

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**

**DENNIS LYLE AKERS and SHERRIE L. AKERS, husband and wife,,** )  
 )  
 )  
*Plaintiffs,* )

Case No. **CV 2002 222**

vs. )

**ORDER ON DEFENDANT VERNON MORTENSEN'S MOTION TO DISQUALIFY**

**D.L. WHITE CONST., INC., DAVID L. WHITE and MICHELLE WHITE, husband and wife, and VERNON J. MORTENSEN and MARTI E. MORTENSEN, husband and wife,** )  
*Defendants.* )  
 )

Defendant Vernon J. Mortensen on May 4, 2009, filed a "Motion to Disqualify" the undersigned pursuant to I.R.C.P. 40(d)(2). No hearing was noticed by Vernon Mortensen.

Because the rule requires a hearing, and since the mere filing of such a motion divests a court of taking any other action in a case until a motion to disqualify is decided, on May 6, 2009, this Court noticed up oral argument on the motion for May 21, 2009. At oral argument, Defendant Vernon J. Mortensen's Motion to Strike Plaintiff's Memorandum in Response to V.J. Mortensen's Motion to Disqualify for Cause was denied, and the Court considered all pleadings submitted on this motion to disqualify. At oral argument on the motion to disqualify, counsel for defendant Vernon J. Mortensen rested on the pleadings, counsel for defendant D.L. White had submitted no written pleading but argued in favor of Vernon J. Mortensen's motion to disqualify, counsel for defendant Marti E. Mortensen was present but did not take a position on the motion to disqualify, and counsel for plaintiffs

argued against the motion to disqualify. At the conclusion of oral argument, the Court took the matter under advisement to re-read past decisions of this Court in this case, and to re-read the decisions of the Idaho Supreme Court in this case, all with an eye toward Vernon Mortensen's claims in his motion to disqualify.

The motion to disqualify claims this Court is biased or prejudiced against Vernon J. Mortensen. In his brief, Vernon Mortensen states "...Mortensen firmly believes that this Court is no longer capable of being fair and impartial enough to follow the Idaho Supreme Court's directives on remand." Memorandum in Support of Motion to Disqualify, pp. 1-2.

In the most recent opinion of the Idaho Supreme Court, filed January 22, 2009, this Court was affirmed in its decision that Appellants (the defendants collectively) do not have an implied easement by prior use and that the appellants' prescriptive easement is 12.2 feet in width. The Idaho Supreme Court reversed this Court judgment as to the location of that part of the prescriptive easement located in Parcel B, the award of damages and the award of attorney's fees and costs. Slip Opinion, pp. 6, 13. Specifically, the Idaho Supreme Court affirmed this Court in its finding that the location of appellants' prescriptive easement across the Akers' property was coextensive with the express easement in Government Lot 2, but held this Court erred when it found that appellants' prescriptive easement turned immediately south upon entering Parcel B. *Id.*, pp. 10-12. The Idaho Supreme Court held: "However, these exhibits, which are aerial photographs of the relevant property, indicate that the access road historically made a more gradual turn resembling a shepherd's crook rather than a 90-degree turn." *Id.*, p. 11. The Idaho Supreme Court further held:

In light of this photographic evidence, we conclude that there is not substantial evidence supporting the district court's conclusion as to the location of Appellants' prescriptive easement on Parcel B. This issue must be remanded back to the district court for additional fact finding consistent

with this opinion.

*Id.*, p. 12. The Idaho Supreme Court then held: “Because the district court must determine the location of Appellants’ prescriptive easement in Parcel B on remand, we vacate the district court’s award of damages below based upon trespass.” *Id.* Finally, as to damages awarded by the district court for negligent infliction of emotional distress and punitive damages, because those damages are “inseparable from consideration of Appellants’ easement rights”, those damages were vacated. *Id.*, p. 13.

