STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'clock _____M
CLERK, DISTRICT COURT

_____
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

MADSEN LAW OFFICES, P.C.,

Plaintiff,

vs.

DANIELLE RACHELS,

Defendant.

Case No. **CV 2012 5853**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION FOR ACCEPTANCE OF APPEAL BY PERMISSION

I. PROCEDURAL HISTORY.

This matter came before the Court on October 17, 2013, on oral argument on Defendant's Motion for Acceptance of Appeal by Permission.

On July 29, 2013, Magistrate Judge Penny Friedlander, at the conclusion of oral argument on defendant's motion to dismiss, denied such motion and ordered counsel for plaintiff to prepare an order. About five weeks later, on September 4, 2013, counsel for plaintiff finally faxed Judge Friedlander a proposed Order Denying Defendant's Motions. On September 9, 2013, Judge Friedlander signed the same. This Court notes nothing kept defendant's counsel from preparing such an order when plaintiff's counsel failed to timely comply with Judge Friedlander's order to prepare the order.

On September 13, 2013, counsel for defendant filed the following: Motion for Permission to Appeal From an Interlocutory Order, Brief in Support of Motion for Permission to Appeal from an Interlocutory Order, and Notice. The pleading entitled "Notice" simply stated:

> …Defendant Danielle Rachels will not request oral arguments regarding her Motion for Permission to Appeal per Judge Friedlander's Chamber's request as Judge Friedlander does not have any reasonable time available for oral arguments and this proceeding is an expedited proceeding pursuant to I.R.C.P. 83(a)(5) and Idaho Appellate Rule 12(b). Defendant anticipates this proceeding to be ruled on based upon written argument only.

Notice, p. 1. Counsel for defendant also supplied Judge Friedlander with a proposed Order for Permission to Appeal From an Interlocutory Order. [This fact is evident only from the top of the document showing it was received by the court on that date, not from any certificate of mailing. There is no certificate of mailing and even at the end of the October 17,2 013, hearing before this Court, it was not clear whether counsel for defendant sent counsel for plaintiff a copy of such proposed order on September 13, 2013, the same date it was received via fax by the court] On September 16, 2013, Judge Friedlander signed that Order for Permission to Appeal From an Interlocutory Order, but interlineated that such motion "…is denied.", rather than "granted", as the proposed order stated. On September 18, 2013, that Order for Permission to Appeal From an Interlocutory Order as signed and as interlineated by Judge Friedlander was filed and copies were faxed to counsel.

On September 19, 2013, counsel for defendant filed a Motion for Acceptance of Appeal by Permission, this time before "…the Kootenai County District Court…". Motion for Acceptance of Appeal by Permission, p. 1.

On September 26, 2013, the undersigned was assigned to take jurisdiction of this "…action for the purposes of the Permission to Appeal." Order Assigning District Judge, p. 1. On September 30, 2013, counsel for defendant filed a Notice of Hearing, scheduling oral argument on defendant's Motion for Acceptance of Appeal by Permission on October 17, 2013, "…before Judge Mitchel [sic]." Notice of Hearing, p. 1.

On October 9, 2013, counsel for plaintiff filed "Plaintiff's Response in Opposition and Objection to Defendant's Motion for Acceptance of Appeal by Permission."

Later that same day, October 9, 2013, counsel for defendant filed "Reply to Plaintiff's Response in Opposition and Objection to Defendant's Motion for Acceptance of Appeal by Permission."

Oral argument was held before this Court on October 17, 2013.

II. STANDARD OF REVIEW.

The decision to grant a motion for an interlocutory appeal is reviewed under the abuse of discretion standard. *State v. Bicknell,* 140 Idaho 201, 203, 91 P.3d 1105, 1107 (2004). Under this rule (I.A.R. 12), appeals are only accepted in the most exceptional cases, with the intent to resolve substantial legal issues of great public interest or legal questions of first impression. *Aardema v. U.S. Dairy Sys.,* 147 Idaho 785, 789, 215 P.3d 505, 509 (2009).

III. ANALYSIS.

Defendant's Motion for Acceptance of Appeal by Permission is a legal and factual memorandum contained in the motion itself, a procedure not contemplated by I.R.C.P.7(b)(3). In that "speaking" motion, defendant argues: Moreover, other states appellate courts have ruled on the subject [defining "reside" as it relates to service of process]." Motion for Acceptance of Appeal by Permission. Counsel for defendant cited not a single case. After plaintiff filed its brief, counsel for defendant filed defendant's Reply to Plaintiff's Response in Opposition and Objection to Defendant's Motion for Acceptance of Appeal by Permission, in which counsel for defendant cited *Pineview Overlook, Inc. v. Dual B. Cooper,* 1995 Minn.App. LEXIS 1398, 6 fn. 1 (Minn.Ct.App. 1995). Reply to Plaintiff's Response in Opposition and Objection to Defendant's Motion for Acceptance of Appeal by Permission, p. 2. Counsel for plaintiff has not been disadvantaged by this late citation as that case was cited before Judge Friedlander.

