

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**

TOWER ASSET, INC., a Delaware
Corporation,

Plaintiffs,

vs.

DOUGLAS P. LAWRENCE and BRENDA J.
LAWRENCE, husband and wife,

Defendants.

Case No. **CV 2003 4621**

**MEMORANDUM DECISION AND
ORDER DENYING MOTION FOR
DISQUALIFICATION FOR CAUSE,
I.R.C.P. 40(d)(2)**

CAPSTAR RADIO OPERATING COMPANY,
a Delaware Corporation,

Plaintiffs,

vs.

DOUGLAS P. LAWRENCE and BRENDA J.
LAWRENCE, husband and wife,

Defendants.

Case No. **CV 2002 7671**

**MEMORANDUM DECISION AND
ORDER DENYING MOTION FOR
DISQUALIFICATION FOR CAUSE,
I.R.C.P. 40(d)(2)**

I. BACKGROUND.

A. *Tower Asset, Inc. v. Lawrence.*

On June 27, 2003, plaintiff Tower Asset, Inc. filed this lawsuit against defendants Lawrence, requesting an easement across defendants Lawrences' land so that Tower Asset could service antennas on land it leased on top of Blossom Mountain. Tower Asset requested a temporary restraining order which was granted on June 24, 2003, ordering

Lawrences not to block Tower Asset's access across Blossom Mountain Road, contingent on Tower Asset posting a \$3,000.00 bond. Douglas Lawrence filed a *pro se* appearance on December 5, 2003, and Brenda Lawrence filed a *pro se* appearance on December 18, 2003.

On August 17, 2004, Tower Asset filed its Motion for Summary Judgment. On September 9, 2004, attorney John P. Whelan appeared as counsel for the Lawrences. Oral argument on the summary judgment motion was held November 9, 2004. At the conclusion of that hearing, the Court granted Tower Asset's motion and ordered Tower Asset's counsel to prepare an order. Tower Asset did not prepare a proposed order for quite some time, but on May 27, 2005, this Court entered an "Order Granting Motion for Summary Judgment and Entering Decree of Quiet Title." On July 7, 2005, Lawrences timely filed a Notice of Appeal. On January 26, 2007, the Idaho Supreme Court filed its decision vacating summary judgment and remanding the matter back to this Court. On April 18, 2007, the Remittitur from the Idaho Supreme Court was filed in this case. Two days later, on April 20, 2007, this Court noticed this matter for a status conference to be held on May 14, 2007. Counsel for both sides appeared, and at the conclusion of that hearing, this matter was set for a four day jury trial commencing December 10, 2007. That jury trial was given a first priority setting relative to the *Capstar* case. Also on May 14, 2007, Tower Asset filed its "Renewed Motion for Summary Judgment", and this was discussed at the May 14, 2007, status conference. At that May 14, 2007, hearing, Tower Asset requested a hearing date for their motion for summary judgment and was given the date of June 13, 2007.

On June 5, 2007, John P. Whelan, attorney for defendants Douglas and Brenda Lawrence, filed a "Motion for Disqualification for Cause", an "Affidavit of John P. Whelan" in

support of said motion, and a Notice of Hearing on said motion for June 13, 2007. Since such hearing date did not give plaintiff the required fourteen-day notice (I.R.C.P. 7(b)(3)(A)), an Application for Order Shortening Time was filed. At the June 13, 2007 hearing, the motion to shorten time was granted.

B. *Capstar Radio Operating Company v. Lawrence.*

On November 7, 2002, plaintiff Capstar Radio Operating Company filed this lawsuit against defendants Lawrence, requesting an easement across defendants Lawrences' land so that Capstar could access the land it owns on top of Blossom Mountain, upon which it has a transmission tower. Capstar requested a temporary restraining order which was granted on November 7, 2002, ordering Lawrences not to block Capstar's access across Blossom Mountain Road, contingent on Capstar posting a \$1,000.00 bond. A hearing was held on November 15, 2002, on the preliminary injunction, and Douglas Lawrence and Brenda Lawrence appeared *pro se*. The preliminary injunction order was entered on November 21, 2002. On December 2, 2002, attorney Ian Smith appeared on behalf of Lawrences. On August 26, 2003, Smith filed his motion to withdraw which was rendered moot by the substitution of attorney Sam Eisemann filed on September 5, 2003. Even though he is not an attorney, on November 3, 2003, Douglas Lawrence filed a Notice of Substitution of Counsel for both himself and Brenda Lawrence. On December 5, 2003, Douglas Lawrence filed a notice appearance that he is appearing on behalf of himself only. At a hearing December 11, 2003, Douglas Lawrence appeared, as did Brenda Lawrence. The Court cautioned the Lawrences of the hazards of appearing without counsel, that they would be held to the same standard as an attorney, that Douglas Lawrence could not represent Brenda Lawrence, and required Brenda Lawrence file a written *pro se* appearance if she was going to represent herself. Mediation was ordered to be completed

no later than February 28, 2004. Brenda Lawrence filed her appearance on December 18, 2003.

On March 9, 2004, Capstar filed its Motion for Summary Judgment and noticed that motion for hearing on April 6, 2004, and on March 31, 2004, Capstar noticed that motion for hearing on April 14, 2004. Lawrences appeared *pro se* at the April 14, 2004, hearing. Partial summary judgment was granted in favor of Capstar against Lawrences on Capstar's express easement theory, and the Court specifically stated Capstar's other theories were not to be considered until Lawrences completed their discovery. On April 16, 2004, Capstar filed its Motion for Order of Entry of Final Judgment on the grounds that since the Court had found an express easement, the other theories were moot. On April 22, 2004, the Lawrences *pro se* filed their Motion for Reconsideration of the Court's Partial Summary Judgment of April 14, 2004, and noticed that matter for hearing on April 29, 2004. Capstar noticed its Motion for Entry of Final Judgment on April 29, 2004, as well. At the conclusion of that hearing, this Court granted Capstar's Motion for Entry of Final Judgment, denied Lawrences' Motion for Reconsideration, and counsel for Capstar was ordered to prepare an order reflecting those rulings. Capstar's counsel failed to do so. The case was inactive for quite some time, and as a result, the Court filed a Notice of Proposed Dismissal on January 24, 2005. On February 10, 2005, attorney John P. Whelan appeared for the Lawrences. An Order Granting Motion for Summary Judgment and Entering Decree of Quiet Title was finally prepared by Capstar's counsel and was signed and entered by the Court on June 7, 2005. On July 7, 2005, on behalf of the Lawrences, Whelan filed a Notice of Appeal.

