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AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

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

AED, INC., an Idaho Corporation,)
)
 Plaintiff,)
 vs.)
)
 KDC INVESTMENTS, LLC, a Virginia LLC,)
 and LEE CHAKLOS and KRYSTAL)
 CHAKLOS, individually,)
 Defendants.)
)
)
 _____)

Case No. **CV 2010 7217**
**MEMORANDUM DECISION AND
ORDER DENYING PLAINTIFF AED'S
MOTION TO ALTER OR AMEND
AND ORDER GRANTING
DEFENDANTS' MEMEORANDUM
OF COSTS AND FEES**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On January 31, 2011, the Court issued its Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment and Denying Plaintiff AED's Motion for Reconsideration.

On February 3, 2011, the parties stipulated to dismiss Counts I and II of KDC's counterclaim without prejudice.

On February 4, 2011, AED filed yet another motion for reconsideration. Final Judgment in favor of KDC was entered on February 8, 2011. On February 14, 2011, this Court entered its "Memorandum Decision and Order Denying Plaintiff AED's (Second) Motion for Reconsideration."

The next day, on February 15, 2011, AED filed a "Notice of Hearing" setting March 23, 2011, as the hearing date for its "Motion to Alter or Amend", a motion which AED had not yet even filed. On February 28, 2011, AED filed its "Motion to Alter or

Amend Judgment” which reads, in its entirety: “Plaintiff, AED, Inc., pursuant to Idaho Rule of Civil Procedure 59(e) requests that this Court alter and/or amend its judgment as set forth in the memorandum in support of this motion.” A “Memorandum in Support of Motion to Alter or Amend Judgment” was also filed February 28, 2011. On March 16, 2011, defendants filed “Defendants’ Memorandum in Opposition to Plaintiff’s Motion to Alter or Amend Judgment.”

On February 22, 2011, KDC filed “Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos’s Verified Memorandum of Costs and Fees.” This was noticed for hearing on March 23, 2011. On March 8, 2011, AED filed “Plaintiff’s Objection to Defendants’ Costs and Fees. On March 17, 2011, AED filed “Defendants’ Reply in Support of Verified Memorandum of Costs and Fees.”

On March 4, 2011, AED filed its Notice of Appeal in this matter. On March 14, 2011, AED filed its Amended Notice of Appeal.

Oral argument was held on March 23, 2011, on AED’s Motion to Alter or Amend Judgment and on defendants’ Memorandum of Fees and Costs. At the conclusion of that hearing, those matters were taken under advisement.

In this Court’s February 14, 2011, “Memorandum Decision and Order Denying Plaintiff AED’s (Second) Motion for Reconsideration”, this Court set forth the procedural history of this case:

This litigation started by plaintiff AED on August 23, 2010, involves the sale and future demolition of a bridge over the Ohio River. AED sold this bridge to defendant KDC via a written agreement entered into on May 20, 2010. AED claims eleven days later, on June 1, 2010, KDC entered into an agreement with AED to have AED perform the demolition work on the same bridge AED had just sold to KDC. This Court quieted title to the bridge in KDC based on the purchase agreement.

Because there is an Order from a federal district judge to have the bridge demolished by December 2011, and because AED’s filing of this instant lawsuit brought a halt to KDC’s bridge demolition process, KDC has at all times sought to

speed this litigation along. Due to the utter lack of basis for this second motion to reconsider filed by AED on February 4, 2011, (AED's "Motion to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment"), this motion appears to be nothing more than AED's attempt to filibuster KDC's ability to demolish the bridge. This is AED's second "motion for reconsideration" within six weeks. AED now argues that since "The Court ruled that the promise by KDC to hire AED [to demolish the bridge] is illegal...the remainder of the agreement [the purchase agreement] is illegal based on Quiring..." Memorandum in Support of Plaintiff's Motion to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment, p. 3. This new argument is not based on any new admissible evidence, and misinterprets the Idaho Supreme Court decision in *Quiring v. Quiring*, 130 Idaho 560, 944 P.2d 695 (1997).

This Court has set forth the factual and procedural history of this case in its December 15, 2010, Memorandum Decision and Order on Defendant KDC's Motion for Preliminary Injunction:

This matter is before the Court on defendant KDC Investments LLC's (KDC) Motion for Preliminary Injunction filed November 17, 2010. This Court finds there are too many unanswered questions to grant such relief.

