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

MOUNTAIN WEST BANK,

Plaintiff,

vs.

LAWSON TATE,

Defendant.

Case No. **CV 2011 5008**

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR CHANGE OF VENUE, SCHEDULING ORDER and ORDER FOR MEDIATION

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant Lawson Tate's (Tate) Motion to Change Venue filed August 11, 2011.

Plaintiff Mountain West Bank (MWB) alleges that on March 29, 2005, it extended credit to Tate in the amounts of $72,800.00 and $100,800.00. In consideration for the $72,800.00 extension of credit, Tate signed a promissory note in the amount of $72,261.42 payable to MWB. He also executed and delivered a Deed of Trust to Mountain West Bank conveying real property in Bonner County, Idaho, to secure repayment. In consideration for the $100,800.00 extension of credit, Tate executed and delivered a promissory note payable to Mountain West Bank in the amount of $100,800.00. He executed and delivered a Deed of Trust to Mountain West Bank conveying real property in Bonner County, Idaho, to secure repayment. Tate stated in an affidavit filed on August 18, 2011, that he is a Bonner County resident, one of the

parcels described in the suit is located entirely in Bonner County, and that all the documents and agreements between himself and Mountain West Bank were signed and executed in Bonner County. Affidavit of Lawson Tate, p. 1; Complaint, pp. 2-3, ¶¶ 7, 13.

Both Promissory Notes contain venue selection clauses stating: "If there is a lawsuit, I agree upon Lender's request to submit to the jurisdiction of the courts of Kootenai County, State of Idaho." Complaint, p. 1, Exhibit 1, Exhibit 4. Additionally, both Deeds of Trust contain venue selection clauses stating the following: "If there is a lawsuit, Grantor agrees upon Lender's request to submit to the jurisdiction of the courts of Kootenai County, State of Idaho." *Id.*

Tate failed to make payments on both credit extensions when they were due, and as a result of the nonpayment, MWB directed foreclosure of the property. The property securing the $72,800.00 extension was sold on June 10, 2011, to MWB for the credit bid of $66,000.00, which MWB states was the fair market value of the property at the time of the sale. Complaint, p. 2, ¶ 9. The amount Tate owes relating to the $72,800.00 credit extension and foreclosure resulting from nonpayment is as follows:

Principal Balance	$72,118.88
Accrued interest	$2,987.50
Late Fees	$54.54
Costs	
Foreclosure Legal Fees	$1,340.24
Appraisal	$365.00
Trustee's Sale Guarantee	$518.00
TOTAL	**$77,384.16**

Complaint, p. 3, ¶ 10. Following the sale of the property for $66,000.00, Tate still owes $11,384.16 to MWB, which accrues interest at a rate of 6.0% per annum or $1.87137 per diem. *Id.*

MWB bought the property securing the $100,800.00 credit extension on June 17,

2011, paying a credit bid of $69,000.00. Complaint, p. 4, ¶ 15. MWB states this was the fair market value of the property at the time of the sale. *Id.* The amount Tate owes relating to the $100,800.00 credit extension is broken down as follows:

Principal balance	$99,861.78
Accrued interest	$4,251.64
Late Fees	$149.37
Costs	
Foreclosure legal Fees	$2,013.43
Appraisal	$325.00
Trustee's Sale Guarantee	$518.00
TOTAL	**$107,119.22**

Complaint, p. 4, ¶ 16. After the sale of the property, Tate still owes $39,119.22 on the $100,800.00 credit extension, which is accruing interest at the rate of 6.0% per annum, or $6.10179 per diem. *Id.*

MWB filed a Complaint in Kootenai County on June 21, 2011, seeking a judgment in the amounts owed, plus pre-judgment interest, against Tate. Complaint, p. 5. The bank is also asking for costs and other relief the court may deem just and proper. *Id.* Tate filed a Motion to Change Venue and Notice of Hearing on August 11, 2011, and an Answer and Affirmative Responses on September 2, 2011. MWB responded to the Motion to Change Venue by filing an Opposition to Defendant's Motion to Change Venue on September 6, 2011.

This matter is not yet scheduled for trial. Oral argument on Tate's motion to change venue was heard on October 26, 2011. At the conclusion of oral argument, the Court granted Tate's motion to change venue, but indicated it would issue a written decision given the complexity of the arguments.