On January 26, 2007, the Idaho Supreme Court filed its decision vacating summary judgment and remanding the matter back to this Court. On March 30, 2007, the Remittitur

from the Idaho Supreme Court was filed in this case. On April 20, 2007, this Court noticed this matter for a status conference to be held on May 14, 2007. Counsel for both sides appeared, and at the conclusion of that hearing this matter was set for a four-day court trial commencing December 10, 2007, set with a second priority to the *Tower Asset* case. Also on May 14, 2007, Tower Asset filed its “Renewed Motion for Summary Judgment”, and this was discussed at the May 14, 2007, status conference. At that May 14, 2007 hearing, Tower Asset requested a hearing date for their motion for summary judgment and was given the date of June 13, 2007.

On June 5, 2007, John P. Whelan, attorney for defendants Douglas and Brenda Lawrence, filed a “Motion for Disqualification for Cause”, an “Affidavit of John P. Whelan” in support of said motion, and a Notice of Hearing on said motion for June 13, 2007. Since such hearing date did not give plaintiff the required fourteen-day notice (I.R.C.P. 7(b)(3)(A)), an Application for Order Shortening Time was filed. At the June 13, 2007 hearing, the motion to shorten time was granted.

II. ANALYSIS.

A. Introduction.

The filing of Lawrences’ Motion for Disqualification for Cause has the effect of preempting the June 13, 2007, hearing on Tower Asset’s Renewed Motion for Summary Judgment. That is because “Upon the filing of a motion for disqualification, the presiding judge shall be without authority to act further in such action except to grant or deny such motion for disqualification.” I.R.C.P. 40(d)(5).

Idaho Rule of Civil Procedure 40(d)(2) requires the “...judge...sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions.” Hearing was held on June 13, 2007.

This Court appreciates the fact that this is a matter committed to the Court's discretion.

Desfosses v. Desfosses, 120 Idaho 27, 29-30, 813 P.2d 366, 368-69 (Ct.App. 1991);

Roselle v. Heirs and Devisees of Archie Grover, 117 Idaho 530, 533, 789 P.2d 526, 529

(Ct.App. 1990).

B. Allegations of Bias and Prejudice Based Upon Past Decisions.

The basis of Whelan's motion is stated in paragraph nine of his affidavit:

9. Your affiant believes that the bias and prejudice held by the Court against your affiant results in a situation where your affiant's clients do not receive fair and impartial rulings by the Court. Your affiant believes that the bias and prejudice held by the Court against your affiant causes the Court to be biased and prejudiced against the clients of your affiant.

Affidavit of John P. Whelan, p. 5, ¶ 9. A review of Whelan's affidavit shows he has made specific allegations of "bias and prejudice" by this Court against Whelan, and those concerns must be addressed.

From a temporal standpoint, Mr. Whelan's **first** concern is stated as follows:

3. When the Honorable John T. Mitchell took the bench in 2001, your affiant was the attorney of record for the Defendant in the case of *Yovichin v. Bush*, CV-2001-2116 (2001). Judge Mitchell took over the role as presiding judge in that case for the Honorable James Judd when Judge Judd retired. Your affiant believes that judge Mitchell disqualified himself, pursuant to Rule 40(d)(4), in that case on November 20, 2001 because your affiant was the attorney of record for the Defendants and judge Mitchell was biased or prejudice [sic] against John P. Whelan at that time, as the parties to the action and the counsel for the Plaintiffs (Jerry Trunkenholz [sic]) had had no prior dealings with judge Mitchell before he was assigned to the case. Your affiant believes that judge Mitchell voluntarily disqualified himself in the case because he had a "personality conflict" with your affiant that biased or prejudiced judge Mitchell in his handling of that case. A copy of the order for disqualification is attached hereto as Exhibit A.

This Court has reviewed Exhibit A, the Order on Self Disqualification in *Yovichin v. Bush*.

From a review of that document, the Court has absolutely no independent recollection as to **why** the Court voluntarily disqualified himself from *Yovichin v. Bush*, Kootenai County Case No. CV 2001 2116. The Order on Self Disqualification was entered November 20,

2001, which was the first day of work for the undersigned as a district judge. The court file in *Yovichin* has been purged. The Court has reviewed what was scanned into court records in that case. Following that review, the Court cannot determine the reason for the disqualification and can only speculate as to two possible reasons.

First, in *Yovichin*, John Beutler and Associates, Inc., and Rafael (Rusty) Reyes were eventually brought in as third party defendants by defendant Bush. However, from a review of the limited court records it appears that this did not occur until after November 20, 2001. The undersigned would consider Mr. Reyes and Mr. Beutler as friends and would likely not have felt comfortable being assigned to a case where they were parties or potential witnesses. Since the scanned file is incomplete, it is not clear is whether the Court's review of the file on November 20, 2001, would have disclosed that John Beutler or Rusty Reyes were involved in the case.