In Plaintiff's Response in Opposition and Objection to Defendant's Motion for Acceptance of Appeal by Permission, plaintiff argues:

> Historically, Ms. Rachels (defendant) has papered the Magistrate Court with pleadings in an attempt to delay these proceedings, and after being denied permission by Judge Friedlander to make an interlocutory appeal, has filed her present motion with the District Court *in contravention to Judge Friedlander's Order* and in an another attempt to delay these proceedings.

Plaintiff's Response in Opposition and Objection to Defendant's Motion for Acceptance of Appeal by Permission, pp. 1-2. (italics added) This Court finds every claim made by plaintiff's counsel to be false. In the fourteen months since this case was filed, defendant has filed three motions, and all of them relate to the attempts by plaintiff to effectuate service. This is hardly papering the Magistrate Court with pleadings. But more importantly, this Motion for Acceptance of Appeal by Permission at issue before this Court is not filed "…in contravention to Judge Friedlander's Order…" At no time did Judge Friedlander prohibit defendant from making this Motion for Acceptance of Appeal by Permission, nor would any judge prohibit a party from making the motion (after being denied by the trial court) with the appellate court as contemplated by I.A.R. 12. Counsel for plaintiff takes umbrage that defendant, in discussing what Judge Friedlander said on the record: "Defendant's statements and innuendos are not supported by affidavit nor by citations to the record of any hearing…" *Id.*, p. 2. Shockingly, counsel for plaintiff has provided no affidavit as to what was said on the record either. Plaintiff's counsel concludes:

> For the reasons stated above, the Plaintiff requests this Court dismiss Ms. Rachels' Motion, enter an order remanding this case back to the Magistrate Court, and award Plaintiff's attorney fees, costs and/or sanctions against Ms. Rachels and her attorney pursuant to Rule 11 for signing and filing the Motion for Acceptance of Appeal by Permission which, at the time of its signing, was not well grounded in fact and warranted by existing law or good faith argument for the extension, modification, or reversal of existing law and/or is made solely to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Id., p. 4. First, a "remand" is not necessary as this Court had not at the time of defendant's motion before this Court, and has not now, granted permission to appeal. There is nothing to "remand". There never has been. Second, this Court is not about to award Rule 11 sanctions when all defendant has done is pursue an avenue specifically allowed by I.A.R. 12. Third, counsel for plaintiff has not filed a separate "motion" for sanctions. While the Court can impose Rule 11 sanctions on its "own initiative", the rule is clear a party has to file a motion. All counsel for plaintiff has done in this case is rattle his saber at the end of a brief. The rule reads: "If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction…" I.R.C.P. 11(a)(1). In making the request for Rule 11 sanctions without following that rule's procedures, and without any factual basis (since defendant is entitled to make a motion to this Court asking for permission to appeal), let alone not being well grounded in fact, without requesting an extension, modification or reversal of existing law, and without making a good faith argument, **it is counsel for plaintiff which has violated I.R.C.P. 11(a)(1).** This Court, on its own initiative, grants I.R.C.P. 11(a)(1) sanctions in favor of defendant against plaintiff's counsel. Those sanctions will be in the form of attorney fees spent by defendant's counsel, only for the time spent addressing Rule 11 sanctions in plaintiff's Reply to Plaintiff's Response in Opposition and Objection to defendant's Motion for Acceptance of Appeal by Permission. Application for such fees will be made to Judge Friedlander.

The defendant's Motion for Acceptance of Appeal by Permission pertains to the September 9, 2013, Order Denying Defendant's Motions, and that order denied defendant's motions to: dismiss for insufficiency of service of process, for lack of personal jurisdiction, for untimely service, and a motion to strike and for attorney fees. Order Denying Defendant's Motions, p.1. That order pertained to rulings made on the record by Judge Friedlander on June 28, 2013. Judge Friedlander denied defendant's Motion for

Permission to Appeal From an Interlocutory Order on September 16, 2013. Defendant has now made a similar motion before this Court.

In defendant's final brief filed just a week before oral argument before this Court, defendant cited *Pineview Overlook, Inc. v. Dual B. Cooper,* 1995 Minn.App. LEXIS 1398, 6 fn. 1 (Minn.Ct.App. 1995). It is noted that counsel for defendant did not provide a copy of this case to the Court for its review. The Court found the case, and finds the following problem with it being presented to this Court. First, the Court notes it has the following admonition: "NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3)." And at least according to the Westlaw rendition, 1995 WL 673008, there is no footnote 6. What defendant has cited appears to be footnote 1. In any event, that there might be a split of authority throughout the country does little to advance defendant's argument that this Court should grant permission to appeal.

