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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**

**LAWRENCE SPENCER, THOMAS R.)
MACY, and WILLIAM McCRORY,,)**

Case No. **CV 2009 8934**

Plaintiffs,

vs.

**NORTH IDAHO COLLEGE, and NORTH)
IDAHO COLLEGE FOUNDATION, an)
Idaho non-profit corporation,.)**

Defendants.)

**MEMORANDUM DECISION AND ORDER ON:
PLAINTIFFS' MOTION FOR EXTENSION OF
TIME; DEFENDANTS' MOTION FOR ENTRY
OF JUDGMNET *NUNC PRO TUNC*:
DEFENDANTS' MOTION FOR PROTECTIVE
ORDER; AND DEFENDANTS MOTION TO
QUASH SUBPOENA (AND MOTION TO
SHORTEN TIME)**

I. PROCEDURAL HISTORY AND BACKGROUND.

Defendant North Idaho College (NIC) is a community college district organized pursuant to I.C. § 33-2101, *et seq.* Defendant North Idaho College Foundation (Foundation) is an Idaho non-profit corporation incorporated pursuant to I.C. § 30-3-1, *et seq.* Plaintiffs Lawrence Spencer (Spencer), Thomas R. Macy (Macy) and William McCrory (McCrory) (collectively plaintiffs) own real property located within Kootenai County, Idaho, thus, are taxpayers within the district boundaries of NIC. Complaint, p. 2, ¶¶ 3, 4, 5, 9.

On July 23, 2009, the Foundation purchased property in Kootenai County known as the "Mill Site." This property is adjacent to the existing NIC campus. At an open public meeting on July 21, 2009, NIC, acting through its Board of Trustees (Board), authorized NIC to enter into a lease agreement with the Foundation for the Mill Site.

Resolution 2009-01 was approved by the Board on that date. At that meeting, it was determined the lease was “in the best interests of the students, residents and taxpayers of Kootenai County...” Complaint, Exhibit 3, Resolution No. 2009-01, p. 1. On July 23, 2009, NIC executed the lease agreement which provided for NIC to lease the Mill Site from the Foundation on a yearly basis. Complaint, Exhibit 3, Lease Agreement, p. 2. Renewal of the lease would require affirmative action by the Board *each year* through the term of the lease. *Id.*

On October 27, 2009, the three plaintiffs filed their *pro se* Complaint, alleging a violation of Article VIII, Section 3 of the Idaho Constitution. Plaintiffs claim the lease agreement is a *de facto* installment land sale contract for which NIC did not obtain the required two-thirds assent of the qualified elector’s in the district. Complaint, p. 5, ¶¶ 32-33. Plaintiffs also claim NIC did not obtain judicial validation of the lease agreement pursuant to I.C. § 7-1304, as an alternative to the assent of two-thirds of qualified electors in the district. *Id.*, ¶ 34. Plaintiffs seek a declaratory judgment that the lease agreement violates Article VIII, Section 3 of the Idaho Constitution; permanent injunctive relief prohibiting NIC from making further expenditures under the lease agreement until the lease is approved by two-thirds of qualified electors in the district, should that occur; and an entry of judgment compelling the Foundation to return all monies received from NIC under the lease. Complaint, pp. 6-7.

On January 22, 2010, NIC filed its motion for summary judgment. The Foundation joined in NIC’s motion. In its motion for summary judgment NIC requested this Court grant it summary judgment as to the validity of the lease. “If the Lease Agreement does not violate Article VIII, Section 3, all other claims or remedies sought by the Plaintiffs are moot and this lawsuit must be dismissed.” Defendants’

Memorandum in Support of Motion for Summary Judgment, p. 13.

On March 19, 2010, this Court filed its “Memorandum Decision and Order Granting Defendant North Idaho College’s Motion for Summary Judgment.” On March 25, 2010, attorney Starr Kelso appeared on behalf of plaintiffs, and on March 26, 2010, plaintiffs filed a “Motion for Extension of Time to File Affidavits/Depositions With Motion for Reconsideration Pursuant to IRCP Rules 6(b) and 11(a)(2)(B)”, and a “Motion for Reconsideration Pursuant to IRCP Rule 11(a)(2)(B).” Later that same day NIC filed an “Objection to Plaintiffs’ Motion for Extension of Time.” On March 29, 2010, plaintiffs filed “Plaintiffs’ Reply to Objection to Extend Time.” Also, on March 29, 2010, counsel for NIC sent this Court a letter and a “...proposed form of Judgment for the Court’s consideration.” That letter shows copies of that letter and the proposed Judgment were sent to counsel for the Foundation and counsel for plaintiffs. On March 31, 2010, NIC filed its “Motion for a Protective Order”, “Defendant North Idaho College’s Reply to Plaintiffs’ Objection Regarding Entry of Judgment and Memorandum in Support of Motion for Protective Order.” Later that same day plaintiffs filed “[Plaintiffs] Reply to Motion for Protective Order and Memorandum.” On April 7, 2010, NIC filed its “Motion for Entry of Judgment *Nunc Pro Tunc*,” and a “Memorandum in Support of Motion for Entry of Judgment *Nunc Pro Tunc*.” On April 8, 2010, the Foundation filed “North Idaho College Foundation Motion for Protective Order”. On April 13, 2010, the Foundation filed “North Idaho College Foundation Objection to Plaintiffs’ Motion for Extension of Time, Objection Regarding Entry of Judgment and in Support of Motion for Protective Order.” On April 20, 2010, plaintiffs filed “Plaintiffs’ Response to NIC Foundation’s Motion for Protective Order and General Objection.” Also on April 20, 2010, NIC filed its “Motion to Quash *Subpoenas Duces Tecum*,” and its “Memorandum in Support of