The second and more likely reason the undersigned disqualified himself in *Yovichin* is as follows: As an attorney, the undersigned can recall being involved in only one lawsuit where Mr. Whelan was the opposing attorney. That case was *In the Matter of the Estate of Dianne Rothe*, Kootenai County Case No. SP 675. That case involved a probate filed by Mr. Whelan on behalf of his client Alvin V. "Butch" Rothe. A review of the court file in that case shows that at the time the undersigned was transitioning from an attorney to a judge, he was still counsel for the Idaho Trial Lawyer's Association, which had been named as a recipient of a foundation named after the decedent's predeceased husband, to be funded from a medical malpractice claim that allegedly resulted in his death. The undersigned became involved in that case on March 22, 2000, and remained involved until just before his investiture as a district judge. On November 16, 2001, four days before becoming district judge, the undersigned signed a Notice of Substitution of Counsel where Leander L.

James was substituted as counsel for the Idaho Trial Lawyer's Association. Since *In the Matter of the Estate of Dianne Rothe* was *still pending* at the time of the undersigned's appointment as a district judge, the undersigned would have disqualified himself from *Yovichin* as a matter of course. Upon inheriting Judge Judd's caseload on November 20, 2001, the undersigned disqualified himself from those cases assigned to Judge Judd in which counsel on those cases were the opposing counsel in cases in which the undersigned was involved as an adversarial opponent at the time of the undersigned's appointment. Self disqualifications in those cases were made to avoid any appearance of bias since just prior to November 21, 2001, the undersigned and one of the counsel in those cases assigned to the undersigned judge were in an adversarial relationship. Those self-disqualifications were only made to cases in which counsel were involved who were opposing adversarial counsel in other cases that were *still pending* which the undersigned was an attorney at the time he became district judge. Those self-disqualifications were made in *several* cases in an effort to avoid the appearance of impropriety that would occur when one day the undersigned was your adversarial opponent in a litigated case, and the next day he was assigned to be the judge in another one of your cases. The passage of time ameliorated that concern.

Again, since the undersigned has no independent recollection as to why he disqualified himself in *Yovichin*, all of the above amounts to conjecture. Mr. Whelan has not stated any reason why he feels this Court would have had a "personality conflict" with Mr. Whelan back on November 21, 2001, so this Court can only speculate. The only reason this Court engages in such speculation is because Mr. Whelan has raised concerns and those concerns must be addressed. The undersigned cannot recall why he disqualified himself in *Yovichin v. Bush*. In spite of the Court's best efforts to determine the

reason for the 2001 disqualification in *Yovichin v. Bush*, the fact that the Court cannot recall the reason itself indicates a lack of bias or prejudice. Had bias or prejudice or a “personality conflict” been the reason for that disqualification in 2001, the Court would expect to remember that. It does not.

The undersigned can unequivocally state that he harbors no grudges against Mr. Whelan at the present, nor did he on November 21, 2001. The undersigned can unequivocally state that he has no bias or prejudice against Mr. Whelan at present, nor did he on November 21, 2001.

If the reason for that self-disqualification in *Yovichin v. Bush* was due to the *still pending* probate or trust litigation, the passage of time eliminates the need to self-disqualify or disqualify for cause due to past adversarial relationships. Within the passage of a year, the undersigned did not disqualify himself from new cases assigned to him, in which counsel were involved which were involved in litigation still *pending* at the time he became a district judge. That fact is borne out by the fact that apparently the next time a case in which Mr. Whelan was involved was assigned to the undersigned was in 2004 in *Sauls v. Luchi*, Kootenai County Case No. CV 2004 1616. That case was filed March 8, 2004, twenty eight months after the undersigned was appointed as a district judge, and at least twenty-eight months distant from any prior dealings with Mr. Whelan as an adversary. Accordingly, there was no self-disqualification in *Sauls v. Luchi*.

Mr. Whelan’s next concern is as follows:

4. In the case of *Sauls v. Luchi* (CV-04-1616), your affiant was the counsel for the Defendant. The matter was tried as a jury trial. The jury rendered a defense verdict in that chase [sic] which the Honorable John T. Mitchell overturned in part. The portion of the verdict overturned required your affiant’s client to pay over an earnest money deposit to the Plaintiffs even though their pleadings made no such request. Your affiant believes that the Court’s action was motivated by bias or prejudice against your affiant as the attorney for the Defendant in the action. The Defendant filed his own appeal

in that action, the status of which is unknown.

Affidavit of John P. Whelan, pp. 2-3, ¶ 4. This Court's action in that case was simply not in any way "motivated by bias or prejudice against your affiant as the attorney for the Defendant in the action." Mr. Whelan is correct; Mr. Luchi filed his own appeal. A review of the Court file in *Sauls v. Luchi*, which is entirely intact, would have shown Mr. Whelan that on November 8, 2006, the Idaho Court of Appeals affirmed the undersigned in all respects in 2006 unpublished Opinion No. 715. That decision became final upon April 16, 2007, with the filing of the Remittitur in that case. In any event, the decisions made by the Court in *Sauls v. Luchi* were not made based upon bias or prejudice against Mr. Whelan. They were decisions based upon motions made by opposing counsel Charles Dean. The Court has reviewed its June 17, 2005 "Memorandum Decision and Order on Plaintiffs' Motion for Judgment Not Withstanding the Verdict" in *Sauls v. Luchi*. It is well reasoned. While Luchi filed his own appeal, if Mr. Whelan felt the judge was biased or prejudiced, or off base in its decision, or misunderstood the matter before it, there are mechanisms short of appeal Mr. Whelan could have used to bring that error to the Court's attention. That did not occur. In any contested motion, usually one side wins, one side loses. Sometimes one party wins in part and loses in part. Just because one side wins does not mean the judge's decision was based upon bias or prejudice against the party who lost or their attorney. The undersigned knows such was not the case in *Sauls v. Luchi*.