This lawsuit involves the sale of a bridge across the Ohio River on the Ohio/West Virginia border. Due to a December 23, 2009, Order from Federal District Court in Ohio, that bridge must be demolished no later than December 21, 2011. Affidavit of Krystal Chaklos in Support of Motion for Expedited Hearing, filed October 6, 2010, Exhibit C, p. 1. Defendant KDC bought the bridge from plaintiff AED, Inc. (AED) via what will be referred to as the "purchase agreement", a document signed May 20, 2010. Amended Complaint, Exhibit A. Under the terms of that purchase agreement, KDC assumed responsibility for "proper demolition and removal [of the bridge] on or before June 1, 2011." *Id.*, p. 1. Subsequently, a separate "demolition agreement" between the parties was at least discussed, if not executed. At the end of the "demolition agreement" AED's Eric J. Kelly, Sr. signed the document on June 1, 2010, as did KDC's Krystal Chaklos, also on June 1, 2010. However, the "demolition agreement" which is titled a "proposal" lacks a signature by any person from KDC on the first page "accepting" the agreement. The "purchase agreement" clearly places the responsibility to demolish the bridge on KDC. The "demolition agreement", if it was in fact executed by KDC, places that responsibility on AED. AED filed this lawsuit, and KDC claims the moment AED filed this lawsuit KDC's efforts to demolish the bridge stopped as a result of a letter sent the United States Coast Guard "...until the court sorts out ownership of the Bellaire Bridge." Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction filed November 18, 2010, Exhibit 2. KDC then moved for a preliminary injunction "...prohibiting AED from repudiating the Purchase Agreement so that KDC Investments can continue its efforts to demolish and remove the Bridge..." Memorandum in Support of Motion for Mandatory Injunction, p. 20.

AED, an Idaho corporation, filed its Complaint and Jury Demand in the instant matter on August 23, 2010. AED alleged defendant KDC Investments, LLC, a Virginia LLC, and defendants Lee Chaklos and Krystal Chaklos individually (hereinafter “KDC” collectively) induced AED to enter into an agreement to sell a bridge to KDC via a promise that AED would be hired to later demolish said bridge. Complaint, p. 1, ¶ 6; Amended Complaint, p. 2, ¶ 9. AED alleges: “Said promise was material to the parties’ transaction and Plaintiff would not have agreed to sell the bridge without the promise that Plaintiff would be allowed to demolish the bridge.” Amended Complaint, p. 2, ¶ 9. This allegation is completely contrary to the written language found in the “purchase agreement.” The “purchase agreement” places the responsibility for demolition of the bridge squarely and solely upon KDC. Amended Complaint, Exhibit A. AED would only have the right to demolish the bridge if KDC failed to do so. Amended Complaint, p. 2, ¶ 7. AED’s Amended Complaint alleges fraud in the inducement and breach of contract, and seeks rescission, damages, or specific performance. Amended Complaint, pp. 3-4. In the Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC’s Amended Counterclaim, filed on November 9, 2010, KDC counterclaims fraud, breach of contract, and seeks a declaratory judgment to quiet title to the bridge. Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC’s Amended Counterclaim, pp. 8-10.

On November 17, 2010, KDC filed its motion for preliminary injunction and memorandum and affidavits in support thereof, asking this Court to enjoin “AED from continuing to breach the sale agreement by repudiating its validity and seeking to rescind the agreement so that KDC Investments may continue the demolition process in order to demolish and remove the Bridge by June 1, 2011.” Memorandum in Support of Motion for Mandatory Injunction, p. 2. KDC noticed a hearing for November 24, 2010. AED filed its Objection to Defendants’ Motion for Preliminary Injunction on November 18, 2010, arguing only procedural, not substantive, issues with regard to KDC’s motion.

On November 22, 2010, KDC filed its Reply to Plaintiff’s Objection to Defendant KDC Investments, LLC’s Motion for Mandatory Injunction. At oral argument on November 24, 2010, the Court indicated its frustration with both sides: with KDC for not filing its motion for preliminary injunction until November 17, 2010, in spite of the fact that at a hearing held October 22, 2010, this Court set aside that November 17, 2010, date for hearing additional motions; and with AED for not making any substantive argument opposing the preliminary injunction, choosing instead to simply complain that KDC had violated I.R.C.P. 7(b)(3)(A) by not providing written notice of the motion fourteen days prior to the hearing. At the November 24, 2010, hearing, the Court re-scheduled oral argument on KDC’s motion for preliminary injunction to December 6, 2010, providing AED with more than the requisite notice under I.R.C.P. 7(b)(3)(A). At the November 24, 2010, hearing, due to the time-sensitive nature of this case, and with the agreement of counsel for both sides, this Court also

scheduled this case for a three-day jury trial beginning February 22, 2011. Following the hearing on November 24, 2010, AED filed a "Motion to Strike Portions of Krystal Chaklos Affidavit." On November 24, 2010, AED also filed the "Affidavit of Mark Wilburn in Support of Plaintiff's Objection to Issuance [sic] of Preliminary Injunction" and the "Affidavit of Eric J. Kelly in Support of Plaintiff's Objection to Issuance [sic] of Preliminary Injunction." On November 29, 2010, AED filed "Plaintiff's Response to Issuance of Preliminary Injunction", providing the Court with AED's substantive arguments regarding KDC's motion for preliminary injunction. On December 2, 2010, KDC filed "Defendant KDC Investments, LLC's Reply in Support of Motion for Preliminary Injunction." Also on December 2, 2010, KDC filed "Defendant KDC Investments, LLC's Motion to Strike Affidavits of Eric J. Kelly and Mark Wilburn." On December 3, 2010, KDC filed an "Affidavit of Lee Chaklos in Support of Motion for Preliminary Injunction" and an "Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction".

On December 6, 2010, the same day scheduled for oral argument, AED filed a "Motion to Strike Affidavits of Krystal Chaklos and Lee Chaklos" and a motion to shorten time to hear such motion at the hearing scheduled for December 6, 2010. Also on December 6, 2010, AED filed a pleading entitled "Plaintiff's Notice of Filing" to which was attached the Idaho Secretary of State's Corporation Reinstatement Certificate dated December 3, 2010. Oral argument was held on December 6, 2010. At that hearing, counsel for KDC had no objection to AED's motion to shorten time to hear AED's Motion to Strike Affidavits of Krystal Chaklos and Lee Chaklos. Argument was then heard on that motion to strike, at the conclusion of which this Court denied AED's Motion to Strike Affidavits of Krystal Chaklos and Lee Chaklos.

Next, argument was heard on KDC's motion to strike the affidavits of Eric J. Kelly and Mark Wilburn. At the conclusion of that argument, the Court granted KDC's motion to strike the affidavit of Eric J. Kelly as to all paragraphs except paragraphs 15-22 and the exhibits attached referred to in those paragraphs, and the Court granted KDC's motion to strike the affidavit of Mark Wilburn in its entirety. The Court then heard oral argument on KDC's motion for preliminary injunction, following which the Court took said motion under advisement.

The bridge at issue is the Bellaire Toll Bridge which spans the Ohio River on the border of Ohio and West Virginia, connecting the towns of Bellaire, Ohio and Benwood, West Virginia. Memorandum in Support of Motion for Preliminary Injunction, p. 1. Demolition of the bridge was the subject of a federal lawsuit resulting in an Order requiring AED to demolish and remove the bridge by December 11, 2011. Amended Complaint, p. 1, ¶ 5.

KDC and AED entered into an Asset Purchase and Liability Assumption Agreement (purchase agreement) on May 20, 2010, in which AED sold the bridge to KDC for \$25,000. Memorandum in Support of Motion for Mandatory Injunction, p. 2. AED's initiation of this litigation in Idaho has brought demolition efforts to a halt, according to KDC. *Id.* KDC

now seeks a preliminary injunction “to prohibit AED from continuing to breach the Purchase Agreement by repudiating its validity and seeking to rescind the Agreement.” Reply to Plaintiff’s Objection to Defendant KDC Investment, LLC’s Motion for Mandatory Injunction, p. 4.

Memorandum Decision and Order on Defendant KDC’s Motion for Preliminary Injunction, pp. 1-6. This Court determined the remaining questions of fact and unresolved issues of law precluded it from granting KDC the injunctive relief it sought. *Id.*, pp. 27-28.

On December 15, 2010, KDC filed its Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, and the Affidavits of Randall Schmitz, Lee Chaklos, and Krystal Chaklos in support of the motion. This Court’s Pretrial Order, dated November 24, 2010, required the party opposing any motion for summary judgment to serve and file materials objecting thereto no later than 14 days before hearing on the motion. Hearing on KDC’s motion for summary judgment was held on January 12, 2011. This Court heard oral argument on AED’s motion to reconsider the Court’s ruling that AED was not entitled to rescission of the contract on January 26, 2011. On January 31, 2011, the Court issued its Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment and Denying Plaintiff AED’s Motion for Reconsideration. On February 3, 2011, the parties stipulated to dismiss Counts I and II of KDC’s counterclaim without prejudice. On February 4, 2011, AED filed the motion for reconsideration now before the Court. AED now asks this Court to vacate its earlier decision quieting title of the bridge in KDC, or alternatively, “set the matter for Jury Trial on the sole issue of whether AED would have sold the bridge without the agreement that AED perform the blast.” Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment, pp. 1-2.

Oral argument on AED’s “Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment” was held on February 14, 2011. At oral argument, this Court took under advisement KDC’s Motion to Strike the Affidavit of Eric J. Kelly in Support of Plaintiff’s Motion to Reconsider Court’s Decision and Order Granting Defendant KDC’s Motion for Summary Judgment. That affidavit of Kelly, filed on February 4, 2011, sets forth how much AED would have spent blasting the bridge, and AED’s memorandum makes the argument as to how much profit AED would have made from blasting the bridge, in an effort to show how important the demolition agreement was to the purchase agreement. As shown below, this is simply more extrinsic evidence that is not admissible, thus, it is not relevant. Additionally, Kelly’s affidavit lacked foundation.

Memorandum Decision and Order Denying Plaintiff AED’s (Second) Motion for Reconsideration, pp. 1-6. At the conclusion of that Memorandum Decision and Order, this Court: 1) denied AED’s Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment, and 2) granted KDC’s

Motion to Strike the Affidavit of Eric J. Kelly in Support of Plaintiff's Motion to Reconsider Court's Decision and Order Granting Defendant KDC's Motion for Summary Judgment. *Id.*, p. 19.

II. STANDARD OF REVIEW.

"A motion to reconsider a dismissal order properly should be treated as a motion to alter or amend a judgment under I.R.C.P. 59(e) if the motion was timely filed." *Ross v. State*, 141 Idaho 670, 671, 115 P.3d 761, 762 (Ct.App. 2005); *Straub v. Smith*, 145 Idaho 65, 71, 175 P.3d 754, 760 (2007). A motion to alter or amend a judgment, pursuant to Rule 59(e) "shall be served not later than fourteen (14) days after entry of the judgment." I.R.C.P. 59(e). In *Straub*, the Smiths made a motion to reconsider under I.R.C.P. 11(a). The Idaho Supreme Court stated:

However, a party may only make a motion to reconsider interlocutory order or orders entered *after* the entry of final judgment. I.R.C.P. 11(a)(2). The dismissal was a final judgment and, thus, the Smith's motion to reconsider should be treated as a motion to modify or amend the order of dismissal.

Id. (emphasis added). Under I.R.C.P. 59(e), this Court may correct any alleged legal and factual errors before it. In *Straub*, the Supreme Court reversed the district court's denial of reconsideration, treating the motion as one to alter or amend under I.R.C.P. 59(e). 145 Idaho 65, 71, 175 P.3d 754, 760. The Smiths had supported their motion with an affidavit alerting the court to the fact that they had stipulated to dismissal with prejudice, but had not agreed to waive costs. *Id.* "Thus, if the court entered the order denying costs and fees because it understood that to be part of the stipulation terms, the Smiths' motion alerted it to the factual error and the motion gave it the opportunity to correct that error." *Id.* AED's instant motion is one to alter or amend a judgment, but

the Court will not consider new evidence in motions to alter or amend under I.R.C.P. 59(e).

Idaho Rule of Civil Procedure 59(e) motions were discussed by the Idaho Supreme Court in *Coeur d'Alene Mining Co. v. First National Bank of Idaho*, where the Court stated:

A Rule 59(e) motion to amend a judgment is addressed to the discretion of the court. An order denying a motion made under Rule 59(e) to alter or amend a judgment is appealable, but only on the question of whether there has been a manifest abuse of discretion. Rule 59(e) proceedings afford the trial court the opportunity to correct both errors of fact and law that had occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal. Such proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.

118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990) (quoting *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct.App. 1982)).

A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006).

III. ANALYSIS.

A. INTRODUCTION.

AED moves this Court to alter or amend its February 14, 2011, Memorandum Decision and Order Denying Plaintiff AED's (Second) Motion for reconsideration on several grounds: (1) AED argues the Court erred in ruling the demolition contract was illegal and the Court failed to address principles of contract law supporting its finding of illegality; (2) the Court's factual findings pertaining to the execution of the purchase

agreement and demolition agreement were incorrect and this matter “is a jury question anyway”; and (3) the Court erred in its interpretation of *Quiring v. Quiring*, 130 Idaho 560, 944 P.2d 695 (1997). Memorandum in Support of Motion to Alter or Amend Judgment, pp. 1, *et seq.* In response, KDC argues AED’s motion is untimely; AED cannot present new evidence and the evidence in the record supports the Court’s findings with regard to the dates of execution, and the Court’s analysis regarding *Quiring* is proper. Defendants’ Memorandum in Opposition to Plaintiff’s Motion to Alter or Amend Judgment, pp. 2, *et seq.*

First, AED’s motion to alter or amend is untimely, and the rule basis given by AED for that motion is simply wrong. Idaho Rule of Civil Procedure 59(e) requires a motion to alter or amend a judgment to be served no later than fourteen days after entry of the Judgment. I.R.C.P. 59(e). As noted by KDC, AED’s motion to alter or amend the Judgment in this matter is clearly untimely as the Judgment was entered on February 8, 2011, and AED moved pursuant to I.R.C.P. 59(e) by filing its motion on February 28, 2011. This is beyond the fourteen-day time limitation under I.R.C.P. 59(e). An I.R.C.P. 59(e) motion would also be entirely improper and untimely if, as sought by AED, it was to apply to the Court’s February 14, 2011, Memorandum Decision and Order. It appears AED seeks yet another motion for reconsideration and has for some odd reason framed the motion as one under I.R.C.P. 59(e). AED’s motion to alter or amend the Court’s Judgment, filed on February 8, 2011, is untimely and cannot be heard in light of the mandatory “shall” language of the I.R.C.P. 59(e). See *Dunlap v. Cassia Memorial Hospital Medical Center*, 134 Idaho 233, 236, 999 P.2d 888, 891 (2000) (“This renewed motion was untimely as a Rule 59(e) motion to alter or amend the

certified partial summary judgment because it was clearly made more than fourteen days after entry of the certified judgment.”)

Second, to the extent that AED seeks to have the Court review its Decision and Order on AED’s second motion for reconsideration, as opposed to the Court’s Judgment, the proper procedure would have been to file yet another motion for reconsideration. And, even if the Court were to treat AED’s motion as one for reconsideration under I.R.C.P. 11(a)(2)(B), AED’s motion is nonetheless untimely. The Court’s Memorandum Decision and Order was filed on February 14, 2011, but AED’s motion was not filed until March 1, 2011. Counsel for AED faxed courtesy copies of the motion and memorandum in support on February 28, 2011, to the Court in chambers, but the pleadings were not *filed* with the Court until March 1, 2011. See I.R.C.P. 5(e). The certificate of service for AED’s motion and memorandum in support indicate a courtesy copy was faxed to this Court’s chambers on February 28, 2011, but no correspondence accompanied the courtesy copies requesting that they be *filed* by the Court as permitted by Rule 5(e)(1). Nevertheless, I.R.C.P. 61 permits the Court to disregard errors or defects in the proceeding which do not affect the substantial rights of the parties. Here, KDC has not provided the Court with any evidence of prejudice resulting from AED’s untimely filings and was able to substantively respond to the arguments AED makes in this third motion for reconsideration, incorrectly captioned as a motion to alter or amend a judgment.

B. AED’S NEW CLAIM THAT NEITHER THE PURCHASE AGREEMENT NOR THE DEMOLITION AGREEMENT ARE ILLEGAL IS CONTRARY TO PRIOR POSITIONS TAKEN BY AED, AND IS UNSUPPORTED.

In its Memorandum in Support of Motion to Alter or Amend Judgment AED’s first contention is that it never argued the purchase agreement was illegal and that this

Court erred in finding the demolition agreement illegal and must set forth the principles of contract law supporting its finding. Memorandum in Support of Motion to Alter or Amend Judgment, pp. 1-2. KDC does not directly address this argument, but does note throughout its reply that AED fails to set forth any support for its contentions.

Defendants' Response to AED, Inc's Motion to Alter or Amend Judgment, pp. 3 *et seq.*

AED's argument directly contradicts the opposite argument it made on its earlier motion for reconsideration. There, AED argued the purchase agreement between the parties is illegal because the consideration upon which the agreement was based is illegal. Memorandum in Support of Plaintiff's Motion to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment, p. 1. This Court wrote in its decision:

AED states it would not have entered into the purchase agreement to sell the bridge to KDC but for the agreement that AED would perform blasting work. *Id.*, p. 3. AED argues the demolition agreement cannot be separated from the purchase agreement; “[b]oth are illegal if the blasting contract is illegal.” *Id.*, p. 4. **AED cites *Quiring v. Quiring*, 130 Idaho 560, 944 P.2d 695 (1997), as support for its contention that because the sale of the bridge was based on illegal consideration (the demolition contract determined by this Court to be an illegal contract), the purchase agreement is unenforceable and the Court should vacate the portion of its Order declaring KDC the owner of the bridge.** *Id.*, p. 5. In the alternative, AED requests the Court set for jury trial the sole issue of whether AED would have sold the bridge without the agreement that AED would perform demolition of the bridge. *Id.* But the issue of “whether AED would have sold the bridge without the agreement that AED would perform the demolition of the bridge” is completely irrelevant given the contract language in the purchase agreement.

Memorandum Decision and Order Denying Plaintiff AED's (Second) Motion for Reconsideration, p. 8. (bold added). AED is now not being candid with the Court.

AED presents both this Court and KDC with a moving target. This Court has already taken great pains to set forth its basis for the determination that the demolition contract is illegal (because of AED's failure to secure the proper West Virginia Contractor's

License). See Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment and Denying Plaintiff AED's Motion for Reconsideration, pp. 15-16. Following this decision, filed on January 28, 2011, AED shifted its argument to the one in its second motion for reconsideration, that because the demolition agreement is illegal, so is the purchase agreement. This Court again thoroughly addressed AED's arguments and concluded them to be without merit. Memorandum Decision and Order Denying Plaintiff AED's (Second) Motion for Reconsideration, pp. 10-11. Ultimately, the Court determined the demolition agreement could not be the consideration supporting the purchase agreement which had been entered into weeks before, made no reference to the demolition agreement, and contained a merger clause. *Id.*, p. 7. Now, AED again makes the argument that neither the demolition agreement nor the purchase agreement are illegal. Memorandum in Support of Motion to Alter or Amend Judgment, pp. 1-2. AED has set forth nothing new to support this Court's reconsidering its previous findings of fact and conclusions of law.

At oral argument, counsel for AED claimed for the first time that the demolition agreement is not subject to the statute of frauds and AED would be able to act on a breach of the contract although it were verbal. KDC responded AED never pled breach of a verbal contract, but rather specifically alleged breach of the written demolition agreement in its Complaint. To the extent KDC objects to AED's raising this argument for the first time on a third motion for reconsideration, such objection is sustained. "A cause of action not raised in a party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal." *O'Guin v. Bingham County*, 139 Idaho 9, 15, 72 P.3d 849, 855 (2003).

C. AED'S NEW CLAIM THAT THE COURT ERRED IN ITS FACTUAL FINDINGS PERTAINING TO THE EXECUTION DATES OF THE AGREEMENTS IS UNSUPPORTED.

AED next takes issue with the Court's finding that the purchase agreement and demolition agreement were executed at different times. *Id.*, pp. 2-4. AED sets forth a timeline for the Court, purporting to demonstrate when each agreement was entered into. *Id.*, p. 3. AED contends the purchase agreement was entered into on May 20, 2010, terminated on May 27, 2010, only to be given effect again on June 1, 2010 (with the caveat that KDC execute the demolition contract). *Id.*, p. 3. As noted by KDC, AED cites to portions of the Affidavit of Eric Kelly which have been stricken in supporting this timeline. Defendants' Response to AED, Inc.'s Motion to Alter or Amend Judgment, p. 4, fn. 1. The portions of Eric Kelly's Affidavit which remain in the record do not support the conclusion of termination AED seeks. The May 27, 2010, e-mail of Eric Kelly states he terminated the purchase agreement in writing; this writing was never made part of the record and is not before the Court. Eric Kelly's stating, "I did not [sic] terminate the agreement as I should have..." [Kelly states in his Affidavit he meant to say he did terminate the agreement as he should have] is at best ambiguous. Affidavit of Eric Kelly, Exhibit D. Kelly writes:

AED is presently weighing the opinion [sic] to decline to enter into any agreement with KDC Investments. As of today's date, May 27, 2010, you have not complied with the Contingency Agreement of May 20th, 2010.

Id. This statement is even more unclear than Kelly's misstatement as to whether he should or should not have terminated the purchase agreement. AED is arguing Kelly's *equivocal* statement (that he's weighing the option to decline to enter into an agreement with KDC), as evidence of a termination. KDC notes the deposition testimony of Eric

and Lisa Kelly indicates they *granted KDC an extension* to pay funds under the purchase agreement. Defendants' Response to AED's Motion to Alter or Amend, p. 5.

The evidence before the Court demonstrates the parties had heated e-mail discussions on May 27, 2010, however none of the email exchanges individually nor in their entirety can be said to amount to a termination of the purchase agreement by AED. There is simply no question of fact as to whether "AED is presently weighing the opinion [presumably option] to decline to enter into any agreement with KDC Investments..." amounts to a termination. Whether AED was weighing its options or not, the evidence submitted to this Court simply does not amount to a termination.

D. THIS COURT'S ANALYSIS OF *QUIRING V. QUIRING*.

Finally, AED urges the Court to reconsider its analysis of *Quiring* with regard to the question of whether illegal consideration can be separated from legal consideration in a case where an illegal contract purports to be *the* consideration (or at least *part of* the consideration) for a different legal contract. Memorandum in Support of Motion to Alter or Amend, pp. 4-7. AED argues *Quiring's* holding that the quitclaim deed in that case was illegal, although supported by independent consideration of \$800, is the opposite of this Court's holding in this matter. *Id.*, p. 6. AED continues:

The quit claim deed in *Quiring* made no reference whatsoever to the separate agreement regarding the forgiveness of "all past differences" or to not report the incidents to the police, yet the factual situation was that one did have something to do with the other. This Court's [sic] has made a finding of fact that the blast contract did not have anything to do with the purchase contract. This is against the weight of the evidence, but this Court is not supposed to be weighing evidence.

Id. Again, AED presupposes matters not determined by the Court. The weight of the evidence, as discussed numerous times in previous written decisions by this Court, does not support AED's contention that the demolition contract formed the basis of

consideration for the purchase agreement. The amount and type of evidence in *Quiring*, is simply not present here.

This Court is now faced with AED's third motion for reconsideration, incorrectly brought before the Court as a Motion to Alter or Amend Judgment pursuant to Rule 59(e). AED now claims the Court: should explain why it made a finding of fact that the demolition agreement was not part of the purchase agreement; "should explain how the failure of the [AED's] fraudulent inducement claim amounts to an inability to admit parol evidence of a separate illegal agreement that was a material inducement for the purchase agreement"; "should explain the relevance of this finding of fact [that AED's own failure to secure proper licensing in West Virginia resulted in the demolition agreement being illegal] to the contract law principles raised in the first motion to reconsider; and "should further explain why this finding of fact should not have been made by a jury." *Id.*, pp. 6-7. In short, AED's actions or lack thereof resulted in the demolition agreement's illegality. AED's unclear and rapidly changing arguments appear to set forth it seeks to provide parol evidence to support its contention that the demolition agreement was consideration for the purchase agreement and it would not have agreed to sell the bridge but for the alleged fraudulent inducement related thereto; this argument is moot as it was AED who did not take the steps necessary to secure licensing and ensure the demolition agreement was valid. Although the Court is unsure what portions of AED's first motion to reconsider AED is now referring to, the motion argues (contrary to the instant argument) that the purchase agreement is illegal if the demolition agreement is. Again, AED failed to secure licensing and could not have gone forward with the demolition agreement; this does not invalidate an earlier agreement to purchase the bridge entered into by the parties. And, finally, KDC states this Court is

entitled to find facts at the summary judgment stage. Defendants' Response to AED, Inc.'s Motion to Alter or Amend Judgment, p. 6. This claim somewhat misstates what the Court may do. The role of the Court is not to find facts by resolving disputes at the summary judgment stage, but to determine, in the light most favorable to the non-moving party, whether there are genuine issues of material fact. *Davidson v. Davidson*, 2011 WL 227673, at *9 (Idaho Ct.App. Jan. 26, 2011) (quoting *J.E.B., et al. v. Danks*, 785 N.W.2d 741, 746-47 (Minn. 2010)). The questions AED has posed in its numerous successive motions for reconsideration do not involve genuine issues of material fact.

In short, this Court found the demolition agreement formed NO part of the consideration for the purchase agreement. Period. For AED to now raise these arguments is frivolous. The Court, in an attempt to clarify and explain its reasoning, appears to have utterly confused AED. What the Court wrote was, "But here, the demolition agreement did not even exist at the time the purchase agreement was entered into." Memorandum Decision and Order Denying Plaintiff AED's (Second) Motion for Reconsideration, p. 11. The Court never claimed, as misstated by AED, that partial legal consideration makes a whole contract legal. However material AED may believe the demolition agreement is to its purchase agreement, this Court never found the purchase agreement was supported in any way by an agreement which was not even in existence at the time the purchase agreement was entered into.

E. KDC'S MEMORANDUM OF COSTS AND FEES AND AED'S OBJECTION.

As mentioned above, on February 22, 2011, KDC filed "Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos's Verified Memorandum of Costs and Fees." This was timely given the Judgment was filed February 8, 2011. I.R.C.P. 54(d)(5). On March 8, 2011, AED filed "Plaintiff's Objection to Defendants' Costs and

Fees.” This was timely. I.R.C.P. 54(d)(6). On March 17, 2011, AED filed “Defendants’ Reply in Support of Verified Memorandum of Costs and Fees.”

At oral argument on March 23, 2011, counsel for AED indicated they had no argument to present, that his client would stand on the written objection which was filed. In AED’s “Plaintiff’s Objection to Defendants’ Costs and Fees”, AED makes no argument that KDC is the prevailing party, and makes no argument that KDC is not entitled to its costs as a matter of right. Accordingly, costs as a matter of right as requested by KDC in the amount of \$5,670.56 are awarded in favor of KDC against AED.

As to discretionary costs, AED obliquely objects that none of the discretionary costs are “exceptional”, citing *Fish v. Smith*, 131 Idaho 492, 494, 960 P.2d 175, 177 (1998). Plaintiff’s Objection to Defendants’ Costs and Fees, pp. 1-2. Certainly, under *Fish* it was very difficult if not impossible to ever receive an award of discretionary costs. However, *Fish* is not the current status of the law. KDC correctly notes the more recent cases such as *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 474, 36 P.3d 218, 227 (2001), *Hayden Lake Fire Protection District v. Alcorn*, 141 Idaho 307, 313, 109 P.3d. 161, 168 (2005), and *Puckett v. Verska*, 144 Idaho 161, 158 P.3d 937 (2007). Defendants KDC Investments, LLC and Lee Chaklos and Krystal Chaklos’s Verified Memorandum of Costs and Fees, pp. 5-6. AED objects that travel expenses of KDC’s counsel should not be awarded as KDC chose a south Idaho attorney and AED should not have to pay for that decision. Plaintiff’s Objection to Defendants’ Costs and Fees, p. 2. AED also objects to the \$3,359.00 Westlaw costs because “A firm such as Hall Farley likely has a Westlaw plan which is a flat fee other than those items which are outside of that plan, which have not been identified.” *Id.*

That unfounded claim by AED is in contrast to the *itemized* Westlaw claims in the *verified* memorandum of costs and in contrast to *itemization* in the *Affidavit* of Counsel in Support of Defendants' Verified Memorandum of Costs. Casting aspersions does not trump admissible evidence under oath of counsel. Due to the nature of the case, and especially the multi-state law involved, it is understandable how Westlaw research was not only necessary, but exceptional as defined in *Hayden Lake Fire Protection District*, where "the case was itself exceptional given the magnitude and nature of the case. 141 Idaho 307, 313, 109 P.3d. 161, 168. The Court finds that same reasoning applies to this case in general and the Westlaw expenses and the travel expenses of KDC's attorneys in specific. There is nothing persuasive about AED's argument as to KDC's hiring a south Idaho law firm. Going into this litigation, AED had to have known that if it lost in this litigation, attorney's fees would be allowed to the prevailing party under I.C. § 12-120(3). The locale from which KDC chose to hire its attorney is of no import *other than* if AED felt it may have a chance of losing this litigation, it should have factored in the fact that AED would not be able to control which counsel KDC hired. All discretionary costs are allowed, which total \$5,608.37.

KDC requests attorney fees, including paralegal fees, in the amount of \$68,327.50. *Affidavit of Counsel in Support of Defendants' Verified Memorandum of Costs*, p. 2, ¶ 3; *Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos's Verified Memorandum of Costs and Fees*, pp. 10-13. The only fees AED "challenges" are the travel expenses of a Boise attorney (discussed above), and a meeting and a lengthy telephone call which both took place on January 25, 2011. *Plaintiff's Objection to Defendants' Costs and Fees*, pp. 2-3. Those objections are not persuasive. The legitimate objection overlooked by AED is that paralegal expenses are

not allowed. Fees for paralegal services clearly are not contemplated as awardable attorney's fees or costs under this rule. *Hines v. Hines*, 129 Idaho 847, 855, 934 P.2d 20, 28 (1997); and *Perkins v. U.S. Transformer West*, 132 Idaho 427, 431, 974 P.2d 73, 77 (1999). Paralegal expenses might have been awarded as discretionary costs, but KDC did not request them as such. Because paralegal expenses are not allowed as an attorney fee, they will not be awarded as requested. However, all attorney fees requested by KDC's attorneys will be allowed under I.C. § 12-120(3). Counsel for KDC have set forth an excellent analysis under the criteria of I.R.C.P. 54(e)(3), and this Court agrees with that analysis. The hourly rate is fair, if not low, the time spent is appropriate, and this case presented novel and difficult questions and presented a moving target given AED's positions. This Court has taken all the I.R.C.P. 54(e)(3) factors into consideration, and finds the amount requested, minus the paralegal fees, to be fair. This Court does not have the time to make the appropriate calculation based on that finding, and directs counsel for KDC to submit the accurate amount of attorney fees only.

IV. CONCLUSION.

For the reasons set forth above, this Court must deny AED's motion to reconsider, which was inaptly named a motion to alter or amend. And, for the reasons set forth above, this Court finds KDC to be the prevailing party in this litigation; and this Court grants KDC's costs as a matter of right as requested by KDC in the amount of \$5,670.56 are awarded in favor of KDC against AED; and discretionary costs in the amount of \$5,608.37 are awarded in favor of KDC against AED; and attorney fees in the amount requested less paralegal fees, will be awarded (counsel for KDC to provide the Court with that total in a pleading to be filed).

IT IS HEREBY ORDERED AED's Motion to Alter or Amend (motion to reconsider) is DENIED.

IT IS FURTHER ORDERED KDC is the prevailing party in this litigation.

IT IS FURTHER ORDERED this Court awards KDC's costs as a matter of right as requested by KDC in the amount of \$5,670.56 in favor of KDC against AED; this Court awards KDC's discretionary costs in the amount of \$5,608.37 are awarded in favor of KDC against AED; and this Court awards attorney fees in the amount requested by KDC less paralegal fees (counsel for KDC to provide the Court with that total in a pleading to be filed), pursuant to I.C. § 12-120(3).

Entered this 28th day of April, 2011.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
Arthur Bistline	665-7290	Randy L. Schmitz	208-395-8585

Jeanne Clausen, Deputy Clerk