STATE OF IDAHO)
County of KOOTENAI)ss

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AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

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

RUSTY REESE, et ux, *Plaintiffs*,

vs.

MARK BOWLIN, et ux. *Defendants*.

Case No. **CV 2009 6659**

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

I. BACKGROUND AND PROCEDURAL HISTORY.

Both plaintiffs Rusty and Terry Reese (Reeses) and defendants Mark and Karin Bowlin (Bowlins) are owners of real property located in Kootenai County. On June 15, 2009, Reeses and Bowlins executed a Post Mediation Agreement to resolve an access dispute regarding access to Reeses' property; the dispute had been the subject of litigation in Kootenai County case CV 2005 8855. The terms of the agreement included a grant of an access easement and a grant of a landscape easement in favor of Reeses by Bowlins. Additionally, pursuant to the agreement, Reeses granted Bowlins a first option to purchase Reeses' property, providing Reeses performed certain conditions and Bowlins thereafter exercised their option within 60 days.

On August 18, 2009, plaintiffs Reeses filed this lawsuit and claim Bowlins failed to exercise their option within 60 days and properly notify Reeses thereof. Reeses claim Bowlins improperly clouded title to the property by recording a Memorandum of First Option Agreement with Kootenai County. Reeses filed this quiet title action and

seek declaratory relief. Bowlins counterclaim for Rescission of Contract and Breach of Contract.

On September 23, 2009, Bowlins filed a motion for protective order prohibiting their attorney, Michael Schmidt, from being deposed. This Court heard oral argument on the motion on November 4, 2009, and ruled from the bench on that date. This Court granted the motion in part and denied the motion in part (also denying attorney's fees to either party). The Court ordered plaintiffs are not "entitled to Mr. Schmidt's thought process, mental impressions or opinions or strategies, past, present or future legal arguments. " Tr, p. 20, Ll. 2-4. Ultimately, as to the list of questions provided by Plaintiffs, the Court ordered all questions of fact be answered. For example, "Mr. Eismann [plaintiffs' attorney], can ask you [Michael Schmidt, defendants' attorney] what are the facts that support your contentions…"(Tr., p. 20, Ll. 19-20); "Mr. Eismann can't ask you for your opinions unless you've already given them, but then he can ask for what facts support your party's claims." (Tr., p. 21, Ll. 6-8); etc.

In early November 2009, Bowlins noticed up the deposition of attorney Jim Raeon, former attorney of Reeses. On November 10, 2009, Reeses filed a "Motion for Protective Order." This matter is currently set for a 3-day court trial commencing on June 21, 2010.

II. ANALYSIS.

Reeses now seek a protective order pursuant to I.R.C.P. 26(c), regarding the taking of their former attorney, James Raeon's, deposition. The Rule sets forth that upon a motion by the party from whom discovery is sought, the Court may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including that the discovery may be had only

on specified terms and conditions, including the designation of the time and place. I.R.C.P. 26(c)(2). The granting of a protective order in this context is a matter of discretion for the court, the word "may" in the rule denotes that such an action by the Court is permissive and not compulsory. *Walborn v. Walborn,* 120 Idaho 494, 501 817 P.2d 160, 167 (1991). Given the permissive language, the Court's decision would not be overturned absent an abuse of discretion. *Selkirk Seed Co. v. Frney,* 134 Idaho 98 104 995 P.2d 798, 804 2000).

Deposing opposing counsel is generally limited to those circumstances where; (1) no other means exist to obtain the information other than deposing the opposing counsel; (2) the information sought is relevant and not privileged; and (3) the information is crucial to the preparation of the case. *State v. Wood,* 132 Idaho 88, 107, 967 P.2d 702, 721 (1998) citing *Spectra-Physics, Inc. v. Superior Court,* 198 Cal.App.3d 1487, 244 Cal.Rptr. 258, 263 (Cal.App. 6 Dist. 1988); *Estate of Ruchti,* 12 Cal.App.4th 1593, 16 Cal.Rptr. 2151 (Cal.App. 2 Dist. 1993). However, in the present case, Mr. Raeon is no longer counsel for Reeses. As such, Reeses are seeking a protective order for matters they argue are protected by the attorney-client privilege. Specifically, the subpoena and subpoena *duces tecum* requests Mr. Raeon bring the following:

1. All correspondence and emails between he and Michael Schmidt pertaining to this action.
2. All correspondence and emails between Raeon and Reeses pertaining to the action.
3. All documents pertaining to the case, including agreements and all documents prepared
4. All photos/video taken by Raeon or Reeses pertaining to the case.
5. Any and all written evidence of work performed on this case by Raeon or any member of his firm
6. Any retainer agreements between Raeon and Reeses
7. All billings sent from Raeon to Reeses reflecting services rendered in this action
8. All real estate appraisals obtained by Raeon or Reeses relating the value of the real property involved in this action

9. All documents or things pertaining to Plaintiffs' violations of any easement granted Defendants including correspondence and emails between Raeon, Bowlins, and/or Schmidt
10. Any and all documents authored by Raeon in any way pertaining to the case
11. Any and all letters, emails, documents, or other correspondence between Raeon and Reeses or Raeon and any appraisers regarding the subject litigation or Reeses property.