On remand, the directive by the Idaho Supreme Court as to further action by this Court is limited. This Court must locate the prescriptive easement, only on Parcel B, as it follows the path of a shepherd’s crook as opposed to a 90 degree bend. Once so located, this Court must also determine if there was a trespass, and if there was, determine damages. No new evidence was ordered to be taken, and no party has requested new evidence be taken.

The Idaho Court of Appeals held in *Desfosses v. Desfosses*, 120 Idaho 27, 30, 813 P.2d 366, 369 (Ct.App. 1991), “A disqualifying prejudice cannot be deduced from adverse rulings by a judge, whether they are right or wrong.” *Citing* 46 Am.Jur.2d *Judges* § 221 (1969). Adverse rulings alone do not support the existence of a disqualifying prejudice. *Bell v. Bell*, 122 Idaho 520, 835 P.2d 1331 (Ct.App. 1992). “Merely because a judge has participated in prior legal proceedings involving related parties or issues does not provide grounds for the judge to recuse himself.” *Roselle v. Heirs and Devisees of Archie Grover*, 117 Idaho 530, 534, 789 P.2d 526, 530 (Ct.App. 1990). While Vernon Mortensen appreciates adverse rulings alone do not provide grounds for recusal (Memorandum in Support of Motion to Disqualify, p. 3), much of Vernon Mortensen’s memorandum and Affidavit of Terri R. Pickens is focused on precisely that, past decisions of this Court.

Another way of stating the rule that adverse rulings alone do not support the existence of disqualifying prejudice, is that alleged prejudice must stem from an extra-judicial source. *Department of Health and Welfare v. Doe*, 133 Idaho 826, 829, 992 P.2d 1226, 1229 (Ct.App. 1999) citing *Desfosses*, 120 Idaho 27, 29, 813 P.2d 366, 368. The only extra-judicial source claimed by Vernon Mortensen's counsel is as follows:

b. "Defendant Mortensen has violated the Subdivision Ordinance on prior occasions and has thereby harmed innocent purchasers of property." See p. 18 of Findings 1. This statement is not substantiated by any testimony in the trial transcript, and is a fabrication by counsel for Plaintiffs and adopted by this Court, showing bias against Mortensen.

Affidavit of Terri R. Pickens, p. 2, ¶ 3.b. Vernon Mortensen overlooks the uncontroverted testimony by Scott Razor, who testified that: defendants violated the subdivision ordinance by splitting it more than four times (Tr. Vol. II, p. 537, L. 24 – p. 538, L. 25); and that defendants violated the subdivision ordinance by doing work first prior to getting an exception, and in so doing, defendants "make the splits first, worry about the rules later", (*Id.*, p. 539, L. 1 – p. 540, L. 1). Razor also testified that Vernon Mortensen had on prior occasions requested Razor to make splits that do not conform to the subdivision ordinance, that Razor had explained to Vernon Mortensen in writing that doing so violated the subdivision ordinance, and that Mortensen persisted in making such divisions which resulted in subsequent purchasers of land from Vernon Mortensen calling Razor upset about not being able to get building permits because the division was not done up to standard. *Id.*, p. 540, L. 2 – p. 542, L. 11.

This is a discretionary decision by this Court, and this Court must be convinced that he can sit on this case and "...fairly and impartially perform the proper legal analysis which the law requires to be performed." *State v. Pratt*, 128 Idaho 207, 210-11, 912 P.2d 94, 97-98 (1996). This Court is convinced it can do so.

As stated by the Idaho Court of Appeals upholding a denial of a motion for disqualification for cause by a judge: “Suspicion, surmise, speculation, rationalization, conjecture, innuendo, and statements of mere conclusions...may not be substituted for a statement of facts.” *Desfosses*, 120 Idaho 27, 30, 813 P.2d 366, 369; *citing Walker v. People*, 126 Colo. 135, 248 P.2d 287, 295 (1952). Much of Vernon Mortensen’s arguments are based on an assumption that Vernon Mortensen has already won on all fronts, when the Idaho Supreme Court has at all times sustained this Court’s finding that Mortensen did not have a right to use the curved approach.

