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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 BONNER**

**LEON ATKINSON,** )  
 )  
 ) *Plaintiff,* )  
 )  
 )  
 vs. )  
 )  
 ) **NANCY LAUX, and spouse, BRUCE AND** )  
 ) **SHARON CARDE.** )  
 )  
 )  
 ) *Defendants.* )

Case No. **S CV 2008 827**

**MEMORANDUM DECISION AND  
ORDER DENYING PLAINTIFF'S  
MOTION TO VACATE JUDGMENT**

**I. PROCEDURAL HISTORY AND BACKGROUND.**

This matter is presently before the Court on a Motion to Vacate Judgment filed by plaintiff Leon Atkinson (Atkinson) on January 5, 2010. Defendants filed a brief on February 6, 2010, and oral argument was held on February 10, 2010. Atkinson at all times has appeared *pro se*. The following procedural history is taken from the Memorandum Decision and Order Granting Defendants' Motion to Dismiss, filed August 11, 2009.

Plaintiff Leon Atkinson (Atkinson) alleges that when he purchased a rental property from defendants, the agreement contemplated one-half ownership of a well. Atkinson states he entered into an agreement in which defendants would provide water to each unit of the property, but he does not recall entering into the agreement with the specific provision regarding water to each rental unit, as he believed he'd purchased partial ownership of the well. A letter from defendants has been provided to the Court

stating that license for use of water would be revoked; the water cut-off date was extended from Nov. 30, 2007 to May 21, 2008. On May 16, 2008, Atkinson noticed up a show cause hearing regarding the termination of the water supply. Atkinson sought a temporary restraining order to cease any action to stop the flow of water from the well in dispute. This Court denied that motion on June 20, 2008.

Because nothing had been filed in the case for over six months, on January 1, 2009, this Court issued a Notice of Proposed Dismissal. No response was filed by any party. Accordingly, an Order of Dismissal was filed by the Court on February 4, 2009. Atkinson sought an Order of this Court vacating judgment pursuant to I.R.C.P. 60(b)(1),(3), and (6), which this Court granted on May 26, 2009.

Defendants then moved to dismiss the action pursuant to I.R.C.P. 12(b)(6). Oral argument was held on August 11, 2009. Atkinson appeared in person, Bruce Greene appeared telephonically on behalf of defendants. An "Amended Complaint Regarding Real Property Water Rights and Civil Rights Violations and Declaratory Judgment, Demand for Jury Trial" was filed by Atkinson just prior to oral argument. The Court found at oral argument that defendants' Motion to Dismiss is a "responsive pleading" pursuant to I.R.C.P. 15(a), and thus, Atkinson needed to file a motion for leave to amend pursuant to that rule, and obtain a ruling from the Court, in order for the filing of the "Amended Complaint" to have any validity.

In their Motion to Dismiss, defendants argued only:

The Complaint seeks restraining order, which the Court has already properly denied. Additionally, as shown by Defendant's affidavit the water line at issue was dug up and capped off due to Plaintiff's non-payment. The Defendants thereafter dug his own well, or had other drill same, making this issue and any temporary orders moot anyway. If there was ever a justifiable controversy pled, there no longer is one; hence dismissal is appropriate.

Motion to Dismiss and Notice, p. 1. Atkinson did not reply to the motion to dismiss. At oral argument, Atkinson noted that the original pleading was for injunctive relief, but at all times he intended to file an amended complaint.

This matter is before the Court as a result of a “Complaint RE Water Rights” filed by Plaintiff on May 16, 2008. The entire Complaint reads:

COMES NOW Leon Atkinson, pro se, plaintiff in the above action and hereby requests the Court to restrain, stop and cease any action to stop the flow of water from the well in dispute between Plaintiff and Defendants.

Plaintiff alleges that if this act is not stopped, it will cause great hardship to Plaintiff. Plaintiff is on dialysis and doing dialysis at home at the residence in question. Plaintiff alleges that a sterile environment must be maintained for this procedure which would be impossible without water. In addition, hardship would be imposed on Plaintiff’s tenants which include two children.

Complaint RE Water Rights, p. 1. Plaintiff re-filed the Complaint quoted *supra* in its entirety on November 17, 2008, only changing the *pro se* language to *in peropria persona*. Thus, the relief sought, and the behavior complained of, remains the same: Atkinson is asking the Court to restrain any action by defendants to stop the flow of water from the disputed well. Atkinson has submitted no additional evidence, by way of affidavit, etc., to support his complaint. As argued by defendants, this court has previously ruled, on June 18, 2008, that Atkinson’s request for a temporary restraining order must be denied as Atkinson failed to demonstrate a clear right to the relief sought (the underlying well dispute is not before the Court based on the Complaint filed by Atkinson) or irreparable harm or injury.

