what might constitute a "fraud upon the court." Memorandum in Support of this Motion for Reconsideration for New Trial and Relief from Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(e) and Accompanying Affidavit, pp. 20-24. There are Idaho appellate cases discussing what constitutes "fraud upon the court." In *Catledge v. Transport Tire Company, Inc.,* 107 Idaho 602, 607, 691 P.2d 1217, 1222 (1984), the Idaho Supreme Court held "Apparently such fraud [against the court] will only be found in the presence of such tampering with the administration of justice as to suggest 'a wrong against the

institutions set up to protect and safeguard the public…'." The Idaho Court of Appeals, citing an Idaho Supreme Court decision, held "Perjury or misrepresentation by a party or witness does not constitute 'fraud upon the court' contemplated by I.R.C.P. 60." *Anderton v. Herrington,* 113 Idaho 73, 77, n. 1, 741 P.2d 360, 364, n. 1 (Ct. App. 1987) (*citing Compton v. Compton,* 101 Idaho 328, 612 P.2d 1175 (1980). Thus, based on the same reasoning given in Part B above, this Court specifically finds no "fraud upon the court" has been committed.

E. WURMLINGERS ARE THE PREVAILING PARTY ON THIS MOTION.

Wurmlingers prevailed against Greenfield on this motion, for purposes of I.C. § 12-121. Further, this Court finds that Greenfield pursued this motion frivolously, unreasonably, and without foundation, for purposes of I.R.C.P. 54(e)(1). However, no attorney fees are awarded in favor of Wurmlingers against Greenfield regarding this motion because *Walker v. Boozer,* 140 Idaho 451, 457, 95 P.3d 69, 75 (2004), and *Seininger Law Officers, P.A., v. North Pacific Ins. Co.,* 145 Idaho 241, 251, 178 P.3d 606, 616 (2008), limit such an award only when *the entire case* is brought frivolously, unreasonably, or without foundation, not simply when a *motion* meets those criteria. The Idaho Supreme Court specifically found that Greenfield's "remaining issues on appeal were pursued frivolously, unreasonably, or without foundation", but that finding was limited to certain issues (all issues other than a breach of the CC&R's and timber trespass) and was limited to the appeal. 2015 Opinion No. 47, p. 20. Prior to the appeal, Judge Haynes awarded attorney fees in favor of Wurmlingers against Greenfield, but did so under the CC&R's and under the timber trespass. July 8, 2013, Memorandum Decision and Order Re: Costs and Attorney Fees, pp. 1-11. Indeed, those were the only two methods under which Wurmligners sought attorney fees. *Id.,* p. 2. Additionally,

Wurmlingers appeared *pro se* in responding to Greenfield's motion by briefing, and while Wurmlingers at the November 17, 2015, hearing were represented by counsel, that counsel's argument was limited to what Wurmlingers, *pro se*, had briefed. The Idaho Supreme Court has ruled that a pro se party can never be awarded attorney fees. *Curtis v. Campbell,* 105 Idaho 705, 707, 672 P.3d 1035, 1037 (1983); *O'Neil v. Shuckardt,* 112 Idaho 472. 480. 733 P.2d 693, 701 (1986).

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED plaintiff Greenfield's "Motion for Reconsideration for New Trial and Relief From Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(c)" is DISMISSED in its entirety as it is untimely. Alternatively, Greenfield's "Motion for Reconsideration for New Trial and Relief From Judgment Pursuant to I.R.C.P. 59(a)(4)(5)(b)(c)" is DISMISSED because Greenfield's motion fails on the merits.

IT IS FURTHER ORDERED that any attempt by Greenfield to make a motion for a stay pursuant to I.R.C.P. 62(b) (as is mentioned in Greenfield's reply brief) is DENIED.

Entered this 20th day of November, 2015.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 2015, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Christina Greenfield pro
se
210 S. Park Wood Place
Post Falls, ID 83854

James S. Macdonald Fax: 208 263 0759

_____
Jeanne Clausen, Deputy Clerk