6-27-2014

Greenfield v. Wurmlinger Appellant's Brief Dckt. 41178

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CHRISTINA J. GREENFIELD, Plaintiff / Appellant, vs. ERIC J. WURMLINGER and ROSALYN D. WURMLINGER, husband and wife, Defendants / Respondents.	Supreme Court Docket No. 41178-2013 Kootenai County No. 2010-8209

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
FOR KOOTENAI COUNTY
JUDGE LANSING HAYNES PRESIDING

Christina J. Greenfield
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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case stems from Covenants, Conditions, and Restriction (*hereafter*: CC&R) violations, wherein the Respondents are; a.) operating a full time commercial business on their property in the Park Wood Place subdivision (*hereafter: PWP*), which is known as the River Cove Bed and Breakfast; b.) Respondents planted a row of arborvitae shrubs that form a hedge, which constitutes a 'fence' and is located on the property line separating the two parties'. The hedge continues to grow beyond the CC&R height restrictions, blocking Appellants protected view of the river and is a nuisance; c.) Respondents have breached a written contract with Appellant to maintain the arborvitae hedge at a height of six (6) feet; d.) Respondents have retaliated against Appellant by falsely accusing Appellant of multiple crimes (Appellant was arrested and charged with a felony), spitefully planting additional arborvitae shrubs and trees to block Appellants view of the river, and causing extreme emotional distress to Appellant.

B. COURSE OF PROCEEDINGS

On September 23, 2010, Appellant Christina J. Greenfield filed a civil action against the above-mentioned Respondents in Kootenai County District Court seeking injunctive relief and damages as listed;

1.) that the Court enter an Order declaring that the Respondents operation of the Bed and Breakfast in PWP is in violation of the CC&Rs;

2.) that the Court enter an Injunction prohibiting the Respondents from operating the Bed and Breakfast, or any similar business in the Park Wood Place subdivision;

3.) that the Court enter an Order Declaring that the arborvitae hedge as described herein constitutes a fence and the Respondents are to maintain the arborvitae hedge, which continues to violate the PWP CC&Rs height restrictions on fences;

4.) that the Court enter an Order declaring that the easement be cleared of all obstructions;

5.) that the Court award Appellant a judgment against the Respondents for Nuisance;

6.) that the Court enter an Order for Abatement requiring the Respondents to remove any and all shrubs and trees located at or near the parties common property line that were planted out of "spite", which block the Appellant's view of the river, obstruct the Appellant's free use of property, and interfere with the Appellant's comfortable enjoyment of life and property;

7.) that the Court enter an Injunction prohibiting the Respondents from planting any shrubs or other vegetation at or near the common boundary line between the parties' real property, which blocks the Appellant's long standing view of the Spokane River and obstructing the Appellant's free use of her property, and interferes with the Appellant's comfortable enjoyment of life and property;

8.) that the Court award the Appellant a judgment against the Respondents for Intentional Infliction of Emotional Distress;

9.) that the Court award the Appellant a judgment against the Respondents for Negligent Infliction of Emotional Distress;

10. that the Court award Appellant post-judgment interest on any judgment;

11. that the Court award Appellant her reasonable attorney fees;

12. that the Court award Appellant further relief as the Court deems to be just and equitable under the circumstances.

On May 24, 2012, Judge Lansing Haynes granted Appellant all motions on summary judgment, except for Intentional Infliction of Emotional Distress. After numerous delays by the Respondents, a five day Jury Trial began on November 26, 2012.

On December 10, 2012, Appellant filed a J.N.O.V. Motion to overturn the jury's verdict, as a matter of law under Federal Rule of Civil Procedure 50. The Court DENIED Appellant's J.N.O.V. on March 21, 2013. The district court DENIED Appellant's Motion to Reconsider on May 2, 2013. Appellant filed her timely Notice of Appeal on June 12, 2013. The Court issued a Final Amended Judgment on July 8, 2013. Appellant filed an Amended Notice of Appeal on July 24, 2013. Appellant now submits this brief in support of her appeal.

C. Statement of the Facts

1.) The Respondents are intentionally and / or recklessly unlawfully operating a full time, year round commercial business that is open to the public, upon their real property, which is named the "River Cove Bed and Breakfast." The business offers several overnight accommodations and a wedding facility via internet advertising, and other marketing sources. Said commercial business is "PROHIBITED" under the PWP CC&Rs.

2.) The Respondents have planted an arborvitae shrub hedge in a single row upon or near the property line between parties' real property, which constitutes a "FENCE." The arborvitae hedge continues to grow and violate the height restriction for fences as permitted by the PWP CC&Rs.

3.) Respondents have planted nine (9) additional arborvitae shrubs to existing hedge of twenty-four (24) arborvitae and several large growing trees upon their real property, after Appellant exercised her legal right to enforce the PWP CC&Rs. Said spite plantings

obstruct and infringe upon the Appellant's real property blocking her coveted view of the river, the free use of her property and the comfortable enjoyment of life and property.

4.) Respondents entered into an agreement with the Appellant to maintain the arborvitae hedge at the agreed upon height of six (6) feet in May 2006. Respondents breached said agreement by allowing the arborvitae fence to grow to a height in excess of six (6) feet.

5.) Respondents have engaged in a retaliatory course of conduct to harass the Appellant by planting spite shrubs and trees, installing surveillance cameras that face the Appellant's property, intentionally and recklessly making false allegations to local law enforcement about the Appellant, and manufacturing defamatory statements about the Appellant to news sources. One allegation resulted in the Appellant being arrested and charged with a Felony, which she was eventually acquitted of nineteen (19) months later.

6.) Due to the intentional and / or negligent actions of the Respondents as set forth above, the Appellant suffers from severe physical manifestations and emotional distress.

II. ISSUES

a) Did the District Court err in its finding that the Respondents' operation of their business, the River Cove Bed and Breakfast and wedding event facility did not violate the neighborhood CC&Rs?

b) Did the District Court err in its finding that the Respondents' operation of their business, the River Cove Bed and Breakfast and wedding event facility was "Not open to the public"?

c) Did the District Court err in its finding that the Respondents' operation of their business, the River Cove Bed and Breakfast and wedding event facility, qualifies as a "Home Occupation" and not a "Business" as so defined in the neighborhood CC&Rs?

d) Did the District Court err in its finding that the Respondents' lack of maintenance of the arborvitae hedge, which is located on or near the real property line that separates both properties, did not violate the neighborhood CC&Rs height restrictions and therefore refuse to enter an Injunction prohibiting the Respondents' from allowing the arborvitae shrubs to exceed the height restrictions as set forth in the neighborhood CC&Rs?

e) Did the District Court err in its finding that the arborvitae shrubs that form a hedge did not constitute a "Fence"?

f) Did the District Court err in its finding that the arborvitae shrubs that form a hedge, as mentioned above, are to be considered trees?

g) Did the District Court err in its finding that the arborvitae hedge is solely located on the Respondents' property when a mutual ownership was evident on both surveys?

h) Did the District Court err in its finding that Appellant should be accused and assessed damages for intentionally and willfully committed Timber Trespass to the property of Respondents wherein I.C. § 6-202 allowing for treble damages would have applied when a dual ownership of the arborvitae (shrub) hedge, which is located on or near the adjoining property line of both the Appellant and Respondents, is evident?

i) Did the District Court err in its finding that the Appellant should be assessed "Timber" damages for property (arborvitae hedge) that she equally owns, after the Appellant trimmed said arborvitae hedge to the agreed upon height, which was previously cut four years prior to the same height by the Respondent at which time it was neither damaged or destroyed?

j) Did the District Court err in its finding that the Appellant has intentionally, willfully or negligently damaged and / or destroyed the ten (10) arborvitae shrubs in question?

k) Did the District Court Honorable Judge Lansing Haynes err in his finding that the Respondents' asserted legal claims for "Negligent Infliction of Emotional Distress" during the trial were properly disclosed, when in fact, the District Court Honorable Judge Lansing Haynes had previously dismissed the Respondents' original claim of Negligent Infliction of Emotional Distress on March 22, 2011 with Prejudice?

l) Did the District Court err in its finding that the Respondents' violation of the neighborhood CC&Rs by operating a business, the River Cove Bed and Breakfast and wedding event facility, and the arrest of the Appellant after trimming said arborvitae hedge, along with constant harassment, including many false allegations of crimes reported by the Respondents, did not cause extreme negligent emotional distress on the Appellant?

m) Did the District Court err in its finding that the jury instructions and the special verdict form were properly amended and submitted within the time frame as specified under I.R.C.P. 51(a)(1)?

n) Did the District Court err in its finding that the Respondents' Survey was properly signed and introduced into evidence?

o) Did the District Court err in its finding that Respondents' did not purposely and or negligently plant large trees and or shrubs to intentionally block Appellant's view of the Spokane River, which infringes upon Appellant's real property, obstructs her free use of property and interferes with her comfortable enjoyment of life and property?

p) Did the District Court err in its finding that the large trees and or shrubs that were planted intentionally to block Appellant's granted view of the Spokane River, which infringes upon Appellant's real property, obstructs her free use of property, and interferes with her

comfortable enjoyment of life and property, should be abated by the Respondents' and ordered an injunction prohibiting future obstructions of Appellant's view of the Spokane River, and not interfere with her comfortable enjoyment of life and property?

q) Did the District Court err in denying Appellant's invocation of the Fourteenth Amendment right to Due Process, which prohibits state and local governments from depriving persons of life, liberty, or property without certain steps being taken to ensure fairness and to recognize her substantive and procedural rights?

r) Did the District Court err in allowing excessive awards of damages and attorney fees to the Respondents'?

s) Did the District Court err in determining whether damages were correctly assessed in accordance with the finding for and the allowable amount of awards of damages and attorney fees to the Respondents?

t) Did the District Court err by depriving Appellant her rights by violating 42 USC § 1983 - Civil action for deprivation of rights and due process?

u) Did the District Court Judge Lansing Haynes express an "appearance of partiality" against Greenfield during the proceedings?

v) Did the District Court Honorable Judge Lansing Haynes err by not disqualifying himself, as well as his law clerk, Schuyler A. Pennington, from the court proceedings do to their affiliation with the Knights Of Columbus, an inclusive Catholic organization of men, wherein Eric Wurmlinger is also affiliated with such organization, therefore causing prejudicial bias within the judicial outcome of the case?

w) Did the District Court Honorable Judge Lansing Haynes err by allowing the Defendants 'Unclean hands' to mislead the trial court into believing that certain Trial Exhibits were

factual, wherein said exhibits were submitted "Incomplete" or contained "Unacceptable" information?

x) Did the District Court base its findings upon unsubstantiated and incompetent evidence from the Respondents', and did that evidence support the district courts conclusions of law wherein the Appellant was prejudiced by said evidence?

y) Did the District Court Honorable Judge Lansing Haynes err by giving the jury improper instructions?

z) Did the District Court Honorable Judge Lansing Haynes err by failure to Order an Abatement requiring the Respondents' to remove any and all shrubs and trees located at or near the parties common property line which obstruct the Appellant's free use of property, and interferes with the Appellant's comfortable enjoyment of life and property?

aa) Did the District Court Honorable Judge Lansing Haynes err by failure to Enter an Injunction prohibiting the Respondents' from planting any trees, shrubs, or other vegetation which blocks the Appellant's view of the Spokane River or otherwise obstructs the Appellant's free use of property, and interferes with the Appellant's comfortable enjoyment of life and property?

bb) Did the District Court Honorable Judge Lansing Haynes commit Fraud Upon the Court as witnessed and verified by the Appellant on December 30, 2013, after Appellant viewed her case file, wherein the Honorable Judge Lansing Haynes commented in his case file notes "The only issue that concerns me is the N.I.E.D. (Negligent Infliction of Emotional Distress) claim being dismissed...We can play up the former counsel's decision and the no objection to putting it to the jury later on" wherein Judge Haynes openly admits by

acknowledging concerns and states "We can Play up..." the N.I.E.D. claim that Judge Haynes had dismissed with prejudice a year and a half prior to trial?

III. ARGUMENT

DUE TO RELATIVELY LENGTHY AMOUNT OF ISSUES IN THIS CASE, APPELLANT IS CONSOLIDATING ISSUES BY SUBJECT MATTER

A. Consolidating Issues (a)(b)(c) CC&R Violations for Respondents Business

Respondents, Eric and Rosalyn Wurmlinger entered into a contractual agreement in 1994, when they purchased their property in a Post Falls subdivision known as Park Wood Place (PWP), which is zoned as single family residential.

The PWP lots are governed by covenants, conditions and restrictions (CC&Rs) (*See Appellant's Trial Exhibit #1, CC&Rs, Pg. 1, ARTICLE I "Land Use" #1 Residential Purposes, Pg. 2, ARTICLE II "Building Restrictions" #1 Architectural Control Committee, Pg. 3, Paragraph 2*), which limits the use of said lots for residential purposes. The PWP CCRs contain a broader prohibition that prevents the owners from operating a business on their property; Paragraph #1 states "*No lot shall be used except for residential purposes*." Respondent Eric Wurmlinger testified to his knowledge of the PWP CC&R business prohibition, yet Respondents constructed their home to accommodate the bed and breakfast commercial venture (*See Trial Testimony Eric Wurmlinger, Pg. 216, Lines 18-25, Pg. 217, Lines 1-5, Pg. 219, Lines 3-8, Lines 11-25, Pg. 220, Lines 1-4, Pg. 221, Lines 11-13, Pg. 223, Lines 5-25, Pg. 224, lines 1-2, Pg. 225, Lines 6-13, Pg. 226, 9-14, Pg. 232, Lines 17-19, Pg. 236, Lines 20-25, Pg. 243, Lines 5-6, Lines 12-25, Pg. 249, Lines 4-8, Pg. 252, Lines 8-11, Pg. 253, Lines 5-6, Lines 21-25, Pg. 254, Lines 14-15, Line 23, Pg. 255, Line 3, Pg. 261, Lines 7-18, Pg. 262, Lines 7-10, Pg. 280, Lines 18-25, Pg. 281, Lines 8-18, Pg. 282, Lines 1-12, Pg. 283, Lines 7-18, Line 21-22, Pg. 349, Lines*

9-11, Lines 18-23). *See* Atwood; "The CC&Rs specifically prohibit the use of such lots for any businesses."

The PWP CC&Rs may be amended by a 75% or more vote from the PWP property owners (*See Appellant's Trial Exhibit #1, CC&Rs, Pg. 6, ARTICLE III "General Provisions" #4 Amendments*). To date, no amendment has successfully been adopted to allow any businesses to operate in the PWP subdivision.

The Respondents promote their commercial business by advertising on their website and with on-line booking agencies, wherein the public can view and purchase overnight accommodations and wedding packages (*See Appellant's Trial Exhibit #2, Coeur d'Alene Bed & Breakfast Association Internet Advertisements for the River Cove B & B Accommodations and a Wedding Venue for up to 25 people and Trial Exhibit #26, The River Cove B & B Internet Advertisement for a Wedding Venue for up to 40 people).* The Respondents have advertised in highly visible newspapers of their "open to the public events" as well as local tourist venues (*See Appellant's Trial Exhibit #54, The Spokesman Review Newspaper Article Advertising "Open-House" event "open to the public"*). The River Cove Bed and Breakfast operates seven days a week, twelve months a year, patrons are allowed to park on the street, book and attend wedding events, come and go at all hours of the night and day, and utilize the outdoor hot tub facility, as well as other amenities (paddle boat and yacht) that are advertised on Respondents commercial business website (*See Clerks Record: Pg. 509, List of "Booking Sites" for River Cove Bed and Breakfast and Trial testimony of Eric Wurmlinger, Pg. 235, Lines 4-16*).