Next, Mr. Whelan writes in his affidavit;

5. In the case of *Straub v. Smith*, CV-04-5437 (Supreme Court No. 31955), your affiant was the attorney for the Defendants. In that case, the Plaintiff dismissed her action one week before a scheduled jury trial. The attorney for the Plaintiff, Scott Poorman, sought and received your affiant's stipulation to have the case dismissed. Your affiant reached no agreement with Mr. Poorman to waive costs and attorney fees. Yet, the order submitted to the Honorable John T. Mitchell by Mr. Poorman contained wording that the parties were to bear their own costs. The proposed order was not sent to

your affiant before being submitted to the Court for signing. The Court signed the order as submitted. When the order was served on your affiant after it had been signed, your affiant filed a timely motion for reconsideration. The Honorable John T. Mitchell did not apparently read the motion. The motion was denied. The grounds for denial included the failure to cite a rule of procedure in support of the motion (yet such a rule was referenced in the motion). The claim for costs and attorney fees was denied on the additional ground that the Defendants' pleading did not contain a request for attorney fees (which I.R.C.P Rule 54(e)(4) specifically states is not necessary). This ground for denial of the motion for reconsideration was not even asserted by Mr. Poorman in his opposition papers to the motion. The Court supplied Mr. Poorman with his argument. Attorney fees and costs were denied to your affiant and his clients even though the Court admonished Mr. Poorman for perpetrating a fraud on the Court. An appeal was filed by your affiant for the Defendants and the Court of Appeal overturned the trial court's ruling on the matter. The Idaho Supreme Court took the case on review but no decision has been issued on the review. Your affiant believes that the Court's ruling in the *Straub v. Smith* case was motivated by the Court's bias and prejudice against your affiant.

Affidavit of John P. Whelan, pp. 3-4, ¶ 5. The rulings against Mr. Whelan's client in *Straub v. Smith* were simply not motivated in any way by bias or prejudice on behalf of this Court. The Court has reviewed the intact Court file in *Straub v. Smith* and is convinced of that fact. Mr. Whelan's affidavit raises several issues. Since *Straub v. Smith* is still under consideration by the Idaho Supreme Court, it would be inappropriate for this Court to comment on the *merits* of anything that occurred in that case.

Mr. Whelan claims: "The Honorable John T. Mitchell did not apparently read the motion [to reconsider]." *Id.* A review of the court file in *Straub v. Smith* shows that a hearing was held on May 10, 2005, on Smith's (Mr. Whelan's client) Motion to Reconsider. At that hearing, a review of the court minutes show that not only did this Court indicate on the record that it had reviewed the Motion to Consider, but articulated the grounds Mr. Whelan set forth in that motion. The Court mentioned *Jones v. Berezay*, 120 Idaho 332, 815 P.2d 1072 (1991) as a case on point, a case neither attorney in *Straub* cited to the Court. So not only did the Court read Mr. Whelan's motion to reconsider, since Mr.

Whelan's motion contained no citations to any legal authority, the Court conducted its own research.

The bottom line is that in *Straub v. Smith*, Mr. Whelan did what he should have done if he and/or his client disagreed with this Court's rulings...they filed a request for reconsideration and then an appeal.

A request for reconsideration is exactly what the Lawrences did in *Capstar v. Lawrence*, CV 2002 7671, and an appeal is exactly what Mr. Whelan and his clients have done in *Capstar* and *Tower Asset Sub, Inc. v. Lawrence*, CV 2003 4621. An appeal is the appropriate action to take if you believe a judge has committed error, made a mistake, or misunderstood the facts or the law. The rulings made against Mr. Whelan's client in *Capstar* and *Tower Asset* were not in any way made or motivated by bias or prejudice against Mr. Whelan by this Court. In fact, this Court's ruling in the *Capstar* case was made **before** Mr. Whelan even appeared in that case. The ruling was made in *Capstar* while the Lawrences were proceeding *pro se*. For the same reasons set forth above in *Straub v. Smith*, it would be inappropriate for this Court to discuss the merits of these two cases.

Mr. Whelan claims bias or prejudice on behalf of the Court because counsel for plaintiffs in *Capstar v. Lawrence*, CV 2002 7671 and *Tower Asset Sub, Inc. v. Lawrence*, CV 2003 4621 "...Susan Seeks [sic], the partner of Lee James, a friend of the Honorable John T. Mitchell and the current president of the Idaho Trial Lawyers Association." Affidavit of John P. Whelan, p. 4, ¶ 6. It is true that plaintiffs' counsel in *Capstar* and *Tower Asset*, Susan Weeks, is in the same law firm as Lee James. However, the undersigned has no knowledge as to whether they are partners or what their professional relationship is. It is true that Lee James is president of the Idaho Trial Lawyers Association, but the undersigned was unaware of that fact until the undersigned read Mr. Whelan's affidavit and

confirmed the fact by viewing the ITLA website. Mr. Whelan has not made clear what Mr. James being president of ITLA has to do with anything. The undersigned was a member of the ITLA five and one half years ago, but is not a member now that he is a district judge. The undersigned was the attorney of record for ITLA in the case *In the Matter of the Estate of Dianne Rothe*, but the undersigned received no financial remuneration for all time spent on that case. That matter was handled *pro bono* during the undersigned's involvement. In the general sense of the word, the undersigned is a "friend" of Lee James, but has not seen Lee James in other than a professional setting in more than fourteen months. The last time the undersigned saw Lee James socially was at a fund raising event for ICARE, a child abuse prevention agency. Lee James may have appeared in court before the undersigned in the past fourteen months as an attorney in a hearing, but the undersigned has no recollection of that one way or another. The Court is confident it has not spoken to Lee James or seen Lee James socially since the ICARE fund raising event. Along with Peter Erbland, Lee James helped organize a fund raising event for the undersigned in his re-election, but that occurred about fifteen months ago. The fund raising event was held at Mr. Erbland's law firm and other than that fact, the undersigned is not aware of what efforts Mr. James expended on that fund raising event.

Mr. Whelan then makes the claim that:

8. In the recent cases of *Krivor v. Rogers* (CV-06-6252) and *Metropolitan Property & Casualty v. Allen* (CV-06-6358), where your affiant represents the Rogers and the Allens, Defendants in the actions, the Honorable John T. Mitchell has seemingly made it clear that the Court will not entertain argument from your affiant unless the argument is supported by cases directly on point. Your affiant believes the Court has singled out your affiant for treatment that is different from the treatment received by other attorneys appearing before the Honorable John T. Mitchell.