II. STANDARD OF REVIEW.

The decision to grant or deny a motion for a change of venue is reviewed under an abuse of discretion standard. *Corder v. Idaho Farmway, Inc.*, 133 Idaho 353, 358-59,

986 P.2d 1019, 1024-25 (Ct.App. 1999); *Jarman v. Hale,* 122 Idaho 952, 963, 843 P.2d 288, 299 (Ct.App. 1992); *Czaplicki v. Gooding Joint School District No. 231*, 116 Idaho 326, 332-33, 775 P.2d 640, 646-647 (1989). Analysis of the standard requires an inquiry into "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standard applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Sun Valley Shopping Center, Inc. v. Idaho Power Company*, 119 Idaho 8794, 803 P.2d 993, 1000 (1991).

III. ANALYSIS

A. Positions of the Parties.

In the Motion to Change Venue, Tate argues that the venue selection clauses in the documents are void under Idaho Code § 5-404, and cites case law mandating that venue be dictated by statute, regardless of contractual provisions. Defendant's Motion to Change Venue and Notice of Hearing, p. 2, citing *Pintlar Corp. v. Bunker Ltd. Partnership*, 117 Idaho 152, 156, 786 P.2d 543, 547 (1990). Alternatively, Tate argues Idaho Code § 5-401 requires the matter be tried in Bonner County because the suit is related to real property. *Id.,* p. 3.

MWB opposes the Motion to Change Venue, stating that the motion is procedurally defective because it fails to cite with particularity which civil rule it was brought under, as required by I.R.C.P. 7(b)(1) and *Naney v. Linella, Inc.,* 130 Idaho 477 (Ct.App. 1997). Plaintiff's Opposition to Defendant's Motion to Change Venue, pp. 3-4. Next, MWB argues that the forum selection clause is, indeed, enforceable, because the credit extension agreement between the two parties to the suit is governed by the

Uniform Commercial Code, rather than the general principles of contract law. I.C. § 28-3-104; I.C. § 28-3-101, *et seq*, and *Sirius LC v. Erickson*, 144 Idaho 38, 42 (2007); *see also* I.C. § 28-103; Plaintiff's Opposition to Defendant's Motion to Change Venue, p. 4. MWB then makes a policy argument supporting enforcement of selection clauses, citing trends in other states, as well as the United States Supreme Court and Ninth Circuit Court of Appeals. *Id.,* pp. 5-7. In addition, MWB points out that Idaho law allows the right to contractually relinquish the rights related to litigation of disputes, further supporting a policy of enforcing contractual provisions. *Id.,* p. 7, *citing, Hecla Min. Co. V. Bunker Hill Co.*, 101 Idaho 557, 562, 617 P.2d 861, 866 (1980). Finally, MWB argues that I.C. § 5-401 does not apply to the this action, per *First Interstate Bank of Idaho, NA. v. Eisenbarth*, 124 Idaho 895, 865 P.2d 985 (Ct.App. 1993), because the suit is for judgment on the remaining amount owed on the promissory notes rather than a property interest. *Id.,* pp. 7-8.

B. Tate's Motion to Change Venue is Procedurally Defective.

Again, MWB raises the issue that Tate's Motion to Change Venue is procedurally defective for failing to state the applicable civil rule. Opposition to Defendant's Motion to Change Venue, pp. 3-4. Whether Tate's Motion to Change Venue is defective is a threshold issue.

Parties filing motions must state "with particularity" the applicable civil rule governing the grounds under which they seek an order or relief. Idaho Rule of Civil Procedure 7 governs the form of motions and pleadings. I.R.C.P. 7(b)(1) states:

> An application to the court for an order shall be made by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therfor including the number of the applicable civil rule, if any, under which it is filed, and shall set forth the relief or order sought.

I.R.C.P. 7(b)(1). The Idaho Court of Appeals has upheld the particularity requirement, stating in *Nanny v. Linella, Inc.:* "This requirement for particularity is 'real and substantial,' and good practice 'demands that the basis of a motion and the relief sought shall be clearly stated' so that the other party will not suffer surprise or prejudice.'" *Nanny*, 130 Idaho 477, 481-482, 943 P.2d 67, 71-72 (Ct.App. 1997); *see also Mason v. Tucker*, 125 Idaho 429, 432, 871 P.2d 846, 432 (Ct.App. 1994).