Motion to Quash *Subpoenas*.” On April 21, 2010, the Foundation filed “North Idaho College Foundation’s Joinder in North Idaho College’s Motion to Quash *Subpoenas Duces Tecum*”. Finally, on April 21, 2010, plaintiffs filed “Plaintiffs’ Response to North Idaho College’s Motion to Quash.” Oral argument on the various motions and objections was held on April 23, 2010, with the Court participating telephonically, with counsel for all parties indicating on the record “no objection” to that procedure.

II. STANDARD OF REVIEW.

The five motions filed before the Court are addressed to its sound discretion. A trial court’s decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006). A decision to give a judgment *nunc pro tunc* effect or not is also vested in the discretion of the trial court. *Ward v. Lupinacci*, 111 Idaho 40, 42, 720 P.2d 223, 225 (Ct.App. 1986). The grant of a protective order under Rule 26(c) 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 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). And, finally, the decision to grant an extension of time within which to file is governed by the abuse of discretion standard. Rule 6(b) states:

When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the parties, by written stipulation, which does not disturb the orderly dispatch of business or the convenience of the court, filed in the action, before or after the expiration of the specified time period, may enlarge the period, or the court for cause shown may at any time in its discretion (1)

with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but the time may not be extended for taking any action under rules 50(b), 52(b), 59(b), (d), (e) and 60(b) except to the extent and under the conditions stated in them.

I.R.C.P. 6(b).

In a criminal case on a motion to quash a subpoena *duces tecum*, the Supreme Court reviews the decision of a Magistrate Judge independently of but with due regard for the decision of the District Judge; findings of fact are upheld where they are supported by substantial and competent evidence and issues of law are freely reviewed.

State v. Salsbury, 129 Idaho 307, 308, 924 P.2d 208, 209 (1996). See e.g. *Kroopf v. Guffrey*, 183 Cal.App.3d 1351, 1356 (1986) (Review of order granting a motion to quash is governed by the substantial evidence standard of review). Cf. *Leber v. Stretton*, 928 A.2d 262, 266 (Pa.Super., 2007) (citing *Slusaw v. Hoffman*, 861 A.2d 269, 272 (Pa.Super., 2004)) (standard of review on motions to quash a subpoena is typically the abuse of discretion standard).

III. ANALYSIS.

The five motions before the Court are inextricably interrelated. In essence: plaintiffs seek reconsideration of this Court's March 19, 2010, "Memorandum Decision and Order on Summary Judgment pursuant to Rule 11(a)(2)(B)", but to do so they need additional evidence which they hope to secure via depositions. Those depositions in turn sought by plaintiffs require an extension of time in which to file the materials supporting the motion for reconsideration. NIC and Foundation object to the extension of time sought and simultaneously seek a protective order prohibiting plaintiffs from taking the depositions. NIC and Foundation also seek entry of final judgment *nunc pro*

tunc on the motion for summary judgment.

A. Plaintiffs’ “Motion for Extension of Time to File Affidavits/Depositions With Motion for Reconsideration Pursuant to IRCP Rules 6(b) and 11(a)(2)(B).”

Plaintiffs seek an extension of time in which to file affidavits and depositions in support of their motion for reconsideration of this Court’s “Memorandum Decision and Order on Summary Judgment pursuant to Rule 11(a)(2)(B)”. Plaintiffs seek to depose representative of NIC, the Foundation, Mountain West Bank, and the “original owner” of the mill site. Motion for Extension of Time, p. 1.

NIC filed an objection to the motion to extend time in which NIC argues plaintiffs cannot properly seek reconsideration pursuant to I.R.C.P. 11 because the Court’s “Memorandum Decision and Order on Summary Judgment pursuant to Rule 11(a)(2)(B)” was not an interlocutory order. Objection to Plaintiff’s Motion for Extension of Time, pp. 1-2. NIC and Foundation argue that because the Court’s “Memorandum Decision and Order on Summary Judgment pursuant to Rule 11(a)(2)(B)” resolved all pending issues, save for attorney fees and costs, plaintiffs may only seek to alter or amend the judgment under Rule 59(e) and the Court “cannot consider new evidence on a motion to reconsider a final judgment pursuant to a motion to alter or amend a judgment under Rule 59(e).” *Id.*, p. 1, citing *PHH Mortgage Services Corp. v. Perreira*, 146 Idaho 631, 200 P.3d 1180 (2009).

In response, plaintiffs argue the Court’s Order was interlocutory, an interlocutory order is subject to reconsideration pursuant to I.R.C.P. 11(a)(2)(B), new evidence may be presented in support of a motion for reconsideration, and:

The function of a trial court when presented with a motion for reconsideration under I.R.C.P. 11(a)(2)(B) of an order granting summary judgment, when filed prior to the entry of judgment, is to take into account any new facts presented by the moving part that bear on the correctness

of the interlocutory order.

Plaintiffs' Reply to Objection to Extend Time, pp. 2-4, citing *Barmore v. Perrone*, 145 Idaho 340, 179 P.3d 303 (2008).