Affidavit of John P. Whelan, p. 5, ¶ 85. The claim that "the Honorable John T. Mitchell has seemingly made it clear that the Court will not entertain argument from your affiant unless

the argument is supported by cases directly on point”, without more, is a difficult claim in which to form a response. Since those are pending cases, it is improper to respond to the merits of any legal arguments raised in those cases by Mr. Whelan. First of all, it should go without saying that argument supported by cases directly on point will be more persuasive than an argument lacking that support. Second, the allegation by Mr. Whelan that “...the Honorable John T. Mitchell has seemingly made it clear that the Court will not entertain argument from your affiant unless the argument is supported by cases directly on point” lacks specificity as to any particular ruling made at a particular hearing. A review of the court minutes on *all* hearings held in *Krivor* and *Metropolitan* show that at no time was Mr. Whelan not allowed to present argument, nor was he cut off on any argument, nor was he told that without cases on point his arguments would not be entertained. In *Krivor*: Mr. Whelan did not attend the January 30, 2007 hearing; Mr. Whelan did not attend the February 20, 2007, hearing; Mr. Whelan attended the April 26, 2007, hearing and argued without interruption; Mr. Whelan did not attend the May 23, 2007, hearing. In *Metropolitan*: Mr. Whelan did not appear at the December 19, 2006 scheduling conference, he had on November 8, 2006 faxed the Court in chambers a copy of a Notice of Appearance, but no filing fee was paid so the pleading was not filed; Mr. Whelan attended the March 22, 2007 hearing and argued without interruption; Mr. Whelan attended the April 24, 2007 hearing and argued without interruption. If the Court in *Krivor* and *Metropolitan* failed to entertain an argument by Mr. Whelan, one would expect a motion for reconsideration. A review of the court files in *Krivor v. Rogers* (CV-06-6252) and *Metropolitan Property & Casualty v. Allen* (CV-06-6358) reveals no motions for reconsideration filed by Mr. Whelan on behalf of his clients therein.

A review of the court files in the following cases show no motion for disqualification

for cause (I.R.C.P. 40(d)(2)) has ever been filed: *Krivor v. Rogers* (CV-06-6252), *Metropolitan Property & Casualty v. Allen* (CV-06-6358), *Straub v. Smith*, (CV-04-5437), *Sauls v. Luchi* (CV-04-1616). While that fact has little, if anything, to do with this Court not being biased or prejudiced against Mr. Whelan, if Mr. Whelan's feeling that this Court was biased or prejudiced against him goes back to November 21, 2001, one would have expected a motion for disqualification to have been made in one of these cases at an earlier time. On November 15, 2006, a motion to disqualify *without cause* (I.R.C.P. 40(d)(1)) was made by Mr. Whelan on behalf of his client in *Krivor v. Rogers*, and that motion was granted on November 16, 2006. Following objection from opposing counsel as to the issue of service, that order was rescinded by an order dated November 20, 2006. If there were concerns as to bias or prejudice of this Court, a motion for disqualification **for cause** would certainly have been anticipated in that case at that time.

Decisions from the Idaho Supreme Court were issued on January 26, 2007, in *Tower Asset Sub Inc., v. Lawrence* and *Capstar Radio Operating Company v. Lawrence*. Mr. Whelan states that regarding those two cases an appeal was taken by the defendants, that the Idaho Supreme Court overturned the grant of summary judgment, then notes "Your affiant believes that the result on the appeal has merely increased the bias and prejudice of the Court against your affiant." Affidavit of John P. Whelan, pp 4-5, ¶¶ 6, 7. The Court has read the decisions in both cases and finds them to be well written. As noted by the Idaho Supreme Court, this Court committed error, and the Idaho Supreme Court reversed that error. Those appellate decisions are the "law of the case" in these two cases. This Court is human. It is quite a different thing to argue that because this Court committed error, which the Idaho Supreme Court corrected, that this Court would then hold against Mr. Whelan the fact he prevailed on behalf of his clients on those appeals. Quite

the contrary. Mr. Whelan is to be commended for bringing those appeals and having the Idaho Supreme Court correct the mistake. He did the right thing. “The results of the appeal” (Affidavit of John P. Whelan, p. 5, ¶ 7), create no bias or prejudice against Mr. Whelan whatsoever. 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).

At oral argument on June 13, 2007, Mr. Whelan mentioned that in *Capstar* the Court found the language in the deed to be unambiguous, and the language in the same deed to be ambiguous in *Tower Asset*. Certainly that was a mistake by this Court, and that mistake was pointed out by the Idaho Supreme Court in *Tower Asset Sub, Inc. v. Lawrence*, 2007 Opinion No. 14, p. 5, n. 2 (January 26, 2006). However, that mistake by this Court does not indicate bias or prejudice against Mr. Whelan. To the extent the mistake needs to be explained to address any concerns of Mr. Whelan, it is explained as follows: On April 14, 2004, this Court heard argument on plaintiff’s motion for summary judgment in *Capstar*, and Lawrences’ argument was presented by Douglas Lawrence, *pro se*. In granting summary judgment, the Court found the language of the deed and sales agreement unambiguous. The Lawrences *pro se* made a motion to reconsider in *Capstar*, and at hearing on that motion on April 29, 2004, this Court again stated the deed was unambiguous. The *Tower Asset* motion for summary judgment was heard *seven months*

later on November 9, 2004, and argument was presented by Mr. Whelan. While the finding of ambiguity/unambiguity is inconsistent, the Court was faced with two different arguments by two different people, one a lawyer and one not, on two different days seven months apart. The ambiguous/unambiguous nature of the deed and sales agreement was not the basis for the reversal in these cases by the Idaho Supreme Court. The Idaho Supreme Court found that neither the deed nor the sales agreement created an express easement. *Tower Asset Sub, Inc. v. Lawrence*, 2007 Opinion No. 14, pp. 6-7 (January 26, 2006); *Capstar Radio Operating Company v. Lawrence*, 2007 Opinion No. 13, p. 4 (January 26, 2006). Thus, even if there were some logic to the argument that the Court was biased or prejudiced because the Court found the documents ambiguous in the case Mr. Whelan argued and unambiguous in the case Douglas Lawrence argued seven months earlier, that specific ruling was not relevant. What is relevant as far as any bias or prejudice by the Court is the fact that in both cases, one argued *pro se* by Douglas Lawrence and one argued by Mr. Whelan, the result was the same. There is no differential treatment by this Court as between Mr. Whelan or Douglas Lawrence.