In *Linella*, failure to satisfy the requirement for particularity resulted in the trial court striking the defendant's objection to awarding attorney fees to the plaintiff, a decision upheld by the Idaho Court of Appeals. *Linella,* 130 Idaho 477, 482, 943 P.2d 67, 72. Like the case at bar, one of the rules cited by the *Linella* defendant appears to have been incorrect – I.R.C.P. 54(b)(6), which deals with reasonable costs for preparation of exhibits, when presumably I.R.C.P. 54(d)(6) governing objections to costs was intended. *Linella,* 130 Idaho 477, 481, 943 P.2d 67, 71. Although the defendant asserted that his motion provided adequate notice "on its face," the court stated that the defendant's "motion satisfies neither the 'particularity' nor the 'relief or order sought' criteria of Rule 7(b), for it neither tells the claimant what ground of objection he must be prepared to meet at the hearing nor discloses whether the relief sought is complete disallowance of all the requested fees and costs or only a portion thereof." *Id.*

Tate has also stated the grounds for his motion under an invalid rule of civil procedure, stating "Defendant requests an award of attorneys' fees and costs as Judgment against the Plaintiff or counsel pursuant to Idaho Rules of Civil Procedure 40(c)(5) and related statutes and case law." Motion to Change Venue, p. 3. There is no I.R.C.P. 40(c)(5). However, Tate also cites statutory grounds for his motion, including I.C. § 5-401 and I.C. § 5-404. *Id.* Rule 40(c) contains no numbered sub-parts and

deals with the dismissal of inactive cases. I.R.C.P. 40. Tate also fails to cite I.R.C.P. 40(e), which governs changes of venue, and in fact cites no rules other than 40(c); I.R.C.P. 40(e); Def.'s Motion to Change Venue and Notice of Hearing at 3. While MWB admits that Tate meets the policy behind I.R.C.P. 7(b)(1) in that the failure did not cause MWB to meet with surprise or prejudice, MWB is technically correct in stating Tate's Motion to Change Venue is defective. *Linella,* 130 Idaho 477, 482, 943 P.2d 67, 72; I.R.C.P. 7(b)(1). However, it is important to note that the *Linella* motion is distinguishable from the motion to change venue under consideration here because the lack of particularity in *Linella* also related to the defendant's failure to file a memorandum stating the grounds and reasons supporting the objection, and because it dealt with an award of attorney fees rather than the kind of substantive relief sought by Tate. *Linella,* 130 Idaho 477, 481, 943 P.2d 67, 71; Motion to Change Venue, p. 3. The Court also notes Tate did cite I.C. § 5-402 et.seq. in its motion to change venue, so MWB cannot claim any surprise or prejudice. MWB candidly admits it has not been prejudiced by the citation to a non-existent rule.

Despite the shortcomings in Tate's motion for change of venue, the Court "…at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial right of the parties." I.R.C.P. 61. Tate's failure to cite I.R.C.P. 40(e) (and mistakenly cite I.R.C.P. 40(c)), is harmless error as MWB has conceded no prejudice or surprise resulted.

C. Venue is Dictated by Statute and Case Law.

The next issue to be addressed is whether Idaho statutes, Rules of Civil Procedure, and case law allow venue selection clauses, and if they do, whether policy considerations supporting and trends of enforcing such clauses permit the court to enforce the forum selection clause agreed upon by MWB and Tate.

Venue in civil actions is governed by I.R.C.P. 40(e) and I.C. § 5-404. The applicable section of the statute reads:

> (T)he action must be tried in the county in which the defendants, or some of them, reside, at the commencement of the action; or, if none of the defendants reside in the state, or, if residing in this state, the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint.

I.C. § 5-404. The Idaho Rules of Civil Procedure provide further guidance on statutory provisions for changing venue. Under I.R.C.P. 40(e), a change of venue may be granted in a civil action "as provided by statute." I.R.C.P. 40(e). The rule requires the court must grant a change of venue when "the county designated in the complaint is not the proper county," unless the otherwise proper venue is inconvenient for the witnesses and retaining jurisdiction where the action is filed would meet the ends of justice. *Id.*