The Foundation seems to foist the preparation of an actual "judgment" on the Court, as the Foundation argues:

A judge is required to sign and enter a judgment under I.R.C.P. 58(a) upon a decision by the court that all relief shall be denied. The Memorandum Decision entered and filed by the Court in this case clearly determined the case and determined that all relief requested by the Plaintiff's [sic] should be denied. Although it is a common practice in this Judicial District to have the prevailing party draft a final judgment and circulate the same to all parties for review prior to submitting the same to the court for signature, this practice does not negate the requirements of I.R.C.P. 58(a).

North Idaho College Foundation Objection to Plaintiffs' Motion for Extension of Time, Objection Regarding Entry of Judgment and in Support of Motion for Protective Order, p. 5. **First**, this Court disagrees with Foundation's claim that this Court's March 19, 2010, "Memorandum Decision and Order Granting Defendant North Idaho College's Motion for Summary Judgment", "clearly determined the case and determined that all relief requested by the Plaintiff's [sic] should be denied." The relief requested by NIC and the foundation is a dismissal of the case, and an award of costs and attorney fees. NIC Answer, p. 6; Foundation Answer, p. 5. This Court's March 19, 2010, "Memorandum Decision and Order Granting Defendant North Idaho College's Motion for Summary Judgment" provides neither dismissal of the case nor an award of attorney fees. **Second**, both the first and third sentence of Foundation's above quoted argument infer the responsibility for *preparing* a "judgment" upon the Court:

A judge is required to sign and enter a judgment under I.R.C.P. 58(a) upon a decision by the court that all relief shall be denied. * * * Although it is a common practice in this Judicial District to have the prevailing party draft a final judgment and circulate the same to all parties for review prior

to submitting the same to the court for signature, this practice does not negate the requirements of I.R.C.P. 58(a).

North Idaho College Foundation Objection to Plaintiffs' Motion for Extension of Time, Objection Regarding Entry of Judgment and in Support of Motion for Protective Order, p. 5. This inference is not supported by a complete reading of I.R.C.P. 58(a). That rule reads:

Rule 58(a). Entry of Judgment.

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the court shall sign the judgment and the judgment shall be entered by the judge or clerk; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, *the court shall approve the form* and sign the judgment, and the judgment shall be entered by the judge or the clerk.

(emphasis added). This Court has just explained why this Court's "Memorandum Decision and Order Granting Defendant North Idaho College's Motion for Summary Judgment" did not state that "all relief shall be denied." Even if this Court had made such a finding that "all relief shall be denied" in its "Memorandum Decision and Order Granting Defendant North Idaho College's Motion for Summary Judgment," if this Court had then prepared a "judgment" *sua sponte*, the consternation by perhaps all parties is a specter this Court would not dare invite. In nearly a decade, this Court has never *sua sponte* prepared a judgment. It is clear that this Court's responsibility is to *timely* sign and enter a judgment. "Although a judge may seek assistance from a prevailing party in preparing the judgment, it remains emphatically the province and the responsibility of the judge to ascertain that the judgment is timely entered." *Ward v. Lupinacci*, 111 Idaho 40, 43, 720 P.2d 223, 226 (Ct.App. 1986). The Idaho Court of Appeals noted that it was the experience of the District Judge in *Ward* "...that a judgment is usually prepared by the prevailing party." 111 Idaho 40, 42, 720 P.2d 223, 225. In that case, a

judgment was not prepared for twenty-three months. 111 Idaho 40, 43, 720 P.2d 223, 226. Obviously, it is the practice of NIC's attorney to prepare such a judgment, as that is what occurred on March 29, 2010. However, a judgment in the present case was not prepared by any party prior to the filing of plaintiffs' "Motion for Reconsideration Pursuant to IRCP 11(a)(2)(B)" on March 26, 2010. However, unlike the twenty-three months in *Ward*, as of the March 26, 2010, filing of plaintiffs' "Motion for Reconsideration Pursuant to IRCP 11(a)(2)(B)", only one week had transpired since the March 19, 2010, entry of this Court's "Memorandum Decision and Order Granting Defendant North Idaho College's Motion for Summary Judgment".

The paramount question for this Court on all pending motions is: "Whether the Court's 'Memorandum Decision and Order on Summary Judgment pursuant to Rule 11(a)(2)(B)' filed on March 19, 2010, is a '*final order*'?". The answer to this question is also determinative of the other three issues before the Court: whether to grant defendants' motion for entry of judgment *nunc pro tunc*, whether to grant defendants' motion for a protective order, and whether to grant defendants' motion to quash subpoenas. Ultimately, the answer to this question also settles whether plaintiffs may properly seek the underlying motion for reconsideration in the first place (because if there was a final order, then I.R.C.P. 59(e) does not allow for additional evidence).

Both parties cite to the *PHH Mortgages* case. In that case the Idaho Supreme Court differentiated between courts being able to consider new evidence bearing on the correctness of an interlocutory order when asked to do so in a timely manner in an I.R.C.P. 11(a)(2)(B) motion as opposed to courts not being able to consider new evidence when asked to reconsider a final judgment pursuant to a motion to alter or amend under I.R.C.P. 59(e) or to amend findings or conclusions under I.R.C.P. 52(b).