This Court has repeatedly found restrictive covenants valid and enforceable, which clearly restrict the use a party may put on his or her property. *See* Atwood v.

Smith, 143 Idaho 110, 138 P. 3d 310 (2006); Pinehaven, 138 Idaho at 829, 70 P. 3d at 667; Sun Valley Ctr. For the Arts & Humanities, Inc. v. Sun Valley Co., 107 Idaho 411, 413, 690 P. 2d 346, 348 (1984); Brown, 129 Idaho at 192, 923 P. 2d at 437. "As a derogation of the common law right to use land for lawful purposes, restrictive covenants will not be extended by implication." Id. At 192, 923 P. 2d at 437; Birdwood, 145 Idaho at 20, 175 P. 3d at 182. "When restrictive covenants clearly express (as the Park Wood Place CC&Rs do), then the restrictions on the use of land shall be enforced." Brown 129 Idaho at 192, 923 P. 2d at 437; Becker v. Arnfeld, 466 P.2d 479 (Colo. 1970).

""Where the language of the CC&Rs is clear and unambiguous, statutory construction is unnecessary, and this Court need only determine the application of the words to the facts of the case at hand. *See* Hamilton v. Reeder Flying Serv., 135 Idaho 568, 571, 21 P.3d 890, 893 (2001). "A statute (CC&Rs) is ambiguous where the language is capable of more than one construction." Struhs v. Protection Techs. Inc., 133 Idaho 715, 718, 992 P.2d 164, 167 (1999). "Ambiguity is not established merely because differing interpretations are presented to a court; otherwise, all statutes (CC&Rs) subject to litigation would be considered ambiguous. Hamilton, 135 Idaho at 571, 21 P. 3d at 893. "The interpretation should begin with an examination of the literal words of the statute (CC&R), and this language should be given its plain, obvious, and rational meaning." Williamson v. City of McCall (In re Williamson), 135 Idaho 452, 455, 19 P. 3d 766, 769 (2001). 'Farm Bureau Mut Auto. Ins. Co. v. Violano, 123 F.2d 692 (2d Cir. 1941), "342 P.2d at 933. "Words should be taken in that sense to which the apparent object and intention of the parties limit them, and the courts will always look behind the terminology to ascertain what the parties intended in making the

contract." The determination of whether a document is ambiguous is a question of law, over which we exercise free review. *See* Smith; Maroun v. Wyreless Sys., Inc., 141 Idaho 604, 614, 114 P.3d 974, 984 (2005) (citations omitted). In evaluating for ambiguity, this Court will examine the relevant portions of the document "to determine whether [it] is reasonably subject to conflicting interpretations." Id. (citations omitted).""

It is undisputed that the CC&Rs by impressing upon all lots in PWP subdivision develop a uniform set of restrictive covenants, intended to establish a scheme or plan to insure the development is a "residential area of high standards." Said PWP lots are taxed at a premium rate due to their location in relationship to the river, which has resulted in a residential area of high standards. A commercial business detracts from said "High Standards" and decreases property values.

The Respondents business attracts a large number of the public on a daily basis, through multiple internet advertising sites (*See Appellant's Trial Exhibit #26 A & B, Respondents Website Advertisements*), which creates excessive traffic, constant noise, and intrusions from unwelcome patrons who stray onto adjacent properties, block driveways, mail boxes, and causes street congestion (PWP is situated in a cul-de-sac with one entrance). Said commercial business qualifies as a "Nuisance" (*See Idaho Code §52-101 and Idaho Code §52-111*) to neighboring property owners who must endure the numerous commotions and annoyances year round.

It is further noted that Respondent Eric Wurmlinger, during testimony, uses the word "Business" multiple times in referring to the River Cove Bed & Breakfast. The Respondents submitted a claim for 'Tortious Interference with Prospective Economic Advantage' referring to their commercial business, then later dismissed said claim (*See*

Clerks Record Pg. 48 and Pg. 56). Mr. Wurmlinger states "*it started as a hobby then grew into a full-time job.*" Respondents' commercial business produces a substantial income compared to that of a "Hobby." (*See Appellant's Trial Exhibit #55, Revenue Reports for Respondents Business and Appellant's Trial Exhibit #109 and Appellants Attached Exhibit #1, Respondents Tax Records "Detail Report" for 2010*). Appellant believes that the trial judge did not properly construe the meaning of the restrictive covenants under "Home Occupation". A "Home Occupation" is considered a non-intrusive occupation that is unseen and mostly kept hidden from view from adjacent homeowners that does not change the appearance of the neighborhood and does not becomes a nuisance.

It is obvious that the Respondents business is a highly successful commercial business. *See* Metzner v. Wojdyla, 125 Wn.2d 445 (WA 1994) 886 P. 2d 154. ""Holding that the Wojdylas operation of a licensed day care constituted a commercial enterprise and is in violation of the restrictive covenants of the neighborhood. The phrase "residential purposes" was interpreted by the Washington Court of Appeals in Hagemann v. Worth, 56 Wn. App. 85 (1989) 782 P. 2d 1 072. In holding a group home violated the restrictive covenant, the court noted that the term "residential" was the antonym of "business" and that accepting paying customers was not synonymous with a residential purpose. This interpretation of "residential" was confirmed in Mains Farm Homeowners Association v. Worthington, 64 Wash. App. 171, 824 P.2d 495 (1992). There the covenant limited use to "single family residential purposes only." As in the Hagemann case, operation of an adult group home was at issue."" The court focused on the business nature of the enterprise and held it violated the restrictive covenant. ""Respondent's use

includes a commercial element because she receives payment for the care that she gives unrelated adults in her home. The single-family residential nature of respondent's use of her home is destroyed by the elements of commercialism..." It is beyond question that the Wojdylas are indeed operating a business. Like the state-licensed adult facilities in Hagemann and Mains Farm, the child day care center operated by the Wojdylas accepts money in exchange for the care of persons (in this instance, children) not related to them. It is also licensed by the State and considered an "agency" under state law."" (*See Appellant's Trial Exhibit #88, Idaho Business License for Respondents Business*).

Appellant further argues that the Respondents are aware that the City of Post Falls Zoning Ordinance requires that a bed & breakfast business owner must obtain a "Special Use" Permit to operate a commercial venture in a residential zoned neighborhood. The Respondents DO NOT have a "Special Use" permit; they operate under a "Home Occupation" permit. Not only are the Respondents violating the PWP CC&Rs (*See Appellant's Trial Exhibit #1, PWP CC&Rs, ARTICLE I "Land Use", #1 Residential Purposes Pg. 2),* they are also in violation of City of Post Falls "Home Occupation" Permit (*See Appellant's Trial Exhibit #4, Business License Application and Home Occupation Requirements, Pg. 3, (A) (1) (2) (3) (5) (8) (10)*). Also; (*See Trial Testimony Christina Greenfield, Pg. 515, Lines 12-15 and Appellants Trial Exhibit #102, Photos of Respondents "Home Occupation" Violations*).

The Respondents attempted to modify a portion of the PWP CC&Rs (*July 2011, after Appellant filed her Claim against the Respondents; See Appellant's Trial Exhibit #104*) by obtaining PWP homeowner signatures that were illegally notarized by Respondent Rosalyn Wurmlinger, who is a Registered Notary for the State of Idaho,

which violates Idaho State laws for Notaries (*See Idaho Code §51-108, Idaho Code §51-112, Idaho Code §51-117, Idaho Code §51-119*).

Respondent Rosalyn Wurmlinger is sworn under oath to uphold the provisions of Idaho State Code as a Notary for the State of Idaho. The signatures that Ms. Wurmlinger notarized are not legally binding under the "disqualifying interest" rules, therefore invalidating the Instrument (*See Trial Testimony of Eric Wurmlinger Pg. 374, Line 25, Pg. 375, Lines 1-3, Lines 6-8, Pg. 380, Lines 11-15, Lines 18-25, Pg. 381, Lines 1-7, Line 11-15, Pg. 417, Lines 2-15*).

The Respondents then attempted to utilize this nullified document as trial evidence (*See Respondents Trial Exhibit #T*) during court proceedings , which violates Idaho Code (*See Idaho Code §18-2601 and Idaho Code §18-2602*).

B. Consolidating Issues (d)(e)(f)(aa) CC&R Fence Restrictions, 'Spite' Plantings, and Injunctive Relief

Appellant purchased her property primarily for the coveted view of the river, which Appellant paid a premium price for said view (*See Trial Testimony of Kootenai County Tax Assessor John Wilhelm Pg. 422, Line 18-19, Pg. 424, Lines 15-23, Pg. 425, Lines 2-12*). The Appellants view of the river had been established in 1993 upon completion of the Appellant's home (*one year prior to the Respondents purchase of their property*), which Appellant purchased from the original homeowner in May 2005.

To ensure that the property owners who bought the higher priced premium properties kept their views of the river, and other residential protections, an Architectural Control Committee was established to protect their interests by drafting and enforcing a Declaration of Protective Covenants, Conditions, and Restrictions.

It is mandated that all property owners within the PWP subdivision are to follow the CC&Rs that run with the land perpetually binding all persons who hold any right, title, or interest in said properties. The height restriction for PWP fences, and other like structures, is set at a maximum height of five (5) feet and the approval of the Architectural Control Committee was required before any property owner could erect any fence or like structure (*See Appellant's Trial Exhibit #1, Park Wood Place Protective CC&Rs, Pg. 4, ARTICLE II "Building Restrictions", #2 Building Conditions*).

When Appellant purchased her property, she was aware that the PWP CC&Rs protected the coveted view of the river by certifying that adjacent property owners were to adhere to the five (5) foot height restrictions for fences and like structures (including hedges). Several of the homes that are located adjacent to the Greenfield property have exceptional views of the Spokane River as well, and are taxed at a higher premium. These homes were designed and approved by the Architectural Control Committee to avoid interference with the protected views of the neighboring homes.

The Respondents were aware of the height restriction for fences (*See Trial Testimony of Eric Wurmlinger, Pg. 296, Lines 4-6, Lines 13- 25, Pg. 297, Lines 1-4, Pg. 299, Lines 3-11*), yet Respondents willfully and intentionally allowed the 'Emerald Green' arborvitae hedge they planted in 1994 -1995, on the adjoining property line, to grow and exceed the five (5) foot PWP CC&R height requirement. In May 2006, Appellant hired attorney, Kacey Wall, to address the arborvitae height issue, wherein both parties then agreed that Respondent, Eric Wurmlinger, would maintain the arborvitae hedge at a six (6) foot height (*See Trial Testimony of Eric Wurmlinger, Pg. 326, Lines 6-8, Lines 16-17, Pg. 327, Lines 12-21 and Appellants Trial Exhibit #16 Pg. 2, #4*).

One month after said agreement, Respondent, Eric Wurmlinger, began retaliatory attacks against the Appellant by planting spite shrubs and trees, which included; two (2) large pine trees and two (2) large deciduous trees (planted June 2006), an additional nine (9) arborvitae shrubs to the existing twenty-four (24) arborvitae shrubs (planted May 2008), two (2) large Maple trees (planted September 2012), next to the parties' property line to completely block Appellants view of the river ((*See Appellants Trial Exhibit #25 and #102(E) (before plantings) and Exhibit #13 from Clerks Record Pg. 561 of 717 also Appellants Attached Exhibit #2 (after plantings)*)).

It is further noted that the Respondent, Eric Wurmlinger, planted the above-mentioned spite trees and shrubs from a period of approximately fourteen (14) to eighteen (18) years after the Respondents landscaping had been initially approved by the Architectural Control Committee.

The Respondents "spite" plantings, along with the arborvitae hedge height issue, has caused Appellant to suffer extreme property devaluation and diminution at the loss of her highly valued view of the River, a primary reason Greenfield purchased her property.

In Sundowner, Inc. v. King, 509 P.2d 785 (Idaho 1973) "Under the modern American rule, however, one may not erect a structure for the sole purpose of annoying his neighbor. Many courts hold that a spite fence which serves no useful purpose may give rise to an action for both injunctive relief and damages." *See* 5 Powell, supra, ¶ 696, p. 277; IA Thompson on Real Property, § 239 (1964 ed.). "Many courts following the above rule further characterize a spite fence as a nuisance." *See* Hornsby v. Smith, 191 Ga. 491, 13 S.E.2d 20 (1941); Barger v. Barringer, 151 N.C. 433, 66 S.E. 439 (1909); Annotation 133 A.L.R. 691; Burke v. Smith, 69 Mich. 380, 37 N.W. 838 (1888).

"Subsequently, many American jurisdictions have adopted and followed Burke so that it is clearly the prevailing modern view." *See* Powell, supra, ¶ 696 at p. 279; Flaherty v. Moran, 81 Mich. 52, 45 N.W. 381 (1890); Barger v. Barringer, supra; Norton v. Randolph, 176 Ala. 381, 58 So. 283 (1912); Bush v. Mockett, 95 Neb. 552, 145 N.W. 1001 (1914); Hibbard v. Halliday, 58 Okla. 244, 158 P. 1158 (1916); Parker v. Harvey, 164 So. 507 (La. App. 1935); Hornsby v. Smith, supra; Brittingham v. Robertson, 280 A.2d 741 (Del. Ch. 1971). *See* the opinion of Mr. Justice Holmes in Rideout v. Knox, 148 Mass. 368, 19 N.E. 390 (1889). "In Burke a property owner built two 11 ft. fences blocking the light and air to his neighbors' windows. The fences served no useful purpose to their owner and were erected solely because of his malice toward his neighbor."

See Austin v. BALD II, LLC, 658 S.E.2d 1 (N.C. Ct. App. 2008); "A spite fence is one which is of no beneficial use to the owner and which is erected and maintained solely for the purpose of annoying a neighbor." Welsh v. Todd, 260 N.C. 527, 528, 133 S.E.2d 171, 173 (1963). "[A] fence erected maliciously and with no other purpose than to shut out the light and air from a neighbor's window is a nuisance." Barger v. Barringer, 151 N.C. 433, 434, 66 S.E. 439, 439 (1909) (citing 12 Am. & Eng. Enc., 1058, and cases cited in note; 1 Cyc., 789). "It may be abated, subject to the same equitable principles which govern injunctive relief generally, and damages recovered if any have been sustained." Welsh, 260 N.C. at 528, 133 S.E.2d at 173 (citing Burris v. Creech, 220 N.C. 302, 17 S.E.2d 123 (1941)).

The record demonstrates that Respondents were on constructive notice to keep the arborvitae hedge 'fence' (*See Idaho Code §35-102 (5) LAWFUL FENCES DESCRIBED*)

trimmed to a maximum height of six (6) feet per the May 2006 written agreement between both parties'.

Idaho State Code, City Ordinances, and CC&Rs mandate height restrictions on fences, which include hedges, due to the fact that the natural fences will continue to grow violating said codes, ordinances, and covenants if left unattended. Hedges have been considered natural fences for decades, wherein State Code and City Ordinances incorporate the word "Hedge" into the fence codes and / or ordinances to protect property owners from neighboring property owners who may be attempting to circumvent the law for their own self-interests.