At oral argument on June 13, 2007, Mr. Whelan mentioned several issues he had not mentioned in his "Motion for Disqualification for Cause" or his "Affidavit of John P. Whelan". First, Mr. Whelan mentioned that he had won jury trials and court trials before the undersigned. At oral argument Mr. Whelan stated he had "...a string of motions that had not been granted by the Court." Not every attorney wins every motion, and not every attorney wins half of the motions they bring or defend. Mr. Whelan's affidavit mentions *Sauls v. Luchi* (one motion), *Straub v. Smith* (one motion and a motion to reconsider that motion) and now *Capstar v. Lawrence* (one motion but as previously mentioned, Mr. Whelan was not counsel for Lawrences when *Capstar* was decided) and *Tower Asset Sub*,

Inc. v. Lawrence (one motion). Even if it were proper to base a claim of bias or prejudice upon past adverse rulings (*Desfosses* and *Bell* show it is not proper), **four** motions is hardly a significantly large statistical sample upon which to base a claim of bias or prejudice resting upon prior decisions rendered. And if keeping score were proper (it is not), one would think you would weigh those motions against the court **trials** Mr. Whelan indicated he had won which were assigned to this Court.

At oral argument Mr. Whelan for the first time raised the case of *Whelan v. Mills*, a fee dispute between Mr. Whelan and a client that was assigned to this Court, as another example of how this Court exhibited bias or prejudice against Mr. Whelan. Mr. Whelan did not have a case number, but the Court researched the matter and reviewed the court file in Kootenai County Case No. CV 2003 3582. In *Whelan v. Mills* Mr. Whelan in his complaint alleged the Mills owed him \$11,903.74. In their answer the Mills claimed Mr. Whelan owed the Mills \$4,085.00 for work they had done for Mr. Whelan. After a May 24, 2004, court trial before the undersigned, this Court found the Mills owed Mr. Whelan \$6,453.89. Part of the reason Mr. Whelan was found to not be entitled to all he was claiming was he had unilaterally raised his hourly rate from \$125.00 to \$150.00 per hour. The remaining reason Mr. Whelan was found to not be entitled to all he claimed was Greg Mills was entitled a credit for work he had performed on Mr. Whelan's land. However, instead of the \$4,085.00 credit the Mills were seeking, the Court found them only entitled to \$1,290.00. It is difficult to see how this Court's ruling in that case amounts to bias or prejudice against Mr. Whelan.

Finally, while the following argument has not been made by Mr Whelan, it needs to be addressed. It could be argued that simply because Mr. Whelan has made this motion to disqualify, and his affidavit contains many allegations of bias and prejudice against the

undersigned, such allegations of bias or prejudice alone would **now** render the Court biased and prejudiced. There have been other motions to disqualify the undersigned for cause in the past, and there will be similar motions in the future. While such motions are infrequent, the undersigned is duty bound to take the claims very seriously. The undersigned has given careful attention to the claims of bias and prejudice and can assure the parties and their attorneys, especially Mr. Whelan, that no bias or prejudice is present merely because this motion has been made. Mr. Whelan has concerns. Mr. Whelan is commended for bringing those concerns to the Court's attention. It is unfortunate that Mr. Whelan did not raise these concerns earlier as he has apparently harbored them for at least a couple of years since *Sauls v. Luchi* was decided. But Mr. Whelan has come forth and raised his concerns at this time in this motion to disqualify for cause in this case. He has that *right*. Indeed, if he is sincere in those concerns, and there is no reason to believe he is not sincere in those beliefs, then he has a *duty* to consult with his client, and if his client consents, to raise those concerns with the Court. The filing of this motion to disqualify for cause does not in any way result in bias or prejudice by the Court. The Court is neither insulted nor inconvenienced in any way by the filing of the motion. Mr. Whelan has concerns and the Court must address those concerns. The reason for the length of this written opinion is to address those concerns.

The affidavit of Mr. Whelan uses terms such as: "Your affiant believes that Judge Mitchell disqualified himself...because...Judge Mitchell was biased or prejudice [sic] against John P. Whelan at that time" (Affidavit of John P. Whelan, p. 2, ¶ 3); "Your affiant believes that judge Mitchell voluntarily disqualified himself in the case because he had a 'personality conflict' with your affiant..." (*Id.*); "Your affiant believes that the Court's action was motivated by bias or prejudice against your affiant..." (*Id.* p. 3, ¶4); "The Honorable

John T. Mitchell did not apparently read the motion” (*Id.* p. 3, ¶ 5); “Your affiant believes that the Court’s ruling in the *Staub v. Smith* case was motivated by the Court’s bias and prejudice against your affiant” (*Id.* p. 4, ¶ 5); and “Your affiant believes the Court has singled out your affiant for treatment that is different from the treatment received by other attorneys appearing before the Honorable John T. Mitchell” *Id.* p. 5, ¶ 8. 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 v. Desfosses*, 120 Idaho 27, 30, 813 P.2d 366, 369 (Ct.App. 1991), *citing Walker v. People*, 126 Colo. 135, 248 P.2d 287, 295 (1952). While Mr. Whelan’s concerns are not “facts”, making this motion to disqualify for cause is about the only way he could air these concerns he has. Mr. Whelan’s concerns are unfounded. That is not to say Mr. Whelan is not sincere when he says he has those feelings. But it is to say that this Court simply does not harbor the bias and prejudice alleged by Mr. Whelan. The undersigned is not biased or prejudiced against Mr. Whelan or against his present clients in this case, or his past clients in past cases.