146 Idaho 631, 635, 20 P.3d 1180, 1184, citing *Coeur d'Alene Mining Co. v. First Nat'l Bank of North Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990); *Rae v. Bunce*, 145 Idaho 798, 805, 186 P.3d 654, 661 (2008). The Idaho Supreme Court in *PHH Mortgage* determined that, because a partial judgment was filed and certified as final under I.R.C.P. 54(b) before the final judgment was filed, it was an interlocutory order and defendants Perreiras were permitted to seek reconsideration of the order granting partial summary judgment. 146 Idaho 631, 635-36, 200 P.3d 1180, 1184-85. "If the Perreiras' motion asked the district court to reconsider the order granting *partial* summary judgment, the court was required to consider the new evidence that was relevant to the summary judgment motion." 146 Idaho 631, 636, 200 P.3d 1180, 1185, citing *Coeur d'Alene Mining Co.*, 118 Idaho 812, 823, 800 P.2d 1026, 1037. But, because Perreiras framed their issue on appeal as the district court having erred and abused its discretion in granting the Rule 54(b) certificate, the Idaho Supreme Court did not consider the district court's "erroneous refusal to consider the new evidence in connection with their motion for reconsideration." 146 Idaho 631, 636, 200 P.3d 1180, 1185.

"[U]ntil a final judgment has been entered, an order granting summary judgment is an interlocutory order and subject to reconsideration pursuant to I.R.C.P. 11(a)(2)(B). *Puckett v. Verska*, 144 Idaho 161, 166, 158 P.3d 937, 942 (2007), citing *Idaho First Nat'l Bank v. David Steed & Assocs.*, 121 Idaho 356, 361, 825, P.2d 79, 84 (1992).

Idaho Rule of Civil Procedure 54(b)(1) reads:

(1) Certificate of Final Judgment. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment upon one or more but less than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of the

judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the actions as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The matter before the Court in this instance was resolved by the Court's "Memorandum Decision and Order on Summary Judgment pursuant to Rule 11(a)(2)(B)", specifically, the portion which reads:

IT IS HEREBY ORDERED NIC's Motion for Summary Judgment (in which the Foundation has joined) is GRANTED as to all claims made by plaintiffs.

Memorandum Decision and Order Granting Defendant North Idaho College's Motion for Summary Judgment, p. 14. (emphasis and parenthetical in original). As such, this case did not involve the Court's adjudicating less than all the claims or the rights and liabilities of less than all the parties. It follows that an Order granting summary judgment as to all claims made and all parties involved is a final order. In *M & H Rentals, Inc. v. Sales*, 108 Idaho 567, 569, 700 P.2d 970, 972 (Ct.App. 1985), the Court of Appeals deemed the judgment at issue to be final for purposes of appealability, although it adjudicated less than all claims asserted in the lawsuit, because it was "the last in a series and it disposes of all remaining claims leaving none pending." *Id.* The Court noted Rule 54(b) is designed to prevent piecemeal appellate litigation and does not apply to a judgment which leaves no claims undecided. *Id.*

Thus, **substantively**, because none of plaintiffs' claims remained following grant of summary judgment in favor of NIC and Foundation, the Court's Order created a final judgment.

However, **procedurally**, no final "judgment" was submitted or sought by NIC or the Foundation prior to April 7, 2010, when NIC filed its "Motion for Entry of Judgment

Nunc Pro Tunc.” That filing occurred *after* plaintiffs on March 26, 2010, sought reconsideration and an extension of time to submit affidavits and/or depositions in support of reconsideration. Idaho case law and the Idaho Rules of Procedure have determined this issue:

In *Camp v. East Fork Ditch Co.*, this Court defined a final judgment as “an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties. It must be a separate document that on its face states the relief granted or denied.” 137 Idaho 850, 867, 55 P.3d 304, 321 (2002) (internal citations omitted). We further stated in *In re Universe Life Insurance Co.*, that “[a]n order granting summary judgment does not constitute a judgment.” 1144 Idaho at 756, 171 P.3d at 247. In addition, Idaho Rule of Civil Procedure 58(a) requires: “**Every judgment shall be set forth in a separate document.**”

T.J.T., Inc., a Washington corporation, v. Ulysses, No. 35079-2010, 2010 WL 1491424, 2010 Opinion No. 41, Supreme Court Docket No. 35079, Slip Opinion p. 1 (Idaho April 15, 2010) (emphasis added). Analyzing just that language, this Court’s March 19, 2010, “Memorandum Decision and Order Granting Defendant North Idaho College’s Motion for Summary Judgment” “...adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties”, but it does not “end the lawsuit”, nor is it “*a separate document that on its face states the relief granted or denied.*” (emphasis added). This is not merely splitting hairs. The following passage from *T.J.T.*, provides some clarity for this distinction, especially in light of the facts of the present case:

The relief to which a party is entitled is not the granting of a motion for summary judgment. The Rule [I.R.C.P. 56(c)] refers to the relief to which the party is ultimately entitled in the lawsuit, or with respect to a claim in the lawsuit. The granting of a motion for summary judgment is simply a procedural step towards the party obtaining that relief.