According to Appellants arborist Joe Zubaly, the "*Emerald Green arborvitae shrub, a multi-stemmed plant, is a natural fence and this variety is used for privacy fences all the time*" (*See Testimony of Arborists Zubaly Pg. 431, Lines 16-25, Pg. 437,* Lines 8-9, *Pg. 451, Lines 20-25, Pg. 455, Lines 23-25, Pg. 456, Lines 5-8 and Appellants Attached Exhibit #8*).

Respondents deceitfully convinced the trial court that because the arborvitae shrubs may grow to a height exceeding fifteen (15) feet, they should be classified as trees. Yet by testimony, affidavits, and case documents, the Respondents and their expert witnesses referred to the arborvitae as shrubs, plants, and / or bushes, NOT trees, in multiple statements (*See Pg. 457, Line 20-21, Pg. 458, Line 25, Pg. 459, Line 1, Lines 23-25, Pg. 460, Lines 21-22*). The Respondents Master Arborist, Tim Kastning, referred to the arborvitae as plants that are "generally referred to as shrubs" (*See Pg. 44 line 7*). On April 25, 2012, Tim Kastning refers to the arborvitae as shrubs ten (10) times in his written proposal (*See Respondents Trial Exhibit #3*). During his deposition, Mr. Kastning

referred to the arborvitae as "shrubs" approximately thirty (30) times (*See Kastning Deposition pg. 25, lines 7, 12, pg. 28, lines 19, 24, 25, pg. 29, line 11, pg. 30, lines 10, 11, pg. 31, lines 3, 8, 13, pg. 32, line 25, pg. 33, lines 7, 9, 11, pg. 37, lines 10, 15, 25, pg. 38, lines 2, 14, 17, pg. 39, line 6, pg. 42, line 17, pg. 43, lines 4, 5, pg.44, line 7, pg. 46, line 11, pg. 50, lines 6, 11, pg. 52, line 1) (See also Clerks Record Pg. 531-532).*

It is the belief of the Appellant that the only rational contemptible evaluation in deducing why the Respondents would insist that the arborvitae shrubs should be labeled as "trees", is to validate their derisive claim for "Timber Trespass." Even if this Court were to decide that the arborvitae are "trees", the argument is moot, as it would not deter from the fact that a line of shrubs, bushes, plants, and / or trees that form a "hedge" is considered to be a "fence", and may be abated as a nuisance (*See Clerks Record Pgs. 533-535 Definitions Fences / Hedges*).

Both Arborists testified that the ten (10) arborvitae shrubs were neither damaged nor destroyed, but are healthy and thriving, mostly due to pruning. The fact that the Respondent, Eric Wurmlinger cut the arborvitae hedge in 2006 claiming "*...they were 7 to 12 feet high before I pruned them...*" (*See Trial Testimony of Eric Wurmlinger Pg. 302, Lines 10-20, Pg. 304, Lines 9-17*) without damaging or destroying said hedge is evident by the numerous photos that were submitted during trial proceedings ((*See Appellants Trial Exhibit #102 (A), Photo dated 2005 of hedge prior to Eric Wurmlinger cutting in 2006 and Appellants Trial Exhibit #25 showing partial arborvitae hedge two (2) years after the 2006 cutting and Clerks Record Pg. 542*). So is it logical to deduce that the identical ten (10) arborvitae shrubs, previously cut by the Respondent, would be neither damaged nor destroyed after the Appellants trimming, which was comparable in nature.

In the Alberino v. Balch, 969 A.2d 61, 65 (Vt. 2008) case, the fence was more visible from Balch's house than from Alberino who had erected the eight (8) foot tall "Spite" fence to obstruct Balch's view of the river. "There are, however, also cases holding that a fence with a primary purpose to annoy is also subject to abatement. The cases are uniform in their approval of reliance on the history of relations between neighbors as evidence of intent to annoy. *See*, e.g., Gertz v. Estes, 879 N.E.2d 617, 621 (Ind. Ct. App. 2008) ("The parties' conduct and the extraordinary nature of the fence were adequate to overcome [the] assertion that the eight-foot fence was intended to protect eighteen-inch tree seedlings."). We need not decide which standard is required generally; the factual backdrop here the photographs of the fence, the site visit, the contempt order concerning the other fence in virtually the same location, and over fifteen years of increasingly acrid disputes about dogs, brush piles, trespass, plowing, and noise—supports a finding that the fence was intended solely to annoy Balch by obstructing his view and shading his property." "A Connecticut case cited by the trial court, DeCecco v. Beach, 381 A.2d 543 (Conn. 1977), is also instructive. In that case, the appellant-landowner sought an injunction mandating that his neighbor remove four sections of a ten-foot-high wooden fence that blocked the appellant's view of a river. After concluding that there was support in the record for the trial court's conclusion that "malice was the primary motive in [the fence's] erection," the court noted that "the fact that it also served to protect the respondent's premises from observation must be regarded as only incidental, since to hold otherwise would be to nullify the [spite-fence] statutes."

This is also true in this case where the arborvitae fence is more visible and invasive to the Appellant and has no useful purpose to the Respondents. Respondents

have minimal visibility on the Northwest side of their home facing Appellants property except for two small windows, one on the second story, which is located approximately twenty-five (25) feet from the ground, and the second smaller window located on the first floor, both of which look directly northwest to the city park and rear of Appellant's lot ((*See Appellants Trial Exhibit #102 (A) Window location*). Evidence of this can be found in Respondent, Eric Wurmlingers, trial testimony about the location of his surveillance camera where he stated "*That's a game camera and it's located on the west side of our home looking at the -- our side yard toward Black Bay Park and back toward Black Bay Park*" (*Trial Transcript Pg. 709, Lines 16-19*).

Further, Balch testified that "the fence has curled so much that it encroaches on his land, that it casts a shadow "halfway across [his] land," and that it "does not inhibit sound at all." Just as in this case the arborvitae fence encroaches onto Appellants property up to approximately three or more feet, the uncontrolled height blocks the coveted view of the river, and prevents sunlight onto Appellant's property.

The Court issued findings of fact and conclusions of law in Alberino v. Balch finding that the fence served "no objective purpose." *See* 24 V.S.A. § 3817 ("*A person shall not erect or maintain an unnecessary fence or other structure for the purpose of annoying the owners of adjoining property by obstructing their view or depriving them of light or air.*").

In this case the Respondents have testified that they want privacy for their "Guests" (not family members) who purchase overnight accommodations. The arborvitae hedge fence has no useful purpose in providing "privacy" for the "guest" accommodations as said "guest" rooms are located on the bottom level of Respondents

home, on the opposite side (south) of the property. The main floor "guest" accommodation faces the front yard of the Respondents property. The hot tub, which is located on the Respondents rear property line next to the park and is used by "guests", is enclosed in a darkened gazebo, surrounded by foliage, wherein the arborvitae hedge does not contribute any privacy for said hot tub. As for the "family" bedrooms, they too are located on the opposite side (south) of the Respondents home with one exception, the Respondents daughter currently utilizes the second floor bedroom that has a small window that peers out onto the northwest side of the property overlooking the park and rear boundary line of the Appellants property ((*See Appellants Trial Exhibit #102 (A)*).

Generally, a movant qualifies for injunctive relief by showing: (1) a probable right of recovery; (2) imminent, irreparable harm will occur in the interim if the request is denied.; and (3) no adequate remedy at law exists. Despite this general rule, however, a movant seeking an injunction to enforce a restrictive covenant is not required to show proof of irreparable injury. *See* Guajardo v. Neece, 758 S.W.2d 696, 698 (Tex. App. Fort Worth 1988, no writ). "Instead, the movant is only required to prove that the respondent intends to do an act that would breach the covenant. As previously noted, appellees were not required to show proof of irreparable injury because they were seeking an injunction to enforce a restrictive covenant. *See* Guajardo v. Neece, 758 S.W.2d at 698."

C. Consolidating Issues (g)(h)(i)(n)(o)(p)(z) Survey, Nuisance, Abatement, Timber Trespass, Trespass

When Appellant purchased her property in May 2005, Appellant hired Meckel Engineering to conduct a survey on her property *(See Trial Testimony Christina*

Greenfield, Pg. 538, Lines 17-19 and Clerks Record Pg. 516-524 of 717) to locate all of her property lines and corners.

Respondent, Eric Wurmlinger, also hired Inland Northwest Consultants to conduct a survey on his property in May 2005, as Respondents were planning on building a large addition to their home next to Appellant's property (*See Appellants Trial Exhibit #109, 2010 Tax "Detail Report" for 2005 survey costs of $5055 and Appellant's Attached Exhibit #1*). The Respondents surveyor located the northwest property corner and placed two wooden survey hubs in the center of the parties' property line at the base of two arborvitae shrubs, which were incorporated within the hedge row of ten (10) arborvitae shrubs that were trimmed by both parties' (*See Trial Testimony Christina Greenfield, Pg. 539, Lines 13-19*).

By April 2006, Appellant had attempted to notify the Respondents that the top of the arborvitae hedge needed to be trimmed to the five (5) foot height to adhere to the PWP CC&Rs height restrictions for "Fences." The Respondents had not responded to Greenfield's request, so Appellant contacted the City of Post Falls Zoning Department seeking resolution. After contacting the Post Falls Code Enforcement Officer, Collin Coles; it was decided that the city would send a letter to the Respondents regarding the height restrictions in the city "fence" ordinance requiring that the arborvitae hedge must be maintained at the six (6) foot height (*See Appellant Trial Exhibit #12*).

The Respondent, Eric Wurmlinger, eventually trimmed all of the existing twenty four (24) arborvitae shrubs; the ten (10) west of the center Pine tree were trimmed to a height of approximately six (6) feet and the remaining fourteen (14) arborvitae shrubs east of the center pine tree were trimmed to a height of approximately nine (9) feet.

Appellant informed the Post Falls Code Enforcement Officer that the Respondents were not in full compliance. A second compliance letter was sent to the Respondents (*See Appellant Trial Exhibit #14*). Respondents ignored the letter, so Appellant hired attorney Kacey Wall in May 2006, to draft a friendly "Cautionary" letter to the Respondents identifying PWP CC&R violations, including the arborvitae hedge height restriction.

Respondent Eric Wurmlinger agreed that he would comply with the PWP CC&Rs and he would maintain the arborvitae hedge at its current height, which Greenfield agreed to, and no further action was taken (*See Appellant Trial Exhibit #16, Pg. 2, Point #4*).

In June 2006, following the above-mentioned agreement, Respondent Eric Wurmlinger planted two (2) large pine trees right next to the adjoining parties' property line near the Appellants northwest corner that partially blocked her view of the river (*See Appellants Trial Exhibit #102 (E) Photo of Pine Tree Next to Appellants Block Wall*).

The arborvitae hedge continued to grow and began to block Appellant's view of the river. It became apparent in Spring 2008 that the Respondents were disregarding their agreement with Appellant to maintain the arborvitae hedge at the agreed upon height of six (6) feet. The Respondent, Eric Wurmlinger planted an additional nine (9) arborvitae to existing arborvitae hedge on May 6, 2008, to further block Appellants view of the river (*See Appellants Trial Exhibit #25*). Appellant sent a note to the Respondent, Eric Wurmlinger, on May 26, 2008, (*See Appellant Trial Exhibit #29*) reminding him of their agreement or Appellant would "*...hire someone to trim them*" (arborvitae) (*See Idaho Code §35-111*). Respondents ignored the Appellant's letter, so Appellant justly employed her brother-in-law on April 1, 2010, (23 months later) to trim the ten (10) arborvitae shrubs, previously cut by Respondent, Eric Wurmlinger, in April 2006 (*See Trial*

Testimony of Monroe Greenfield, Pg. 483, Lines 11-15, Lines 20-25, Pg. 484, Lines 1-21, Line 25, Pg. 485, Lines 1-4, Lines 8-25, Pg. 486, Lines 1-16, Lines 18-25, Pg. 478, Lines 2-17).

Greenfield had developed major health problems and was scheduled for major surgery on April 29, 2010, wherein she would be recuperating for up to ten (10) weeks. Greenfield specifically asked her brother-in-law, an experienced hedge trimmer, to trim the arborvitae hedge, simply so she could enjoy her coveted view of the river while recuperating from surgery.

Because the arborvitae had also become an overgrown Nuisance (*See Idaho Code §52-301*) and was affecting Appellant in a damaging manner, Appellant is allowed by Idaho Law to abate the nuisance without harming the arborvitae. (*See Idaho Codes §35-105, §55-312, §52-302, §52-303*). Both expert witnesses testified that the arborvitae shrubs were neither damaged nor destroyed by the Appellant's trimming. *See* Larsen v. Village of Lava Hot Springs, 88 Idaho 64, 396 P 2d. 471 (1964); Vanderpol v. Starr, 194 Cal. App. 4th 385 (2011).

Respondent, Eric Wurmlinger, upon viewing the trimmed arborvitae notified the Post Falls Police Department and alleged that Appellant, Greenfield had "Destroyed their arborvitae..." (*See Idaho Code §18-2601*). This falsehood caused Greenfield to undergo weeks of interrogation from the Post Falls Police department, which led to a felony charge, causing Greenfield severe emotional stress at work and home while recuperating from surgery.

The Respondent, Eric Wurmlinger, had testified that the arborvitae shrubs he "*planted approximately ten years earlier as a border planting between our properties*"

(*See Trial Testimony of Eric Wurmlinger, Pg. 294, Lines 16-20, Pg. 305, Lines 5-25, Pg. 306, Lines 1-2*). In Respondents Trial Brief (dated May 11, 2012, Pg.5, Paragraph 2(b), under ARGUMENT), it states: "*the arborvitae hedge had been present on the parties' boundary line since 1995 and were between ten (10) and twelve (12) feet tall.*" The Respondents Statement of Remaining Issues (dated November 8, 2012, Pg. 1, Paragraph 2) states: "*Do the arborvitae growing along the parties' property line constitute a nuisance?*" (Pg. 2, Paragraph 4) states: "*Do the arborvitae planted on or near the property line between the appellant's and respondents' real property violate the Park Wood Place CC&Rs?*" It appears by statements and / or testimony that the Respondents believed that a mutual ownership of the arborvitae hedge also existed. *See* Holmberg v. Bergin 172 N.W.2d 739 (1969); Herrmann v. Larson, 214 Minn. 46, 7 N.W.2d 330; Joyce v. Village of Janesville, 132 Minn. 121, 155 N.W. 1067, L.R.A. 1916D, 426; Mead v. Vincent, 199 Okl. 508, 187 P.2d 994; Lemon v. Curington, 78 Idaho 522, 306 P.2d 1091, 64 A.L.R.2d 665; Shevlin v. Johnston, 56 Cal.App. 563, 205 P. 1087; Stevens v. Moon, 54 Cal.App. 737, 202 P. 961; Gostina v. Ryland, 116 Wash. 228, 199 P. 298, 18 A.L.R. 650; Buckingham v. Elliott, 62 Miss. 296, 52 Am.Rep. 188.

Appellant may bring suit to abate the nuisance and to recover for damages done to her property. *See* Mead v. Vincent, supra; Shevlin v. Johnston, supra; Stevens v. Moon, supra; Gostina v. Ryland, supra.