In granting Defendant’s Motion to Dismiss, this Court held:

This matter having remained before the Court for over one year, and Atkinson having presented no further evidence of waste and/or great or irreparable injury, weighs against the damages claimed by Atkinson in his Complaint. And, although more than one year has passed, Atkinson

has not sought to litigate the underlying property issues with respect to the well. This necessarily mitigates against his being entitled to the injunctive relief demanded. Even though defendants reference to an affidavit stating the water line has already been dug up, capped, and defendant has dug his own well, such affidavits are not in the Court file. However, even without those affidavits, Atkinson has nevertheless not met his burden of showing entitlement to the injunctive relief sought. *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)

Further, A temporary injunction will not usually be allowed where its effect is to give plaintiff principal relief he seeks without bringing the cause to trial. *Rowland v. Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869, 872 (1925); *White v. Coeur d'Alene Big Creek Mining Co.*, 56 Idaho 282, 55 P.2d 720, 722(1936); *Gilbert v. Elder*, 65 Idaho 383, 144 P.2d 194, 195 (1943). Although the Idaho Supreme Court has not banned outright preliminary injunctions in cases where a grant would have the effect of giving a party all the relief sought in the action, it does absolutely require the moving party to "show a clear right to the relief sought." *Farm Service, Inc. v. U.S. Steel Corp.*, 90 Idaho 570, 586, 414 P.2d 898, 906-07 (1966).

Here, Atkinson has not demonstrated an entitlement to the relief sought, has not shown waste or irreparable injury would result if the request is denied, and only seeks the same relief previously denied by this Court in his new Complaint. Giving Atkinson all reasonable inferences, defendants are entitled to their Motion to Dismiss.

### **III. ORDER.**

IT IS HEREBY ORDERED that defendants' Motion to Dismiss is GRANTED.

Memorandum Decision and Order Granting Defendants' Motion to Dismiss, pp. 4-5.

Atkinson now moves anew to vacate the Court's August 11, 2009 Order pursuant to I.R.C.P. 60(b) for fraud upon the Court. Atkinson also seeks sanctions for defendants' having submitted documents in violation of I.R.C.P. 11(a)(1). Defendants seek attorney fees against Atkinson pursuant to I.R.C.P. 11(a)(1) as well.

### **II. STANDARD OF REVIEW.**

A motion for relief under I.R.C.P. 60(b) is committed to the discretion of the Court and will not be set aside absent an abuse of that discretion. *Artiach Trucking, Inc. v. Wolters*, 118 Idaho 656, 658, 798 P.2d 938, 940 (Ct.App. 1990); *Eliopolulus v. Idaho State Bank*, 129 Idaho 104, 108, 922 P.2d 401, 405 (Ct.App. 1996). A trial court's imposition of sanctions is reviewed under the abuse of discretion standard. *Koehn v.*

*Riggins*, 126 Idaho 1017, 1020, 895 P.2d 1210, 1213 (1995); *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991) (adopting the analysis of *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 110 S.Ct. 2447 (1990)). In *Sun Valley Shopping Center*, the Court stated, “[t]he abuse of discretion standard is more compatible with our view of the appropriate role of appellate courts in reviewing the award of sanctions under I.R.C.P. 11(a)(1) than *de novo* review.” 119 Idaho 87, 94, 803 P.2d 993, 1000.

### **III. ANALYSIS.**

On January 5, 2010, Atkinson moved this Court to vacate its judgment and issue sanctions against defendants. Motion to Vacate Judgment, p. 1. Atkinson argues defendants’ attorney, Bruce Green, committed fraud upon the Court by failing to include page 2 of the Water Well and Maintenance Agreement (Agreement) as “it is a fact that this agreement shows that the Carde’s [sic] have no interest in the Water Well Use and Maintenance Agreement”. *Id.* Atkinson goes on to argue that, even if the Cardes had an interest in the agreement, the agreement contains “no provision for cutting the supply of public water to the Plaintiff, which would allow the Court to enter an injunction to prevent further injury to plaintiff”. *Id.*, p. 2. Defendants argue Atkinson knew their predecessors signed the agreement, as they signed with Atkinson present, and that it was Atkinson, as Plaintiff, who named the defendants in this action. Defendant’s Argument, p. 2.

Idaho Rule of Civil Procedure 60(b) provides a party the opportunity to seek relief from a final judgment, order, or proceeding. Here, Atkinson seeks relief from the Order of Dismissal, claiming defendants committed a fraud upon the Court. In *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980), the Idaho Supreme Court clarified that

a party may attack a fraudulent judgment in one of three ways under Rule 60(b): First, under Rule 60(b)(3); second, through an equitable independent action to relieve a party from judgment; or third, by bringing a claim for fraud upon the court. 101 Idaho 328, 333-34, 612 P.2d 1175, 1180-81.