35079-2010, 2010 WL 1491424, Slip Opinion, p. 2, citing *Spokane Structures, Inc. v. Equitable Inv., LLD*, No. 35349-2008, 2010 WL 309004, Slip Opinion, p. 4. The Idaho

Supreme Court in *T.J.T.* was discussing I.R.C.P. 56(c), and the quoted portion of *Spokane Structures* was discussing I.R.C.P. 54(b) and (c), but that distinction is of no import. The Idaho Supreme Court in *T.J.T.* went on to state: “The judgment must be a separate document that does not contain the trial court’s legal reasoning or analysis.” *T.J.T., Inc., a Washington corporation, v. Ulysses*, No. 35079-2010, 2010 WL 1491424, 2010 Opinion No. 41, Supreme Court Docket No. 35079, Slip Opinion p. 1 (Idaho April 15, 2010), citing *Spokane Structures, Inc. v. Equitable Inv., LLD*, No. 35349-2008, 2010 WL 309004, Slip Opinion, p. 4. In the present case, in this Court’s “Memorandum Decision and Order on Summary Judgment pursuant to Rule 11(a)(2)(B),” NIC and the Foundation do not have “a separate order that does not contain the trial court’s legal reasoning or analysis.”

Counsel for NIC cited *Goodman Oil Co. v. Scotty’s Dura-Built Generator, Inc.*, 2010 WL 3667704 (February 3, 2004) for the proposition that “...if an ‘order is entered that resolves all issues, grants all relief to which the prevailing party is entitled other than attorney fees and costs, and brings an end to a lawsuit’ that order serves as an appealable judgment.” Objection to Plaintiffs’ Motion for Extension of Time, p. 2. At oral argument on April 23, 2010, counsel for NIC correctly noted the apparent confusion between that correct statement in *Goodman Oil*, and the substitute opinion in *T.J.T.* In *Spokane Structures*, just as in *Goodman Oil* (2010 WL 3667704, Slip Opinion, p. 4), 2004), the Idaho Supreme Court set forth its *mea culpa* as to the “confusion” its decisions have created:

Unfortunately, this Court has at times contributed to the confusion by focusing upon whether the document “adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties,” *Davis v. Peacock*, 133 Idaho 637, 641, 991 P.2d 362, 366 (1999), without also requiring that it be “a separate document” that “grant[s] the relief to which the party in whose favor it is rendered is entitled,” I.R.C.P.

Rules 58(a) & 54(c).

Spokane Structures, No. 35349-2008, 2010 WL 309004, Slip Opinion, p. 5. This Court has read *Goodman Oil, T.J.T.*, *Spokane Structures*, and *Camp v. East Fork Ditch Co.*

This Court concludes that these cases taken together, require the following in order for there to be a “final Judgment” or a “final order” in the present case:

- 1) There must be a “separate document” (*Camp, T.J.T., Spokane Structures*);
- 2) [that separate document] *does not* contain the trial court’s legal reasoning and analysis (*Spokane Structures, T.J.T.*),
- 3) [that separate document] *does* state:
 - a) the relief granted or denied (i.e., in the present case, dismissal of all of plaintiff’s claims) (*Spokane Structures, T.J.T., Camp*); and
 - b) that this is a final determination of the rights of the parties (*Goodman, T.J.T., Camp, Spokane Structures*)

Spokane Structures makes it clear that this Court must look at the pleadings in the present case in order to determine if this Court’s March 19, 2010, “Memorandum Decision and Order Granting Defendant North Idaho College’s Motion for Summary Judgment” set forth “the relief granted or denied.” The Idaho Supreme Court in *Spokane Structures* stated:

The “relief to which the party...is entitled” must be read in conjunction with other rules. Rule 8(a)(1) provides, “A pleading which sets forth a claim for relief...shall contain...(2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled.” The “demand for judgment for the relief to which he deems himself entitled” obviously refers to the relief that the party seeks in the lawsuit. For example, neither the Builder in his complaint nor the landowner in its answer prayed for the granting of a motion for summary judgment. In this case, the relief sought by Builder was either specific performance of the Design/Build Agreement or damages, and the relief sought by Landowner was dismissal of Builder’s complaint. The relief to which a party is entitled

is the specific redress or remedy that the court determines the party should receive in the litigation, or with respect to a claim for relief in the litigation.

Spokane Structures, No. 35349-2008, 2010 WL 309004, Slip Opinion, pp. 4-5.

As set forth above, the relief requested by NIC in its Answer, and the Foundation in its Answer, is a dismissal of the case and an award of costs and attorney fees. NIC Answer, p. 6; Foundation Answer, p. 5. This Court's March 19, 2010, "Memorandum Decision and Order Granting Defendant North Idaho College's Motion for Summary Judgment" provides neither dismissal of the case nor an award of attorney fees. While, as the Idaho Supreme Court itself noted "confusion", *Goodman, T.J.T., and Camp*, those two decisions and the decision in *Spokane Structures* clarifies any confusion. The Foundation's counsel's law firm was involved in the *Spokane Structures* appeal and should be conversant with these cases.

For the reasons set forth above, no final judgment has been filed in the instant matter via this Court's March 19, 2010, "Memorandum Decision and Order Granting Defendant North Idaho College's Motion for Summary Judgment."