"In Nuisance cases (Abatement is a Nuisance Issue), as in other cases involving injunctive relief, the extent of the relief to be granted lies largely within the discretion of the trial court, and our function on appeal is to determine whether such discretion has been abused. *See* Robinson v. Westman, 224 Minn. 105, 29 N.W.2d 1, 174 A.L.R. 746.

This opinion cites: Cole v. Kunzler, 768 P.2d 815 (Idaho Ct. App. 1989), Ervin Const. Co. v. Van Orden, 874 P.2d 506 (Idaho 1993), Everhart v. COUNTY ROAD AND BRIDGE DEPT., 939 P.2d 849, Kawai Farms, Inc. v. Longstreet, 826 P.2d 1322 (Idaho 1992), Kugler v. Drown, 809 P.2d 1166 (Idaho Ct. App. 1991)."

"The law is clear that one cannot exercise his right to plant a tree in such a manner as to invade the rights of adjoining landowners." *See* Vanderpol v. Starr, 194 Cal. App. 4th 385 (2011). The evidence in this case shows that Respondents, by planting and improperly maintaining the arborvitae hedge in question, are obstructing Appellant's free use and enjoyment of her property. "When one brings a foreign substance on his land, he must not permit it to injure his neighbor. Buckingham v. Elliott, supra; Mead v. Vincent, supra; Stevens v. Moon, supra; Parker v. Larsen, 86 Cal. 236, 24 P. 989."

Respondents have cited no case holding that one adjoining landowner may plant a tree on his boundary line, or in such a manner that it will grow across the boundary line, thereby forcing an involuntary tenancy in common of the tree upon his neighbor under which neither can remove or damage the tree without the consent of the other, notwithstanding that such tree is damaging his neighbor's property.

During the course of litigation both parties hired additional surveyor's to locate the exact location of the arborvitae shrubs in relationship to the parties' shared property line. The Appellant's Survey, which commenced on August 31, 2011, (*See Appellant's Trial Exhibit #106*) along with trial testimony by Licensed Surveyor, Dusty Obermayer, indicate that the ten (10) arborvitae shrubs, that were trimmed by both parties, are located on the shared property line (*See Trial Testimony by Obermayer, Pg. 465, Lines 19-20, Pg. 466, Line 20, Pg. 467, Lines 3-24, Pg. 468, Lines 5-12, Lines 17-25, Pg. 469, Lines 1-6*).

The Respondent, Eric Wurmlinger, testified that he only had one survey of his property completed (*referring to the Monaco Survey*) on October 14, 2011 (*See Trial Testimony Pg. 304, Lines 19-25, Pg. 305, Line 1-2*), but court records say otherwise, wherein Eric Wurmlinger hired Inland Northwest Consultants (INC) to perform a survey on June 30, 2005 and December 16, 2010 (*See Clerks Record Pg. 566-568*).

The Post Falls Police Department Chief, Scot Haug and the Kootenai County Prosecutor, Barry McHugh along with the Respondents Eric and Rosalyn Wurmlinger, had all agreed (*meeting at Kootenai County Prosecutors office on December 9, 2010, per Post Falls Police Report, Appellants Trial Exhibit #49, Pg. 9 and Appellant's Attached Exhibit #6, Pg. 9*) that a survey was mandatory to "*verify the exact property line.*"

The Respondent, Eric Wurmlinger, initially paid the $450 fees to INC for said survey and was later reimbursed by the City of Post Falls and the Kootenai County Prosecutor (*See Clerks Record Pgs. 566-568 and Trial Testimony of Detective Rodney Gunderson Pg. 634, Lines 1-25, Pg. 635, Lines 1-13*). Appellant observed the INC survey crew mark several areas along the adjoining parties' property line with wooden stakes that were placed in the middle of the arborvitae hedge (*See* Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir.1989).

After said survey was performed, the Kootenai County Prosecutor amended the felony charge against Greenfield on June 10, 2011 and again on July 11, 2011, by adding the words "*to wit: trees and / or shrubs, of a value in excess of One Thousand Dollars ($1000), the property of Eric Wurmlinger, and / or property which was jointly owned by Eric Wurmlinger and the Respondent (Greenfield)...*"(*See Appellant Trial Exhibit #82, Clerks Record Pg. 581, Appellants Attached Exhibit #5*). The Respondents constantly

denied the existence of the December 16, 2010, survey and refused to turn over the findings of said survey to the Appellant through multiple discovery requests.

Greenfield was acquitted of the bogus felony charge on October 4, 2011 (*See Appellant Trial Exhibit #83*), and on October 14, 2011 (*See Respondents Trial Exhibit #B*), ten (10) days later, the Respondents hired Jon Monaco to re-survey the previously surveyed adjoining property line. Since the Respondents had denied the existence of the December 16, 2010 survey during testimony, they could not utilize the findings of said nonexistent survey, as the Respondents would be guilty of perjury.

Appellant believes that the reason behind Respondents decision to repudiate the survey, was because said survey showed that the location of the ten (10) arborvitae shrubs that Appellants agent had trimmed, were planted on the property line of both parties and mutual ownership existed (*See Trial Testimony of Rodney Gunderson Pg. 649, Lines 20-25*) This information could have prevented Greenfield from suffering an additional nine (9) months awaiting trial for a spurious crime, of which she was eventually acquitted.

It is disconcerting to the Appellant that the Respondents surveyor, Jon Monaco, testified that he DID NOT measure the base of the arborvitae shrubs as to their placement on the parties shared property line, yet the Respondents survey displayed tiny black dots that allegedly represented each of the arborvitae shrubs location along the parties' shared property line (*See Deposition by Monaco Pg. 30, Lines 21-25, Pg. 31, Lines 5-12*).

Furthermore, Jon Monaco misstates the number of arborvitae shrubs, claiming there are thirty four (34), when in fact there are thirty three (33) arborvitae shrubs. Monaco also misrepresents the fact by stating that seventeen (17) arborvitae shrubs were trimmed when in fact only ten (10) arborvitae shrubs were trimmed by Appellant's agent.

Another puzzling element of Jon Monaco's survey, is that it specifies "Site Survey of lot 7 and part of Lot 8." Respondents' own lot 7 and Appellant owns lot 6. Who owns lot 8? With so many discrepancies, one wonders if Jon Monaco actually performed a survey and on which lots?

Clearly, the Respondents survey is irrelevant and non-conclusive as to the exact location of the ten (10) arborvitae shrubs. After Jon Monaco submits the unsupported survey, the Respondents Amend their Counter Claims by adding the 'Timber Trespass' Claim just ten (10) days after Greenfield was acquitted of the felony charge. The fact that Jon Monaco, a licensed surveyor with thirty (30) years' experience and owner of "Empire Surveying", testified that he knows the Idaho State Law in regard to licensed surveyors, but DID NOT validate his findings by signing said survey (*See Idaho Code §54-1215*) only makes the Appellant more suspicious of duplicitous behavior on behalf of both the Respondents and Jon Monaco. It is further noted that Appellant objected to the submission of the Monaco Survey during trial proceedings (*See Appellant's Attached Exhibit #3, Trial Minutes from 2:39:39 – 2:40:14 P.M. on November 29, 2012*).

""A "fraud on the court" occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense. *See* e.g., Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir.1989); Pfizer, Inc. v. International Rectifier Corp., 538 F.2d 180, 195 (8th Cir.1976); England v. Doyle, 281 F.2d 304, 309 (9th Cir.1960); United Business Communications, Inc. v. Racal-Milgo, Inc., 591 F. Supp. 1172, 1186-87 (D.Kan.1984); United States v. ITT

Corp., 349 F. Supp. 22, 29 (D.Conn.1972), aff'd mem., 410 U.S. 919, 93 S. Ct. 1363, 35 L.Ed.2d 582 (1973).”” “In our view, this gross misbehavior constituted fraud on the court. *See* Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 986 (4th Cir.1987) (*fraud on court may exist where witness and attorney conspire to present perjured testimony*); Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 (5th Cir.1978) (*same, where party, with counsel's collusion, fabricates evidence*).”

This Court must also consider the fact that both the Respondents and Appellants properties butt up against the City of Post Falls ‘Black Bay’ and public Park, which is open year round to the public. The PWP subdivision was developed along the river and park, wherein privacy is not an option when living in close proximity to said amenities.

The Respondents have NOT enclosed any of their property by any other fences, hedges, screens, or structures of the like, other than the thirty three (33) arborvitae shrubs and spite trees on / or near the parties’ adjoining property line (*See Respondents Trial Exhibit #DD (1), Photos of spite trees and Exhibit #KK of Respondents Front yard*).

D. Respondents Dismissal of Negligent Infliction of Emotional Distress Claim (k)

The Respondents filed Counter Claims against Appellant for Intentional Infliction of Emotional Distress (I.I.E.D.) and Negligent Infliction of Emotional Distress (N.I.E.D.) on October 21, 2010 ((*See Clerks Record Pg. 47 (7)*). Respondents then asked the Court to dismiss their N.I.E.D. claim and were granted said dismissal with prejudice on March 22, 2011 (*See Clerks Record Pg. 58*). The Respondents then attempted to deceptively introduce the N.I.E.D. claim back into Trial proceedings on November 29, 2012, approximately twenty (20) months after said N.I.E.D. claim was dismissed with prejudice

by Judge Haynes. Respondents DID NOT utilize their claim for I.I.E.D. during trial proceedings, nor did they instruct the jury for said claim under 'Timber Trespass.'

For Greenfield to be guilty of 'Timber Trespass' under *Idaho Code §6-202,* she must have acted willfully and intentionally. *See* Kenneth J. Good v. Larry W. Sichelstiel, (Idaho Ct. App. 2012). Greenfield had been acquitted of the felony charge for trimming the arborvitae shrubs due to the fact that the State did not have any evidence that Greenfield acted willfully and intentionally in trimming the arborvitaes shrubs (*See Appellant Trial Exhibit #83, Acquittal*).

It is further noted that the Respondents 'Statement of Remaining Facts' dated November 8, 2012, submitted just twenty-one (21) days prior to Trial, DID NOT include the N.I.E.D. Claim in their statement of facts (*See Clerks Record Pgs. 184-186 of 717).*

The Respondents are barred from bringing an action on the same claim. Dismissal with prejudice is a final judgment and the case becomes res judicata on the claims that were or could have been brought in it.

E. Appellants Negligent Infliction of Emotional Distress Claim (l)

The Appellant had attempted to resolve all of Respondents CC&R violations through legal representation in May 2006, and considered all matters moot at that time.

However, the Respondents continued to aggressively harass the Appellant by engaging in combative maneuvers such as; 1.) trespassing on Appellants property (*See Clerks Record Pgs. 133-135, Pg. 137-138, and Trial Testimony of Appellant Pg. 550, Lines 12-16*); 2.) installing surveillance cameras aimed at Appellants property (*See Appellants Trial Exhibit #102*); 3.) moving Appellants personal property; 4.) making false allegations to law enforcement approximately twenty times, including having the

Appellant charged with a misdemeanor trespass in 2008 (dismissed) (*See Clerks Record, Pg. 135 (44)*) and a felony in 2010 (acquittal); 5.) Appellants garbage was seized and searched; and 6.) endangering the Appellants life on one occasion when the Respondents called 911 and reported that a "prowler" was lurking in Appellants back yard, when in fact Appellant was watering her garden. The Appellant was surrounded by local law enforcement revealing weapons (*See Clerks Record, Pg. 137 (51) and Trial Testimony of Appellant Christina Greenfield Pg. 553, Lines 12-24, Pg. 554, Lines 20-24*).

Due to the negative actions of the Respondents, Appellant was constantly under surveillance by local law enforcement and had the contents of her garbage seized purportedly to find evidence of alleged crimes (*See Trial Testimony of Appellant Christina Greenfield)*

When Respondents noticed that the arborvitae shrubs had been trimmed in April 2010, they contacted law enforcement and made false statements alleging that they had been the victims of a crime (*See Appellant's Trial Exhibit #49*). The Respondents allegations were "FALSE" and were made intentionally and / or recklessly to harm Greenfield.

On June 18, 2010, Greenfield, while at home on medical leave recuperating from major surgery, was served a summons (Dated June 3, 2010) by Kootenai County Sheriff Mike Douglas, who demanded that Greenfield go immediately to the Kootenai County Sheriff's building to get fingerprinted or a "Bench Warrant" for her arrest would be initiated, as she had been officially charged with "Felony Malicious Injury to Property"

When Greenfield arrived at the Kootenai County Sherriff's building, Greenfield was informed that she needed to proceed directly to the "Jail." A female guard

approached Greenfield and handcuffed her hands behind her back. Greenfield began uncontrollably sobbing, petrified at what would transpire next. Appellant was in excruciating pain, as her hands were bound tightly behind her back in handcuffs, which were stretching her abdomen region where Greenfield had an eight (8) inch incision, extreme bruising, and multiple sutures from her recent surgery. Greenfield explained to the guard that she had surgery and was in a great deal of pain from standing and the position of the handcuffs. Greenfield asked the guard to lift her shirt and see where the incision was located so the guard would not cause Greenfield irreparable damage and additional trauma to the incision area during the search (*See Trial Testimony of Appellant Christina Greenfield Pg. 542, Lines 10-25*).

Greenfield was forced to sit in a hard metal chair for hours while being processed for a felony, which included fingerprinting and "Mug Shots." Greenfield felt extremely violated, distraught, and nauseated at this point. Greenfield alerted the guard that she was not feeling well and in a great deal of pain. After approximately five (5) hours of excruciating pain and humiliation, Greenfield was finally released (*See Trial Testimony of Appellant Christina Greenfield Pg. 543, Lines 9-17*).

The Appellant chooses to exercise her legal right to abatement pursuant to *Idaho Code §52-302*, wherein a "person injured by a private nuisance may abate it by removing, or, if necessary, destroying the thing which constitutes the nuisance..." and is subsequently arrested and accused of committing a felony injury to property all at the request of the Respondents. The removal (trimming of arborvitae hedge) of the nuisance (hedge in excess of the height requirement that obstructed a premium "view" river front property) was not a breach of the peace or injury to Respondents. To make matters

worse, Respondent, Eric Wurmlinger, contacted KXLY News and the local newspapers to persecute the Appellant as a "Hedge Hacker" defaming her good name and distorting the truth to the media (*See Appellants Trial Exhibit #100*).

The Appellant was further victimized, wherein she was fired from her lucrative employment as a Senior Personal Banker with Bank of America (a criminal background checked secured banking position) on September 2, 2010, due to the felony charge and the multiple mandatory court appearances. Greenfield was unable to find employment for the nineteen (19) months prior to her acquitted of the spurious charge, was unable to pay her bills, causing her credit score to plummet and was forced to file for bankruptcy. Greenfield also lost her "Bonding" ability, a crucial element in procuring employment in her field of expertise. *See* Davis v. Gage, 106 Idaho 735, 682 P.2d 1282 (1984); Spence v. Howell, 126 Idaho 763, 890 P.2d 714 (1995); Payne v. Wallace, 136 Idaho 303, 32 P.3d 695 (2001); Brown v. Matthews Mortuary, Inc., 118 Idaho 830, 801 P.2d 37 (1990).