Atkinson's motion alleges fraud upon the court, because defendants Cardes fraudulently implied through the Affidavit of Bruce Carde they had an interest in the agreement, when they in fact did not. Motion to Vacate Judgment, pp. 1-2. Atkinson alleges Cardes committed this fraud by failing to include page two of that Water Well and Maintenance Agreement. *Id.* Indeed, Exhibit B to the Affidavit of Bruce Carde, the Water Well and Maintenance Agreement, consists of pages 1 and pages 3 through 5. Page two, the omitted page, sets forth: the remainder of the Recitals begun on page 1; the legal description of Atkinson's parcel; the legal description of Pat E.F. Doe and Gretchen F. Steen' parcel (now the Cardes' parcel), and that:

There exists a well in the NE corner of the Doe/Steen Property that is presently providing water to the Laux Property and the Atkinson Property. A cistern exists on the Laux property and separate lines run to each parcel.

Water Well Use and Maintenance Agreement, p. 2; (Atkinson's) Motion to Vacate Judgment, Exhibit B.

Atkinson imputes the omission to Bruce Greene, counsel for defendants. See Motion to Vacate Judgment, p. 1. It is this omission that Atkinson uses as the basis for his seeking of Rule 11 sanctions. *Id.* Atkinson argues the filing of a "fraudulent" affidavit and exhibits thereto has resulted in the need for him to file a Complaint, "which has increased unnecessarily the cost of litigation in this matter." *Id.*, p. 2. In making that argument, Atkinson ignores the fact that his "Complaint RE: Water Rights" was filed on May 1, 2008, well *before* the Affidavit of Bruce Carde was filed. Atkinson seeks

sanctions against the defendants and/or Mr. Green in the amount of \$1,569.86 for increased litigation costs. *Id.*

*Eliopulos v. Idaho State Bank*, 129 Idaho 104, 922 P.2d 401 (Ct.App. 1996) involved plaintiffs alleging fraud upon the Court via the defendant bank's failure to produce a Bureau of Tobacco and Firearms letter in discovery. The Court of Appeals found plaintiffs contended they, not the Court, were the subject of fraud and misrepresentation, "[t]herefore, their claims should have been analyzed under the standards applicable to an independent equitable action for relief from a fraudulent, not under the standards pertaining to fraud upon the court." 129 Idaho 104, 109, 922 P.2d 401, 406. Ultimately, the Court held plaintiffs' fraud upon the court claims had been properly dismissed below. 129 Idaho 104, 111, 922 P.2d 401, 408. In *Compton*, the Idaho Supreme Court discussed fraud upon the court in detail:

The term "fraud upon the court" contemplates more than interparty misconduct, and, in Idaho, has been held to require more than perjury or misrepresentation by a party or witness, even where the misrepresentation was made to establish the court's jurisdiction. *Willis v. Willis*, 93 Idaho 261, 460 P.2d 396 (1969). Apparently such fraud will be found only 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..." *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 246 64 S.Ct 997, 1001, 88 L.Ed. 1250, 1256 (1944) (fraud upon the court found where attorney for patent holder wrote article describing the patent as unique, and arranged for publication in trade journal under name of ostensibly disinterested expert; court relied on article in reaching decision; construing identical language of F.R.C.P. 60(b)); 11 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE § 2870 (1973).

101 Idaho 328, 334, 612 P.2d 1175, 1181.

Here, defendants omitted a page of the agreement. However, at no point in this litigation have Cardes ever claimed to have been signatories to the agreement themselves. In fact, the Affidavit of Bruce Carde reads, "I have attached Defendant

Exhibit B, Water Well Use and Maintenance Agreement, again signed by the parties and/or their predecessors.” Affidavit of Bruce Carde, p. 1. Carde also attached Defendants’ Exhibit A, the Road Maintenance Agreement, which was “executed by Mr. Atkinson, Nancy Laux, *and our predecessor.*” *Id.* (emphasis added). At no point does Carde’s Affidavit set forth any facts which may amount to fraud upon this Court. There is no information or statement contained in the missing page two that would have in any way changed any decision made by this Court in this lawsuit. There is simply nothing here that would amount to an act on the part of defendants which meets the requirement of being “*more than perjury or misrepresentation by a party or witness.*” To be certain, there is nothing here that rises anywhere near the level of perjury or misrepresentation; this appears to have been an oversight and the omitted page two cannot be read to support Atkinson’s motion for a finding of fraud upon the court or for sanctions.

