STATE OF IDAHO )
County of BONNER )ss

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 BONNER**

**JOHN R. SANDERS,**

*Plaintiff*,

vs.

**BIG WOOD LOG HOMES, INC., and BRYAN NAVARRO and CHERYL NAVARRO, a married couple,**

*Defendants*.

Case No. **CV 2006 1744**

**MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION FOR CHANGE OF VENUE AND MOTION FOR IMPROPER VENUE**

Plaintiff filed this negligence (Complaint ¶ 18) action against defendants on October 5, 2006. Plaintiff through his attorney made the conscious decision to file the action in Bonner County, even though plaintiff's complaint enumerated that "Defendants, are individuals, who at all times relevant to this action, reside and did reside in Boundary County, Idaho. Complaint, ¶ 2. Defendants answered on November 3, 2006. On January 16, 2007, defendants filed their Motion for Change of Venue and Motion for Improper Venue. Oral argument on their motion was held February 5, 2007.

Defendant did not brief the matter prior to oral argument. Plaintiff sent the court a brief about an hour before oral argument. In that brief the reason given by plaintiff's attorney as to why the action was filed in Bonner County as opposed to Boundary County where the defendants live, was "The Defendants have a close familial relationship with Ron Sukenik, the Boundary County Court Bailiff/Jury Commissioner", that "The Defendant

Bryan Navarro is a former Bonners Ferry City Police Officer", that "The Defendant's father is a former under-sheriff for Boundary County Sheriff's Office" and as such "It would be virtually impossible for an unbiased jury to be selected in Boundary County." Plaintiff and his attorney overlook the fact that this will be **a court trial.** Neither plaintiff nor defendants have filed a demand for a jury trial in their pleadings and the time for demanding a jury trial via separate pleading has long since passed under I.R.C.P. 38(b).

At oral argument, the Court ruled that venue was improper and took under advisement the issue of attorney fees for filing in a county of improper venue. Plaintiff's counsel was directed to submit an order changing venue to Boundary County. As of this date, no such proposed order has been filed.

Since defendants provided no brief and since plaintiff cited no law to support plaintiff's decision to file the Complaint in Bonner County, additional simultaneous briefing was requested by the Court on the issue of attorney fees, due the following day. On February 6, 2007, defendants timely submitted an Affidavit of Attorney Fees and a Memorandum of Points and Authorities in Support of Motion for Change of Venue Pursuant to Rule 40(e) and Motion for Improper Venue Pursuant to 12(b)(3) and 12(g)(3). On February 7, 2007, a day late, the Court received a two page letter from plaintiff's counsel (not an affidavit so it is disregarded) and plaintiff filed an Objection to an Award of Attorney Fees for Motion for Change of Venue and Motion for Improper Venue.

At oral argument and in plaintiff's "objection", plaintiff's counsel justified the decision to file in Bonner County by representing that I.R.C.P. 40(e)(5) allows attorney fees against plaintiff as a sanction for filing in the county of improper venue only if the court finds the action was filed in the county of improper venue without good cause. While that is what the rule says, the argument, and all of plaintiff's briefing ignores Idaho Code § 5-404, which

reads: "In all other cases [ie., not actions relating to real property, actions against counties or officers which are covered by other statutes] the action *must* be tried in the county in which the defendants, or some of them, reside, at the commencement of the action…and that in all actions against any corporation organized uner the laws of the state of Idaho, suit or action *shall* be commenced and tried in any county of this state where the defendant has its principal place of business or in the county in which the cause of action arose." The italicized portions of the statute show it is *mandatory*. Only when the plaintiff does not know the county where defendants reside may the plaintiff designate the county. Idaho Code § 5-204. Plaintiff and her attorney knew the individual defendants resided in Boundary County, the so stated in their Compliant. Complaint, ¶ 2. Plaintiff has not alleged the corporate defendant had a principal place of business in any county, but certainly plaintiff has not made the argument that Big Wood Log Homes, Inc. had its principal place of business in Bonner County. To the contrary, plaintiff acknowledged in his complaint that the officers of Big Wood Log Homes, Inc., were residents of Boundary County (Complaint, ¶ 3) and that the work performed by Big Wood Log Homes, Inc., was done at plaintiff's home. Complaint, ¶ 4. Since the plaintiff's residence is in Boundary County (Complaint, ¶1) this Court assumes the plaintiff's home in which the work performed by defendants was done in Boundary County.

Since the language of Idaho Code § 5-204 is *mandatory*, there can be no *good cause* under I.R.C. P. 40(e)(5). All the reasons listed by plaintiff were the inability to get a fair jury trial in Boundary County. However, *this is not a jury trial*. Even if it were a jury trial, the proper course for plaintiff would have been to file in Boundary County, then, pursuant to I.R.C.P. 40(e)(1)(B), make a motion for a change of venue to another county such as Bonner County, due to a perceived inability to obtain an impartial trial. But to *sua sponte*

file in the wrong county is to completely disregard Idaho Code § 5-204. Accordingly, attorney fees must be awarded. To hold otherwise, any party initiating any lawsuit knowing the defendants' county of residence, could file in any of the other 43 counties in the State of Idaho rather than the county in which defendants reside, and unilaterally force defense counsel and a court to unnecessarily deal with a situation that was created in disregard of a mandatory statute. Idaho Rule of Civil Procedure 40(e) certainly contemplates the proper procedure is to file in the proper county first, then make a motion for change of venue, Idaho Code § 5-204 *requires* such.

The Court has reviewed the Affidavit of Attorney Fees filed by defendants, and finds such amounts to be reasonable in light of the criteria under I.R.C.P. 54(e)(3).

IT IS HEREBY ORDERED that venue is changed to Boundary County. Pursuant to I.R.C.P. 40(e)(2), the case remains assigned to the undersigned judge.

IT IS FURTHER ORDERED that pursuant to I.R.C.P. 40(e)(5) and Idaho Code § 5-204, attorney's fees in the amount of $526.50 are awarded against plaintiff and in favor of defendants.

Entered this 9th day of February, 2007.

_____
John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the _____ day of February, 2007, 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 #** |
|---|---|---|---|
| Todd Reed | 208 263-4438 | Angela Marshall | 208 263-0143 |
| Hon. John P. Luster, Administrative District Judge | | Clerk of Court, Boundary County | |
| | | Clerk of Court, Bonner County | |

_____
Secretary