Greenfield suffers from severe emotional distress and health issues due to the constant intentional negligent actions and harassment from the Respondents over a span of eight years.

In Appellants Amended Trial Brief, Appellant listed health issues due to the stress from Respondents constant harassment: On March 8, 2006, Greenfield was diagnosed with Erythema Nodosum ((*See Clerks Record Pg.128(20)*); On June 26, 2007, Greenfield went to Kootenai Hospital for ultrasound testing for pain and swelling ((*See Clerks Record Pg.133(35)*); On February 12, 2009, Greenfield went to the Dirne Clinic as she was experiencing severe chest-pain ((*See Clerks Record Pg.141(58)*); On March 3, 2009, Greenfield saw Dr. Fritz for a heart stress test ((*See Clerks Record Pg.141(59)*); On

March 13,2009, Greenfield saw Dr. Ambrose as she was experiencing fatigue and female issues were elevated from stress. Greenfield was anemic and underwent an emergency medical procedure called a DNC ((*See Clerks Record Pg.141(60)*); On April 16, 2009, Greenfield saw Dr. Abate for heart related issues caused by stress and anxiety that she was experiencing ((*See Clerks Record Pg.141(61)*); On August 27, 2009, Greenfield went to Dirne Clinic for fatigue, stress and anxiety related health issues. Blood test were done and Greenfield was diagnosed with anemia ((*See Clerks Record Pg.142(66)*); On October 3, 2009, Greenfield went to Dirne Clinic with heart related issues ((*See Clerks Record Pg.142(67)*); On February 11, 2010, Greenfield visited Dr. Ambrose to evaluate health concerns. Lab-tests were performed ((*See Clerks Record Pg.143(68)*); On February 20, 2010, Greenfield visited Dr. Ambrose to evaluate health concerns with upcoming surgery ((*See Clerks Record Pg.143(69)*); On February 22, 2010, Greenfield visited Dr. Ambrose to evaluate heart related issues with upcoming surgery ((*See Clerks Record Pg.143(70)*); On February 23, 2010, Greenfield was admitted to Kootenai Hospital for a medical procedure to be performed by Dr. Ambrose ((*See Clerks Record Pg.143(71)*); Due to heart related issues, surgery was not completed and rescheduled for a later date to be determined, which said medical procedure occurred on April 29, 2010 ((*See Clerks Record Pg.144(78)*); On September 8, 2011, Greenfield was rushed to the emergency room, while visiting her daughter in Colorado, with heart related issues ((*See Clerks Record Pg.149 (95)*). Appellant began weekly counseling sessions to cope with her debilitating emotional distress and depression in January 2011, and continuing through the present. Appellant continues to suffer from physical manifestations requiring medical attention.

Although Judge Haynes dismissed Appellants claim for Intentional Infliction of Emotional Distress, Appellant suffers from the associated elements described herein of said intentional and negligent distress; "An action for intentional infliction of emotional distress will lie only where there is extreme and outrageous conduct coupled with severe emotional distress. Hatfield v. Max Rouse & Sons Northwest, 100 Idaho 840, 606 P.2d 944 (1980). The Arizona Court of Appeals put it this way:

"There are four elements which must coincide to impose liability for intentional infliction of emotional distress: (1) conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress, and (4) the emotional distress must be severe."

Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is reasonable to believe that the Respondents had a motive to do harm to Appellant by deceptively submitting photographs to law enforcement (*See Idaho Code §18-2603*) in April 2010, that indicated the arborvitae hedge height was approximately twelve (12) feet high, when in fact they ranged between six and one half (6 ½) to nine and one half (9 ½) feet tall when Appellants agent trimmed said arborvitae. Respondents did not inform law enforcement that the arborvitae shrubs were planted along the property line and a prior agreement to maintain the arborvitae hedge at a specified height had been conveyed by Respondents and Appellant in May

2006. The Respondents were hoping for a conviction to get rid of Greenfield through any devious method and / or propaganda they could cultivate.

Greenfield suffered through nineteen (19) months of excruciating torture not knowing if she was going to be convicted of a felony for merely trimming ten (10) arborvitae shrubs. Greenfield, a fifty-six (56) year old grandmother, has never been arrested or convicted of any crimes prior to the fabricated felony charge. Greenfield had to refinance her home at a higher rate for a much longer term, sell a majority of her personal belongings, borrowed from relatives, file for bankruptcy and apply for food stamps to survive while waiting for trial and compensating her defense attorney.

Greenfield developed life-threatening medical issues; including heart issues, and tumors, along with debilitating panic attacks, severe rashes, sleeplessness, excruciating headaches, nervousness, and fell into a deep depression, wherein she was isolated from family and friends.

When considering the emotional distress caused to Greenfield, not only should the Appellant be awarded N.I.E.D. damages, but punitive damages as well, due to the Respondents disturbing behavior toward the Appellant. "An award of punitive damages is first within the province of the trier of fact, subject to review for abuse of discretion. Cheney v. Palos Verdes Investment Corp., 104 Idaho 897, 665 P.2d 661 (1983). That discretion is to be exercised within the "general advisory guidelines" laid down in the past, see id. at 905, 665 P.2d at 669, but an award will be sustained only when it is shown that the act was "an extreme deviation from reasonable standards of conduct, and that the act was performed by the respondent with an understanding of or a disregard for its likely

consequences (in the words of prior cases, with fraud, malice or oppression)." Linscott v. Rainier National Life Ins. Co., 100 Idaho 854, 858, 606 P.2d 958, 962 (1980).

The Respondents sedulous harassment was induced each and every time after Appellant utilized her legal right to bring the Respondents into compliance with the PWP CC&Rs and City Ordinances.

F. Consolidating Issues (m)(y) Jury Instructions

On October 29, 2012, Judge Haynes Pre-Trial Order stated that all parties' "*shall submit their Jury Instructions no later than 5:00 P.M. on November 16, 2012*" ((*See Clerks Record Pg. 183(2)*). The Appellant had timely submitted all of her jury instructions per Judge Haynes Order by said deadline. Judge Haynes DENIED all of the Appellants jury instructions and direct verdict form (*See Appellants Attached Exhibit #7*). Appellant did not receive the new jury instructions until 2:11 PM on November 30, 2012, the last day of trial (*See Trial Transcript Pg.965, Lines 9-11, Lines 16-18*). Appellant objected to the format of the new direct verdict form, stating that it may confuse the jury on the claims.

A challenge to the adequacy of jury instructions presents a question of law over which this Court exercises free review. State v. Merwin, 131 Idaho 642, 647, 962 P.2d 1026, 1031 (1998); State v. Harris, 136 Idaho 484, 485, 36 P.3d 836, 837 (Ct.App.2001). This requires that we determine whether the instructions, taken as a whole, fairly and accurately state the applicable law. State v. Keaveny, 136 Idaho 31, 33, 28 P.3d 372, 374 (2001); Harris, 136 Idaho at 485, 36 P.3d at 837.

Judge Haynes had dismissed the Respondents Claim for Negligent Infliction of Emotional Distress with Prejudice in March 2011 (*See Hearing Transcript dated March*

17, 2011, Pg. 61, Lines 7-9), yet Haynes allowed Jury Instruction #14 and #24 (*See Clerks Record Pg. 238*), which pertained to said dismissed N.I.E.D. Claim.

Appellant requested that Jury Question #18 should be separated into two parts as well: "Did appellant damage or destroy respondents' arborvitae and/or spruce tree?"

Jury Instruction #21 is confusing and has no bearing in this case.

There were NO Jury Instructions given on Appellants Claims in regard to: "Breach of Contract" and Idaho "Fence" Law.

There were NO Jury Instructions given referencing the Respondents Claim for "Intentional Infliction of Emotional Distress" and there is NO record of the Respondents requesting to omit said claim from their Defense.

The Direct Verdict Form referred once more in #9 to Respondents dismissed N.I.E.D. Claim: "*Did the appellant's general conduct negligently inflict emotional distress on the respondents*?"

Appellant contends that Judge Haynes did not sufficiently denote the meaning of the *Idaho Code §6-202* regarding "Trespass" by omitting several key components of said statute in Jury Instructions #15, #16, #18, and #19 (*See Clerks Record Pgs. 239, 242, 243*). For example; there is no mention of the term 'arborvitae', but instead the term 'tree' is utilized in *Idaho Code §6-202*, yet instruction #18 references 'arborvitae' and instruction #19 'tree' is referenced and not 'arborvitae'. Why did Judge Haynes find it necessary to divide the meaning of the statute into three separate Jury Instructions and equate the word 'tree' and 'arborvitae' in one instruction and not the other, unless to confuse the jury. The Jury did question the 'Timber Trespass' verbiage and clarification was requested (*See Appellant Attached Exhibit #4*).

It is further noted that the Respondents stated a claim for "Timber Trespass", which pertains to a criminal action under *Idaho Code §18-7008*. Greenfield had been acquitted of Malicious Injury to Property, including trespass, which is encompassed in the *Idaho Code §18-7008* for Trespass and Malicious Injuries to Property.

See Austin; "When a party's requested jury instruction is correct and supported by the evidence, the trial court is required to give the instruction." Maglione v. Aegis Family Health Ctrs., 168 N.C.App. 49, 55, 607 S.E.2d 286, 291 (2005) (quoting Whiteside Estates, Inc. v. Highlands Cove, L.L.C., 146 N.C.App. 449, 464, 553 S.E.2d 431, 441 (2001)). "In reviewing the trial court's decision to give or not give a jury instruction, the preliminary inquiry is whether, in the light most favorable to the proponent, the evidence presented is sufficient to support a reasonable inference of the elements of the claim asserted." Blum v. Worley, 121 N.C.App. 166, 168, 465 S.E.2d 16, 18 (1995) (citing Anderson v. Austin, 115 N.C.App. 134, 443 S.E.2d 737, 739 (1994)). "Once a party has aptly tendered a request for a specific instruction, correct in itself and supported by the evidence, failure of the trial court to render such instruction, in substance at least, is error." Worley, 121 N.C.App. at 168, 465 S.E.2d at 18 (citing Faeber v. E.C.T. Corp., 16 N.C.App. 429, 430, 192 S.E.2d 1, 2 (1972)). "[I]t is the duty of the trial court to charge the law applicable to the substantive features of the case arising on the evidence and to apply the law to the various factual situations presented by the conflicting evidence." Faeber, 16 N.C.App. at 430, 192 S.E.2d at 2.

"Whenever the latest edition of the Idaho Jury Instructions (IDJI) contains an instruction applicable to the case and the court determines that the jury should be instructed on the issue, it is recommended that the judge use the IDJI instruction unless

the judge finds that a different instruction would more adequately, accurately or clearly state the law I.R.C.P. 51(a)(2). Use of the IDJI is not mandatory, only recommended. Needs v. Hebener, 118 Idaho 438, 442, 797 P.2d 146, 150 (Ct.App.1990). However, any court that chooses to vary from a jury instruction previously approved by the Idaho Supreme Court, does so with the risk that the verdict rendered may be overturned on appeal. *See* State v. Merwin, 131 Idaho 642, 647, 962 P.2d 1026, 1031 (1998). While it clearly is not error to modify an IDJI instruction, such modification will constitute error if the modified instruction does not conform to the state of the law or omits elements basic to the case. Ramco v. H-K Contractors, Inc., 118 Idaho 108, 111, 794 P.2d 1381, 1384 (1990). Schaefer v. Ready, 3 P. 3d 56 – 2000."

Appellate courts exercise free review over the question of whether a jury has been properly instructed. We must review the jury instructions given and ascertain whether, when considered as a whole, they fairly and adequately present the issues of the case and state the applicable law. DeGraff v. Wight, 130 Idaho 577, 579, 944 P.2d 712, 714 (1997); Brooks v. Gigray Ranches, Inc., 128 Idaho 72, 76, 910 P.2d 744, 748 (1996).

G. Consolidating Issues (q)(t) Constitutional Rights

"In construing a restrictive covenant, a court's primary task is to determine the intent of the framers of the restrictive covenant. *See* Wilmoth v. Wilcox, 734 S.W.2d 656, 658 (Tex.1987). In determining this intent, the court must liberally construe the covenant's language and must ensure that every provision is given effect. If there is ambiguity or doubt as to the intent, the covenant is to be strictly construed against the party seeking to enforce it in favor of the free and unrestricted use of the premises."

In this case there is NO AMBIGUITY (information, in words, pictures, or other media, is the ability to express more than one interpretation) as the PWP CC&Rs reads "NO BUSINESS IS ALLOWED." The River Cove Bed and Breakfast is a commercial, profitable business (*See Appellants Trial Exhibit #109, Respondents Tax Records*), open twelve (12) months of the year, which offers several suites, boat cruises, and a wedding facility to the public via internet and multiple advertising agents across the globe.

Idaho recognizes the validity of covenants that restrict the use of private property. Nordstrom v. Guindon, 135 Idaho 343, 345, 17 P.3d 287, 290 (2000) (citing Brown v. Perkins, 129 Idaho 189, 192, 923 P.2d 434, 437 (1996)). "When interpreting such covenants, the Court generally applies the rules of contract construction. Id. However, because restrictive covenants are in derogation of the common law right to use land for all lawful purposes, the Court will not extend by implication any restriction not clearly expressed. Post v. Murphy, 125 Idaho 473, 475, 873 P.2d 118, 120 (citing Thomas v. Campbell, 107 Idaho 398, 404, 690 P.2d 333, 339 (1984)). ""In applying the rules of contract construction, the court analyzes the document in two steps. Beginning with the plain language of the covenant, the first step is to determine whether or not there is an ambiguity. *See* Brown v. Perkins, 129 Idaho at 193, 923 P.2d at 438 (citing City of Chubbuck v. City of Pocatello, 127 Idaho 198, 201, 899 P.2d 411, 414 (1995)). "Words or phrases that have established definitions in common use or settled legal are not rendered ambiguous merely because they are not defined in the document where they are used." City of Chubbuck v. City of Pocatello, 127 Idaho at 201, 899 P.2d at 414. Rather, a covenant is ambiguous when it is capable of more than one reasonable interpretation on a given issue. Post v. Murphy, 125 Idaho at 475, 873 P.2d at 120 (citing Rutter v.

McLaughlin, 101 Idaho 292, 612 P.2d 135 (1980)). Ambiguity is a question of law subject to plenary review. Brown v. Perkins, 129 Idaho at 192, 923 P.2d at 437. To determine whether or not a covenant is ambiguous, the court must view the agreement as a whole. Id. at 193, 923 P.2d at 437.""

""The second step in contract or covenant construction depends on whether or not an ambiguity has been found. If the covenants are unambiguous, then the court must apply them as a matter of law. *See* City of Chubbuck v. City of Pocatello, 127 Idaho at 201, 899 P.2d at 414. "Where there is no ambiguity, there is no room for construction; the plain meaning governs." Post v. Murphy, 125 Idaho at 475, 873 P.2d at 120. Conversely, if there is an ambiguity in the covenants, then interpretation is a question of fact, and the Court must determine the intent of the parties at the time the instrument was drafted. Brown v. Perkins, 129 Idaho at 193, 923 P.2d at 438. To determine the drafters' intent, the Court looks to "the language of the covenants, the existing circumstances at the time of the formulation of the covenants, and the conduct of the parties.""