Additionally, Atkinson’s argument that the agreement contains no provision for cutting off his water supply must likely also fail. Atkinson argues the fact that the agreement does not contain this provision “would allow the Court to enter an injunction to prevent further injury to the plaintiff...” Motion to Vacate Judgment, p. 2. This argument does not provide the Court with evidence. This argument ignores that the agreement before the Court attached to Cardes’ Affidavit at all times contained no provision for cutting off his water supply. The inclusion of the missing page two does not change that fact. Nor does Atkinson’s underlying action for *injunctive relief* in this case amount to litigation of *property issues* with respect to the well. The Court, having previously dismissed Atkinson’s claim for injunctive relief and the Court having ruled Atkinson’s “Amended Complaint” as invalid for failure to obtain leave of the Court before filing, the Court will not now rule on the

propriety of the agreement between the parties. Defendants also correctly note Atkinson argues there was no provision for cutting off his “public” water supply, but that “[n]o ‘public’ water rights are even alleged.” Defendant’s Argument, p. 2.

Thus, it follows that no pleadings, motions or other papers were signed by defendants in derogation of I.R.C.P. 11(a)(1). Rule 11 requires that pleadings, motions, and other papers be: (1) well grounded in fact; (2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (3) not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increases in the costs of litigation. I.R.C.P. 11(a)(1). Before filing, an attorney must inquire into the facts and the law involved to satisfy the requirements of Rule 11. *Sun Valley Shopping Center*, 119 Idaho 87, 95, 803 P.2d 993, 1001. Rule 11 is considered a management tool used by the district court to weed out, punish, and deter frivolous and misguided filings. *Campbell v. Kildew*, 141 Idaho 640, 650, 115 P.3d 731, 741 (2005). This management tool should be exercised narrowly. *Id.*; *Curzon v. Hansen*, 137 Idaho 420, 422, 49 P.3d 1270, 1273 (Ct.App. 2002). The appropriate standard to consider under Rule 11 is “reasonableness under the circumstances.” *Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990). Thus, if an attorney unreasonably fails to properly inquire into the facts and law involved in a case before signing and filing a motion, pleading, or other paper, Rule 11 sanctions may be appropriate.

In *Lester v. Salvino*, the Court of Appeals concluded that the district court properly imposed Rule 11 sanctions against an attorney because the rule is “specifically designed to be a management tool by which the district court can, among other things, punish actions... which constitute litigative misconduct.” 141 Idaho 937, 941, 120 P.3d 755, 759 (Ct. App. 2005). Omitting a non-material portion of an agreement does not rise to the

level of “litigative misconduct” such that Rule 11 sanctions would be applicable and appropriate.

Defendants request attorney fees and costs “incurred due to Plaintiff’s bad faith and spurious motion here which has no basis in either law or fact.” Defendant’s Argument, p. 1. Defendants make clear that it was the Cardes’ predecessors who signed the agreement with Atkinson, which Atkinson well knew. *Id.*, p. 2. Defendants argue:

The Plaintiff chooses to proceed pro-se, in an area where he has no expertise. In doing so he causes unnecessary and unwarranted legal expenses to Defendant’s [sic] and wastes court time with his frivolous motions. It is time that he become accountable for Defendant’s expenses in contending with him.

*Id.*, p. 1. Again, as stated above, Rule 11 sanctions are a management tool to be exercised narrowly. In this case, it is Atkinson’s Motion to Vacate Judgment which is not well grounded in fact, not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and arguably being interposed for an improper purpose, such as to harass or cause unnecessary delay or needless increases in the costs of litigation. I.R.C.P. 11(a)(1). While Atkinson is correct the Affidavit of Bruce Carde omitted page two of the agreement, not a single claim of significance Atkinson attaches to that omission, follow in fact or in law. The fact that Atkinson represents himself is not a defense to the imposition of fees as a sanction for violating I.R.C.P. 11(a)(1). “If a pleading, motion or other paper is signed in violation of the rule [I.R.C.P. 11(a)(1)], 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, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney’s fee.”

**IV. CONCLUSION AND ORDER.**

For the reasons stated above, this Court must deny Atkinson’s Motion to Vacate Judgment and grant an award of attorney fees in favor of defendants against Atkinson, pursuant to I.R.C.P. 11(a)(1), for defendants’ defending Atkinson’s Motion to Vacate Judgment.

**IT IS HEREBY ORDERED** Atkinson’s Motion to Vacate Judgment is **DENIED**.

**IT IS FURTHER ORDERED** attorney fees in favor of defendants and against Atkinson, are awarded pursuant to I.R.C.P. 11(a)(1), for defendants’ defending Atkinson’s Motion to Vacate Judgment. Defendants’ attorney’s time and charges for preparing the “Defendants’ Argument” memorandum, and time spent at the February 10, 2010, hearing on Atkinson’s Motion to Vacate Judgment will be awarded against Atkinson as a sanction.

\_\_\_\_\_  
John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of February, 2010, 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>Pro Se Plaintiff</u>                                | <u>Fax #</u> |
|---------------|--------------|--|--------------|
| Bruce Greene  | 208 265-2451 | Leon Atkinson<br>P. O. Box 1282<br>Sandpoint, ID 83864 |              |

\_\_\_\_\_  
Deputy Clerk