Case law also directs trial courts to look to Idaho statutes when determining whether venue is proper, recognizing that, for the purposes of venue, breach of contract actions arise in the county where the contract was made, where it was breached, or where the damage occurred. *Corder,* 133 Idaho 353, 358, 986 P.2d 1019, 1024; *Pintlar Corp.,* 117 Idaho 152, 156, 786 P.2d 543, 547. In *Corder*, the Idaho Court of Appeals upheld a trial court's decision that venue was proper in Elmore County, Idaho, the place where "the contract was created and breached, and the ensuing damages occurred," even though the defendant's principal place of business was in Canyon County, Idaho. *Corder,* 133 Idaho 353, 358-359, 986 P.2d 1019, 1024-1025. And in *Pintlar,* the Idaho Supreme Court affirmed a district court decision that a waiver of venue by one of the defendants was not sufficient reason to change the county in which the suit was brought. *Pintlar*, 117 Idaho 152, 156, 786 P.2d 543, 547. The *Pintlar* court approvingly quoted *McCarty v. Herrick*, 41 Idaho 529, 535, 240 Pac.192 (1925):

> This Court held that venue is a statutory matter to be determined by the residence of the defendant, and could not be changed by the agreement of the parties... "the rules to determine in what courts and counties actions may be brought are fixed and considerations of general convenience and expediency, by general law; to allow them to be changed by the agreement of the parties would disturb the symmetry of the law and interfere with such convenience."

Pintlar, 117 Idaho 152, 156, 786 P.2d 543, 547.

Tate's motion to change venue in the current case meets the requirements of I.R.C.P. 40(e) and I.C. § 5-404. Bonner County is the correct venue dictated by statute. Tate is a Bonner County resident, and I.C. § 5-404 provides that "the action must be tried in the county in which the defendants, or some of them, reside, at the commencement of the action." I.C. § 5-404. Tate signed the promissory notes on which he still owes money in Bonner County, and both I.C. § 5-404 and *Corder* allow actions to be brought "in the county in which the cause of action arose." I.C. § 5-404; *Corder,* 133 Idaho 353, 358-359, 986 P.2d 1019, 1024-1025. Additionally, the property used to secure the loans, which was subsequently foreclosed, is located in Bonner County, further bolstering Tate's assertion that Bonner County is the proper venue. *Id*. Tate's argument that the venue selection clause in the promissory note is void also holds up under *Pintlar*, which dictates that venue depends upon state statutes rather than upon the choice of parties. *Pintlar*, 117 Idaho 152, 156, 786 P.2d 543, 547.

However, MWB argues I.C. § 5-404 and *Pintlar* do not apply because statutory provisions "must yield to the more specific and controlling provisions of the Uniform Commercial Code (UCC)." Plaintiff's Opposition to Defendant's Motion to Change Venue, p. 4. MWB argues this is because the promissory notes Tate signed are "negotiable instruments," governed by the UCC and defined by I.C. § 28-3-104. *Id.* MWB argues the UCC "expressly tolerates choice of law and forum selection clauses."

Id. However, the promissory note under discussion does not appear to be a negotiable instrument at all, either under the statutory definition or prior court determinations of what constitutes a negotiable instrument. I.C. § 28-3-104; *Sirius, L.C. v. Erickson*, 144 Idaho 38, 41-42, 156 P.3d 539, 542-543 (2007).

The Idaho Code defines negotiable instruments as an "unconditional promise or order to pay a fixed amount of money" if, among other qualifications, it "(i)s payable to the bearer or to order at the time it is issued or first comes into the possession of a holder." I.C. § 28-3-104(1)(a). *Sirius* reinforces the requirement. In *Sirius*, the Idaho Supreme Court declined to consider a promissory note a "negotiable instrument" governed by the UCC because the note did not explicitly state that it was payable "'to order,' or 'to the bearer.'" 144 Idaho 38, 42, 156 P.3d 539, 543-543. Like the promissory note in *Sirius*, Tate's promissory notes to MWB are too specific about the identity of the payee to be considered a negotiable instrument. *Id.*; Plaintiff's Exhibit 1; Plaintiff's Exhibit 4. Not only do they state "I will pay Lender at Lender's address shown above..." and define the Lender at the top of the note as "Mountain West Bank," the borrower, identified at the top of the note as Lawson Tate, states "I promise to pay *Mountain West Bank*..." This is not the "to the bearer" or "to order" language of a negotiable instrument.