Affidavit of Samuel Eismann, Exhibit A. Regarding each item sought, Reeses respectively argue:

1. Bowlins are already in possession of the correspondence/emails
2. The correspondence sought is subject to the attorney-client privilege
3. The items sought include work product, items Schmidt already has, items subject to the attorney-client privilege, irrelevant items, and items prepared in anticipation of litigation
4. The items sought include items constituting work product, items prepared in anticipation of litigation and items subject to the attorney-client privilege
5. The items sought are irrelevant and subject to the attorney-client privilege
6. The items sought are irrelevant and subject to the attorney-client privilege
7. The items sought are irrelevant and subject to the attorney-client privilege
8. Bowlins are already in possession of the appraisals
9. Bowlins are already in possession of the emails requested, the items sought wrongfully presume Reeses violated easements, and the items sought constitute work product, are subject to the attorney-client privilege and were obtained in anticipation of litigation
10. The request is overly broad and burdensome and the items sought constitute work product, are irrelevant, are subject to the attorney-client privilege and were obtained in anticipation of litigation
11. Bowlins are already in possession of the letters, emails, documents or other correspondence sought.

Motion for Protective Order, pp. 2-3. In response, Bowlins argue Reeses should be judicially estopped from previously having taken the position that the information sought was not privileged and now claiming the attorney-client privilege applies. Memorandum in Opposition to Motion for Protective Order, p. 3. "Having taken such a position previously before this Court, Plaintiffs should be judicially estopped from claiming such a privilege at this point." *Id.,* p. 4. Additionally, Bowlins argue Mr. Raeon is a material witness and they seek to depose him on matters relating to *ex parte* communication with appraisers; the documents requested are simply related to such communication.

Id., pp. 5-7. Finally, Bowlins argue Reeses' contentions that Bowlins are already in possession of certain documents sought are irrelevant because Bowlins "are entitled to know and receive exactly what the Deponent possesses." *Id.,* p. 7.

A. Judicial Estoppel.

As stated by Bowlins, the doctrine of judicial estoppel "prohibits 'a party from assuming a position in one proceeding and then taking an inconsistent position in a subsequent proceeding.'" *Riley v. W.R. Holdings, LLC,* 143 Idaho 116, 121-22, 138 P.3d 316, 321, 22 (2006) (quoting *A&J Constr. Co. v. Wood,* 141 Idaho 682, 688, 116 P.3d 12, 18 (2005)). However, the issue previously before the Court, whether Reeses should be prohibited from deposing Mr. Schmidt, past and current counsel for Bowlins, varies greatly from the instant matter because: 1) Mr. Raeon is no longer counsel for any party to the instant litigation and 2) the issue of Mr. Schmidt bringing documents, etc., pursuant to the subpoena *duces tecum* was not before the Court. This Court ruled on questions to be posed of Mr. Schmidt in an upcoming deposition, specifically stating:

> If a fact—if the response to a fact is covered by a privilege, then my ruling doesn't encompass that, and I haven't been asked to encompass that or I haven't been asked to decide that. No—the deposition hasn't taken place, so the privilege hasn't been invoked, and there's nothing for me to decide along those lines. And I'm not gonna issue you an advisory opinion in advance.

Tr., p. 27, Ll. 12-19. Judicial estoppel does not apply and this Court will not allow Bowlins to use that doctrine to defeat Reeses' Motion for Protective Order.

Bowlins also claim Reeses' counsel took the position in opposing Bowlins' motion for a protective order that information similar to what is now sought to be protected by Reeses was "not privileged." Memorandum in Opposition to Motion for Protective Order, p. 3. Essentially, Bowlins claim that because Reeses argued in an earlier brief that "Plaintiffs are not seeking to annoy or embarrass Mr. Schmidt, nor are they seeking

privileged information.", and since the information sought was on a list, that therefore, everything on that list was claimed by Reeses to be not privileged. *Id.,* pp. 3-4. (emphasis in original) That is not a valid construction of those claims by Reeses' counsel. Reeses' counsel just as likely was asking for a list of information, but limiting that list to not include privileged information. Bowlins counsel now turns that on its head, and argues that since the information was asked for by Reeses' counsel in a list, and since Reeses' counsel stated they did not seek any privileged information, then everything on that list must not be privileged. That flies in the face of logic. Even if Bowlins' construction of this past discovery sequence were a valid construction, as set forth above, this Court finds judicial estoppel does not apply.