C. Campaign Contributions by Opposing Counsel’s Firm.

Mr. Whelan raised the issue of campaign contributions for the first time at oral argument on June 13, 2007. Mr. Whelan made an offer of proof that the firm of which Susan Weeks is a partner contributed \$1,000 to the undersigned’s re-election fund in the spring of 2006, according to the Sunshine Disclosure filed with the State of Idaho Secretary of State. At oral argument, Mr. Whelan also mentioned that attorney Scott Poorman, the attorney opposing Mr. Whelan in *Straub v. Smith*, *supra*, donated to the undersigned’s re-election fund in the spring of 2006. The problem with the argument regarding Mr. Poorman

is that the last action taken by this Court in *Straub v. Smith* occurred on May 10, 2005 (a year **before** the election and Mr. Poorman's contribution), when this Court signed the Order Denying Defendant's Motion for Reconsideration. There cannot even be the appearance of a *quid pro quo* when the predicate contribution has not even yet occurred.

As to the contribution to the undersigned's re-election fund by Ms. Week's firm, there was no evidence that Ms. Weeks made the contribution or that she consented to the contribution, or even that there is a partnership. If the Court were to assume that she consented and that her firm is a partnership, there still is no basis for the Court to disqualify himself.

First of all, had the offer of proof not been made by Mr. Whelan at the hearing on June 13, 2007, the undersigned would still to this day be ignorant of what is contained in the Sunshine Report regarding Ms. Weeks' law firm. The Court disclosed on the record at the June 13, 2007, hearing the fact that it had not reviewed the Sunshine Report, but assumed it was accurate as the Court trusts his campaign treasurer who filed the report. The reason the Court has not reviewed the financial disclosure report is the Court must abide by the Idaho Code of Judicial Conduct. Canon 5(C)(2) states in part: "Except as required by law, a candidate's judicial election committee should not disclose the names of contributors to judicial campaigns and judicial candidates and judges should avoid obtaining the names of contributors to the judicial campaign." Since the Court was at all times ignorant of this financial contribution, the Court could not and was not biased or prejudiced in favor of Ms. Weeks. Likewise, the Court was not biased or prejudiced against Mr. Whelan as a result of a contribution made by Ms. Weeks' firm, of which it was, up to June 13, 2007, ignorant.

Now the Court has been made aware of that fact by Mr. Whelan, the Court must

now make two determinations. First, does the knowledge of Ms. Weeks' firm's contribution result in any bias or prejudice in her favor? Second, is this now a "proceeding in which the judge's impartiality might reasonably be questioned", which includes but is not limited to instances "where the judge has a personal bias or prejudice concerning a party or a party's lawyer." Cannon 3(E)(1)(a). Campaign contributions of which a judge has knowledge, made by lawyers or other who appear before the judge, may be relevant to disqualification." Comment to Cannon 5(C)(2).

This Court can honestly say that the contribution by Ms. Weeks' firm in no way results in any bias or prejudice in her favor. There are several reasons for this. **First**, there is more than one attorney in Ms. Weeks' firm. The firm's phone book ad lists three attorneys. It is unknown who made the decision to contribute. **Second** is the *amount* of the contribution. A candidate's committee may only solicit and accept reasonable contributions from lawyers. Cannon 5(C)(2). One thousand dollars is a reasonable amount from a firm of lawyers. According to Mr. Whelan's own offer of proof, other firms donated similar amounts or more. **Third**, since the undersigned was ignorant of the contribution until Mr. Whelan's offer of proof, obviously no one within the firm expected or asked for any preferential treatment as a result of the contribution.

No cases were cited by Mr. Whelan on this issue at the June 13, 2007 hearing. Since the issue was raised by Mr. Whelan for the first time at hearing, Ms. Weeks cited no cases. Campaign contributions cannot serve as independent grounds for recusal. *Degarmo v. State*, 922 S.W.2d 256, 267 (Tex.App. 1996), *citing River Road Neighborhood Association v. South Texas Sports, Inc.* 673 S.W.2d 952, 953 (Tex.App. 1984). In that case, the judge was found not to have abused his discretion when he accepted a \$500 campaign contribution from a murder victim's family. *Id.* In *Rocha v. Ahmad*, 662 S.W.2d

77 (Tex.App. 1983), the Court of Appeals of Texas unanimously held that one of its members should not be disqualified even though two of the justices had received "...many thousands of dollars from or through the Law Office of Pat Maloney, P.C. (attorney for the appellees)". *Id.* In *River Road Neighborhood Association*, 673 S.W.2d 952 (Tex.App. 1984), it was held that two justices on the Texas Court of Appeals, one who had received 21.7% of his total reported campaign contributions, and another justice who had received 17.1% of his total reported campaign contributions from South Texas Sports, a party to the litigation, were not disqualified because neither of the "...challenged Justices may gain or lose anything of a pecuniary or personal nature because of any judgment that might be rendered in this case." The \$1000 contribution from Ms. Weeks' firm is significantly less than 17.1% of all amounts contributed to the undersigned's campaign, as the undersigned himself spent \$12,000.00 of his own funds on such campaign, and the undersigned is aware that over \$50,000 was spent on the campaign (thus assumes about \$38,000 was raised from other people). There is no contention made, nor is there any way possible the undersigned could gain or lose from any future rulings in either the *Capstar* or the *Tower Asset* case.

In *MacKenzie v. Super Kids Bargain Store* and *MackKenzie v. Breakstone*, 565 So.2d 1332 (Fla. 1990), the Supreme Court of Florida held that an allegation in a motion for disqualification "...that a litigant or counsel for a litigant has made a legal campaign contribution to the campaign of the trial judge, or the political campaign of the trial judge or the trial judge's spouse (two consolidated cases on appeal) without more, is not a legally sufficient ground" for disqualification. 565 So.2d at 1334. The Florida Supreme Court noted: "As with other campaigns, judicial campaigns require funds." 565 So.2d at 1335. "Judicial campaigns and the resultant contributions to those campaigns, therefore are

necessary components to our judicial system.” *Id.* The Florida Supreme Court noted that “...the United States Supreme Court has raised two concerns raised by contributions to campaigns for public office: ‘1. The tendency or possibility to create a quid pro quo relationship and, 2. The creation of an appearance of influence or corruption.’” *Id.* The Florida Supreme Court then held:

However, we find that Florida’s Code of Judicial Conduct together with Florida’s statutory limitation upon campaign contributions and the requisite public disclosure of such contributions, provide adequate safeguards against the above-entitled concerns regarding contributions to constitutionally mandated judicial campaigns and render the ground alleged in the motions at bar legally insufficient when presented as the sole ground for disqualification.

565 So.2d at 1336. There are thus, three factors. First, the applicable Florida Judicial Conduct provision was that judicial candidates “*should not himself solicit campaign funds, or solicit attorneys for publicly stated support, but he may establish committees of responsible person to secure and manage the expenditure of funds...*” *Id.* (emphasis in original). Idaho has essentially identical language: “A candidate shall not solicit campaign contributions in person.” Canon 5(C)(2). “A candidate may establish committees of responsible person to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds...” *Id.* Second, the per person campaign contribution limit in Florida for a district judge in 1990 was \$2,000. 565 So.2d at 1336. In Idaho that amount at present is \$1,000. Idaho Code § 67-6610A. Third, Florida statute requires disclosure by the campaign treasurer of amounts and name address and occupation of each person who made a contribution over \$100. 565 So.2d at 1336. Idaho requires the same disclosure, but for any amounts over \$50. Idaho Code § 67-6610. Thus, Idaho’s statutes are twice as

restrictive today as Florida's statutes were 17 years ago.

In addition to the three factors discussed in *MacKenzie*, there are two additional factors that indicate that the campaign contributions are not legally sufficient grounds for recusal in the instant case. Fourth, the passage of time since the contribution. The contribution had to have been over a year before Mr. Whelan brought his motion on behalf of the Lawrences. The fact of the contribution was available for Lawrences and Mr. Whelan to ascertain through the Secretary of State's website for nearly a year, yet nothing was mentioned until plaintiffs in the two cases renewed their motion for summary judgment. Fifth, the undersigned in fact did not know of the contribution by Ms. Weeks' firm until the June 13, 2007, hearing and heard of such only through Mr. Whelan. It is hard to have a *quid pro quo* relationship when one is ignorant of the contribution.

The Florida Supreme Court cited a Nevada Supreme Court case:

In Florida, as in Nevada, "leading members of the state bar play important and active roles in guiding the public's selection of qualified jurists. Under these circumstances, it would be highly anomalous if an attorney's prior participation in a justice's campaign could create a disqualifying interest, an appearance of impropriety or a violation of due process sufficient to require the justice's recusal from all cases in which the attorney might be involved." *Ainsworth v. Combined Ins. Co. of America*, 774 P.2d 1003, 1020 (Nev. [1989]) cert. denied 493 U.S. 958, 110 S.Ct. 376, 107 L.Ed.2d 361 (1989).

565 So.2d at 1337-38. In *MacKenzie*, the Florida Supreme Court held that even though the ground (campaign contributions) was legally insufficient, the motion for disqualification should have been granted because in ruling on the motion for disqualification, Judge Mackenzie "went beyond a mere determination of the legal sufficiency of the motion and passed upon the truth of the facts alleged." 565 So.2d at 1339. This is because **Florida has a rule that prohibits such**. The Florida Supreme Court stated: "...our rules clearly provide, and we have repeatedly held, that a judge who is presented with a motion for his disqualification 'shall not pass on the truth of the facts alleged nor adjudicate the question

of disqualification.” *Id.* “When a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and *on that basis alone* established the grounds for his disqualification.” *Id.* **Idaho has no such rule.** Obviously Texas has no such rule as the courts in the above cases discussed the allegations of prejudice. Obviously Nevada has no such rule as the reasons put forth by the judge who was sought to be disqualified (Justice Gunderson) were discussed in detail. *Ainsworth v. Combined Ins. Co. of America*, 774 P.2d 1003, 1020-22 (Nev. 1989), *cert. denied* 493 U.S. 958, 110 S.Ct. 376, 107 L.Ed.2d 361 (1989). This Court finds that a simple denial of the Motion to Disqualify for Cause, without a discussion, would create an untenable result, in that neither Mr. Whelan nor his clients would have any idea how the Court treated these various allegations raised by Mr. Whelan. Should this decision be appealed and the Idaho Supreme Court or Court of Appeals graft a rule that the judge may only adjudicate the question of disqualification, so be it. This Court is convinced that since there is no such rule, the more fair result to all parties and counsel is to discuss the various allegations.

III. ORDER.

IT IS HEREBY ORDERED that in the exercise of this Court’s discretion, for the reasons set forth above, defendants’ Motion for Disqualification for Cause pursuant to I.R.C.P. 40(d)(2), in *Capstar v. Lawrence*, CV 2002 7671 is **DENIED** and defendants’ Motion for Disqualification for Cause pursuant to I.R.C.P. 40(d)(2) in *Tower Asset Sub, Inc. v. Lawrence*, CV 2003 4621 is **DENIED**.

Entered this 25th day of June, 2007.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of April, 2008, 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>
John P. Whelan	208 664-2240	Susan Weeks	208 664-1684

Secretary