B. NIC's "Motion for Entry of Judgment *Nunc Pro Tunc*."

NIC urges the Court to exercise its discretion and give the proposed judgment it seeks *nunc pro tunc* effect. Defendants' Memorandum in Support of Motion for Entry of Judgment, p. 2. NIC quotes a case in which the Idaho Court of Appeals held that where the *delay in rendering a judgment arises from an act of the Court*, the judgment may be entered retroactively as of the time it should have been entered. *Id.*, pp. 2-3, quoting *Ward v. Lupinacci*, 111 Idaho 40, 42, 720 P.2d 223, 225 (Ct. App. 1986). NIC writes:

[W]here the delay in rendering a judgment or a decree arises from the act of the court, ...the judgment or decree may be entered retrospectively, as of a time when it should or might have been entered up." *Id.*, (quoting *Mitchell v. Overman*, 103 U.S. (13 Otto) 62, 64-65, 26 L.Ed. 369 [1881].)

Defendants' Memorandum in Support of Motion for Entry of Judgment, pp. 2-3. As already noted above, the Foundation notes the local practice in this Judicial District is to have the prevailing party draft the final judgment, circulate it, and submit it to the Court, but that, "this practice does not negate the requirements of I.R.C.P. 58(a)." North Idaho College Foundation Objection to Plaintiff's Motion for Extension of Time, p. 5. Plaintiffs object to the entry of judgment, arguing: "Defendant wishes to rush to judgment in this matter despite the pending Motion for Reconsideration and it would be a travesty for the Court to take such action at this time given the pending and scheduled for hearing motion." Objection to Entry of Judgment, p. 1.

In the present case, no judgment, set forth in a separate document as required by Rule 58(a), was presented by either defendant to the Court. It cannot be said that NIC's or the Foundation's failure to do so amounts to an act of *the Court* causing delay in the rendering of a judgment. Given the fact that only seven days transpired between this Court's filing its "Memorandum Decision and Order Granting Defendant North Idaho College's Motion for Summary Judgment" on March 19, 2010, and plaintiffs filing their "Motion to Extend Time" on March 26, 2010, there is no "...delay in rendering a judgment or a decree arises from the act of the court..." under *Ward*. Even if delay could be attributed, it could only be attributed from March 29, 2010, on the date counsel for NIC submitted to the Court a proposed Judgment. The Court was unable to sign such when presented because the Court was out of the country on that date, and for two weeks thereafter. However, between March 19, 2010, and March 29, 2010, plaintiffs had filed their Motion to Extend Time. Accordingly, it would not be appropriate for this Court to grant NIC's Motion for Entry of Judgment *Nunc Pro Tunc*.

There simply was no final judgment in this matter despite this Court's having

granted NIC and the Foundation summary judgment as to all of plaintiffs' claims.

Therefore, plaintiff's motion for reconsideration, a matter committed to the Court's discretion, was properly and timely filed.

That finding, in turn, results in plaintiffs having properly sought to admit additional evidence. See *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so.) And, the decision to extend the time period within which plaintiffs may submit additional evidence in support of their motion to reconsider is also a matter vested in the Court's discretion. Given plaintiffs' timely filing of their Motion for Reconsideration and timely filing of the Motion for Extension of Time, NIC's and/or the Foundation's failure to submit a final judgment (until after plaintiffs filed their Motion for Extension of Time), and (upon a Motion for Reconsideration the Court having discretion as to whether hear reconsideration) the requirement that the Court consider new evidence bearing upon the motion for summary judgment, this Court can properly grant the motion to extend time sought by plaintiffs. NIC and the Foundation have set forth no evidence of prejudice which would inure to them if the Court grants plaintiffs' motion. See *e.g.* I.R.C.P. 61.

C. NIC'S Motion for Protective Order.

Idaho Rule of Civil Procedure 26 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 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, 95 P.2d 798, 804 (2000).

NIC argues for a protective order on the grounds that, given the Court’s ruling on summary judgment, any attempt by plaintiffs to take depositions “appears to be for the purpose of annoyance, embarrassment, oppression or to unduly burden the Defendants.” Defendant North Idaho College’s Reply to Plaintiffs’ Objection Regarding Entry of Judgment, pp. 4-5. NIC states the Court has already decided the issue of whether the lease at issue created an unconstitutional debt or liability and the irrelevance of NIC’s intent to acquire the land. *Id.*, p. 4. The Foundation argues the written lease itself governs and no affidavits or depositions sought by plaintiffs can possibly change the written terms of the clear and unambiguous lease agreement. North Idaho College Foundation Objection to Plaintiffs’ Motion for Extension of Time, Objection Regarding Entry of Judgment and In Support of Motion for Protective Order, p. 3. In response, plaintiffs argue:

Full exploration of ...liability can not be determined without an investigation into the seller and seller’s position, an investigation into the bank and the bank’s position, an investigation into the Foundation and the Foundation’s position, and an investigation into NIC and NIC’s position. That has not occurred. The Court has only been presented with the agreements, and seemed to hang its hat on the non-appropriation clause.

Reply to Motion for Protective Order, p. 3. The Foundation’s “four corners” argument is well taken. But, as has long been held in Idaho, “Parol evidence is always admissible to show the illegality of a contract, no matter how valid it may be upon its face.” *Settle v. Sterling*, 1 Idaho 259, 265, 1869 WL 2374 *4 (Idaho Terr. 1869). Here, plaintiffs are not parties to the lease at issue, but plaintiffs seek reconsideration of the Court’s Order on

summary judgment by alleging the lease agreement amounts to an illegal contract.

Given the reasoning set forth *supra*, this Court must exercise its discretion and deny the motion for protective order.