A case this Court can cite is: *Budell v. Todd,* 105 Idaho 2, 665 P.2d 701 (1983). This Court finds that decision by the Idaho Supreme Court to be helpful in this case:

> The legal issue that would be raised by an appeal by certification from the order denying the motion for summary judgment is whether a prior judgment in favor of the defendant in a small claim action for property damage to a vehicle in an accident bars this action for personal injury under the doctrines of *res judicata,* collateral estoppel, or the single cause of action rule. The defendant argues that this issue is a controlling question of law inasmuch as if these doctrines are applied to this factual situation, the motion for summary judgment for the defendant would be granted thereby terminating the case. While no argument is presented by the defendant as to why an immediate appeal would "materially advance the orderly resolution of the litigation," it is obvious that if the defendant prevails, it will prevent the necessity of a trial. At the same time, it is obvious that if the defendant does not prevail in the appeal, the trial of the action and relief sought by the plaintiff will be delayed by the pendency of this interlocutory appeal and that there is a possibility of a second appeal after the trial in the district court.
>
> In accepting or rejecting an appeal by certification under I.A.R. 12, this Court considers a number of factors in addition to the threshold questions of whether there is a controlling question of law and whether an immediate appeal would advance the orderly resolution of the litigation. It was the intent of I.A.R. 12 to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved. The Court also considers such factors as the impact of an immediate appeal upon the parties, the effect of the delay of the proceedings in the district court pending the appeal, the likelihood or possibility of a second appeal after judgment is finally entered by the district court, and the case workload of the appellate

> courts. No single factor is controlling in the Court's decision of acceptance or rejection of an appeal by certification, but the Court intends by Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under I.A.R. 11. For these reasons, the Court has, over the six year experience of the use of Rule 12, accepted only a limited number of the applications for appeal by certification.

105 Idaho 2, 3-4, 665 P.2d 701, 702-03. Certainly, defendant in the instant case *wants* the interlocutory appeal granted by this Court. But "wanting" a particular outcome, and providing cogent legal reasons why this extraordinary relief should be granted, are two separate things. Just as in *Budell*, if this Court granted defendant permission to appeal, and if this Court on appeal reversed Judge Friedlander's decisions denying the motions to dismiss on appeal, the case would likely have to be dismissed. Obviously, that reason wasn't sufficient to convince the Idaho Supreme Court to take an interlocutory appeal thirty years ago. And, just as *Budell*, the converse is true in the present case. As the Idaho Supreme Court noted in *Budell*: "At the same time, it is obvious that if the defendant does not prevail in the appeal, the trial of the action and relief sought by the plaintiff will be delayed by the pendency of this interlocutory appeal and that there is a possibility of a second appeal after the trial in the district court." *Id.*

Looking at these two concepts in the instant case, the burden of going to trial is not great. This is a collection lawsuit to collect legal fees allegedly owed. Defendant requested a jury trial, but even with that feature, this could only be a two-day trial. If permission were allowed, the fees "sought by plaintiff will be delayed by the pendency of this interlocutory appeal and…there is the possibility of a second appeal after the trial…" *Id.* Additionally, the passage of time is often a detriment to the plaintiff in a collections case. As *Budell* shows, this Court must keep in mind "the impact of an immediate appeal upon the parties, the effect of the delay of the proceedings". On balance, that factor tips in favor of denying defendant's motion to allow an interlocutory appeal. This Court does not find that "an immediate appeal would advance the orderly resolution of the litigation". This Court finds that while of interest to the individual defendant in this case, the Court does not find "substantial legal issues of great public interest" in this interlocutory appeal. It may present a "legal questions of first impression" as far as Idaho's Appellate Courts are concerned, but a decision has already been made by Judge Friedlander, and it appears logical to this Court that if defendant does not prevail at trial, the defendant can appeal any trial issues as well as the service of process issues all at one time to Idaho's Appellate

Courts. While the Idaho Supreme Court in *Budell* stated "no single factor is controlling" (*Id.*), this Court does not find any factor controlling in favor of granting defendant's motion for acceptance of appeal by permission.

IV. CONCLUSION AND ORDER.

IT IS HERBY ORDERED THAT Defendant's Motion for Acceptance of Appeal by Permission is DENIED.

IT IS FURTHER ORDERED defendants are entitled to I.R.C.P. 11(b) sanctions against plaintiff's attorney, only for the time spent in defending plaintiff's counsel's claims for Rule 11 sanctions against defendants. Should defendant seek to prove that amount, such claims will need to be made before this Court under the Idaho Rules of Civil Procedure.

DATED this 17th day of October, 2013.

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of October, 2013 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

HENRY D. MADSEN
JONATHAN FRANTZ
HON. PENNY FRIEDLANDER

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy