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AT \_\_\_\_\_ O'Clock \_\_\_\_\_ M  
CLERK OF DISTRICT COURT

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Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

WILLIAM O. WHITE, et ux,

*Plaintiffs,*

vs.

CODY RUSSELL.

*Defendants.*

Case No. **CV 2004 3783**

**MEMORANDUM DECISION AND  
ORDER DENYING DEFENDANT'S  
MOTION FOR DISQUALIFICATION**

**I. INTRODUCTION.**

*White v. Russel*, Kootenai County Case No. CV 2004-3787 has been assigned to District Court Judge John T. Mitchell since its inception on May 25, 2004. On August 30, 2005, this Court in CV 2004-3783 issued an Order consolidating *Russell v. White*, Kootenai County Case No. CV-05-4977 into the present action. In that same Order, the Court also granted Plaintiffs' Motion to Continue the hearing on Plaintiffs' Motion for Partial Summary Judgment, and re-scheduled such hearing to be heard on September 13, 2005. The Order consolidating cases and continuing/re-scheduling the hearing on partial summary judgment was made on the record at the August 29, 2005 hearing, and the written Order was signed/entered by the Court on August 30, 2005 following Mr. Rose's presentment, and was filed by the Clerk of Court on August 31, 2005.

On September 13, 2005, the parties had oral argument on Plaintiffs' Motion for Partial Summary Judgment in CV 2004-3783. At that hearing, the Court announced its

ruling in open court denying Plaintiffs' Motion for Partial Summary Judgment, and an Order Denying Plaintiff's Motion for Summary Judgment on Judicial Foreclosure was entered and filed on September 16, 2005. A Notice of Trial was mailed to the parties on September 13, 2005.

Defendant Russell filed his Motion for Disqualification on September 16, 2005. Russell argues that pursuant to I.R.C.P 40(d)(1)(E), a party may file a motion for disqualification without cause as to the new judge within the time limits prescribed by subparagraph (B). Subparagraph (B) provides the motion must be filed within seven days of setting the case for trial or within twenty-one days after receipt of a pleading specifying who the presiding judge may be. Russell argues that in this case, the motion was timely because the consolidation was filed August 31, 2005, less than 21 days from the date his motion to disqualify was filed, and trial was ordered on September 13, 2005, less than seven days from his motion to disqualify was filed.

Whites argue that under I.R.C.P. 40(d)(1)(E), when a new judge is assigned to a case during the course of ongoing proceedings, a party shall have the right to one motion for disqualification, but must act within the time limits set forth in Rule 40(d)(1)(B).

I.R.C.P 40(d)(1)(B) states:

A motion for disqualification without cause must be filed no later than seven days after service of a written notice or order setting the action for status conference, pretrial conference, trial or for hearing on the first contested motion, or no later than twenty-one days after service or receipt of a complaint, summons, order or other pleading indicating or specifying who the presiding judge to the action will be, whichever occurs first; and such motion must be filed before the commencement of a status conference, a pretrial conference, a contested proceedings or trial before the judge sought to be disqualified.

Whites' interpretation of this Rule is that Russell's attempt to disqualify this Court is untimely. On August 31, 2005, the Court served a written Order setting the hearing

date for the first contested motion to follow consolidation of the two cases. That was the continuance of Plaintiff's Motion for Partial Summary Judgment to September 13, 2005. Whites argue Russell had seven days from August 31, 2005 to then file his Motion for Disqualification, which he failed to do. It was not until September 16, 2005 that Russell filed his disqualification, and Whites argue this is untimely under the rule.

Additionally, Whites contend that Rule 40(d)(1)(B) specifically requires a motion for disqualification be filed before the commencement of a contested proceeding, and that in this case Russell's Motion for Disqualification came three days after the Motion for Partial Summary Judgment was argued.

## **II. ANALYSIS.**

Idaho Rule of Civil Procedure 40(d)(1)(A) states:

A motion for disqualification shall not be made under this rule to hinder, delay or obstruct the administration of justice.

Idaho Rule of Civil Procedure 40(d)(1)(B) states:

A motion for disqualification without cause must be filed no later than seven days after service of a written notice or order setting the action for status conference, pretrial conference, trial or for hearing on the first contested motion, or no later than twenty-one days after service or receipt of a complaint, summons, order or other pleading indicating or specifying who the presiding judge to the action will be, whichever occurs first; and such motion must be filed before the commencement of a status conference, a pretrial conference, a contested proceedings or trial before the judge sought to be disqualified.

Idaho Rule of Civil Procedure 40(d)(1)(E) states:

If at any time during the course of the proceedings, except under circumstances involving alternate judges as set forth below in subparagraph (G), a new judge is assigned to preside over the case, each party shall have the right to file one (1) motion for disqualification without cause as to the new judge, within the time limits set forth in paragraph (B) of this rule.

In this case, on August 31, 2005, the Court served a written Order setting the

hearing date of the first contested motion (the motion for Partial Summary Judgment) to follow consolidation of the two cases. Pursuant to Rule 40(d)(1)(B), Russell had seven days to then file his Motion for Disqualification. The motion for Disqualification was filed by Russell on September 16, 2005 and is therefore untimely under the rule. Even though under Rule 40(d)(1)(E) a party may file a motion for disqualification without cause as to the new judge, it must be within the time limits of subparagraph (B) and in this case, Mr. Russell did not meet those time requirements.

**III. ORDER.**

**IT IS HEREBY ORDERED** the Defendant's Motion for Disqualification pursuant to I.R.C.P. 40(d)(1)(E) is **DENIED**.

Entered this \_\_\_\_\_ day of October, 2005.

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

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of October, 2005, 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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\_\_\_\_\_  
Secretary