The promissory notes instead are governed by other provisions of Idaho Code, Title 28, as indicated by I.C. § 28-41-301 and the explicit language of MWB's Complaint. The Complaint calls the transaction from which the claim originated an "extension of credit," and I.C. § 28-41-301 defines "Credit" as "the right granted by a creditor to a debtor to defer payment of debt, to incur debt and defer its payment, or to purchase property or services and defer payment therefor." I.C. § 28-41-301(13);

Complaint, p. 2, ¶¶ 5-7, p. 3, ¶¶ 11-13. Moreover, it is important to note that because the promissory note falls within this section of code, the venue selection clause cannot be valid. I.C. § 28-41-201(8)(c). The code states: "...the following agreements by a buyer or debtor are invalid with respect to regulated credit sales, regulated loans, or modifications thereof, to which this act applies: (a) That the law of another state shall apply; (b) That the buyer or debtor consents to the jurisdiction of another state; and (c) *That fixes venue.*" (emphasis added). I.C. § 28-41-201(8)(c). The venue selection clause in the promissory note signed by Tate attempts to fix venue, and because it is an extension of credit rather than a negotiable instrument, the venue selection clause is void. I.C. § 28-41-201(8)(c); I.C. § 28-41-301(13); I.C. § 28-3-104(1)(a); *Sirius, L.C. v. Erickson*, 144 Idaho 38, 42, 156 P.3d 539, 543; Plaintiff's Exhibit 1 and 4.

MWB makes a policy argument in favor of supporting the venue selection clause as well, stating: "blind adherence to *McCarty v. Herrick* must be questioned in light of recent trends away from the authority relied upon by the Supreme Court in that decision." Plaintiff's Opposition to Defendant's Motion to Change Venue, p. 6. In support of it's public policy argument, MWB cites *Jacobson v. Mailboxes Etc. U.S.A., Inc*, 419 Mass. 572, 646 N.E.2d 741 (1995); *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907 (1972); and *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984). Plaintiff's Opposition to Defendant's Motion to Change Venue, p. 6. The United States Supreme Court in *Bremen* upheld a forum selection clause between two international corporations "in light of present day realities" connected to international trade. *Bremen*, 407 U.S. 1, 15, 92 S.Ct. 1907, 1916. The Ninth Circuit Court of Appeals in *Pelleport,* adopted the approach in upholding the enforceability of a forum selection clause contained in a contract between California

and New York businesses. *Pelleport,* 741 F.2d 273, 279-80. And in *Mailboxes Etc.*, the Massachusetts Supreme Court signaled accord with the federal interpretation, stating "We accept the modern view that forum selection clauses are to be enforced if it is fair and reasonable to do so." *Mailboxes Etc.,* 419 Mass. 572, 574-575, 646 N.E.2d 741, 743. Moreover, MWB points out that Idaho courts have sanctioned the contractual waiver of other rights guaranteed by Idaho law, such as the right to judicial review of dispute resolutions. *Hecla Min. Co. v. Bunker Hill Co.*, 101 Idaho 557, 562, 617 P.2d 861, 866 (1980). In that case, the parties agreed to arbitration, precluding judicial review in all but extraordinary circumstances. *Id.* "It must be remembered that the right to litigate disputes in court is generally available but that it can be contractually relinquished," the *Hecla* court stated. *Id.*

Tate has made no policy arguments in his Motion to Change Venue. However, Tate notes that statutes and case law, as referenced above, support his argument. *Pintlar,* 117 Idaho 152, 156, 786 P.2d 543, 547; I.C. § 5-404. Idaho District courts are bound by the decisions of the Idaho Supreme Court and Idaho Court of Appeals, rather than the policy decisions of other jurisdictions. IDAHO CONSTITUTION Article V § 2; *Roeder Holdings, L.L.C. v. Board of Equalization of Ada County*, 136 Idaho 809, 813, 41 P.3d 237, 241 (2001); *Sunshine Mining Co. v. Allendale Mutual Insurance Co.*, 105 Idaho 133, 136-137, 666 P.2d 1144, 1147-1148 (1983).

D. Idaho Code § 5-401 Does Not Apply to This Action.

Finally, the parties disagree over whether I.C. § 5-401 applies to the Motion to Change Venue. Defendant's Motion to Change Venue, p. 3; Plaintiff's Opposition to Defendant's Motion to Change Venue, pp. 7-8. Idaho Code § 5-401 reads:

> Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to

> the power of the court to change the place of trial, as provided in this code:
> 1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest and for injuries to real property.
> 2. For the partition of real property.
> 3. For the foreclosure of a mortgage of real property. Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action.

To determine whether I.C. § 5-401 applies, the court must determine whether an action related to property actually falls under the provision stated above. *See Jarvis v. Hamilton*, 73 Idaho 131, 132, 246 P.2d 216, 217 (1952).