However, it is within the Court's discretion to place limitations on the discovery, in this case, the depositions. NIC and the Foundation have claimed lack of relevance and that the depositions are requested only to harass. Relevance has just been discussed by the Court. Harassment claims have not been established by NIC or the Foundation. However, plaintiffs are not allowed to engage in a "fishing expedition" with any deponent or all the proposed deponents collectively. Otherwise, harassment will result. At this point in time, counsel for plaintiffs had better have a good faith basis on where they are going with these depositions. Accordingly, direct examination of each deponent whom plaintiffs have proposed taking the deposition will be limited to one hour on direct examination by plaintiffs' counsel. Without an order from this Court, not one additional minute of direct examination will take place of any deponent. If counsel for either defendant wishes to make further inquiry, that inquiry is not limited. However, plaintiffs will be allowed exactly the same amount of time for re-direct examination as defendants' counsel *collectively* spent on cross-examination. On any re-cross, defendants collectively will be limited to the amount of time spent by plaintiffs' counsel on re-direct. Following re-cross, if any, by either or both counsel for defendants, the deposition shall conclude (ie., there will be no re-re-direct). Since plaintiffs are taking the deposition, it is ordered plaintiffs' counsel note on the record the start time and stop time of all direct examination, all cross-examination, all re-direct examination and all re-cross examination.

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D. NIC's "Motion to Quash *Subpoenas Duces Tecum*" and Foundation's "North Idaho College Foundation's Joinder in North Idaho College's Motion to Quash *Subpoenas Duces Tecum*".

NIC argues "any arguments that additional discovery is necessary to determine the intent and communications of the players in the negotiations of the subject transition are not well received." Defendants' Memorandum in Support of Motion to Quash Subpoena, pp. 6-7. "None of the evidence now sought by Plaintiffs is relevant to the constitutionality of the Lease Agreement." *Id.*, p. 7. Because NIC claims the subpoenas do not in good faith seek evidence relevant to the issues, NIC asks the Court to quash them. *Id.*, p. 8. Additionally, NIC argues I.R.C.P. 56(f) is the most on-point given what plaintiffs seek. *Id.* But, NIC states, because the Rule only provides for additional time to conduct discovery to oppose a motion for summary judgment, and plaintiffs have not set forth why additional time is necessary or why they were unable to oppose the motion through depositions or discovery responses in a timely fashion, plaintiffs are not entitled to relief under I.R.C.P. 56(f). *Id.*, p. 9.

Plaintiffs filed their "Plaintiffs' Response to North Idaho College's Motion to Quash", on April 21, 2010. At the April 23, 2010, oral argument on these various motions, this Court did not have the benefit of reading such pleading at that time. The Court has now read such pleading submitted by plaintiffs.

Preliminarily, 81 Am.Jur. 2d *Witnesses* § 12, reads:

The propriety of a subpoena is for the court--not the person served to determine. Thus, the feasible way to test the validity of the subpoena is by a preliminary motion to quash it.... It has been held that a motion to quash a subpoena can only challenge the validity of the subpoena or the jurisdiction of the issuing party, and the relevancy of the testimony sought is not an issue which may be raised by a motion to quash. However, it has also been held that on motion to quash a subpoena, the trial court may consider: (1) whether the subpoena was issued primarily for the purpose of harassment; (2) whether there are other viable means to obtain the same evidence; and (3) the extent to which the information

sought is relevant, nonprivileged and crucial to the moving party's case. The burden of persuasion in a motion to quash a subpoena issued in the course of civil litigation is borne by the movant.

(citations omitted). It follows that the issuing party must have jurisdiction over those served with a subpoena. When deciding a motion to quash, courts may consider the movant's nonparty status in weighing the burdens imposed in connection with the subpoena at issue. *S.E.C. v. Seahawk Deep Ocean Technology, Inc.*, 166 F.R.D. 268, 35 Fed. R. Serv. 3d 360 (D. Conn. 1996). Here, Mountain West Bank and Lake City Development Corporation are non-parties, though they are not the parties moving the Court for an Order quashing the subpoenas they have received. In evaluating objections to subpoenas by third parties, the Federal District Court for the Eastern District of North Carolina gave "extra consideration" to the non-parties' objections in weighing relevance against burdensomeness. *Schaaf v. SmithKline Beecham Corp.*, 233 F.R.D. 451 (E.D. N.C. 2005). These non-party deponents have not appeared; thus, the Court has no basis from which to give Mountain West Bank or Lake City Development Corporation "extra consideration."

Using the criteria set forth immediately above, the first question is "(1) whether the subpoena was issued primarily for the purpose of harassment." 81 Am.Jur. 2d *Witnesses* § 12. Other than make the claim of harassment, neither NIC nor the Foundation substantiate that claim with any evidence. Thus, this Court concludes the subpoena's are not issued primarily for the purpose of harassment. The second question is: "whether there are other viable means to obtain the same evidence" (*Id.*), and no party has suggested to the Court other means of obtaining this evidence. The first two criteria are resolved in plaintiffs' favor. The third question is: "the extent to which the information sought is relevant, nonprivileged and crucial to the moving party's

case". *Id.* It is this relevance requirement with which this Court struggles.