The United States Court of Appeals for the Ninth Circuit has identified four types of unreasonable factual determinations in state court proceedings: (1) when state courts fail to make a finding of fact; (2) when state courts mistakenly make factual findings under the wrong legal standard; (3) when "the fact-finding process itself is defective"; or (4) when state courts "plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim." *See* Taylor v. Maddox, 366 F.3d. 992, 1000-01 (9th Cir. 2004). Appellant list the following due process issues: 1.) Judge Haynes allowed Appellants attorney to quit within eight (8) weeks prior to trial, leaving Appellant vulnerable for bias

and prejudice. Appellant informed the judge that trial deadlines had passed and that she could not afford another attorney; 2.) Judge Haynes should have insisted on a site evaluation so the jury could visually see the condition of the arborvitae, the property lay-out of the homes and proximity of where the river, park, and homes were located in relationship to one another; 3.) Judge Haynes did not allow Appellants timely disclosed witness Leonard Benes to testify on behalf of Appellant, a crucial factor to the Appellants defense (*See Trial Transcript Pg.963, Lines 12-13*); 4.) Judge Haynes allowed the Respondents to submit evidence at trial that was never disclosed to Appellant and was in violation of the November 8, 2012, deadline per Court Order (*See Clerks Record Pg. 201, Paragraph #2, and Pg. 202*); 5.) Judge Haynes allowed the Jury Instructions to be altered from their original state as quoted within the Idaho Codes; 6.) Judge Haynes did not grant Injunctions to Appellant for Abatement and PWP CC&R violations as requested.

""The Court as the finder of fact may conduct a site visit or other analogous inspection, and may "base its findings upon such examination together with all the evidence in the case." *See* Daigle v. Conley, 121 Vt. 305, 309, 155 A.2d 744, 748 (1959) (emphasis added); see also In re Quechee Lakes Corp., 154 Vt. 543, 551-52, 580 A.2d 957, 962 (1990) (administrative fact-finder may rely to same extent as trial judge on knowledge gained from a site visit); Cass-Warner Corp. v. Brickman, 126 Vt. 329, 336, 229 A.2d 309, 314 (1967) (affirming verdict based in part on court's view of allegedly defective bulkhead); McAndrews v. Leonard, 99 Vt. 512, 521, 134 A. 710, 714 (1926) (upholding jury verdict based in part on jury's inspection of tort appellant's allegedly injured skull, holding that "the jury had a right to base their verdict upon such examination together with all the evidence in the case")."" The Court cannot visually

comprehend a distorted image on paper *(Respondents Trial Exhibit #CC)*, which is used to illustrate where the river, park, hedge, and homes are located in relationship to each other in the PWP subdivision, when deciding this case (*See Trial Testimony of Appellant Christina Greenfield Pg. 586, Lines 15-25, Pg. 587, Lines 1-7).*

Appellant contends that the trial court erred when it determined a row of thirty three (33) trees (arborvitae shrubs) in their natural state that formed a hedge, was not a fence or other structure in the nature of a fence, as so intended within the meaning of the unambiguous PWP CC&Rs.

It is for the trial court in the first instance to make the necessary factual findings, based on the evidence received at trial, to determine whether the row of trees (arborvitae) in this case satisfies all of the elements of a spite fence. *See* Wilson v. Handley, 119 Cal. Rptr. 2d 263, 267 (Ct. App. 2002)

The facts are clear that States and Cities alike purposely control the height of fences and like structures to a six (6) foot height and regulate zoning laws for purposes of protecting land owners from abusive contemptuous property owners who do not want to adhere to regulatory law.

The Respondents admitted to having knowledge of the PWP CC&Rs and they chose to violate said CC&Rs.

H. Consolidating Issues (r)(s) Respondents Award of Attorney Fees

The Appellant has reasonable cause to believe that Respondents have violated the law under the "un-clean hands" doctrine, wherein they deceptively corrupted the Court by submitting falsified testimony and evidence into trial. *See* Campbell v. Kildew, 141 Idaho 640, 648, 115 P.3d 731 (2005). This contaminated so-called evidence (Survey,

N.I.E.D. Claim) cannot sustain the verdict that was rendered and should not entitle Respondents to recover any damages and / or sums in this cause. *See* Russell v. Chamberlain, 12 Ida. 299, 303, 9 Ann. Cas. 1173, 85 Pac. 926; Potter v. Seattle, 8 Cal. 217, 221; Grant v. Moore, 29 Cal. 644, 656; Anderson v. Coleman, 53 Cal. 188; Vesper v. Crane Co., 165 Cal. 36, 130 Pac. 876, L. R. A. 1915A, 541.

The district court awarded damages in the amount of $168,000 (*See Clerks Record Pgs. 675-676*) to Respondents pursuant to erroneous interpretations of the law regarding *Idaho Code §6-202*. Appellant should not be expected to pay for damages that never occurred on property that she jointly owns. For argument purposes, even if the arborvitae shrubs were all located on the Respondents property, said property was never defined with "No Trespass" signs, and there was no intent by the Appellant to destroy or damage said arborvitae, both contributing factors in finding guilt, per Idaho Code. If this were the case, the Appellant would have been found guilty under the alleged felony charge for essentially the same offense, of which she was acquitted.

The Respondents interpretation of the word "Tree" was so absurd that any scholar would wince at the epilogue used to persuade the jury that a shrub can become a tree simply because it may grow to a height of fifteen (15) feet. Ridiculous!

For example purposes, the following shrubs, plants, and / or bushes; *Lilac bush, Perfume Bush, Giant Milkweed Bush, Golden Dewdrop, Cherry Laurel, Gibb's Firethorn, Japanese Holly Sky Pencil, and the Emerald Green arborvitae*, just to name a few, have the ability to grow to a height of fifteen (15) feet, have multiple stems, yet they remain labeled as a bush, plant or shrub. Appellant does not have personal knowledge or any

expert opinions on the matter regarding the harvesting of these varieties for their "Timber" value.

The trial court based its judgment award upon the market value of the alleged damaged and / or destroyed trees (arborvitae shrubs) as merchantable timber under *Idaho Code §6-202* for Timber Trespass, and evidence demonstrated that the trees (arborvitae shrubs) were not cultivated for such use, but instead utilized as a screen (fence), which violated the PWP CC&Rs and they were neither damaged nor destroyed as testified by both arborists. There was NO aesthetic value, as the arborvitae shrubs were NOT damaged or destroyed, and there was no devaluation of property value due to the natural trimming.

The Respondents convoluted the action brought by the Appellant after submitting claims that they later dismissed (*Tortious Interference with Economic Advantage and Negligent Infliction of Emotional Distress*), then resubmitting a new claim thirteen months later for Timber Trespass, just fourteen (14) days after the Appellant was acquitted of a bogus crime for Malicious Injury to Property.

Much of the Respondents trial evidence was offered just prior to / or at trial (late disclosure) and has absolutely nothing to do with their claims, but rather irrational assumptions after the fact (*Pictures of alleged vandalism after the fact, pictures of neighboring arborvitae shrubs, a distorted aerial view, a hand drawn alleged site plan with no dimensions, and various unsubstantiated hearsay testimony*).

The Respondents repeatedly ignored Court Orders by not responding to discovery requests, which Appellant was eventually awarded Sanctions and attorney fees (*See Transcript Pg. 76, Lines 17-25*). Constant delays due to countless rotation of

Respondents attorneys of record caused further frustration and monetary damage to Appellant, wherein Appellants attorney fees quadrupled. Appellant believes that the blatant disregard for court proceedings was due to the fact that the Respondents court costs were covered by their Commercial Business Insurance Binder Policy (*Per Testimony of Eric Wurmlinger*), which covered the Respondents attorney fees and related costs on counterclaims and defense.

There is no evidence to prove that the Wurmlingers suffered any mental or physical manifestations for emotional distress as to the Appellants alleged conduct. *See* Davis v. Gage, 682 P.2d 1282 (Idaho Ct. App. 1984); Venerias v. Johnson, 622 P.2d 55 (Ariz. Ct. App. 1980). The Respondents could not verify that they suffered any emotional distress by offering such evidence, as medical evaluations or the contrary. Respondent Eric Wurmlinger testified that he did not have any physical, mental, or medical conditions from emotional distress stating "*...I have not gone to the doctor*" (*See Trial Testimony of Eric Wurmlinger Pg. 837, Lines 8-17*) Rosalyn Wurmlinger testified that she had flu like symptoms, but never saw a doctor. If Respondents symptoms were that serious, they would have sought medical treatment and / or counseling (*See Trial Testimony of Rosalyn Wurmlinger Pg. 939, Lines 8-19, Pg. 954, Lines 2-7, Lines 11-14*). As mentioned above in testimony, it was the Respondents who repeatedly reported to law enforcement that the Appellant was guilty of alleged crimes, therefore causing extreme emotional distress to the Appellant, unless the Respondents are claiming that their bad behavior was causing their own stress?

"In the case of Board of County Commissioners of Weld County v. Slovek, 723 P.2d 1309, 1315 (Colo. 1986), the Colorado Supreme Court warned that the trial court

must undertake careful evaluation when allowing an injured party to recover costs of restoration that are greater than the diminution in market value because of the possibility that the injured party will receive a monetary windfall. *See* Weitz, 148 Idaho at 866, 230 P.3d at 758."

Individuals may value land for specific and personal reasons, and in such instances, justice requires that an award of damages restore such property owners to the position they enjoyed prior to the damage. The Respondents suffered no damage as the ten (10) arborvitae shrubs were previously cut by the Respondent, Eric Wurmlinger, in May 2006, then trimmed to the same height a second time in April 2010 by the Appellant's agent. Appellant, however, lost her coveted view of the river due to malice by the Respondents, who should not be rewarded for their fraudulent behavior in offering tainted evidence, duplicitous documents, lately disclosed evidence, and false testimony.

See Aoude. ""We find the caselaw fully consonant with the view that a federal district judge can order dismissal or default where a litigant has stooped to the level of fraud on the court. The Supreme Court said so in Hazel-Atlas, albeit in dicta. Id. at 250, 64 S. Ct. at 1003. The most closely analogous cases we can find, in our own circuit and in a variety of other courts, stand for much the same proposition. *See*, e.g., Brockton Savings Bank, 771 F.2d at 11-12 (affirming district court's entry of default judgment under court's inherent powers in response to defendant's abusive litigation practices); Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 589 (9th Cir.1983) ("courts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice"); Eppes v. Snowden, 656 F.Supp. 1267, 1279 (E.D.Ky.1986) (where fraud committed, court has

"inherent power [to dismiss] ... to protect the integrity of its proceedings"); United States v. Moss-American, Inc., 78 F.R.D. 214, 216 (E.D.Wis.1978) (similar); C.B.H. Resources, Inc. v. Mars Forging Co., 98 F.R.D. 564, 569 (W.D.Pa.1983) (dismissing under Fed. R. Civ. P. 41(b) where party's fraudulent scheme, including use of a bogus subpoena, was "totally at odds with...the notions of fairness central to our system of litigation"). In most of these cases, we hasten to add, the challenged conduct seems, arguably, less reprehensible than in the case at bar. The bogus agreement clearly had the capacity to influence the adjudication and to hinder Mobil's presentation of its case."" As in this case the Respondent's bogus survey and other documents clearly influenced the jury's decision. ""The failure of a party's corrupt plan does not immunize the defrauder from the consequences of his misconduct. When Aoude concocted the agreement, and thereafter when he and his counsel annexed it to the complaint, they plainly thought it material. That being so, "[t]hey are in no position now to dispute its effectiveness." Hazel-Atlas, 322 U.S. at 247, 64 S.Ct. at 1002. See also Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin, 283 U.S. 520, 521-22, 51 S.Ct. 501, 502, 75 L.Ed. 1243 (1931) (litigant who engages in misconduct "will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent")."""

I. Consolidating Issues (u)(v)(w)(x)(bb) Judge Haynes Controversy and Bias

The Respondents officially amended their counter claims by adding trespass and timber trespass on October 17, 2011 (*See Clerks Record Pg. 71*), thirteen (13) days after Appellant was acquitted of the Felony Malicious Injury to Property charge. Judge Haynes did not respond to the Respondents Amendment until December 15, 2011 (*See*

Clerks Record Pg. 76-77), almost two (2) months later. The Certificate of Mailing attached to said Order is dated September 19, 2011. There are discrepancies on both documents and time lines exceed Idaho Rules of Civil Procedure.

On May 21, 2012, Appellant requested a hearing for Motion to Amend Pre-trial Order, wherein Appellant requested under rules of discovery that the Respondent surrender key pieces of information that were demanded on several prior discovery requests (*See Clerks Record Pgs. 113-121, Trial Transcript Pg. 76, Lines 17-25, Pg.81, Lines 14-25*). The Respondents did not comply. The Appellant objected to the Respondents late disclosure of said additional evidence presented during trial proceedings, approximately six (6) months after the Court Order. Judge Haynes overruled Appellants objections.

The Respondents ignored Judge Haynes Pre-Trial Conference Order, wherein all Exhibit and Witness Lists were due no later than 5:00 P.M. on November 9, 2012 (*See Clerks Record Pg. 182-183*). Respondents amended their lists five times by adding additional exhibits and witnesses that were never disclosed in prior discovery: Original list submitted 5/4/2012, Received by Appellant 5/4/2012 (Exhibits a-bb); Amended list submitted 11/8/2012, Received by Appellant 11/9/2012 (Exhibits a-ll); 2nd Amended list submitted 11/15/2012, Received by Appellant 11/16/2012 (Exhibits a-oo); 3rd Amended list submitted 11/15/2012, Received by Appellant 11/19/2012 (Exhibits a-pp); 4th Amended list submitted 11/26/2012, Received by Appellant 11/26/2012 (Exhibits a-rr – ss, written in at trial). Appellant objected to the Respondents untimely submitted exhibits, yet Judge Haynes "overruled" said objections, which contributed to the collapse of Appellants defense to said alleged evidence.

Appellant requested waivers on court fees with her Notice of Appeal, as she is an Indigent person. The presiding Judge Penny Friedlander granted Appellant said fee waivers. Judge Haynes then interfered with the Court Order and rescinded Appellants said fee waivers for no justifiable reason on July 18, 2013.

The judge must consider the proper mix of factors and juxtapose them reasonably. Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon (*Monaco Survey, N.I.E.D. Claim, Late Disclosure of Evidence and Exhibits*), or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them (*Appellants Objection to Monaco Unsigned Survey*). *See* "Independent Oil and Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir.1988); *See* also Anderson v. Cryovac, Inc., 862 F.2d 910, 923 (1st Cir.1988) (to warrant reversal for abuse of discretion, it must "plainly appear that the court below committed a meaningful error in judgment").

Appellant believes that District Court Honorable Judge Lansing Haynes committed 'Fraud Upon the Court' as witnessed and verified by the Appellant on December 30, 2013. Appellant was viewing her case file, wherein she observed the Honorable Judge Lansing Haynes case file notes, in which Haynes stated "The only issue that concerns me is the N.I.E.D. (Negligent Infliction of Emotional Distress) claim being dismissed...We can play up the former counsel's decision and the no objection to putting it to the jury later on." Judge Haynes had dismissed the Respondents N.I.E.D. claim with prejudice a year and a half prior to trial. Judge Haynes exhibited blatant prejudice toward the Appellant by negating his judicial duty to uphold his ruling by allowing the

Respondents to resubmit their N.I.E.D. claim, during trial proceedings, after he had previously dismissed said claim (*See Appellants Attached Exhibit #9*).