Vernon Mortensen argues: “In this case, the Idaho Supreme Court suggested in its original decision that this case be reassigned to another district judge.” Memorandum in Support of Motion to Disqualify, p. 3. In Pickens’ affidavit, counsel for Vernon Mortensen makes the statement: “In the Opinion, the Idaho supreme Court reassigns this case to an alternate judge to make additional findings of fact and conclusions of law consistent with the Opinion.” Affidavit of Terri R. Pickens, p. 8, ¶ 16. However, that opinion was withdrawn.

Without a doubt, there is animosity between the parties. There has been no animosity by any party expressed toward the Court. While there may be some animosity by a party toward the Court, that is of no import because: 1) the Court is not aware of such; 2) animosity toward a judge by one of two parties in any litigated proceeding is not uncommon; and 3) most importantly, this Court is not biased against any party even if there is animosity by a party or parties against the Court.

When this case was tried over the span of eighteen trial days which took several months to complete, while the parties had animosities toward each other, the Court perceived no animosities between trial counsel or between trial counsel and the Court.

Since that trial, Whites have hired separate counsel, and now each of the Mortensens have separate counsel. If there are animosities between present counsel and the Court, any such animosity by counsel could only be based upon this Court's decisions following the trial. Accordingly, any animosity by counsel could only have arisen as a result of this litigation, and thus, as set forth above, even if there were prejudice, it would not have stemmed from an extra-judicial source. *Department of Health and Welfare v. Doe*, 133 Idaho 826, 829, 992 P.2d 1226, 1229 (Ct.App. 1999). But more importantly, there is no prejudice. This Court bears no animosity toward any party in this litigation, nor does this Court bear any animosity toward any attorney for a party in this litigation. This Court can unequivocally state this Court will not be biased against Vernon Mortensen, or any other party, or their attorneys, as a result of past conduct within this case. That includes the statements and claims made in this current motion to disqualify.

Parties make mistakes, counsel make mistakes, this Court has been reversed in this case. Simply because a party, counsel or this Court makes a mistake, does not mean such mistake is the result of prejudice or creates prejudice. As an example, this Court has shown the claim made by Vernon Mortensen's counsel that: "This statement [by the Court that Mortensen has violated the Subdivision Ordinance on prior occasions and has thereby harmed innocent purchasers of property] is not substantiated by any testimony in the trial transcript, and is a fabrication by counsel for Plaintiffs and adopted by this Court, showing bias against Mortensen", is simply wrong. The fact that Vernon Mortensen's counsel is wrong does not create animosity by the Court toward Vernon Mortensen's attorney. On the other hand, it would be highly inappropriate for this Court to **not** point out that error, simply because there is a possibility that Vernon Mortensen's counsel will later make a claim of animosity by this Court for pointing out that error.

This is not the first motion to disqualify that has been made in this case. Following remand from the first Idaho Supreme Court decision there was a motion to disqualify made by defendants Whites. The defendants Mortensens joined that motion. That motion was based upon I.R.C.P. 40(d)(1)(F), and the mistaken assumption by the defendants that a new trial was ordered on remand. No new trial was ordered after that first remand back to this Court. The present motion by Vernon Mortensen (joined in by defendants Whites) is made pursuant to I.R.C.P. 40(d)(2), and is for cause. The opinion above indicates why this Court is denying that motion.

IT IS HEREBY ORDERED that defendant Vernon Mortensen's Motion to Disqualify (and defendants Whites' joinder in that motion) is DENIED.

Entered this 1<sup>st</sup> day of June, 2009.

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John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of June, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

| <u>Lawyer</u>   | <u>Fax #</u> | <u>Lawyer</u>       | <u>Fax #</u> |
|-----------------|--------------|---------------------|--------------|
| Susan P. Weeks  | 208 664-1684 | Robert E. Covington | 208 762-4546 |
| Dustin Deissner | 509 326-6978 | Terri R. Pickens    | 208 954-5099 |

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Jeanne Clausen, Deputy Clerk