Regarding relevance, plaintiffs argue:

It is Plaintiffs' position that the granting of the summary judgment order was improvidently granted. At the hearing on the Plaintiffs' Motion for Reconsideration, scheduled for June 16, 2010 further briefing will be provided to the Court, in addition to the argument tangentially contained in the already filed motions and memorandums. The pending argument on the Motion for Reconsideration will be based upon the law as applied to the new evidence to be presented to the Court through depositions and affidavits based thereon. The argument will not only address the Court's initial rulings, but it will also provide the factual basis for showing, contrary to the Court's initial ruling on Defendants' motion for summary judgment, that there are relevant questions of fact to be resolved by the Court. Indeed the new evidence in conjunction with the applicable law may well reflect that summary judgment should be entered in favor of plaintiffs.

Response to NIC's Motion to Quash, p. 2. The Court has read and re-read that paragraph written by plaintiffs' counsel, and concludes it says nothing of substance about the relevance of any or all depositions. In essence, plaintiffs' counsel assures the Court that if allowed to take these depositions, the plaintiffs will find reasons to overturn the Court's grant of summary judgment in favor of NIC and the Foundation. As mentioned above, "Parol evidence is always admissible to show the illegality of a contract, no matter how valid it may be upon its face." *Settle v. Sterling*, 1 Idaho 259, 265, 1869 WL 2374 *4 (Idaho Terr. 1869). If plaintiffs' counsel is wrong in its assurances to the Court that if allowed to take these depositions, the plaintiffs will find reasons to overturn the Court's grant of summary judgment in favor of NIC and the Foundation, sanctions in all likelihood will be imposed. In that way, should the depositions prove not relevant, the risk of harassment to NIC and the Foundation is at least mitigated.

Technically, the motion by plaintiffs to seek additional deposition testimony was made before expiration of the time period within which they could seek appeal of the

Court's ruling on summary judgment. As such, it is worth looking to I.R.C.P. 27(b) for guidance. That rule reads:

Depositions pending appeal. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

Here, the time for appeal had not expired at the time plaintiffs sought reconsideration and the attendant extension of time to seek additional depositions and/or affidavits. The permissive "may" language in I.R.C.P. 27(b) indicates this is a matter left to the Court's discretion. Plaintiffs have arguably complied with the notice provisions of I.R.C.P. 27(b) by listing the names and addresses of the parties and non-parties they wish to depose, the substance of what they hope such depositions will reveal, and the reasons for seeking the depositions (at least plaintiffs have done so by stating there would be no need for the depositions if NIC and the Foundation would stipulate to four facts). Response to NIC's Motion to Quash, pp. 4-5. The Court finds such depositions "proper to avoid a failure or delay of justice".

III. CONCLUSION AND ORDER.

For the reasons set forth above, this Court properly exercises its discretion and: grants plaintiffs' motion for extension of time, denies defendant NIC's motion for

entry of judgment *nunc pro tunc*, denies NIC's motion for a protective order, denies the Foundation's motion for a protective order, and denies NIC's motion to quash the subpoenas and the Foundation's joinder therein.

IT IS HEREBY ORDERED plaintiffs' "Motion for Extension of Time to File Affidavits/Depositions With Motion for Reconsideration Pursuant to IRCP Rules 6(b) and 11(a)(2)(B)" filed on March 25, 2010, is GRANTED.

IT IS FURTHER ORDERED defendant NIC's "Motion for a Protective Order" filed on March 31, 2010, is DENIED, subject to the limitations in the order below.

IT IS FURTHER ORDERED defendant Foundation's "North Idaho College Foundation Motion for Protective Order" filed on April 8, 2010, is DENIED.

IT IS FURTHER ORDERED defendant NIC's "Motion for Entry of Judgment *Nunc Pro Tunc*" filed on April 7, 2010, is DENIED, subject to the limitations in the order below.

IT IS FURTHER ORDERED defendant NIC's "Motion to Quash *Subpoenas Duces Tecum*" filed on April 20, 2010, and defendant Foundation's "North Idaho College Foundation's Joinder in North Idaho College's Motion to Quash *Subpoenas Duces Tecum*" are both DENIED, subject to the limitations in the order below.

IT IS FURTHER ORDERED the depositions of those proposed by plaintiffs shall take place as follows: direct examination of each deponent whom plaintiffs have proposed taking the deposition will be limited to one hour on direct examination by plaintiffs' counsel; no additional time will be allowed without a separate order from this Court; if counsel for either defendant wishes to make further inquiry on cross-examination, that inquiry is not limited; however, plaintiffs will be allowed exactly the same amount of time for re-direct examination as defendants' counsel *collectively* spends on cross-examination, and on any re-cross by defendants, defendants

collectively will be limited to the amount of time spent by plaintiffs' counsel on re-direct; following re-cross, if any, by either or both counsel for defendants, the deposition shall conclude (ie., there will be no re-re-direct). Because plaintiffs are taking the depositions, it is ordered plaintiffs' counsel at each deposition note on the record the start time and stop time of all direct examination, all cross-examination, all re-direct examination and all re-cross examination. If any deposition is taken by plaintiffs, for which there is no merit to the information obtained, or no relevance to the information obtained, and no good faith basis for the taking of such deposition (ie., the deposition was not reasonably calculated to lead to the discovery of admissible evidence), the Court reserves the right to impose sanctions upon the plaintiffs, jointly and severally, and/or upon plaintiffs' counsel, in favor of either or both defendants.

Entered this 5th day of May, 2010.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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