Appellant believes that Judge Haynes should have disqualified himself as the presiding judge in the civil action against the Respondents, wherein Appellant uncovered evidence during and after the civil proceedings, which has undermined said proceedings.

Appellant discovered in March 2013 that Judge Lansing Haynes, his law clerk, "Buck" Pennington, and Respondent, Eric Wurmlinger, all belong to the local Catholic association of the "Knights of Columbus", a fraternal Catholic order of men who call themselves the "Brotherhood" "...primarily to serve the Catholic Church, and secondarily the men who are members, by providing a means and conduit through which they may help each other..." (*See Transcript on Appeal Pg. 1038, Lines 7-25*).

On the May 1, 2013, Hearing, Greenfield was shocked when Judge Haynes stated "*as such, there's no prejudice other than self-inflicted prejudice, I might characterize it, not that a person doesn't have the right to represent themselves, but it's just never a good idea if there's any other way around it*" (*See Transcript on Appeal Pg.1089, Lines 20-24, Motion for Reconsideration*). Appellant NEVER planned on representing herself. Judge Haynes allowed Appellants attorney, Ian D. Smith, to walk away with ALL of Greenfield's money just prior to the scheduled court trial (*See Trial Transcript for February 27, 2012, Pg.10, Lines 18-25, Pg.11, Lines 1-9*)

In 1994, the U.S. Supreme Court held that "Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." *See* Liteky v. U.S., 114 S.

Ct. 1147, 1162 (1994). Courts have stated that a trial judge must always remain fair and impartial. *See* Kennedy v. Los Angeles Police Dep't, 901 F.2d 702, 709 (9th Cir. 1989). "He must be ever mindful of the sensitive role [the court] plays in a jury trial and avoid even the appearance of advocacy or partiality." Id. quoting United States v. Harris, 501 F.2d 1, 10 (9th Cir. 1974).

The Courts have repeatedly held that positive proof of the partiality of a judge is not a requirement, only the appearance of partiality. See Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S. Ct. 2194 (1988) "what matters is not the reality of bias or prejudice but its appearance"; See United States v. Balistrieri, 779 F.2d 1191 (7th Cir. 1985).

Two principal Federal statutes dealing with judicial recusal are 28 U.S.C. §144, "Bias or prejudice of judge" and 28 U.S.C. §455, "Disqualification of justice, judge, or magistrate." Section 455(a) of the Judicial Code, 28 U.S.C. §455(a), is intended to protect litigants from actual bias and promote public confidence in the judicial process. The Court also stated that Section 455(a) "requires a judge to recuse himself in any proceeding in which impartiality might reasonably be questioned." *See* Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989). In Pfizer Inc. v. Lord, 456 F.2d 532 (8th Cir. 1972), the Court stated that "It is important that the litigant not only actually receive justice, but that he believes that he has received justice."

The Supreme Court has ruled and has reaffirmed the principle that "justice must satisfy the appearance of justice", See Levine v. United States, 362 U.S. 610, 80 S. Ct. 1038 (1960), citing Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 13 (1954). Further, the judge has a legal duty to disqualify himself even if there is no motion asking

for his disqualification. The Seventh Circuit Court of Appeals further stated that "We think that this language [455(a)] imposes a duty on the judge to act sua sponte, even if no motion or affidavit is filed." Balistrieri, at 1202.

If a judge does not disqualify himself, then the judge is in violation of the Due Process Clause of the U.S. Constitution. See United States v. Sciuto, 521 F.2d 842, 845 (7th Cir. 1996) "The right to a tribunal free from bias or prejudice is based, not on section 144, but on the Due Process Clause." "The Supreme Court has also held that if a judge wars against the Constitution, or if he acts without jurisdiction, he has engaged in treason to the Constitution. If a judge acts after he has been automatically disqualified by law, then he is acting without jurisdiction, and that suggest that he is then engaging in criminal acts of treason, and may be engaged in extortion and the interference with interstate commerce."

See Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir.1989) ""The district courts retain the inherent power to do what is necessary and proper to conduct judicial business in a satisfactory manner. As we have said, that inherent power is "rooted in the chancellor's equity powers, 'to process litigation to a just and equitable conclusion.' " HMG Property, 847 F.2d at 915 (quoting ITT Community Development Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir.1978)). The courts' inherent power includes "the ability to do whatever is reasonably necessary to deter abuse of the judicial process." Eash v. Riggins Trucking Inc., 757 F.2d 557, 567 (3d Cir.1985) (en banc).

IV. REQUEST FOR ORAL ARGUMENT

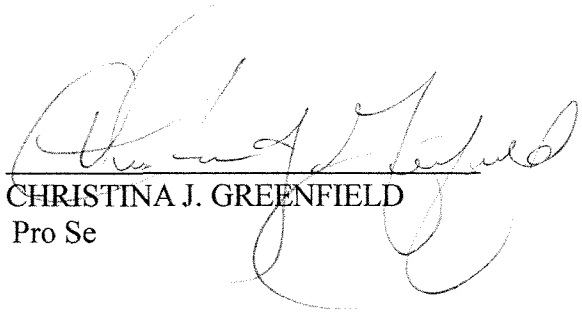
Finally, as a pro se litigant, inexperienced in the art of drafting pleadings, I would appreciate the opportunity to offer oral argument in support of this brief.

V. CONCLUSION AND PRAYER FOR RELIEF

Appellant respectfully requests that this Court reverse the rulings of the District Court and remand this case for further proceedings, including the right to perform additional reasonable discovery and / or;

1. Reverse the District Court ruling that the River Cove Bed and Breakfast is not prohibited by the Park Wood Place Subdivision CC&Rs;
2. Reverse the District Court ruling that the Arborvitae hedge does not constitute a Fence;
3. Reverse the District Court ruling that the Arborvitae shrubs are not exceeding the height restrictions for fences as set forth in the Park Wood Place CC&Rs;
4. Reverse the District Court ruling that the Appellant did not suffer from the Respondents negligent actions and Appellant should be awarded damages for Nuisances;
5. Reverse the District Court ruling that the Arborvitae Hedge is not a nuisance and therefore should be Abated;
6. Reverse the District Court ruling that the Respondents should not be required to remove all spite shrubs and trees that are impeding Appellants river view and the free use of property, and interferes with the Appellant's comfortable enjoyment of life and property;
7. Reverse the District Court ruling that the Appellant did not suffer from the Respondents actions and award damages to Appellant for Intentional Infliction of Emotional Distress;
8. Reverse the District Court ruling that the Appellant did not suffer from the Respondents actions and award damages to Appellant for Negligent Infliction of Emotional Distress;
9. Should this Court decide that Judge Lansing Haynes should have disqualified himself from said proceedings, therefore nullifying all Court Orders, then Order a New Trial with all Statute of Limitations kept intact and void all Final Judgments and awards.

DATED this 25th day of June, 2014.



CHRISTINA J. GREENFIELD
Pro Se

CERTIFICATE OF SERVICE

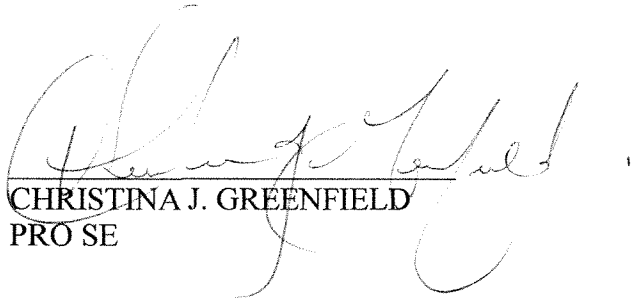
I hereby certify that on the 25th day of June, 2014, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

John C. Riseborough
Paine Hamblen, LLP
717 W. Sprague Avenue, Suite 1200
Spokane, WA 99201

[X] U.S. Mail
[X] HAND DELIVERED

The Supreme Court of Idaho
PO Box 83720
Boise, Idaho 83720-0101

[X] U.S. Mail



CHRISTINA J. GREENFIELD
PRO SE

Exhib. 1 109

Detail Report

12/31/2010 Eric J and Rosalynd D Wurmlinger [redacted]

Item No.	Description of Property "***" indicates DISPOSED	Date Placed In Service	Asset Code	Bus. Use %	Cost or Other Basis	Sec. 179 Deduction	Credit	Special Allowance	Salvage Value	Recovery Basis	AMT Type	Recovery Period (years)	Method	Convention Code	Prior Accum. Deprec., 179, Bonus
Sch C: BED AND					288,140	0	0	2,356	0	241,482					147,139
1	Stereo System	5/6/1994	F-11	100.00%	1,075	0	0	0	0	1,075		7	200DB	HY	1,055
2	TV	2/22/1997	F-10	100.00%	578	0	0	0	0	578		7	200DB	HY	578
2	Bed	5/28/1994	F-11	100.00%	252	0	0	0	0	252		7	200DB	HY	252
3	Entertainment Center	1/5/1997	F-10	100.00%	925	0	0	0	0	925		7	200DB	HY	925
3	SPA	6/4/1995	F-11	100.00%	6,391	0	0	0	0	6,391		7	200DB	HY	6,391
4	Bed	2/1/1999	F-10	100.00%	668	0	0	0	0	668		7	200DB	HY	668
4	Grandfather Clock	12/23/1995	F-11	100.00%	1,364	0	0	0	0	1,364		7	200DB	HY	1,364
5	Bed	1/1/1999	F-10	100.00%	785	0	0	0	0	785		7	200DB	HY	784
5	Sofa	10/8/1995	F-11	100.00%	653	0	0	0	0	653		7	200DB	HY	653
6	Oil Painting	3/1/1999	F-10	100.00%	750	0	0	0	0	750		7	200DB	HY	750
6	Blinds	4/14/1995	F-11	100.00%	582	0	0	0	0	582		7	200DB	HY	582
7	Paddle Boat	5/14/1998	F-6	100.00%	380	0	0	0	0	380		5	200DB	MQ3	380
8	** Washer/Dryer	5/19/1998	F-6	100.00%	608	0	0	0	0	608		5	200DB	MQ3	608
9	Printer	5/21/1998	F-6	100.00%	560	0	0	0	0	560		5	200DB	MQ3	560
9	Computer	5/2/1997	F-6	100.00%	3,224	0	0	0	0	3,224		5	200DB	HY	3,224
10	Gas Fireplace	12/15/1998	F-6	100.00%	2,283	0	0	0	0	2,283		5	200DB	MQ4	2,283
11	Mower	7/1/1998	F-6	100.00%	330	0	0	0	0	330		5	200DB	MQ3	329
→ 12	Bed and Breakfast	5/6/1994	R-4	72.97%	162,379	0	0	0	0	118,488		31.5	SL/GDS	MM	64,531
19	2000 Chapporral Guest Boat	5/14/2001	F-4	100.00%	60,538	0	0	0	0	60,538		5	200DB	HY	46,426
20	Flooring for B&B rooms	6/15/2004	R-5	100.00%	3,790	0	0	0	0	3,790		39	SL/GDS	MM	538
24	Outdoor Music System	6/30/2006	F-11	100.00%	3,340	0	0	0	0	3,340		7	200DB	HY	2,296
25	Outdoor Patio Water Feature	6/30/2006	R-2	100.00%	24,725	0	0	0	0	24,725		15	150DB	HY	9,316
25	Garden Arbor	6/30/2006	F-11	100.00%	673	0	0	0	0	673		7	200DB	HY	463
26	2005 Planning Surveying	6/30/2005	R-4	100.00%	5,055	0	0	0	0	5,055		27.5	SL/GDS	MM	836
26	Laptop Computer	3/1/2008	F-5	100.00%	1,198	0	0	599	0	599		5	200DB	HY	911
26	Entry Doors	6/30/2006	R-4	72.97%	1,521	0	0	0	0	1,110		27.5	SL/GDS	MM	123
27	Dining Furniture	6/30/2009	F-11	100.00%	547	0	0	274	0	273		7	200DB	HY	313
28	Washer/Dryer	6/30/2010	F-3	100.00%	2,966	0	0	1,483	0	1,483		5	200DB	HY	0
	SubTotals				288,140	0	0	2,356	0	241,482					147,139
	Less: Disposed Assets				(608)	(0)	(0)	(0)	(0)	(608)					(608)
	Ending Totals				287,532	0	0	2,356	0	240,874					146,531

Exhibit #1

9/28/2012

Exhibit #2

	Joseph Malloy	buddy buddy with def, put been in his home twice. Don't hang out, never been in his boat. He turns on my water and blows it out, we split rental of the equipment. 8-6 roughly. Saw Dwight and you load truck. Only time I've seen several truck loads with tarp over a couple of days. Easter weekend. Detective Gunderson called me. Comments by def about you and likewise with you about him. We haven't spoken recently, about a dozen in the past. Wasn't aware Dwight had a brother until about a year ago. Def said it was a twin brother.
01:40:58 PM	DA	Redirect.
01:41:03 PM	Joseph Malloy	He didn't have a full white beard. I was asked to sign resolution that def were good neighbors. It was all true. I went to plt's house to tell her that I had done that. She wanted to know if anything said in it about her. I said if names were switched I'd sign it. She said def would learn if you mess with the bull you get the horns.
01:43:07 PM	Plt	Recross.
01:43:14 PM	DA	Object.
01:43:18 PM	J	Sustains.
01:46:15 PM	DA	Have video depo to play, marks as exhibit TT. DVD deposition of John Monaco.
01:46:40 PM	J	Do parties agree that court reporter do not have to take it down?
01:47:13 PM	Plt/DA	Yes.
01:47:28 PM	J	Video deposition of John Monaco is played.
02:27:21 PM	J	Afternoon recess, 10 mins. Admonishes jurors.
02:39:39 PM	J	Back on the record.
02:39:51 PM	DA	Moves to admit exhibt B from the video.
02:40:14 PM	Plt	Objection.
02:42:23 PM	J	Admits exhibit B.
02:43:30 PM	J	Bring the jury back. Jury is seated.
02:44:21 PM	DA	Admits exhibit UU, DVD deposition of Tim Kastning.
02:47:35 PM	J	Parties agee court reporter not taking testimony down?
02:48:00 PM	DA/Plt	Agrees.
02:49:36 PM	J	Plays deposition video of Tim Kastning.
03:58:42 PM	DA	Moves to admit C and Page 2 of O.
03:58:54 PM	J	Admits O-2
03:59:51 PM	J	Admits exhibit C.
04:00:01 PM	J	Recess for the day. Reconvene at 9 am tomorrow. Admonishes

Exhibit #3

	J	Jury is out for deliberation.
05:46:06 PM	J	Thanks parties.
05:46:39 PM	J	Back on the record. Mr. Riseborough is not present. Plt is present. DA was called and not answered.
06:43:09 PM	J	Question by jury, asking to define timber trespass. I intend to answer #16 defines trespass and #19 defines trepass.
06:43:57 PM	Plt	No objection.
06:44:09 PM	J	Jury is seated. I instructed parties to be within 10 mins. We have called DA a few times. I instruct the jury that instruction 16 defines trespass and 19 defines timber trespass.
06:45:23 PM	J	Jury back out for deliberation.
07:57:55 PM	J	Bailiff has advised that the jury has reached it's verdict.
07:59:33 PM	J	Jury is seated.
07:59:50 PM	J	Reads verdict.
08:03:10 PM	J	Thanks jurors. Excuses jurors.
08:05:08 PM	J	DA to produce order that reflects verdict. Now still some court trial issues to be addressed. Will schedule a status conference in the future regarding equity matter.
08:06:24 PM		
08:06:24 PM	End	