B. Attorney-Client Privilege.

While the doctrine of judicial estoppel is inapplicable to the motion before the Court, Bowlins' argument regarding Mr. Raeon's being a material witness and their need to depose him and seek documents related to any purported *ex parte* communication with the appraisers goes to the heart of the litigation. Reeses having now asserted the attorney-client privilege does bring the matter before the Court. The burden of showing information is privileged, and therefore exempt from discovery, **is on the party asserting the privilege**. *Ex Parte Niday,* 15 Idaho 559, 98 P. 845 (1908). (emphasis added). Reeses have the burden of showing the information is privileged. Idaho Rule of Evidence 502 (c) states the privilege may be claimed by the client and/or "[t]he person who was the lawyer or the lawyer's representative at the time of the communication may claim the privilege but only on behalf of the client." Thus, either Reeses or their former attorney Raeon may claim the privilege is applicable. But once the privilege is asserted, Reeses then face the burden of showing the information

sought is in fact privileged.

It appears very likely that items 2, 3, 4, 5, 6, 7, 9, 10 and 11 could amount to materials covered by the attorney-client privilege. To the extent any such materials have been provided to the opposing party, as is arguably the case with items 9 and 11, the privilege is likely waived. *See e.g. Vaught v. Dairyland Ins. Co.,* 131 Idaho 357, 363, 956 P.2d 674, 680 (1998) ("Since there is no indication in the record that Dairyland put privileged communications into evidence, there was no waiver and Dairyland's invocation of the privilege was proper.") To the extent the materials sought are *not* privileged, I.R.C.P. 26 permits discovery of "any matter...which is relevant to the subject matter involved in the pending action…It is not ground for objection that the information sought will be inadmissible at trial…." I.R.C.P. 26(b)(1). And:

> When a party withholds information otherwise discoverable under these rules by claiming it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable the other parties to assess the applicability of the privilege or protection.

I.R.C.P. 26(b)(5)(A).

As to the retainer agreement (item 6), no Idaho case law on point exists. However, the Ninth Circuit Court of Appeals has definitively held retainer agreements are not protected by the attorney-client privilege or the work product doctrine. *Ralls v. United States,* 52 F.3d 223, 225 (9th Cir. 1995); *See also United States v. Blackman,* 72 F.3d 1418, 1424 (9th Cir. 1995); *In re Michaelson,* 882 F.2d 882 (9th Cir. 1975). Similarly, the attorney-client privilege does not extend to billing records. *See Montgomery County v. Micro Vote Corp.,* 175 F.3d 296, 304 (3d Cir. 1999); *Chaudhry v. Gallerizzo,* 174 F.3d 394, 402 (4th Cir. 1999); *Lefcourt v. United States,* 125 F.3d 79, 86

(2d Cir. 1997); *Clarke v. Am. Commerce Nat'l Bank,* 974 F.2d 127, 129 (9th Cir. 1992) (holding billing correspondence is not protected unless it "also reveal[s] the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law").

At this juncture, Reeses have asserted the privilege expressly, but have not yet described the specific materials they seek a protection order for such that Bowlins may properly assess the applicability of the privilege or protection claimed by the Reeses.

C. "Counsel Already in Possession" is Not a Valid Objection.

As to item 1, Reeses respond: "Defense counsel is already in possession of all those items requested in Paragraph 1 of his deposition subpoena." As to item 11, Reeses respond: "The information sought in Paragraph 11 of the deposition subpoena is already in the possession of the Defendants." This is not a valid objection. Bowlins in fact *might* not be in possession of these items. Even if the Bowlins are in possession of something, that does not mean Bowlins cannot discover it from Reeses. A party has a right to find out what another party has or does not have in its possession. That objection is overruled. To that specific extent the Motion for Protective Order is denied.

III. CONCLUSION AND ORDER.

For the reasons set forth above, this Court cannot grant the motion for protective order until it hears additional testimony or is presented additional evidence and Reeses properly meet their burden for asserting the privilege as to the various documents. Accordingly, at this point, Reeses' Motion for a Protective Order must be denied in all aspects.

At the present time, the deposition of James Raeon can go forward. Reeses' Motion for a Protective Order is only based upon certain items (documents) that Bowlins

have listed in their *subpoena deuces tecum* of Reeses' former attorney James Raeon. Counsel for Bowlins at oral argument on December 1, 2009, stated that in that *subpoena deuces tecum*, when the term "this case" and "this action" are used in reference to that list of documents, Bowlins are referring not only to the present litigation, but the prior litigation and settlement agreement that later spawned the present litigation. Bowlins are bound by that representation. Unless the parties are able to work out what document(s) need to be produced during James Raeon's deposition, Raeon will need to attend the deposition with all documents requested in the *subpoena deuces tecum*, and if there is a privilege asserted, a record will need to be made in the deposition of that asserted privilege, the nature of the privilege and who is asserting the privilege, and the document will need to be identified on the record. If Bowlins request a ruling on the assertion of any privilege, they will need to present the record, and counsel for Reeses will need to present the privileged document(s) to the Court for an *in camera* inspection to determine the merit of the assertion.

IT IS HEREBY ORDERED Reeses' Motion for a Protective Order is DENIED.

Entered this 1st day of December, 2009.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of December, 2009, 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 #**
Samuel Eismann	667-3679	Michael G. Schmidt	664-4125

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Jeanne Clausen, Deputy Clerk