Tate argues the action under consideration falls under the provision because it is "related to property." Defendant's Motion to Change Venue, p. 3. MWB contends this case is "merely an 'action on the note.'" I.C. § 5-401; *First Interstate Bank of Idaho, N.A. v. Eisenbarth*, 123 Idaho 895, 898, 853 P.2d 640, 643 (1993); Plaintiff's Opposition to Defendant's Motion to Change Venue, p. 8. MWB is correct under *First Interstate* and *Jarvis*, both of which require a dispute over property to be central to a claim for I.C. § 5-401 to control venue. *First Interstate,* 123 Idaho 895, 898, 853 P.2d 640, 643; *Jarvis,* 73 Idaho 131, 132, 246 P.2d 216, 217. *First Interstate* was particularly on point. In that case, a bank sought money owed by the defendants after the property securing a loan had been foreclosed by another party, making the plaintiff's deed of trust valueless. *First Interstate,* 123 Idaho 895, 896, 853 P.2d 640, 641. "The property was unavailable for future foreclosure, leaving the Bank with only a cause of action on the note," the court stated. *Id.* The property involved in this case is also already foreclosed, and is unavailable for future foreclosure, so the remaining action must be on the note. *Id.* Since the action is on the note, rather than on property, I.C. § 5-401 does not control venue selection. *Id.*

E. Attorney Fees.

Tate claims he is entitled to attorney fees under I.R.C.P. 40(c)(5). Defendant's Motion to Change Venue, p. 3. Tate likely means to reference I.R.C.P. 40(e)(5), which reads:

> When a judge or magistrate grants a motion for change of venue, if the court finds that the action was filed in the county of improper venue without good cause, the court may, in its discretion, assess sanctions against the party, or the party's attorney, who filed the action.

While this Court finds Tate has prevailed on his Motion to Change Venue, this Court does not find that MWB filed the action in Kootenai County without good cause. At oral argument, Tate pointed out that prior to filing Tate's Motion to Change Venue, he had made MWB's counsel aware of *Pintlar* and other cases to try to persuade MWB to stipulate to an order changing venue and to obviate the need for a motion and hearing. Those efforts are laudable, and those efforts would have been required by this Court in order to support an award for attorney fees *had* this Court found MWB did not have good cause to file the action in Kootenai County.

IV. CONCLUSION.

For the reasons stated above, this Court properly exercises its discretion and grants Tate's Motion for Change of Venue because Bonner County is the correct venue under I.C. § 5-404.

IT IS HEREBY ORDERED Tate's Motion for Change of Venue is GRANTED. Tate's request for attorney fees is DENIED.

IT IS FURTHER ORDERED this matter is to be changed to a Bonner County case and assigned a new Bonner County Civil Case number.

IT IS FURTHER ORDERED the undersigned will remain the District Judge assigned to the matter.

IT IS FURTHER ORDERED that the matter is scheduled for a two-day court trial beginning May 29, 2012.

IT IS FURTHER ORDERED:

1. The parties and counsel shall no later than March 31, 2012, in good faith mediate this matter, and the parties shall have selected a mediator by no later than January 31, 2012.
2. If the parties have not agreed upon a mediator by January 31, 2012, the parties shall notify the Court of that failure to agree by that date, by joint letter to the Court, and the Court shall appoint a mediator.
3. The parties shall provide to the mediator such information, position statements or settlement materials as requested by the mediator.
4. Each counsel shall have his or her client (or a representative of such client having full settlement authority) present at the scheduled mediation so that the possibility of settlement may be fully explored.
5. Failure to comply with this Order for Mediation may result in the imposition of sanctions, including without limitation those identified in I.R.C.P. 16(i).
6. The parties shall pay a pro rata share of the costs of the mediator. I.R.C.P. 16(k)(8).
7. Having completed mediation will give this matter priority pursuant to this Court's pretrial order.
8. If resolution or partial resolution is accomplished the resolution must at a minimum be placed on the record. The preferred alternative is a written agreement signed by the parties is filed with the Court. In any dispute involving real property, the agreed upon settlement terms must be set forth in writing, signed by the parties and filed with the Court (a statement on the record is insufficient).

/

Entered this 2nd day of November, 2011.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 2011, 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 #**
R. Wayne Sweney	666-4111	Brent C. Featherston	208-263-0400

_____
Jeanne Clausen, Deputy Clerk