Exhibit #4

BARRY McHUGH
Prosecuting Attorney
501 Govt. Way/Box 9000
Coeur d'Alene, ID 83814
Telephone: (208) 446-1800
Fax: (208) 446-1833

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

STATE OF IDAHO, Plaintiff, vs. **CHRISTINA JUNE GREENFIELD,** DOB: SSN: [redacted] Defendant.	Case No. CR-F10-10624 **SECOND AMENDED INFORMATION** **REPORT #10PF05642-PFPD**

COMES NOW, AMY BORGMAN, Deputy Prosecutor for Kootenai County, State of Idaho, and hereby amends the information in this action and complains that the above named defendant did commit the crime of **MALICIOUS INJURY TO PROPERTY**, a Felony, Idaho Code Section 18-7001, 18-204, committed as follows:

That the Defendant, **CHRISTINA JUNE GREENFIELD**, on or about the 10th-24th day of March, 2010, in the County of Kootenai, State of Idaho, did aid and abet another in the commission of and/or did herself maliciously injure and/or destroy certain real or personal property, to-wit: trees and/or shrubs, of a value in excess of One Thousand Dollars ($1,000), the property of Eric Wurmlinger, and/or property which was jointly owned by Eric Wurmlinger and the Defendant, where Eric Wurmlinger did not give the Defendant permission to injury or destroy such property, all of

Exhibit #5

Supplemental by Det. RL Gunderson:

12/06/10, The KCPA's office wanted me to obtain a current and certified copy of the City of Post Falls ordinance related to Shrubs & Fences. I did obtain those records from Carol Fairhurst today and will provide those to the KCPA. The wording relating Shrubs & Fences was removed from the ordinance. The ordinance now only pertains to Fences. RLG

12/07/10, 09:40, I will be taking this ordinance copy to the KCPA this a.m. RLG

12/09/10, 16:30, I met with KCPA Barry McHugh and the Wurmlingers at the KCPA office. It was determined that a survey of the property is needed to verify the exact property line. Eric stated he would contact the company he previously had locate a mid property line (I.N.C. company in Post Falls).

12/16/10, 10:48, I arrived to 212 Parkwood Place. Surveyer's from I.N.C. had been working a couple of hours already, locating the property lines. I met with I.N.C. employee's, Brian Griffith & Jeff Earling. They continued working while Eric Wurmlinger invited me into his house. He had prepared a document indicating the height of the tree's and the approximate amount of tree which was cut. He numbered the tree's in his report, one through ten, indicating each of the affected tree's, counting from east to west in direction. He also provided me with a list of names of those who could verify that it was Dwight Greenfield who was assisting Chris Greenfield on the Easter weekend, 2010, by hauling loads of cut shrubs in his pickup truck. Those persons are:

1) Joe Malloy [redacted]
2) Becky Thompson [redacted]
3) Ashley Evans [redacted]

another neighbor could also verify the approximate height of the cut tree's, prior to the incident. her name is Ashley Labau [redacted] I asked Eric to fax a copy of that document to the PFPD for me.

The survey was completed at about 11:15 am, about the time Chris Greenfield exited her house. The crew set up a line to show the exact points of the property line. I Photographed the line to try to accurately show where that line was located. Chris Greenfield was also present taking photos from her side of the property and made it clear that nobody was to cross over onto her property. All persons respected her property rights without crossing onto her side.

I returned to the PFPD and notified Barry Mchugh of the results of the survey and provided some photos which accurately depict the scene. Eric Wumlinger had been billed $450.00 for the line marking, a cost which the KCPA/ PFPD had agreed to pay to have this boundary line identified. RLG

12/21/10, 13:18, I called and left a voice message for Ashley Evans, requesting he return my phone call.

12/21/10, 13:20, I called and spoke to Ashley Labau regarding her observations. She said they lived on the opposite side of Chris Greenfield at 208 Parkwood Place, and moved out about March, 2009. She said Chris had commented about her intentions of cutting down the row of trees during a conversation with her. She said Chris told her the trees were blocking her view. Ashley said they moved out of the neighborhood before the trees were cut down. She did see them after they were cut, and verified that several feet of the trees was cut off.

Exhibit #6

Christina J. Greenfield
210 S. Parkwood Place
Post Falls, ID 83854
Phone: (208) 773-0400
Plaintiff Pro Se

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRISTINA J. GREENFIELD Plaintiff, vs. ERIC J. WURMLINGER an ROSALYNN D. WURMLINGER Defendant(s),	CASE NO. CV-10 -8209 PLAINTIFF AMENDED SPECIAL VERDICT FORM AND JURY INSTRUCTIONS

DATED this 19th day of November, 2012

Christina J. Greenfield, Pro Se

Refused
Not for consideration by the Court
It is original proposed

Exhibit #7 (3pgs)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRISTINA J. GREENFIELD, Plaintiffs, vs. ERIC J. WURMLINGER, ROSALYNN D. WURMLINGER Defendants.	)	Case No. CV 10-8209 SPECIAL VERDICT FORM

WE, THE JURY, answer the special interrogatories as follows:

Question No. 1: Does the Defendants' operation of the Rivercove Bed and Breakfast violate the Parkwood Place Covenants, Conditions, and Restrictions (CC&R's)?

Answer to Question No. 1: Yes _____ No _____

Question No. 2: Have Defendants planted tall growing arborvitae shrubs on or near the property line between the Plaintiff's real property and the Defendants' real property?

Answer to Question No. 2: Yes _____ No _____

Question No. 3: Does the arborvitae hedge constitute a fence?

Answer to Question No. 3: Yes _____ No _____

Question No. 4: Have Defendants arborvitae shrubs grown in excess of that which is allowed by the Parkwood Place Covenants, Conditions, and Restrictions (CC&R's)?

Answer to Question No. 4: Yes _____ No _____

Question No. 5: Did the Defendants obstruct and / or block the Parkwood Place pedestrian easement?

Answer to Question No. 5: Yes _____ No _____

Question No. 6: Do the Defendants shrubs and / or trees block the Plaintiff's view of the Spokane river and obstruct the Plaintiff's free use of property?

Answer to Question No. 6: Yes _____ No _____

Question No. 7: Did the actions of the Defendants planting of trees and / or shrubs obscuring the Plaintiff's view result in the reduction in the value of her real property?

Answer to Question No. 7: Yes _____ **No** _____

Question No. 8: Did the Defendants refusal to maintain the arborvitae hedge constitute a nuisance?

Answer to Question No. 8: Yes _____ **No** _____

Question No. 9: Did the Defendants operation of the Rivercove Bed and Breakfast constitute a nuisance?

Answer to Question No. 9: Yes _____ **No** _____

Question No. 10: Did the Defendants operation of the Rivercove Bed and Breakfast interfere with the comfortable enjoyment of Plaintiffs comfortable enjoyment of life and property?

Answer to Question No. 10: Yes _____ **No** _____

Question No. 11: Did the Defendants' falsely report a crime and accuse the Plaintiff of Malicious Injury to Property for trimming the arborvitae hedge?

Answer to Question No. 11: Yes _____ **No** _____

Question No. 12: Did the Defendants' intentionally and / or recklessly make other false accusations to law enforcement about the Plaintiff?

Answer to Question No. 12: Yes _____ **No** _____

Question No. 13: Did the Defendants' engage in a course of conduct to harass the Plaintiff?

Answer to Question No. 13: Yes _____ **No** _____

Question No. 14: Were the Defendants actions negligent, and if so, was this negligence a direct and proximate cause of Plaintiff's damages?

Answer to Question No. 14: Yes _____ No _____

Question No. 15: Were the Defendants actions negligent, and if so, was this negligence a direct and proximate cause of Plaintiff's emotional distress?

Answer to Question No. 15: Yes _____ No _____

Question No. 16: What is the total amount of damage sustained by the Plaintiffs as a result of her damages:

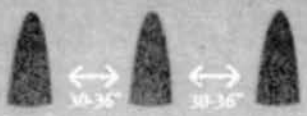
Emerald Green Arborvitae
Thuja occidentalis 'Smargard'

Exposure
Full sun for best results

Mature Height
12-15'

Fertilizing
To maintain lush, healthy plants, feed each spring with an all purpose fertilizer before new growth begins. Follow recommended instructions on label.

Growth Rate
Hedging is recommended at a space of 30-36"



JUST ADD WATER

Your wallet is a bit lighter from my purchase & your back may be tired from digging holes, but the hard part is over & your investment of time & money already looks great. However, there is one more critical task - a deep, thorough weekly watering is essential, especially during hot, dry periods. My roots take about a year to grow and re-establish in my new home.

The key to my survival is to make sure enough water penetrates the bottom of my root zone. I would really benefit from a soaker hose & a few inches of mulch to prevent my roots from drying out & to ensure my continued success.

I appreciate the extra care.

Yours Truly,
Emerald Green

TOP 10
Benefits of a Living Fence

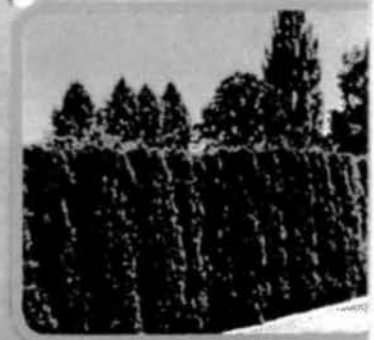
1. Privacy Screen
2. Noise Reduction
3. Attracts Birds
4. Windbreak
5. Blocks Neighboring Eyesores
6. Evergreen provides Year Round Color
7. Low Maintenance
8. Low Cost vs. Fencing
9. Natural & Friendly Appearance
10. Easy, Do-It-Yourself Installation

Emerald Green Arborvitae are the Perfect Combination of Beauty and Function!

Thuja occidentalis 'Emerald Green'. #7 pot

Item Number 25869

CC-W
0 08177 03915 1



America's #1 Living Fence

Enjoy outdoor activities in a natural and private environment.

"Product of USA"

Evil #8

DRAFT

CONFIDENTIAL BENCH MEMORANDUM

Greenfield v. Wurmlinger, et al.
CV 10-8209

PARTIES:

Plaintiff:	**Christina Greenfield**
Defendants:	**Eric and Rosalynd Wurmlinger (husband and wife)**

ATTORNEYS:

Plaintiff:	**Pro Se**
Defendants:	**John Riseborough and Trevor Frank**

1. **Plaintiff's Motion to Set Aside Judgment;**
2. **Plaintiff's Motion Judgment Notwithstanding the Verdict (JNOV)**

I. Introduction

In her Complaint, Plaintiff/Counterclaim Defendant ("Greenfield") asserted legal claims for nuisance and negligent infliction of emotional distress, as well as equitable claims praying for injunctive and abatement relief. In their Counterclaim, the Defendants/Counterclaimants ("Wurmlingers") asserted legal claims for negligent infliction of emotional distress, trespass and timber trespass.

On November 26, 2012, a five-day jury trial commenced in this matter as to the legal claims asserted by the parties, with the Court reserving Greenfield's equitable claims for determination by court trial. Greenfield was represented *pro se* and the Wurmlingers were represented by attorney John C. Riseborough.

On November 30, 2012, the jury returned a special verdict in favor of the Wurmlingers on each of Greenfield's claims, and found in favor of the Wurmlingers on their counterclaims. As to Greenfield's claims, the jury found that the Wurmlingers' maintenance of their arborvitae and/or operation of their bed and breakfast did not constitute nuisances. Additionally, the jury

Exhibit #9 (3pgs)

found that the Wurmlingers had not inflicted emotional distress upon Greenfield. As to the Wurmlingers' counterclaims, the jury found that Greenfield had committed trespass, but did not award trespass damages. Additionally, the jury found that the arborvitae were trees and that Greenfield committed timber trespass. The jury awarded the Wurmlingers timber trespass damages in the amount of $17,000.00. Lastly, the jury found that Greenfield's general conduct negligently inflicted emotional distress on the Wurmlingers, and that the negligence was the proximate cause of the Wurmlingers' damages. The jury awarded the Wurmlingers negligent infliction of emotional distress damages in the amount of $52,000.00.

On December 10, 2012, Greenfield filed her Motion to Set Aside Judgment, Motion for Judgment Notwithstanding the Verdict, and the Affidavit of Christina Greenfield. On December 21, 2012, the Wurmlingers filed their opposition brief. On January 7, 2012, this Court entered its Order Establishing Post Jury Trial Judgment and its Jury Trial Judgment. On January 14, 2012, Greenfield filed her reply brief.

Greenfield's motions came on for hearing on January 16, 2013, and after hearing argument, the Court took the motions under advisement.

II. Summary of Arguments

Greenfield has brought her Motion to Set Aside the Judgment pursuant to I.R.C.P. 60(a) and (b), and her Motion for Judgment Notwithstanding the Verdict pursuant to I.R.C.P. 50(b). In general, Greenfield argues, "Plaintiff believes that the jury would have formulated a different opinion if they hadn't been tricked into believing that the arborvitae hedge was solely owned by the Defendants', a decision that was based on the admission of the Defendants' deceitful survey." *Plaintiff's Motions at p. 22.*

Argument	Opposition	Reply	Analysis
1. JNOV: Wurmlingers	Constitutional and statutory		Procedurally, I note that Greenfield requests that the

IV. Analysis

The only issue that concerns me is the NIED claim being dismissed. We can play up the former counsel's decision and the no objection to putting it to the jury later on.

As to reserving ruling on the Motion to Set Aside Judgment, the CC&R issue does relate to the court trial but there is a judgment entered on the other issues. Will have to ask her about that at the hearing. Also, need to hear about NIED counterclaim dismissal issue.

Campbell, supra, discusses fraud upon the court.

Substantial evidence is "such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance." *Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993) (citation omitted).

As to the NIED claim, the ISC provided in *Belstler v. Conine*:

B. The district court did not err in enjoining the Belstlers from relocating the private driveway easement.

1. The district court had jurisdiction to decide this issue.

The Belstlers argue that the district court did not have subject matter jurisdiction to enjoin any rights pursuant to I.C. § 55–313 to relocate an easement found to exist by the court in its decision. They argue that the relocation issue was not pled or argued before the district court, and that although they pled relocation in their complaint, their amended complaint no longer referred to relocation as an issue. Additionally, they argue that there was no explicit reference to I.C. § 55–313 at trial, and that they did not agree to have the relocation issue decided at trial. Further, any references at trial to relocation, they argue referred to settlement and mediation offers.
The December 30, 2009 Memorandum Decision stated that the:

[P]arties did extensively litigate the relocation issue at trial and the pleadings are deemed amended to include a claim for relocation of the northerly easement. Throughout the trial the parties took the position that if the court should determine that the easements claimed by the CONINES are valid easements, the Court should then determine whether or not the BELSTLERS could, pursuant to I.C. § 55–313 change the location of the northerly easement. Therefore, that issue is ripe for determination at this time by this Court.

Idaho Rules of Civil Procedure Rule 15(b) states in relevant part that: