

12-31-2007

Ewing v. State Clerk's Record v. 1 Dckt. 34541

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LAW CLERK 1 of 1

IN THE SUPREME COURT
OF THE STATE OF IDAHO

JOHN E EWING & NOREEN EWING
Plaintiff/Appellant/Cross-Respondent

vs.

STATE OF IDAHO,
Department of Transportation
Defendant/Respondent/Cross-Appellant

TRANSCRIPT ON APPEAL

In the District Court of the First Judicial District of
the State of Idaho, in and for the County of Kootenai

ATTORNEY FOR APPELLANT
Michael J Verbillis

ATTORNEY FOR RESPONDENT
Michael E Kelly

SUPREME COURT DOCKET #34541

FILED - COPY
DEC 31 2007
Supreme Court _____ Dept. of Appeals _____ Entered on AIS by: _____

34541

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

JOHN E EWING & NOREEN EWING)	
)	CIVIL CASE NO.
Plaintiff-Appellant,)	CV 06-7599
Cross-Respondent)	
vs.)	
)	SUPREME COURT DOCKET
STATE OF IDAHO, DEPARTMENT OF)	NO. 34541
TRANSPORTATION)	
)	
)	
Defendant/Respondent)	
Cross-Appellant)	

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the
County of Kootenai.

HONORABLE CHARLES W HOSACK
District Judge

Attorney for Appellant
MICHAEL J VERBILLIS
P O Box 519
Coeur d'Alene, Idaho 83816-0519

Attorney for Respondent
MICHAEL E KELLY
P O Box 856
Boise, Idaho 83701

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STATE OF IDAHO’S DISCLOSURE OF EXPERT WITNESSES,
filed June 29, 200795

Date: 10/3/2007

First Judicial District Court - Kootenai County

User: PARKER

Time: 09:27 AM

ROA Report

Page 1 of 3

Case: CV-2006-0007599 Current Judge: Charles W. Hosack
John E Ewing, etal. vs. State of Idaho Dept of Transportation

John E Ewing, Noreen G Ewing vs. State of Idaho Dept of Transportation

Date	Code	User		Judge
10/12/2006	NCOC	MCCOY	New Case Filed - Other Claims	Charles W. Hosack
		MCCOY	Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: Michael Verbillis Receipt number: 0717211 Dated: 10/12/2006 Amount: \$88.00 (Check)	Charles W. Hosack
	SUMI	VICTORIN	Summons Issued	Charles W. Hosack
11/9/2006	NOAP	OLSON	Notice Of Appearance-Michael E. Kelly OBO State of Idaho, Department of Transportation	Charles W. Hosack
11/13/2006	NTSD	ZLATICH	Notice Of Service Of Discovery	Charles W. Hosack
11/20/2006	ANSW	OLSON	Answer and Demand for Jury Trial	Charles W. Hosack
11/24/2006	NTSV	SRIGGS	Notice Of Service of Discovery/Michael E Kelly, Esq.	Charles W. Hosack
12/6/2006	NTSV	SRIGGS	Notice Of Service/Michael J Verbillis	Charles W. Hosack
12/14/2006	NTSV	REMPFER	Notice Of Service	Charles W. Hosack
12/21/2006	NTSD	SRIGGS	Notice Of Service Of Discovery	Charles W. Hosack
12/26/2006	NTSD	SRIGGS	Notice Of Service Of Discovery	Charles W. Hosack
1/22/2007	NTSV	LEPIRE	Notice Of Service Of Discovery	Charles W. Hosack
2/5/2007	NTSD	REMPFER	Notice Of Service Of Discovery	Charles W. Hosack
2/28/2007	HRSC	ROHRBACH	Hearing Scheduled (Status Conference 05/07/2007 04:00 PM)	Charles W. Hosack
3/2/2007	NTSD	REMPFER	Notice Of Service Of Discovery	Charles W. Hosack
3/5/2007		ROHRBACH	Notice of Hearing	Charles W. Hosack
	NTSD	MCCORD	Notice Of Service Of Discovery	Charles W. Hosack
3/7/2007	MISC	MCCORD	response to status conference notice	Charles W. Hosack
3/20/2007	NTSD	REMPFER	Notice Of Service Of Discovery	Charles W. Hosack
3/29/2007	HRSC	ROHRBACH	Hearing Scheduled (Motion for Summary Judgment 07/24/2007 03:30 PM) Verbillis/30 min	Charles W. Hosack
4/4/2007	RSCN	MCCORD	Response to Status Conference Notice	Charles W. Hosack
4/10/2007	AFFD	ROBINSON	Affidavit Of Michael J. Verbillis in support of motion for partial Summary Judgment	Charles W. Hosack
	AFFD	ROBINSON	Affidavit Of John Ewing	Charles W. Hosack
	MOTN	ROBINSON	Plaintiff's Motion for partial Summary judgment	Charles W. Hosack
	MOTN	ROBINSON	Plaintiff's Brief in Support of Motion for Partial Summary Judgment	Charles W. Hosack
	NOHG	ROBINSON	Notice Of Hearing	Charles W. Hosack
4/19/2007	NOTC	REMPFER	Notice of service of discovery	Charles W. Hosack
5/2/2007	HRVC	ROHRBACH	Hearing result for Status Conference held on 05/07/2007 04:00 PM: Hearing Vacated	Charles W. Hosack
5/7/2007	HRSC	ROHRBACH	Hearing Scheduled (Jury Trial Scheduled 10/29/2007 09:00 AM) 5 days	Charles W. Hosack
		ROHRBACH	Notice of Trial	Charles W. Hosack

006

Date: 10/3/2007

First Judicial District Court - Kootenai County

User: PARKER

Time: 09:27 AM

ROA Report

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Case: CV-2006-0007599 Current Judge: Charles W. Hosack
 John E Ewing, etal. vs. State of Idaho Dept of Transportation

John E Ewing, Noreen G Ewing vs. State of Idaho Dept of Transportation

Date	Code	User	Judge
5/7/2007	CVPT	ROHRBACH	Scheduling Order, Notice of Trial Setting & Initial Pretrial Order Charles W. Hosack
5/15/2007	PLWL	HULL	Plaintiff's Expert Witness List Charles W. Hosack
6/25/2007	MEMO	BARKER	Defendant State Of Idaho's Combined Memorandum In Support Of Its Motion For Summary Judgment And In Opposition To Plaintiff's Motion For Partial Summary Judgment Charles W. Hosack
	MOTN	BARKER	Defendant's Motion For Summary Judgment Charles W. Hosack
6/28/2007	NOTH	MCCORD	Notice Of Hearing Charles W. Hosack
	AFFD	MCCORD	Affidavit of counsel in support of def State of ID's motion for summary judgment Charles W. Hosack
	AFFD	MCCORD	Affidavit of Michael Ahlers in support of motion for summary judgment Charles W. Hosack
	AFFD	MCCORD	Affidavit of Ross Converse in support of summary judgment Charles W. Hosack
6/29/2007	MISC	HUFFMAN	State of Idaho's Disclosure of Expert Witnesses Charles W. Hosack
7/17/2007	MISC	HULL	Plaintiffs' Reply Brief in Support of Motion for Partial Summary Judgment Charles W. Hosack
7/24/2007	HRHD	ROHRBACH	Hearing result for Motion for Summary Judgment held on 07/24/2007 03:30 PM: Hearing Held Verbillis/30 min Kelly/x-msj Charles W. Hosack
8/14/2007	ORDR	ROHRBACH	Order Granting Defendant State of Idaho's Motion for Summary Judgment Charles W. Hosack
	CVDI	ROHRBACH	Civil Disposition entered for: State of Idaho Dept of Transportation, Defendant; Ewing, John E, Plaintiff; Ewing, Noreen G, Plaintiff. order date: 8/14/2007 Charles W. Hosack
	FJDE	ROHRBACH	Final Judgement, Order Or Decree Entered Charles W. Hosack
8/27/2007		MCCORD	Filing: T - Civil Appeals To The Supreme Court (\$86.00 Directly to Supreme Court Plus this amount to the District Court) Paid by: Michael Verbillis Receipt number: 0759280 Dated: 8/27/2007 Amount: \$15.00 (Check) For: [NONE] Charles W. Hosack
	BNDC	MCCORD	Bond Posted - Cash (Receipt 759281 Dated 8/27/2007 for 100.00) Charles W. Hosack
	APSC	MCCORD	Appealed To The Supreme Court Charles W. Hosack
	NOTC	MCCORD	Notice of appeal Charles W. Hosack
8/29/2007	MISC	MCCORD	clerk's certificate of appeal mailed to Boise Charles W. Hosack
8/30/2007	HRVC	ROHRBACH	Hearing result for Jury Trial Scheduled held on 10/29/2007 09:00 AM: Hearing Vacated 5 days Charles W. Hosack
	STAT	ROHRBACH	Case status changed: closed pending clerk action Charles W. Hosack
9/18/2007	NOTC	VICTORIN	Notice of Cross-Appeal Charles W. Hosack

Date: 10/3/2007

First Judicial District Court - Kootenai County

User: PARKER

Time: 09:27 AM

ROA Report

Page 3 of 3

Case: CV-2006-0007599 Current Judge: Charles W. Hosack

John E Ewing, etal. vs. State of Idaho Dept of Transportation

John E Ewing, Noreen G Ewing vs. State of Idaho Dept of Transportation

Date	Code	User	Judge
10/1/2007	MISC	ROBINSON	Sent Request To Supreme Court Extension Of Time Charles W. Hosack

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Facsimile: (208) 664-1161

ATTORNEY FOR PLAINTIFF

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: 717211

2006 OCT 12 PM 1:17

SUMMONS ISSUED

OCT 12 2006

CLERK DISTRICT COURT
DEPUTY
Sharon McCoy

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

JOHN E. EWING, and NOREEN EWING,)

Plaintiffs,)

vs.)

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION,)

Defendant.)

CASE NO. CV- 06-7599

COMPLAINT

COME NOW the above-named Plaintiffs and hereby states and alleges as follows:

I.

At all times material, Plaintiffs were residents of the State of Washington. Plaintiffs comprise a marital community as the same is defined under Washington and Idaho law. Defendant State of Idaho, Department of Transportation owns and maintains roadways and appurtenant structures within the State of Idaho, including, inter alia, a rest area known as Mineral Mountain Rest Area at or near mile post 371 on U.S. Highway 95 near Potlatch, Idaho.

II.

On the 20th day of June, 2006, Plaintiff John Ewing was an invitee of certain property owned by the State of Idaho, presumably by the State of Idaho, Department of Transportation, to wit Mineral Mountain Rest Area located at approximate mile post 371 on U.S. Highway 95 in the County of Latah near the town of Potlatch, Idaho.

III.

At approximately 8:30 in the morning on June 20, 2006, Plaintiff was injured and suffered severe, permanent and substantial injuries when he fell in a poorly constructed and back-filled ditch that had not been compacted following excavation work done by or at the request of Defendant State of Idaho, Department of Transportation, at the location described in ¶II.

COMPLAINT - 1

ASSIGNED TO ORIGINAL
JUDGE HOSACK
009

IV.

The conduct on the part of Defendant, State of Idaho, Department of Transportation with respect to the property described in ¶II was negligent in several particulars, including but not limited to the following: failure to construct and compact backfill over the excavation work; failure to inspect the project when completed; failure to initially properly install underground conduits or pipes, which lead to leakage of ground water, which lead to the ground becoming soft and creating an ultra-hazardous condition on the property, which to all appearances appeared to be stable and compacted earth; failure to properly warn unsuspecting members of the public of this latent hazard.

V.

As a direct and proximate result of the negligence of the State of Idaho, Department of Transportation, Plaintiffs suffered and will continue to suffer substantial and severe injuries and they have been damaged by virtue of medical expenses, pain and suffering, loss of income, loss of enjoyment of life, all of which is past, present and future in an amount to be proven at trial, but in substantial excess of \$10,000.

WHEREFORE, Plaintiffs pray for a Judgment against the Defendant in an amount to be proven at trial in a substantial excess of \$10,000, the damages complaint in paragraph V.

DATED this 12 day of October, 2006.


MICHAEL J. VERBILLIS
Attorney for Plaintiff

Michael E. Kelly, ISB# 4351
Peg M. Dougherty, ISB# 6043
LOPEZ & KELLY, PLLC
1100 Key Financial Center
702 West Idaho Street
Post Office Box 856
Boise, Idaho 83701
Telephone (208) 342-4300
Facsimile (208) 342-4344
2800.005\NOA.wpd

STATE OF IDAHO }
COUNTY OF KOOTENAI } ss
FILED

2006 NOV -9 AM 10:31

CLERK OF DISTRICT COURT

Cheryl
DEPUTY *40*

ORIGINAL

Attorneys for Defendant State of Idaho,
Department of Transportation

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

JOHN E. EWING, and NOREEN
EWING,

Plaintiffs,

vs.

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION

Defendant.

Case No. CV 06-7599

NOTICE OF APPEARANCE

TO: PLAINTIFFS AND THEIR ATTORNEY OF RECORD:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned hereby
appears as counsel of record for Defendant State of Idaho, Department of Transportation, in the
above-entitled action.

DATED this 6 day of November, 2006.

LOPEZ & KELLY, PLLC

By: *M Kelly*
Michael E. Kelly, Of the Firm

011

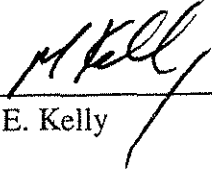
Attorneys for Defendant State of Idaho

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6 day of November, 2006, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Michael J. Verbillis, P.A.
601 E. Sherman Ave., Suite 3
P.O. Box 519
Coeur d'Alene, Idaho 83816-0519
Telephone: (208) 667-9475
Facsimile: (208) 664-1161

☐ U.S. Mail
☐ Hand-Delivered
☐ Overnight mail
☒ Facsimile



Michael E. Kelly



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

October 26, 2006

SPECIAL DEPUTY ATTORNEY GENERAL APPOINTMENT

TO WHOM IT MAY CONCERN:

Michael E. Kelly of the firm of Howard, Lopez & Kelly, PLLC, P. O. Box 856, Boise, Idaho 83701-0856, is hereby appointed Special Deputy Attorney General for the purpose of representing the State of Idaho in *Ewing, et al. v. State of Idaho, Dep't of Transp.*, Case No. CV-06-7599.

This letter of appointment will be included in the files of any court case, hearing, or other matter in which he represents the State of Idaho in this matter. This appointment is effective for the duration of the above-stated case.

Any courtesies you can extend to Mr. Kelly in his conduct of business for the State of Idaho, as my delegate, will be appreciated.

Sincerely,

A handwritten signature of Lawrence G. Wasden is located below the "Sincerely," text. The signature is written in black ink and is stylized.

LAWRENCE G. WASDEN
Attorney General

LGW:blm

013

Michael E. Kelly, ISB #4351
Peg M. Dougherty, ISB #6043
LOPEZ & KELLY, PLLC
1100 Key Financial Center
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2800.005\Answer

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED

2006 NOV 20 AM 10:56

CLERK OF DISTRICT COURT

DEPUTY

Chryid
%

ORIGINAL

Attorneys for Defendant State of Idaho,
Department of Transportation

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JOHN E. EWING, and NOREEN
EWING,

Plaintiffs,

vs.

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION

Defendant.

Case No. CV 06-7599

**ANSWER AND DEMAND FOR JURY
TRIAL**

COMES NOW DEFENDANT State of Idaho, Department of Transportation and in Answer
to Plaintiffs' Complaint admits, denies and alleges as follows:

FIRST DEFENSE

I.

This answering Defendant denies each and every allegation of the Plaintiffs' Complaint not
herein expressly and specifically admitted.

ANSWER AND DEMAND FOR JURY TRIAL - 1

II.

With respect to paragraph I of Plaintiffs' Complaint, this answering Defendant is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in the first two sentences of this paragraph and therefore denies the same. With respect to the remaining sentence this answering Defendant admits that it owns and maintains the rest area known as Mineral Mountain Rest Area located at or near mile post 371 on U.S. Highway 95 in the County of Latah, near Potlatch, Idaho.

III.

With respect to paragraph III of Plaintiffs' Complaint this answering Defendant admits that on the morning of June 20, 2006, during the course and scope of his employment with North Star Enterprises, Inc., Plaintiff John Ewing fell at the Mineral Mountain Rest Area. Except as admitted herein this answering Defendant expressly denies the rest and remainder of the allegations, whether express or implied, contained in paragraph III of Plaintiffs' Complaint.

SECOND DEFENSE

Plaintiffs are not the real party in interest with respect to all or part of their claim for damages, contrary to Rule 17 of the Idaho Rules of Civil Procedure.

THIRD DEFENSE

This answering Defendant, as the statutory employer of the Plaintiff, is precluded from civil liability under the exclusive remedy provisions of Idaho's Worker's Compensation law. *See* I.C. § 72-223(i).

FOURTH DEFENSE

This answering Defendant acted in a reasonable and prudent fashion in satisfying every duty,

if any, owed under the rules, regulations, statutes, ordinances, customs, policies and usage within the State of Idaho.

FIFTH DEFENSE

Any alleged acts or omissions by the Defendant were not the cause in fact or proximate cause of any damages alleged by the Plaintiffs. In asserting this defense, the Defendant does not admit, expressly or impliedly, to any blameworthy conduct.

SIXTH DEFENSE

The Plaintiffs' damages, if any, were proximately caused by the superseding intervening actions of the Plaintiffs and/or other third persons and any action on the part of the Defendant, if any, was not the proximate cause of the alleged damages of the Plaintiffs. In asserting this defense, the Defendant does not admit, expressly or impliedly, to any negligence or blameworthy conduct.

SEVENTH DEFENSE

The Plaintiffs' damages alleged in the Plaintiffs' Complaint were the result of and/or caused by pre-existing and/or unrelated injuries, conditions or complaints.

EIGHTH DEFENSE

The Plaintiffs have failed to mitigate their alleged damages, if any.

NINTH DEFENSE

The Plaintiffs have waived, or by their conduct are estopped, from asserting, the causes of action alleged in their Complaint.

This answering Defendant reserves the right to assert additional defenses to which it may be entitled under the law. This answering Defendant does not intend to waive any such defenses and specifically asserts its rights to amend its answer if, pending research and discovery, facts come to

light giving rise to such additional defenses.

WHEREFORE, this answering Defendant prays that Plaintiffs take nothing by way of their Complaint, that the same be dismissed with prejudice, and that this answering Defendant be awarded its costs of suit and attorney fees and for such other and further relief as the Court deems just.

DEFENDANT HEREBY DEMANDS A TRIAL BY JURY.

DATED this 16 day of November, 2006.

LOPEZ & KELLY, PLLC

By: 

Michael E. Kelly, Of the Firm
Attorneys for Defendant State of Idaho,
Department of Transportation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16 day of November, 2006, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Michael J. Verbillis, P.A.
601 E. Sherman Avenue, Suite 3
Post Office Box 519
Coeur d'Alene, ID 83816-0519
Telephone: (208) 667-9475
Facsimile: (208) 664-1161

- ☒ U.S. Mail
- ☐ Hand-Delivered
- ☐ Overnight mail
- ☐ Facsimile


Michael E. Kelly

MICHAEL J. VERBILLIS, P.A.

Attorneys and Counselors at Law
601 E. Sherman Ave., Suite 3
P.O. Box 519
Coeur d'Alene, Idaho 83816-0519
Telephone: (208) 667-9475
Facsimile: (208) 664-1161

ATTORNEY FOR PLAINTIFF

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2007 APR 10 AM 10:37

CLERK DISTRICT COURT
[Signature]
DEPUTY

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

JOHN E. EWING, and NOREEN EWING,)

Plaintiffs,)

vs.)

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION,)

Defendant.)

CASE NO. CV-06-7599

**AFFIDAVIT OF MICHAEL J. VERBILLIS
IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT**

STATE OF IDAHO)
COUNTY OF KOOTENAI)

Michael J. Verbillis, having been first duly sworn upon oath, deposes and says:

1. I am an attorney for the Plaintiff John E. and Noreen Ewing in the above captioned matter, and I am competent to testify to the matters hereto and do so of my own personal knowledge.
2. Attached as Exhibit "A" is a true and correct copy of Defendant's Responses to Plaintiffs' First Requests for Admission.

Further your Affiant saith not.

[Signature]
MICHAEL J. VERBILLIS

SUBSCRIBED AND SWORN TO before me this 9 of April, 2007.



[Signature]
Notary Public in and for Kootenai
Commission expires: 8-28-2012


AFFIDAVIT OF MICHAEL J. VERBILLIS IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

CERTIFICATE OF SERVICE

I hereby certify that on the 9 day of April, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

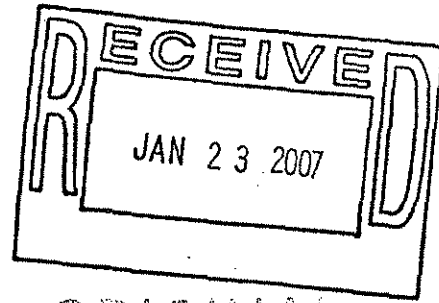
Michael E. Kelly, Esq.
Lopez & Kelly, PLLC
1100 Key Financial Center
702 West Idaho Street
Boise, ID 83701

☒ U.S. MAIL, Postage Prepaid
☐ HAND DELIVERED
☐ OVERNIGHT MAIL
☐ TELECOPY (FACSIMILE)



MICHAEL J. VERBILLIS

Michael E. Kelly, ISB# 4351
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Boise, Idaho 83701
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Facsimile (208) 342-4344
2800.005\Resp to Pltfs 1st RFA.wpd



ORIGINAL

Attorneys for Defendant State of Idaho,
Department of Transportation

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

JOHN E. EWING, and NOREEN
EWING,

Plaintiffs,

vs.

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION

Defendant.

Case No. CV 06-7599

**DEFENDANT STATE OF IDAHO,
DEPARTMENT OF
TRANSPORTATION'S RESPONSES TO
PLAINTIFFS' FIRST REQUESTS FOR
ADMISSION**

COMES NOW Defendant State of Idaho, Department of Transportation, by and through its attorneys of record, Lopez & Kelly PLLC, and answers and responds to Plaintiffs' First Requests for Admission as follows:

REQUEST FOR ADMISSION NO. 1: Please admit that Contract No. 6674, provided in discovery by Defendant, contained no work to be performed at or in the Mineral Mountain Rest

DEFENDANT STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION'S RESPONSES TO PLAINTIFFS' FIRST REQUESTS FOR ADMISSION - 1

Area, located at approximately milepost 371 on U.S. Highway 95 in the County of Latah near the town of Potlatch, Idaho, in June of 2006.

RESPONSE TO REQUEST FOR ADMISSION NO. 1: Admit.

INTERROGATORY NO. 1: If your answer to the foregoing Request for Admission is an unqualified admission, please state with specificity each place in the Contract No. 6674 documents which provide that work be performed at or in the Mineral Mountain Rest Area, located at approximate [sic] milepost 371 on U.S. Highway 95 in the County of Latah near the town of Potlatch, Idaho at the above-referenced time period.

ANSWER TO INTERROGATORY NO. 1: This answering Defendant objects to this Request on the basis that it is confusing in its contradiction of the referenced Request for Admission No. 1, and therefore has been asked and answered, since it asks for information the Defendant has admitted does not exist within Contract No. 6674.

REQUEST FOR ADMISSION NO. 2: Please admit that North Star Enterprises, Inc. did not have a contract with the State of Idaho, Department of Transportation to perform work at or in the Mineral Mountain Rest Area, located at approximate [sic] milepost 371 on U.S. Highway 95 in the County of Latah near the town of Potlatch, Idaho, in June of 2006.

RESPONSE TO REQUEST FOR ADMISSION NO. 2: Admit. This answering Defendant admits that it did not contract with North Star Enterprises, Inc. to perform work at the Mineral Mountain Rest Area; however, North Star Enterprises, Inc. was a subcontractor on Federal Aid Project No. NH-STP-4110(110) on U.S. Highway 95 from milepost 366.593 to 373.027, which is adjacent to the Mineral Mountain Rest Area located at approximately milepost 371.

REQUEST FOR PRODUCTION NO. 1: If your answer to the foregoing Request for Admission is an unqualified admission, please produce the contract between the State of Idaho, Department of Transportation and North Star Enterprises, Inc. for work to be performed in the Mineral Mountain Rest Area, located at approximate milepost 371 on U.S. Highway 95 in the County of Latah near the town of Potlatch, Idaho in June of 2006.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1: This answering Defendant objects to this Request on the basis that it is confusing in its contradiction of the referenced Request for Admission No. 2, and therefore has been asked and answered, since it asks for a document that the Defendant has admitted does not exist.

REQUEST FOR ADMISSION NO. 3: Please admit that North Star Enterprises, Inc. did not have a contract with any subcontractor working for, employed with, or contracting with the State of Idaho, Department of Transportation to perform work at or in the Mineral Mountain Rest Area, located at approximate milepost 371 on U.S. Highway 95 in the County of Latah near the town of Potlatch, Idaho, in June of 2006.

RESPONSE TO REQUEST FOR ADMISSION NO. 3: Please see Response to Request for Admission No. 2, which are fully incorporated by reference herein as if fully set forth herein.

REQUEST FOR PRODUCTION NO. 2: If your answer to the foregoing Request for Admission is an unqualified admission, please produce the contract between the subcontractor working for, employed with, or contracting with the State of Idaho, Department of Transportation and North Star Enterprises, Inc. for work performed in the Mineral Mountain Rest Area, located at approximate milepost 371 on U.S. Highway 95 in the County of Latah near the town of Potlatch,

Idaho, in June of 2006.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2: Please see Response to Request for Production No. 1, which are fully incorporated herein by reference as if fully set forth herein.

DATED this 18 day of January, 2007.

LOPEZ & KELLY, PLLC

By: 

Michael E. Kelly, Of the Firm
Attorneys for Attorneys for Defendant State of
Idaho, Department of Transportation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18 day of January, 2007, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Michael J. Verbillis, P.A.
601 E. Sherman Avenue, Suite 3
Post Office Box 519
Coeur d'Alene, ID 83816-0519
Telephone: (208) 667-9475
Facsimile: (208) 664-1161
Attorney for Plaintiffs

- | | |
|-------------------------------------|----------------|
| <input checked="" type="checkbox"/> | U.S. Mail |
| <input type="checkbox"/> | Hand-Delivered |
| <input type="checkbox"/> | Overnight mail |
| <input type="checkbox"/> | Facsimile |



Michael E. Kelly

MICHAEL J. VERBILLIS, P.A.
Attorneys and Counselors at Law
601 E. Sherman Ave., Suite 3
P.O. Box 519
Coeur d'Alene, Idaho 83816-0519
Telephone: (208) 667-9475
Facsimile: (208) 664-1161

ATTORNEY FOR PLAINTIFF

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2007 APR 10 AM 10:37

CLERK DISTRICT COURT
[Signature]
DEPUTY

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

JOHN E. EWING, and NOREEN EWING,)

Plaintiffs,)

vs.)

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION,)

Defendant.)

CASE NO. CV-06-7599

AFFIDAVIT OF JOHN EWING

STATE OF WASHINGTON)

COUNTY OF Whitman)

John Ewing, having been first duly sworn upon oath, deposes and says:

1. I am the Plaintiff and make this Affidavit based upon my own personal knowledge.
2. On the 20th day of June, 2006, your Affiant utilized the property known as the Mineral Mountain Rest Area located at approximately mile post 371 on U.S. Highway 95 in the County of Latah near the town of Potlatch, Idaho.
3. At the aforementioned date at approximately 8:30 in the morning thereof, I suffered an injury while attempting to walk to use a picnic table at the Mineral Mountain Rest Area when I took a step on what appeared to be normal ground when suddenly the ground gave way and I fell into a soft, apparently noncompacted backfilled ditch that had apparently been left in that condition by the owner or operator of the Mineral Mountain Rest Area.
4. At the aforementioned time and place, I was an employee of North Star Enterprises and was a flagman on a highway project known as project No. 6674.
5. At no time was I ever an employee or in any manner whatsoever supervised by any person or entity that had control or dominion over the Mineral Mountain Rest Area.

AFFIDAVIT OF JOHN EWING

1
ORIGINAL

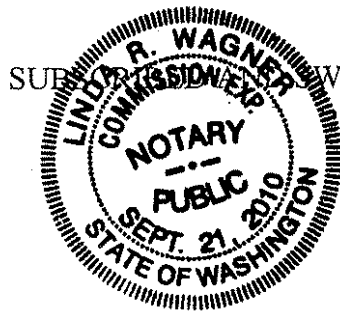
6. I, in fact, performed no labor on, nor did the company I was employed with, perform any labor on or any services upon the Mineral Mountain Rest Area on the date of my injury or at any time before or since.

7. The location where I was injured is not a part of the described contractual area in which I performed services as a flagman during the month of June, 2006.

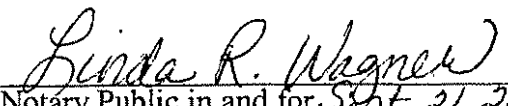
8. I was, in fact, an employee of North Star Enterprises, as mentioned, but at no time did I perform any work for any company, entity, organization, or individual purports to have any control over or authority over Mineral Mountain Rest Area.

Further your Affiant saith not.


JOHN EWING



SUBSCRIBER SWORN TO before me this 23 of March, 2007.


Notary Public in and for Sept. 21, 2010
Commission expires:

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of March, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael E. Kelly, Esq.
Lopez & Kelly, PLLC
1100 Key Financial Center
702 West Idaho Street
Boise, ID 83701

____ U.S. MAIL, Postage Prepaid
____ HAND DELIVERED
____ OVERNIGHT MAIL
____ TELECOPY (FACSIMILE)

MICHAEL J. VERBILLIS

MICHAEL J. VERBILLIS, P.A.
Attorneys and Counselors at Law
601 E. Sherman Ave., Suite 3
P.O. Box 519
Coeur d'Alene, Idaho 83816-0519
Telephone: (208) 667-9475
Facsimile: (208) 664-1161

ATTORNEY FOR PLAINTIFF

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: SS

2007 APR 10 AM 10:37

CLERK DISTRICT COURT
[Signature]
DEPUTY *[Signature]*

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

JOHN E. EWING, and NOREEN EWING,)
Plaintiffs,)
vs.)
STATE OF IDAHO, DEPARTMENT)
OF TRANSPORTATION,)
Defendant.)

CASE NO. CV-06-7599

**PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT**

COME NOW the Plaintiffs and hereby move the Court for an Order granting the partial summary judgment on the question of the Third Defense in the Answer, to wit, that the Defendant was the statutory employer of the Plaintiff and therefore, precluded from civil liability. Plaintiff asserts that the record reflect as a matter of law that said defense is not available to Defendant.

Said Motion is based upon the provisions of Rule 56 of the Idaho Civil Procedure and further upon the supporting Affidavit of the Undersigned with enclosures, the Affidavit of Plaintiff and the documents produced in connection with said Affidavit and further upon the Brief in Support of the Motion for Partial Summary Judgment filed herewith.

Plaintiffs request oral argument of said Motion.

Respectfully submitted,

DATED this 9 day of April, 2007.

[Signature]
MICHAEL J. VERBILLIS

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

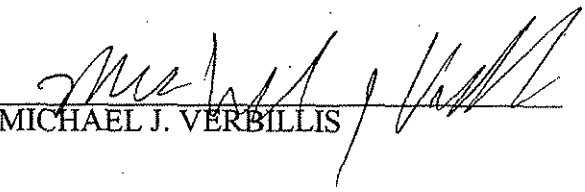
ORIGINAL

CERTIFICATE OF SERVICE

I hereby certify that on the 9 day of April, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael E. Kelly, Esq.
Lopez & Kelly, PLLC
1100 Key Financial Center
702 West Idaho Street
Boise, ID 83701

☒ U.S. MAIL, Postage Prepaid
☐ HAND DELIVERED
☐ OVERNIGHT MAIL
☐ TELECOPY (FACSIMILE)


MICHAEL J. VERBILLIS

MICHAEL J. VERBILLIS, P.A.
Attorneys and Counselors at Law
601 E. Sherman Ave., Suite 3
P.O. Box 519
Coeur d'Alene, Idaho 83816-0519
Telephone: (208) 667-9475
Facsimile: (208) 664-1161

ATTORNEY FOR PLAINTIFF

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2007 APR 10 AM 10:37

CLERK DISTRICT COURT
[Signature]
DEPUTY *[Signature]*

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

JOHN E. EWING, and NOREEN EWING,)

Plaintiffs,)

vs.)

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION,)

Defendant.)

CASE NO. CV-06-7599

**PLAINTIFFS' BRIEF IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

STATEMENT OF THE CASE

On the 20th day of June, 2006, Plaintiff John Ewing was an invitee of certain property owned by the State of Idaho, Department of Transportation, to wit Mineral Mountain Rest Area located at approximate mile post 371 on U.S. Highway 95 in the County of Latah near the town of Potlatch, Idaho. He was at the time an employee of North Star Enterprises, a flagging subcontractor on an adjacent construction project.

At approximately 8:30 in the morning on June 20, 2006, Plaintiff was injured and suffered severe, permanent and substantial injuries when he fell in a poorly constructed and back-filled ditch that had not been compacted following excavation work done by or at the request of Defendant State of Idaho, Department of Transportation, at the location above-described.

The conduct on the part of Defendant, State of Idaho, Department of Transportation with respect to the property above-described is alleged to be negligent in several particulars, including but not limited to the following: failure to construct and compact backfill over the excavation work; failure to inspect the project when completed; failure to initially properly install underground conduits or pipes, which led to leakage of ground water, which led to the ground becoming soft and creating an ultra-hazardous condition on the property, which to all appearances appeared to be stable and compacted earth; failure to properly warn unsuspecting members of the public of this latent hazard.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

The Defense has asserted a statutory defense bottomed upon Idaho Code §72-223. That code section deals with third party liability in fact patterns involving situations where a person is injured during the course and scope of employment but may have a right to sue a so-called third party. The referred to statute defines third party as a person other than the employer who may have a legal liability to pay damages for a given individual.

The language upon which the Defendant is seeking reliance states as follows:

Such third party shall not include those employers described in §72-216, Idaho Code, having under them contractors or subcontractors who have, in fact, complied with the provisions of §72-301, Idaho Code; nor include the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or by any other reason, is not the direct employer of the workman there employed.

Idaho Code §72-223(1).

It is suggested by the tenor of the Defendant's Answer that since Mr. Ewing was working for a subcontractor on a highway project that he is thus disqualified from being a Plaintiff against that same entity for an accident that occurred on adjacent property, that is not governed by the contract. As this Memorandum will point out, the situs of the injury is in no way connected to the situs of the highway construction project upon which the Plaintiff was working for a subcontractor.

QUESTION PRESENTED

Whether the Department of Transportation, which owns an adjacent parcel of property that is not subject to the contract under which Plaintiff was employed as an employee of a subcontractor, is still entitled to the immunity bottomed upon §72-223, Idaho Code.

UNDISPUTED FACTS

1. Contract No. 6674, provided in discovery by Defendant, contained no work to be performed at or in the Mineral Mountain Rest Area, located at approximate milepost 371 on U.S. Highway 95 in the County of Latah near the town of Potlatch, Idaho, in June of 2006.
2. North Star Enterprises, Inc. did not have a contract with the State of Idaho, Department of Transportation to perform work at or in the Mineral Mountain Rest Area, located at approximate milepost 371 on U.S. Highway 95 in the County of Latah near the town of Potlatch, Idaho, in June of 2006.
3. North Star Enterprises, Inc. did not have a contract with any subcontractor working for, employed with, or contracting with the State of Idaho, Department of Transportation to perform work at or in the Mineral Mountain Rest Area, located at approximate milepost 371 on U.S. Highway 95 in the County of Latah near the town of Potlatch, Idaho, in June of 2006.
4. The Idaho Transportation Department entered into a contract with Scarsella Bros., Inc., on or about September 9, 2003 for the work of reconstruction & minor realignment of 6.434 miles of US-95, MP 366.593 to MP 373.027, including right turn lanes, a left turn lane, truck

climbing lanes, snow plow turnarounds, crossdrains, livestock passes, pavement marking & signing; Electrical Substation to Smith Creek, known as Idaho Federal Aid Project No. NH-STP-4110(110), in Latah & Benewah County, Key No. 6298.

5. The above-mentioned Contract did not provide for any work, whatsoever, on the Mineral Mountain Rest Area, located at approximate milepost 371 on U.S. Highway 95 in the County of Latah near the town of Potlatch, Idaho, in June of 2006.
6. Improvements at the Mineral Mountain Rest Area are completed by ITD personnel.

DISCUSSION

This case brings into focus the recent modification of Idaho statutory authority concerning "third party practice." Third party practice in common personal injury and workers' compensation parlance is the subject matter of litigation where a person who is injured, while in the course and scope of his employment under circumstances where he may have a right to sue a party outside his employment, thus a third party. The legislature has long recognized that a person injured in the course and scope of employment should not be disqualified from suing other responsible entities that are not involved in his employment.

In the past, an injured worker had the right to sue the contractor over his subcontractor employer even though under prior statutory and common law rulings said contractor was deemed a "statutory employer." *Runcorn vs. Shearer Lumber Prods.*, 107 Id. 389, 690 P.2d. 324 (1984).

A "statutory employer" is typically a general contractor who is the putative responsible party for workers' compensation liability where the subcontractor does not have workers' compensation coverage. Idaho Code §72-216. There are numerous other fact patterns where a person may sue a party other than his direct employer for an injury that takes place in the course of his employment. A common example is a delivery man who is a victim of a negligent motorist in the course and scope of his delivery duties. That person clearly has a right under the statutory scheme to sue that negligent tortfeasor. That tortfeasor is clearly not a "third party."

Premises owners have also historically been considered third parties under applicable statutory and common law holdings. However, the statute was changed in 1996 by adding the language reproduced on page 2 of this memorandum. It is this language that Defendant would rely upon in order to escape liability. It will be the argument of the State of Idaho, Department of Transportation that any accident happening within the highway system in Idaho suffered by any person that is an employee of a contractor or subcontractor on the highway project involved is disqualified from bringing a lawsuit by the quoted statutory language. With this general contention Plaintiff concurs. However, the devil, as they say, is in the details.

This statute has been interpreted a couple of times by the Idaho Supreme Court. *Robison vs. Bateman-Hall, Inc.*, 139 Id. 207, 76 P.3d. 951 (2003) was a personal injury case brought against a property owner and general contractor. In *Robison*, the plaintiff was an employee of a roofing company that was a subcontractor for a larger project on a property owned by Fred Meyer Stores. The claimant was injured when he hit his head on a sprinkler pipe and fell 15-18 feet landing on a concrete floor. The trial court held that the prime contractor, *Bateman-Hall*, was a statutory employer and also found that the owner of the property, Fred Meyer, Inc., was also a statutory employer, because that entity actually owned the property. The prime contractor, of course, would have been a statutory employer under the pre-1996 test as well.

The trial court's reasoning that the owner of the property was immune, simply by being the owner of the property, under 72-223 was found erroneous. As the Court indicated:

“a statutory employer does not include the mere owner of the premises, unless the owner is also the virtual proprietor or operator of the business there carried on . . . To determine who is the virtual proprietor or operator, the court must consider whether the work being done pertains to the business, trade or occupation of the owner or proprietor and whether such business, trade or occupation is being carried on by it for pecuniary gain.”

139 Id. 207, at 212. In other words, the Court has stated that there must be some nexus between the activity of the injured worker (Plaintiff) and the nature of the activity on the property.

In applying that analysis in *Robison*, the Court found that the owner of the property was not a statutory employer and not exempt from liability under Idaho Code §72-223. As the Court pointed out, Fred Meyer was not in the business of construction or roof installation. Fred Meyer typically did not employ individuals who were trained in business construction and roof installation, nor did it own materials or equipment necessary to engage in the building construction of roof installation.

Applying that analysis to the case at bar, one should be able to quickly determine that the Idaho Department of Transportation is not Plaintiff's statutory employer merely by virtue of its ownership of the property where this injury took place. As the record reveals, the work done by the Plaintiff had nothing to do with the Mineral Mountain Rest Area. The entire construction contract made it clear that no work was to be performed on Mineral Mountain Rest Area. The work that was done on the Mineral Mountain Rest Area that arguably gave rise to the injuries of Plaintiff was done by employees under the supervision of the managing personnel of the Mineral Mountain Rest Area, and not the Idaho Transportation construction or design departments, nor was it done by the general contractor, Scarsella Bros. No work of any kind or description was performed by any employee of North Star Enterprises at Mineral Mountain Rest Area, and certainly none by Plaintiff.

The presence of Mr. Ewing at the Mineral Mountain Rest Area should be no different in character than any other motorist stopping to use the facilities at a rest area. The fact that Mr. Ewing being an employee of a subcontractor on the highway project is serendipity. There is no connection in any manner, whatsoever, to the endeavors of the business of operating a rest area and providing picnic tables and restroom facilities in which Mr. Ewing was involved. Rather, Mr. Ewing was simply an invitee of the property utilizing the facility when he encountered this dangerous condition.

Recently, the Supreme Court had occasion to rule on a fact pattern very different from the one at bar, but which may, nonetheless, be instructional. *Fuhriman vs. State of Idaho, Department of Transportation*, docket no. 31974, 32224, 32225 (Feb. 5, 2007). In this case, the State of Idaho, Department of Transportation owned and maintained an interstate highway (I-15) where an accident occurred causing the death and injury of several persons working at the construction site who were all employees of one of the contractors working on the site.

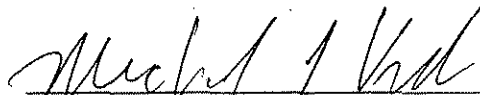
The holding of this case is that the State of Idaho, Department of Transportation was a "category one statutory employer" inasmuch as they were the owner of the property and the employer of the injured parties was directly hired by the State to perform work on the project. This claim would have been allowed under the *Runcorn* doctrine, but the Court found that the 1996 statutory amendment barred relief. Nothing in the language of *Fuhriman* touches on, in any way whatsoever, the ruling suggested by Plaintiff in the case at bar. The fortuity of property ownership, absent some nexus between that ownership and the activity of the person on the premises, does not confer immunity.

CONCLUSION

In conclusion, it is respectfully submitted that the court should enter an order granting partial summary judgment on the issue of the applicability of the statutory defense proffered by the Defendant founded in Idaho Code §72-223.

Respectfully submitted,

DATED this 7 day of April, 2007.


MICHAEL J. VERBILLIS

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of April, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael E. Kelly, Esq.
Lopez & Kelly, PLLC
1100 Key Financial Center
702 West Idaho Street
Boise, ID 83701

_____ U.S. MAIL, Postage Prepaid
_____ HAND DELIVERED
_____ OVERNIGHT MAIL
_____ TELECOPY (FACSIMILE)

MICHAEL J. VERBILLIS

MAY

MICHAEL J. VERBILLIS

Attorneys and Counselors at Law
601 E. Sherman Ave., Suite 3
P.O. Box 519
Coeur d'Alene, Idaho 83816-0519
Telephone: (208) 667-9475
Facsimile: (208) 664-1161

ATTORNEY FOR PLAINTIFF

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED

2007 MAY 15 AM 10:57

CLERK DISTRICT COURT

DEPUTY

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

JOHN E. EWING, and NOREEN EWING,)

Plaintiffs,)

vs.)

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION,)

Defendant.)

CASE NO. CV-06-7599

**PLAINTIFFS' EXPERT
WITNESS DISCLOSURE**

Pursuant to the Court's Pre-Trial Order, Plaintiff discloses the expert witnesses who may testify at the time of trial in this matter:

1. **Any and all medical treaters**, which consist of, but not limited to:

Dean Martz, M.D.

Inland Neurosurgery and Spine

105 West Eighth Avenue, Suite 200
Spokane, WA 99204
509-624-9112

The testimony anticipated to be provided by Dr. Martz and/or representatives from Inland Neurosurgery and Spine are consistent with the medical records previously produced to the Defendant concerning Plaintiff's discectomy, foraminal narrowing due to foraminal and far lateral disk protrusion, all caused as a direct consequence of the accident in question.

H. Graeme French, M.D.

Three Forks Orthopaedics

1200 W. Fairview Avenue
Colfax, WA 99111
509-397-9005

The testimony anticipated to be provided by Dr. French and/or representatives from Three Forks Orthopaedics are consistent with the medical records previously produced to the Defendant

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

concerning Plaintiff's left shoulder MRI study, shoulder arthroscopy and biceps tenodesis, all caused as a direct consequence of the accident in question.

Bryan N. Johnson, M.D.
Whitman Medical Group
1210 W. Fairview St.
Colfax, WA 99111
509-397-4717

The testimony anticipated to be provided by Dr. Johnson and/or representatives from Whitman Medical Group are consistent with the medical records previously produced to the Defendant concerning Plaintiff's low back pain, radicular pain, sciatica, shoulder pain, and chest pain, all caused as a direct consequence of the accident in question.

Sanjeey Vaderah, M.D.
Inland Cardiology Assoc.
122 W. 7th Ave., Ste. 450
Spokane, WA 99204

The testimony anticipated to be provided by Dr. Vaderah and/or representatives from Inland Cardiology Assoc. are consistent with the medical records previously produced to the Defendant concerning Plaintiff's chest pain, caused as a direct consequence of the accident in question.


James Rogers, PT
Whitman Hospital & Medical Center
Physical Therapy Center
1200 W. Fairview Avenue
Colfax, WA 99111
509-397-3435, 333

James Rogers and/or representatives of Whitman Hospital & Medical Center, Physical Therapy Center will testify as to the medical records previously produced to the Defendant concerning Plaintiff's significant symptoms and limited function, ongoing problems with daily low back pain, radicular pain, shoulder pain, and sciatica, all caused as a direct consequence of the accident in question.

Whitman Hospital & Medical Center
1200 W. Fairview Avenue
Colfax, WA 99111
509-397-3435

The testimony anticipated to be provided by representatives from Whitman Hospital & Medical Center are consistent with the medical records previously produced to the Defendant concerning Plaintiff's low back pain, radicular pain, sciatica, shoulder pain, and chest pain, as well as MRIs conducted and studies of same, all caused as a direct consequence of the accident in question.

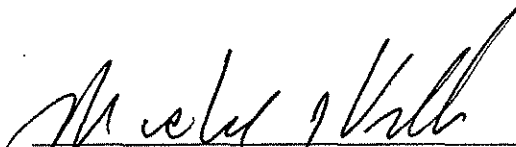
DATED this 14 day of May 2007.


MICHAEL J. VERBILLIS
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on the _____ day of May, 2007, a true and correct copy of the foregoing was sent via facsimile transmission to:

Michael E. Kelly, Esq.
Lopez & Kelly, PLLC
1100 Key Financial Center
702 West Idaho Street
Boise, ID 83701


MICHAEL J. VERBILLIS

Michael E. Kelly, ISB #4351
Peg M. Dougherty, ISB #6043
LOPEZ & KELLY, PLLC
1100 Key Financial Center
702 W. Idaho Street
Post Office Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
G:\INSEDEF\CASES\2800\2800.005\Pleadings\MSJ.Memo.wpd

STATE OF IDAHO
COUNTY OF KOOTENAI } SS.
FILED:

2007 JUN 25 PM 3: 31

CLERK DISTRICT COURT

DEPUTY

Attorneys for Defendant State of Idaho,
Department of Transportation

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

JOHN E. EWING, and NOREEN
EWING,

Plaintiffs,

vs.

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION

Defendant.

Case No. CV 06-7599

**DEFENDANT STATE OF IDAHO'S
COMBINED MEMORANDUM IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT AND IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

I.

INTRODUCTION

This personal injury case involves a June 20, 2006, fall by Plaintiff John E. Ewing at Mineral Mountain Rest Area, located near mile post 371 on US Highway 95, near Potlatch, Idaho. At the time of his fall, the plaintiff was an employee of the subcontractor working on a State of Idaho,

DEFENDANT STATE OF IDAHO'S COMBINED MEMORANDUM IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY
JUDGMENT - 1

Department of Transportation (ITD) project on Highway 95. The plaintiff's claims against ITD fail on the basis that (1) as the plaintiff's statutory employer, ITD is immune from third party liability; (2) ITD did not owe a duty to the plaintiff, who was a licensee on the property, to warn of unknown hazards on the land; and/or (3) ITD is protected from liability under the recreational use statute.

The plaintiff has moved this Court for partial summary judgment asserting that he was an invitee at the rest area, and that because he was not working at the rest area, the State was not his statutory employer.

The following analysis will set forth the points of authority supporting summary judgment for the State and flaws in Plaintiff's assertions.

II.

STATEMENT OF UNDISPUTED FACTS

1. On or about October 15, 2003, ITD awarded Contract No. 6674 to Scarsella Bros., Inc. ("Scarsella"), "for the work of reconstruction & minor realignment of 6.434 miles of US-95, MP 366.593 to MP 373.027, including right turn lanes, a left turn lane, truck climbing lanes, snow plow turnarounds, crossdrains, livestock passes, pavement marking, & signing; Electrical Substation to Smith Creek, known as Idaho Federal Aid Project No. NH-STP-4110(110), in Latah and Benewah County, Key No. 6298" (hereinafter "ITD Contract"). Attached as Ex. "A" to Aff'd. of M. Ahlers.
2. On or about January 27, 2004, Scarsella subcontracted with North Star Enterprises, Inc. ("North Star"), to perform certain portions of the ITD Contract including pilot car and flagging operations (hereinafter "the subcontract"). Attached as Ex. "B" to Aff'd of M. Ahlers.
3. On June 20, 2006, Plaintiff John Ewing was an employee of North Star, working on

the ITD Contract as a pilot car operator and flagger. Attached as Ex. "C" to Aff'd of R. Converse.

4. The Mineral Mountain Rest Area is located at or about mile post 371 which is within the construction zone covered by the ITD Contract and is specifically referred to in the contract as follows:

Mineral Mountain Rest Area

Mineral Mountain Rest Area is a public roadside rest facility located within the project limits. The Contractor shall maintain public access to the rest area at all times. The rest area is intended for use by the traveling public only. The Contractor shall not use the rest area for equipment parking nor material storage during construction. The Contractor shall not allow any of his employee's [sic] nor Subcontractor's employee's [sic] to park private vehicles within the rest area limits. The Contractor shall furnish separate toilet facilities for constructions workers. Any material tracked into the rest area from the project shall be removed by the Contractor at no additional cost to the State.

Attached as Ex. "D" to Aff'd of M. Ahlers

5. On June 20, 2006, while on a break but during the course and scope of his employment with North Star on the ITD Contract, as the Plaintiff walked across the Mineral Mountain Rest Area, the ground gave way causing him to fall. See Aff'd of J.Ewing, ¶4, Mar. 23, 2007, and see, Ex. "C" attached to Aff'd of R. Converse.

6. Plaintiff fell on the Mineral Mountain Rest Area property when he was walking across the rest area to use a picnic table. See Aff'd of J.Ewing, ¶3, Mar. 23, 2007.

7. As a result of his fall, the plaintiff filed for and received worker's compensation benefits. See Pl.'s Answer to Interrog. No. 10, attached as Ex. "E" to Aff'd of Counsel.

III.

STANDARD OF REVIEW

Pursuant to Idaho Rule of Civil Procedure 56(c), summary judgment must be entered when

“the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” The record is to be liberally construed in favor of the party opposing the motion for summary judgment and any reasonable inferences and conclusions are to be drawn in that party’s favor. *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 209, 76 P.3d 951, 953 (2003) (citations omitted).

The burden of proving the absence of material facts rests with the moving party. *Levinger v. Mercy Medical Center, Nampa*, 139 Idaho 192, 195, 75 P.3d 1202, 1205 (2003); I.R.C.P. 56(c). Once the moving party establishes the absence of a genuine issue by sufficiently raising the issues as to an element of the prima facie case, the burden shifts to the non-moving party to show that a genuine issue of material fact on the challenged element of the claim does exist. *Id.* The mere existence of disputed facts will not defeat summary judgment if the non-moving party fails to make an evidentiary showing sufficient to establish the existence of an element essential to its case. *Garzee v. Barkley*, 121 Idaho 771, 774, 828 P.2d 334, 337 (Cl.App.1992).

In establishing the existence of an essential element, the non-moving party “must not rest on mere speculation because a mere scintilla of evidence is not enough to create a genuine issue of fact.” *Harris v. State*, 123 Idaho 295, 298, 847 P.2d 1156, 1156 (1992). Rather, the non-moving party must come forward with admissible evidence upon which a reasonable jury could rely. *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999).

IV.

ARGUMENT

A. The State is a Category One Statutory Employer of the Plaintiff, and therefore Protected From Tort Suit by the Exclusive Remedy Rule.

The Idaho Workers Compensation Act (Act), provides employees with a definite remedy for injuries arising out of and in the course of employment while limiting the liability of employers, resulting in the exclusive remedy rule. *See* I.C. §§72-201,¹ 72-209(1)² & 72-211.³ There is a limited exception to the exclusive remedy rule which does not preclude an individual from bringing a civil action for damages against a third party; however, the Act specifically excludes certain employers, referred to as statutory employers, from third party liability. *See* I.C. §72-223.⁴ There are three

¹"[S]ure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as is otherwise provided in this act." I.C. §72-201.

²"Subject to the provisions of section 72-223, [Idaho Code] the liability of the employer under this law shall be exclusive and in place of all other liability of the employer to the employee, his spouse, dependents, heirs, legal representatives or assigns." I.C. §72-209(1).

³"Subject to the provisions of section 72-223, [Idaho Code,] the rights and remedies herein granted to an employee on account of an injury or occupational disease for which he is entitled to compensation under this law shall exclude all other rights and remedies of the employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or disease." I.C. §72-211.

⁴"The right to compensation under this law shall not be affected by the fact that the injury, occupational disease or death is caused under circumstances creating in some person other than the employer a legal liability to pay damages therefor, such person so liable being referred to as the third party. Such third party shall not include those employers described in section 72-216, Idaho Code, having under them contractors or subcontractors who have in fact complied with the provisions of section 72-301, Idaho Code; nor include the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workmen there employed." I.C. §72-223(1).

relatively recent cases that set forth the framework for determining whether a third party is a statutory employer: *Fuhrman v. State, Dept. of Transp.*, 143 Idaho 800, 153 P.3d 480 (2007); *Venters v. Sorrento Delaware, Inc.*, 141 Idaho 245, 180 P.3d 392 (2005); and *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003).

In *Venters*, the Court began by looking to the established statutory definition of "employer":

'Employer' means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workers there employed. If the employer is secured, it means his surety so far as applicable.

I.C. §72-2-102(13)(a). The *Venters* Court also relied upon its previous interpretation of this definition in *Robison*, and determined that an entity can only qualify as occupying the status of statutory employer in one of two categories if it either:

- a. by contracting **or subcontracting** out services, is liable to pay worker's compensation benefits if the direct employer does not, **or**
- b. was the owner/lessee of the premises, or other person who is virtually the proprietor or operator of the business there carried on, but who by reason of there being an independent contractor or for any other reason, is not the direct employer of the worker.

Venters, 141 Idaho at 249, 108 P.3d at 396; citing I.C. §§72-216, -102, -223; *Robison*, 139 Idaho at 210-211, 76 P.3d at 954-55 (emphasis added). Specifically with regard to the first category of statutory employer, the *Venters* court explained:

Thus, the definition of a statutory employer encompasses a party deemed an employer for the purposes of being liable for worker's compensation benefits under I.C. §72-102, but who, by virtue of that liability, is also immune from third-party

tort liability under I.C. §72-223.

Id.

The *Venters* case involved an injury and subsequent death of an employee of a trucking company that contracted with the defendant Sorrento of Delaware, Inc. ("Sorrento"). The plaintiff's wife and child brought a wrongful death action against Sorrento and Sorrento sought summary judgment on the basis that it was the statutory employer of the trucking company employee and was thus, immune from tort liability. The trial court agreed and the plaintiffs appealed. The Idaho Supreme Court focused its analysis on the first category of statutory employer outlined above, specifically whether Sorrento qualified as a statutory employer because of its contractual relationship with the trucking company. The Court recognized that the trucking company provided worker's compensation for its injured worker but, "[a]s an employer of a contractor, Sorrento would not have been permitted to avoid liability to Mr. Venters under the Idaho worker's compensation statutes should [the trucking company] have failed to comply with the worker's compensation statutes." *Venters*, 141 Idaho at 250, 108 P.3d at 398. The contractual relationship between Sorrento and the trucking company controlled and the Court held that Sorrento was the statutory employer of the direct employees of the trucking company, and therefore, "enjoyed the immunities provided by the Act from third-party tort liability." *Id.* This same immunity is extended to employers who subcontract out services. I.C. §72-216(1), (2).⁵ See also *Robison*, 139 Idaho at 211, 76 P.3d at 955.

⁵"An employer subject to the provisions of this law shall be liable for compensation to an employee of a contractor or subcontractor under him who has not complied with the provisions of section 72-301 [Idaho Code,] in any case where such employer would have been liable for compensation if such employee had been working directly for such employer." I. C. §72-216(1).

"The contractor or subcontractor shall also be liable for such compensation, but the

A similar analysis was done by the Court in *Fuhriman, supra*, which involved the death and injury of several persons who were all employees of Multiple Concrete Enterprises, Inc. ("Multiple"), a contractor that was hired by ITD on a road construction project. *Fuhriman*, 143 Idaho 800, ---, 153 P.3d at 482. In that case the injured road workers and families of road workers injured and killed in an accident at the road construction site brought personal injury and wrongful death actions against ITD. *Id.* ITD owned and maintained the interstate where the accident occurred. *Id.* The Court was asked to determine whether ITD qualified as a category one statutory employer.⁶ Relying on the Act, *Venters* and *Robison*, the Court stated that it had "summarized the I.C. §72-223 category one protection for employers as including 'employers who make use of a contractor's or subcontractor's employees.'" *Fuhriman*, 153 P.3d at 485 (citations omitted) (emphasis added). In *Fuhriman* ITD had a contractual relationship with Multiple, the employer of the injured workers, therefore, the Court concluded "[s]ince [ITD] 'expressly ... contracted the services' of Multiple, it meets the definition of statutory employer. ... In short, [ITD] made use of a contractor's employees by using them to render the services Multiple contracted to provide. Therefore, the State as an employer is immune from third party liability." *Id.* (footnote omitted).

Another case that is instructive on the law regarding statutory employers is *Struhs v. Protection Technologies, Inc.*, 133 Idaho 715, 992 P.2d 164 (1999), in which the Court considered

employee shall not recover compensation for the same injury from more than one party." I. C. §72-216(2).

⁶A "category one statutory employer" as that term is used in the *Fuhriman* case refers to the first category of employers as outlined above, i.e., an entity that, by contracting or subcontracting out services, is liable to pay worker's compensation benefits if the direct employer does not.

whether the Army was the statutory employer of the plaintiff, Struhs, who was working for a subcontractor hired through an entity contracting with the Department of Energy (DOE) for work at Idaho National Engineering Laboratory (INEL, now INEEL). The Court found that “[t]he DOE, which indirectly employed Struhs through its contracts with EG&G [the prime contractor], and the subcontract with APS [Struhs’ direct employer], was Struhs’ statutory employer.” *Id.* at 720, 992 P.2d at 169. In other words, the Court focused on the department of the United States that contracted for the work, rather than an unrelated department or agency of the United States. *Id.*

Applying the Court’s analyses and the framework that is set forth in these cases to the facts of the instant matter leads to the conclusion that ITD is the statutory employer of the plaintiff and is therefore immune from liability. It is undisputed that a contractual relationship existed between ITD and Scarsella and further that Scarsella identified in its contract with ITD that it would subcontract with North Star. *See* Ex. “A” p.3, attached to Aff’d of M. Ahlers. Just as in *Venters* and *Fuhrman*, ITD was, in essence, making use of North Star’s employees by using them to render services including flagging and pilot car operation, which Scarsella contracted to provide for the project. Just as in *Struhs*, ITD indirectly employed the plaintiff through its contract with Scarsella and the subcontract with North Star. It is also undisputed and evidenced by his worker’s compensation claim, that the plaintiff was an employee of North Star at the time of his accident and that he was within the course and scope of his employment when the accident occurred. ITD was clearly a category one statutory employer of the plaintiff and is therefore immune from liability in tort. No genuine issue of material fact exists on this point and as such summary judgment in favor of ITD is appropriate.

B. Plaintiff's Analysis Based on the Location of the Accident is Flawed and Does Not Change ITD's Immunity as a Statutory Employer.

The plaintiff has moved the Court for partial summary judgment seeking to preclude ITD from asserting its immunity as a statutory employer of the plaintiff. The basis for his motion is that he was not performing flagging duties at the time of his fall and that ITD was merely the owner of the property where he fell. He completely ignores the fact that he was within the course and scope of his employment at the time of his fall, his indirect employment relationship with ITD, and the fact that his fall occurred within the construction zone of the project.

The plaintiff was taking a break from his flagging duties on the ITD project on Highway 95 when he fell on the grounds of the Mineral Mountain Rest Area. Construction on the rest area itself was not part of the project, with the exception that the ITD contract required that any material tracked into the rest area from the project was to be cleaned up by the contractor; however, the rest area is located at mile post 371, clearly within the construction zone of the project which stretched from mile post 366.593 to mile post 373.027. The plaintiff argues that because he was not engaged in his duties on the project at the time of his fall, ITD's status as his statutory employer changes into the mere owner of the premises.⁷ To support this flawed premise, Plaintiff relies on *Robison, supra*, and contends without analysis that *Fuhrman, supra* is "very different" than the facts of the instant matter.

⁷Plaintiff acknowledges ITD's status as his statutory employer in his brief, stating "any accident happening within the highway system in Idaho suffered by any person that is an employee of a contractor or subcontractor on the highway project involved is disqualified from bringing a lawsuit [pursuant to I.C. §72-223]. With this general contention Plaintiff concurs." Pls.' Brief in Suppt of Part Sum Judg, p.3.

First, Plaintiff's out-of-hand dismissal of *Fuhriman* rests entirely on his claim that ITD was found to be a category one statutory employer of the injured parties because ITD owned the property and directly hired the contractor that the injured parties worked for. See Pls.' Brief in Suppt of Part Sum Judg, p 5. The *Fuhriman* Court did indeed acknowledge that ITD "owned and maintained the interstate where the accident occurred." *Fuhriman, supra*, 153 P.3d at 483. To reach its conclusion that ITD was the statutory employer, the Court went through the analysis outlined above beginning with the statutory definition of employer found in I.C. § 72-2-102(13)(a), then citing the analysis it provided in *Venters, supra* and *Robison, supra*, the Court stated:

The Court has summarized the I.C. § 72-223 category one protection for employers as including 'employers who make use of a contractor's or subcontractor's employees.'

Fuhriman, 153 P.3d at 485 (citations omitted)(emphasis added).

The case certainly did not turn on the fact that the injured workers were employed by the prime contractor rather than the subcontractor. Furthermore, to adopt Plaintiff's argument that category one statutory employer status only applies to employees of contractors, not only ignores the plain language of the definition of employer provided by the Act but would also result in a ruling that is exactly the opposite of the Court's holding in *Struhs, supra*. In that case, just as in the case at bar, the injured worker was employed by a subcontractor and the Court held that the DOE indirectly employed him and was his statutory employer. The relationships are precisely the same.

As for the plaintiff's position that the *Robison* case controls, the plaintiff overlooks the disjunctive nature of the definition of employer as interpreted within the framework of the Act and the purpose of the Act. The *Venters* Court explained the framework in its analysis of the status of

the owner of the farm where the accident occurred in that case. By way of background, in *Venters* the deceased worker was an employee of 3-C Trucking. *Venters, supra*, 141 Idaho at 248, 108 P.3d at 395. Sorrento, a company engaged in the making of cheese, contracted with 3-C Trucking to have the trucking company come onto Sorrento's cheese-making facility, collect wastewater from the cheese-making process, and haul the wastewater to Montierth Farms, a local farming operation. *Id.* at 247, 108 P.3d at 398. Montierth Farms and 3-C had no contractual relationship. *Id.* at 245, 108 P.3d at 396. While on Montierth Farms property waiting to dump his load of wastewater, the worker was run over and killed. *Id.* at 248, 108 P.3d at 395. The worker's survivors sued both Sorrento and Montierth Farms. The Court's analysis began with the following:

Montierth can only qualify as occupying the status of Mr. Venters' statutory employer if it **either**:

- [1] by contracting or subcontracting out services, is liable to pay worker's compensation benefits if the direct employer does not, or
- [2] was the owner/lessee of the premises, or other person who is virtually the proprietor or operator of the business there carried on, but who by reason of there being an independent contractor or for any other reason, is not the direct employer of the worker.

Id. at 249, 108 P.3d at 396, citing I.C. §§ 72-216, -102, -223; and *Robison*, 139 Idaho at 210-11, 76 P.3d at 954-55 (emphasis added).

The Court first determined that Montierth did not have "even an indirect contractual employment relationship with Mr. Venters" *before* it took up Montierth's status as the owner of the premises where the accident occurred. *Id.*

This analysis sets forth that an entity can qualify as a statutory employer if it meets one of the two criteria; it need not meet both. The relationships in this case are undisputed; ITD was an indirect employer of the plaintiff at the time of his fall, thus qualifying it as his statutory employer

and limiting the plaintiff to worker's compensation benefits as his exclusive remedy. It is not necessary that it meet the second option criteria for statutory employers.

C. Alternatively, ITD Owed No Duty to the Plaintiff.

Should the Court determine that ITD was not the statutory employer of the plaintiff, his status as a licensee on the rest area grounds limits the duty owed to him by ITD. Plaintiff contends, without analysis or authority, that he was an invitee at the Mineral Mountain Rest Area at the time of his fall. Determining the status of the plaintiff is the first step in determining the duty ITD owed him at the time of his fall. See *Holzheimer v. Johannesen*, 125 Idaho 397, 399, 871 P.2d 814, 816 (1994), citing *Rehwalt v. American Falls Reservoir, Dist. No. 2*, 97 Idaho 634, 636, 550 P.2d 137, 139 (1976). "A licensee is a visitor who goes upon the premises of another with the consent of the landowner in pursuit of the visitor's purpose." *Holzheimer* at 400, 871 P.2d at 817; IDJI 2d 3.15. "A landowner is only required to share with the licensee knowledge of dangerous conditions or activities on the land. ... The fact that a guest may be rendering a minor, incidental service to the host does not change the relationship between them as a landowner and a licensee." *Id.*; IDJI 2d 3.15. "An invitee is one who enters upon the premises of another for a purpose connected with the business conducted on the land, or where it can reasonably be said that the visit may confer a business, commercial, monetary or other tangible benefit to the landowner." *Id.*; IDJI 2d 3.13. "A landowner owes an invitee the duty to keep the premises in a reasonably safe condition, or to warn of hidden or concealed dangers." *Id.*; IDJI 2d 3.09.

In *Holzheimer*, the Court was asked to determine whether the plaintiff was a licensee or an invitee; specifically, whether he entered onto the property of the defendant for his own purpose or

for the benefit of the landowner. Both parties in that case were fruit orchard owners who "loaned fruit boxes to one another in the spirit of cooperation." *Id.* The plaintiff fell and injured himself while retrieving boxes from the warehouse of the defendant. *Id.* at 399, 871 P.2d at 816. The plaintiff asserted that he was an invitee on the property of the defendant because he was there for a business purpose connected with the defendant's fruit farm business. Based on the evidence presented at trial that the defendant made no profit on the boxes and the transaction was the minimal type of service between a landowner and visitor, the jury determined that the plaintiff was a licensee and the appellate court agreed that there was sufficient evidence for the jury to reach such a conclusion.

In the instant matter, it is obvious that generally a rest area is provided for the use of visitors for their own purposes. With the exception of a vending machine, ITD conducts no business on the property, nor does it gain a tangible benefit from visitors to the rest area. The plaintiff stated that his purpose for being on the ITD property was to use one of the picnic tables. *See Aff'd of J.Ewing*, ¶3, Mar. 23, 2007. His actions can not be construed to be for the purpose of conferring a benefit on ITD. Even if he had purchased something from a vending machine on the property, such a transaction would be so minimal that it would not transform his status from licensee to invitee. The plaintiff's relationship to ITD with respect to the rest area is far more attenuated than that of the parties in *Holzheimer*. Clearly, Plaintiff was a licensee while on the property of ITD, thus entitled to a lower standard of care from the property owner.

The duty ITD owed to the plaintiff and to all visitors of the rest area was to warn of known dangerous conditions or activities on the property. This duty includes that ITD must avoid willful

and wanton injury to the licensees. *Evans v. Park*, 112 Idaho 400, 401, 732 P.2d 369, 370 (Ct. App., 1987) "But ordinary negligence allowing an unsafe condition or activity on the property is insufficient, by itself, to impose liability to a licensee." *Id.* ITD did not know of the condition of the property where the plaintiff fell. The plaintiff himself has repeatedly stated that there was nothing about the ground that was out of the ordinary: "I took a step on what appeared to be normal ground." Aff'd of J.Ewing, ¶3, Mar. 23, 2007. "[T]he ground ... which to all appearances appeared to be stable and compacted earth." Pls.' Compl., ¶IV and Pls.' Brief in Suppt of Part Sum Judg, p.1. There is no evidence that ITD acted in a willful and wanton manner leading to the fall taken by the plaintiff.

The undisputed facts demonstrate that the plaintiff was a licensee on the property of ITD when he fell due to an unknown condition on the property. ITD does not owe a duty to the plaintiff beyond that of a landowner to a licensee to warn of known dangerous conditions and activities on the property. As such, Plaintiffs' claims should be dismissed as a matter of law.

D. Summary Judgment is Also Warranted Under the Recreational Use Statute.

Idaho Code § 36-1604, known as the recreational use statute, limits liability for a landowner that opens its land, without a fee, for recreational use. The following provisions of the statute are pertinent to the issues in this case:

(b) 4. 'Recreational purposes' includes, but is not limited to, any of the following activities or any combination thereof: hunting, fishing, swimming, boating, rafting, tubing, camping, picnicking, hiking, pleasure driving, the flying of aircraft, bicycling, running, playing on playground equipment, skateboarding, athletic competition, nature study, water skiing, animal riding, motorcycling, snowmobiling, recreational vehicles, winter sports, and viewing or enjoying historical, archeological, scenic, geological or scientific sites, when done without charge of the owner.

(c) Owner Exempt from Warning. An owner of land owes no duty of care to keep the premises safe for entry by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes. Neither the installation of a sign or other form of warning of a dangerous condition, use, structure, or activity, nor any modification made for the purpose of improving the safety of others, nor the failure to maintain or keep in place any sign, other form of warning, or modification made to improve safety, shall create liability on the part of an owner of land where there is no other basis for such liability.

(d) Owner Assumes No Liability. An owner of land or equipment who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

1. Extend any assurance that the premises are safe for any purpose.
2. Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.

I.C. §36-1604.

Under this statute, a person who enters the land for recreational purpose is neither an invitee or licensee and is not owed a duty of care. The statute expressly states, "an owner of land owes no duty of care to keep the premises safe for entry by others for recreational purposes, or to give any warning of a dangerous condition." I.C. § 36-1604(c).

The Mineral Mountain Rest Area, where the Plaintiff fell, is open to the public. In *Bauer v. Mindoka School District No. 33*, 116 Idaho 586, 778 P.2d 336 (1989), the Court acknowledged that the recreational use statute applies to injuries occurring on public land. *Id.* at 588, 778 P.2d at 338, citing *Corey v. State*, 108 Idaho 921, 703 P.2d 685 (1985); *McGhee v. City of Glens Ferry*, 111 Idaho 921, 729 P.2d 396 (1986); *Jacobsen v. City of Rathdrum*, 115 Idaho 266, 766 P.2d 736 (1988). The recreational use statute lists many possible uses that would be considered recreational in purpose, including "picnicking" and "viewing or enjoying ... scenic ... sites." I.C. §36-1604(b)(4).

In *McGhee*, the Court held that the statute limited the city of Glens Ferry's liability after

a child was allegedly injured while swinging in Hull Memorial Park. According to the Court, the park was "public land" and the city was its owner and operator, therefore the statute applied. In *Corey*, the recreational activity the user was engaged in at the time of the alleged injury was snowmobiling. The Court reasoned that this was an activity specifically mentioned within the statute, therefore, the statute "is expressly applicable to the factual situation presented by this case." *Corey, supra*, at 922, 703 P.2d at 686.

There is no dispute that the Mineral Mountain Rest Area is land that is open to the public without charge. The plaintiff has stated that he was crossing over to one of the picnic tables on the property. Along with "picnicking," the statute specifically includes "viewing or enjoying ... scenic ... sites." I.C. §36-1604(b)(4). As a matter of law, the recreational use statute precludes the plaintiff's claim against ITD.

V.

CONCLUSION

Based on the foregoing, Plaintiff's motion for partial summary judgment should be denied and summary judgment for ITD should be granted based on its status as the statutory employer of the plaintiff at the time of his fall or because ITD owed a limited duty to the plaintiff as a licensee on the property, or owed no duty to the plaintiff pursuant to the recreational use statute.

DATED this 25 day of June, 2007.

LOPEZ & KELLY, PLLC

By: 

Michael E. Kelly, Of the Firm
Attorneys for Defendant State of Idaho

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of June, 2007, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

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STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: EC 331

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CLERK DISTRICT COURT

DEPUTY

Attorneys for Defendant State of Idaho,
Department of Transportation

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

JOHN E. EWING, and NOREEN
EWING,

Plaintiffs,

vs.

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION

Defendant.

Case No. CV 06-7599

**DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

COMES NOW the State of Idaho, Department of Transportation (hereinafter "the State"), by and through its attorneys of record, Lopez & Kelly, PLLC, pursuant to Rule 56(b) of the Idaho Rules of Civil Procedure, and respectfully moves this Court for summary judgment against the Plaintiffs on the following alternative grounds: (1) that as the plaintiff's statutory employer, the State is immune from third party liability; (2) that the State did not owe a duty to the plaintiff, who was a licensee on the property, to warn of unknown hazards on the land; and/or (3) that the State is protected from liability under the recreational use statute.

This Motion is made and based upon the pleadings, records, and affidavits on file herein or

filed herewith, including the Affidavits and Combined Memorandum in Support of Defendant State of Idaho's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Partial Summary Judgment, filed contemporaneously herewith, which are incorporated herein by this reference.

DATED this 25 day of June, 2007.

LOPEZ & KELLY, PLLC

By: 

Michael E. Kelly, Of the Firm
Attorneys for Defendant State of Idaho,
Department of Transportation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of June, 2007, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

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<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Overnight mail
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STATE OF IDAHO
COUNTY OF KOOTENAI } ss
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CLERK DISTRICT COURT

Ratnam
DEPUTY
ORIGINAL

Attorneys for Defendant State of Idaho,
Department of Transportation

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

JOHN E. EWING, and NOREEN
EWING,

Plaintiffs,

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STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION

Defendant.

Case No. CV 06-7599

**AFFIDAVIT OF ROSS F.
CONVERSE IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

STATE OF IDAHO)
: ss.
County of Kootenai)

I, Ross F. Converse, being first sworn, do hereby depose and state under penalty of perjury:

1. That I make this Affidavit based upon my own personal knowledge and belief;
2. That I am a Transportation Tech. Principal with the Idaho Transportation Department - District 2 and have been in such a position at all times relevant to this lawsuit;
3. That attached hereto is a true and correct copy of my construction diary

written on June 20, 2006, in reference to John E. Ewing, a subcontractor working on the
ITD Contract #6674.

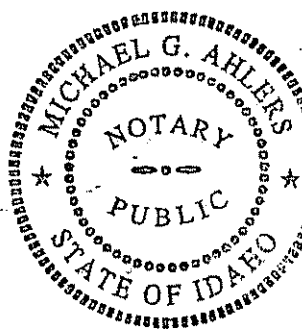
FURTHER YOUR AFFIANT SAITH NAUGHT.

DATED this 11th day of June, 2007.

IDAHO TRANSPORTATION DEPARTMENT

By Ross F. Converse
Ross F. Converse

SUBSCRIBED AND SWORN before me this 11 day of June, 2007.



Michael G. Ahlers
Notary Public for Idaho
Residing in the State of Idaho
My Commission Expires: 2-10-2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of June, 2007, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Michael J. Verbillis, P.A.

601 E. Sherman Avenue, Suite 3 ☒

Post Office Box 519 ☐

Coeur d'Alene, ID 83816-0519 ☐

Telephone: (208) 667-9475 ☐

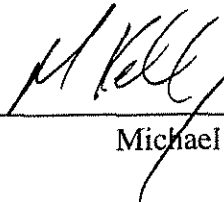
Facsimile: (208) 664-1161

U.S. Mail

Hand-Delivered

Overnight

Facsimile



Michael E. Kelly

John Ewing -

509-287-2902

6-20-06 8:30 AM

Sunny Warm

304 W Washington St 99128 Farmington Wash

2 Ploggers Break walking on path crossed
~~to~~ Trench ground gave way fell in hole

Hit face on ground - Hurt Lt shoulder
and hip, Twisted Ankle -

informed Bill Mitchell - Don care taken filled holes -
Cheryl LaSarte Witness
Ploggers North Star -

Appointment 6-22-06 afternoon -
Dr. Johnson Colfax -

North Star - 509 891 0892
Liberty Lake Wash -

Supervisor

TCS - Lynn Anderson Took pictures - of hole

R. Conners

No. 6674 known as Federal Aid Project No. NH-STP-4110(110) awarded to Scarsella Bros., Inc. and identifying North Star Enterprises, Inc., as a subcontractor on the project;

4. That attached hereto as Exhibit "B" is a true and correct copy of the Subcontract between Scarcella Bros., Inc., and North Star Enterprises, Inc. on the above mentioned ITD project which is kept in the regular course of ITD business; and
5. That attached hereto as Exhibit "D" is a true and correct copy of the Mineral Mountain Rest Area provision of the Bid Proposal for the Idaho Federal Aid Project No. NH-STP-4110(110), which by reference was incorporated into ITD Contract No. 6674.

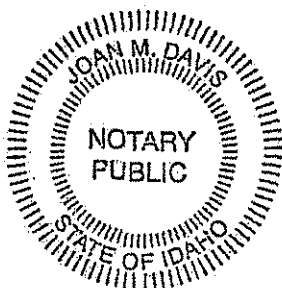
FURTHER YOUR AFFIANT SAITH NAUGHT.

DATED this 22 day of June, 2007.

IDAHO TRANSPORTATION DEPARTMENT

By Michael G. Ahlers
Michael G. Ahlers

SUBSCRIBED AND SWORN before me this 22nd day of June, 2007.



Joan M. Davis
Notary Public for Idaho
Residing in the State of Idaho
My Commission Expires: 01/04/13

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of June, 2007, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Michael J. Verbillis, P.A.

601 E. Sherman Avenue, Suite 3 ☒

Post Office Box 519 ☐

Coeur d'Alene, ID 83816-0519 ☐

Telephone: (208) 667-9475 ☐

Facsimile: (208) 664-1161

U.S. Mail

Hand-Delivered

Overnight

Facsimile



Michael E. Kelly

metric

STATE OF IDAHO
TRANSPORTATION DEPARTMENT
BOISE

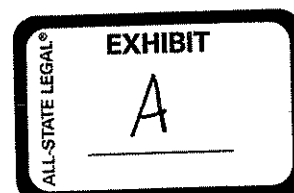
CONTRACT NO. 6674



PROJECT NH-STP-4110(110)
KEY 6298
LOCATION ELECTRICAL SUBSTATION TO SMITH CREEK
HIGHWAY US-95
COUNTY LATAH & BENEWAH



CONTRACTOR SCARSELLA BROS., INC.



October 15, 2003

file

Scarsella Bros., Inc.
P. O. Box 68697
Seattle, WA 98168

Idaho Federal Aid Project No. NH-STP-4110(110)
Electrical Substation to Smith Creek
Contract No. 6674, Latah & Benewah County, Key No. 6298

Contractor:

We are returning your copy of Contract No. 6674, covering the work on the captioned project, which has been duly executed by this office.

Award has been made as of this date. Unless otherwise directed work may commence. Contract time shall commence 15 calendar days after this date, or as stated in the contract proposal.

Our records do not show receipt of State Tax Collector's Form WH-5. Please see that this form is completed and returned as soon as possible.

Sincerely,

LOREN D. THOMAS, P.E.
Roadway Design Engineer

Enclosures
LDT:lj

bcc: Dist Engr #2
Res Engr
Dist Matls Engr
Matls
Traffic
Construction
IC
Bonding Company
Res Agent
CCO

RD--Greg Mead
Construction--Sharon
RD--Trish
RD--Area Engineer
RD--PS&E Coord #1
State Tax Commission
Maintenance
RD-TRS
OFCCP
FHWA

IND	D-2	ACT	SIG
<input checked="" type="checkbox"/>	DE		
<input checked="" type="checkbox"/>	DTE		
<input checked="" type="checkbox"/>	DME		
<input checked="" type="checkbox"/>	DEP		
<input checked="" type="checkbox"/>	DRI		
<input checked="" type="checkbox"/>	EEO/ST-C		
<input checked="" type="checkbox"/>	MADE		
<input checked="" type="checkbox"/>	RE-A		
<input checked="" type="checkbox"/>	RE-B		
<input checked="" type="checkbox"/>	DRWS		
<input checked="" type="checkbox"/>	DPDE		
	DMTC E		
	MTC FRMN		
	ALL SHEDS		
	OBM		
	ALL SUFV		

RECEIVED

OCT 20 2003

DIV. OF HIGHWAYS
LEWISTON, IDAHO

065

ITD - 315 8-98

PAGE 1 of 2

REQUEST TO

☒ SUBCONTRACT OR☐ SUB-SUBCONTRACT

Date: February 6, 2004

Request No.: 10

To: DISTRICT 2 ENGINEER
IDAHO TRANSPORTATION DEPARTMENT
P.O. BOX 837
Lewiston ID 83501

PROJECT NO.: NH-STP-4110(110)
KEY NO.: 6298
LOCATION: US 95, Electrical Substation
CONTRACT NUMBER 6674

From: (Name and Address)

PRIME CONTRACTOR

Scarsella Bros., Inc.

P. O. Box 68697

Seattle, WA 98168-0697

SUBCONTRACTOR:

☒ DBE

North Star Enterprises, Inc.

P. O. Box 607

Liberty Lake, WA 99019

License Number: 10232-A-4

SUB-SUBCONTRACTOR:

☐ DBE

License Number:

Contract Item No.	Contract Quantity	Contract Item	Contract Unit Bid Price	Split Item Unit Price	Amount
203-075A	10,747 M	Removal of Fence	2.00		21,494.00
205-005A	1,021,933 CM	Excavation Partial Truck Rental	2.00	.05	51,096.65
817-005A	346 Ea	Delineator Type 1	17.50		6,055.00
307-010A	224,000 T	Partial Truck Rental	6.70	.38	85,120.00
617-010A	17 Ea	Delineator Type 2	18.00		306.00
617-020A	14 Ea	Delineator Type 4	22.00		308.00
617-025A	23 Ea	Street Monument	175.00		4,025.00
626-005A	22 SM	Rent Construction Sign Class A	40.00		880.00
626-010A	92 SM	Rent Construction Sign Class B	40.00		3,680.00
626-040A	4 Ea	Rent Constr Barr Cl B Type III	150.00		600.00
626-050A	510 Ea	Rent Drum Class B	35.00		17,850.00
626-090A	298 M	Temp Pav Mkng Tape (White)	3.00		894.00
626-095A	11,763 M	Temp Pav Mkng Tape (Yellow)	2.65		31,171.95
626-100A	1 LS	Rent Incdntl Trfc Control Item	2,000.00		2,000.00
626-105A	2,400 Man Hr	Traffic Control Maintenance	36.00		86,400.00
626-115A	280 Ea	Rent Portable Tubular Markers	6.00		1,680.00
630-005A	9,000 Hr	Flagging	34.00		306,000.00
630-010A	3,000 Hr	Pilot Car Operator	42.00		126,000.00
634-005A	18 Ea	Mailbox	200.00		3,600.00
640-015A	210,000 SM	Subgrade Sep Geotextile	1.00		210,000.00
S911-05E	7,912 M	SP - Fiber Wattles	7.25		57,362.00
Sub-Subcontract and/or Speciality Item (Do not include this amount in any total below) TOTALS					

ITD - 315 8-98

PAGE 2 of 2

REQUEST TO

☒ SUBCONTRACT OR☐ SUB-SUBCONTRACT

Date: February 6, 2004

Request No.: 10

To: DISTRICT 2 ENGINEER
 IDAHO TRANSPORTATION DEPARTMENT
 P.O. BOX 837
 Lewiston ID 83501

PROJECT NO.: NH-STP-4110(110)
 KEY NO.: 6298
 LOCATION: US 95, Electrical Substation
 CONTRACT NUMBER 6674

From: (Name and Address)

PRIME CONTRACTOR

Scarsella Bros., Inc.
 P. O. Box 68697
 Seattle, WA 98168-0697

SUBCONTRACTOR:

☒ DBE

North Star Enterprises, Inc.
 P. O. Box 607
 Liberty Lake, WA 99019
 License Number: 1023A-4

SUB-SUBCONTRACTOR:

☐ DBE

License Number:

Contract Item No.	Contract Quantity	Contract Item	Contract Unit Bid Price	Split Item Unit Price	Amount
S912-05D	894 SM -	SP - Erosion Blanket Type 1	2.50 -		2,235.00 -
S912-05E	6,737 SM -	SP - Erosion Blanket Type 2	13.50 -		90,949.50 -
Z629-05A	1 LS -	Mobilization	1,115,000.00 -	20,000.00 -	20,000.00 -
Sub-Subcontract and/or Specialty Item (Do not include this amount in any total below) TOTALS					

Total Amount of this Request

1,129,907.10 -

Total Contract Amount (Less Specialty Items)

11,839,300.15 -

Percent of Total Contract

% 9.70 -

Amount of previously approved request is 3,090,233.76 -
 date \$ 4,220,140.86 - , which is 36.26 -

This will make the total amount subcontracted to
 percent of the total contract amount, less Specialty Items.

Checked by:

[Signature]
 District Engineer

Signed:

[Signature]
 Contractor

Approved:

[Signature]
 District Engineer

Title:

President

Date:

[Signature]
 2/23/04

ITD - 315 8-98
[Reverse Side]

Contractor's Statement and Acknowledgment

The prime contractor on the above contract, whose signature appears below, certifies that the following provisions of this contract will be physically incorporated into and made a part of the Subcontract Agreement and that the Agreement will be submitted to the Resident Engineer for review and made available for compliance reviews by Idaho Transportation Department personnel.

Check applicable contract provisions: (See requirements listed in contract.)

<input checked="" type="checkbox"/> U.S. DOT Form FHWA-1273	<input checked="" type="checkbox"/> SP-Training	<input checked="" type="checkbox"/> Civil Rights Special Provisions
<input checked="" type="checkbox"/> Department of Labor Wage Determination	<input type="checkbox"/> State Aid Special Provisions [SP-SA]	<input checked="" type="checkbox"/> Other <u>Tribal Special Provisions</u> _____ _____

The total dollar value of the Subcontract or Sub-Subcontract is \$

North Star Enterprises, Inc.
1,124,020.85

Signed: [Signature], this 6th day of February, 2004

President

Title

(Name of Prime Contractor)

The subcontractor whose signature appears below also acknowledges his responsibility under the subcontract for including these clauses in any lower tier subcontract awarded by him (required only for Sub-Subcontracts).

Signed: _____, this _____ day of _____, 20____

Signature

Title

(Name of Subcontractor)

Instructions to Contractor

1. Address request to District Engineer having jurisdiction of project.
2. Subcontractor's or Sub-Subcontractor's name and address must be the same as shown on the State License.
3. Fill in all columns using Contract Item Numbers and Contract Items as shown in the Contract. Use column headed "Split Item Unit Price" only if splitting of items is allowed.
4. Contact Resident Engineer for information concerning permissible bid item splitting and determination of "Split Item Unit Price." When splitting an item, including a specialty item, a description of work being split out of the item must appear in the column headed "Contract Item."
5. When "Specialty Items" are listed, or when using form ITD-315 for a Sub-Subcontract, leave blank all total and percentage lines below "Sub-Subcontract or Specialty Item Total" line.
6. Carry percentages to two decimal places. Be sure your figures are accurate before submitting request.
7. If the Prime Contractor is requesting to subcontract, check the box next to "Subcontract." If the Subcontractor is requesting to Sub-Subcontract, check the box next to "Sub-Subcontract."
8. Check DBE box only if Subcontractor or Sub-Subcontractor is certified as a DBE with the Idaho Transportation Department. If DBE goals have not already been met, the good faith effort to obtain DBE participation must accompany this subcontract request.
9. Complete "Contractor's Statement and Acknowledgement" Section.
10. All copies of all "Requests to Subcontract or Sub-Subcontract" must be signed and submitted by the Prime Contractor. Submit original and one copy through the Resident Engineer.

metric

STATE OF IDAHO
TRANSPORTATION DEPARTMENT
BOISE

CONTRACTOR'S BID PROPOSAL



PROJECT NH-STP-4110(110)
KEY 6298
LOCATION ELECTRICAL SUBSTATION TO SMITH CREEK
HIGHWAY US-95
COUNTY LATAH & BENEWAH



Bids will be received until two (2) o'clock P.M. on
September 9, 2003, at the office of the Idaho
Transportation Department in Boise, Idaho.

NOT FOR BIDDING PURPOSES

NOTICE OF LETTING

Sealed proposals will be received by the IDAHO TRANSPORTATION BOARD only at the office of the IDAHO TRANSPORTATION DEPARTMENT, 3311 WEST STATE STREET, BOISE, IDAHO 83703 or received by mail at P. O. Box 7129, BOISE, IDAHO 83707, ATTN: ROADWAY DESIGN until two o'clock p.m., on the 9th day of September, 2003, for the work of reconstruction & minor realignment of 6.434 miles of US-95, MP 366.593 to MP 373.027, including right turn lanes, a left turn lane, truck climbing lanes, snow plow turnarounds, crossdrains, livestock passes, pavement marking, & signing; Electrical Substation to Smith Creek, known as Idaho Federal Aid Project No. NH-STP-4110(110), in Latah & Benewah County, Key No. 6298.

[FOR ADDITIONAL INFORMATION CONCERNING THIS PROPOSAL, PLEASE CONTACT RESIDENT ENGINEER ***VINCENT SPISAK, P.E.*** AT (208) 799-5090.]

The Idaho Transportation Department, in accordance with the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252) and the regulations of the Department of Commerce (15 C.F.R., Part 8), issued pursuant to such act, hereby notifies all bidders that it will affirmatively ensure that in any contract entered into pursuant to this advertisement, minority business enterprises will be afforded full opportunity to submit bids in response to this invitation and will not be discriminated against on the grounds of race, religion, color, sex, national origin, age, or disability in consideration for award.

Plans, specifications, form of contract, proposal forms, and other information may be obtained at the office of the Idaho Transportation Department, Boise, Idaho, and are on file for examination at the office of the District Engineer at Lewiston, Idaho.

A non-refundable charge of ONE HUNDRED TEN DOLLARS (\$110.00) plus applicable sales tax will be made for each set of plans, payment to be made by check, payable to the Idaho Transportation Department. Plans may be ordered by phone (800) 732-2098 (in Idaho) or (208) 334-8430; or by written request to the Idaho Transportation Department, Attn: Financial Services, P. O. Box 7129, Boise, Idaho 83707-1129.

*****COMPUTERIZED BIDDING DISKETTES ARE AVAILABLE UPON REQUEST*****

The right is reserved to reject all proposals, or to accept the proposal or proposals deemed best for the State of Idaho.

No proposal will be considered unless accompanied by an acceptable proposal guaranty. This guaranty must be in the form of a Certified Check or a Cashier's Check drawn on an Idaho bank in the amount of five percent of the total amount bid, made payable to the Idaho Transportation Department, or a Bidder's Bond in the amount of five percent of the total amount bid.

Bidders shall obtain a license from the Idaho Public Works Contractors State License Board (208)327-7326 before award will be made, as provided in Subsection 103.02 and 107.03 of the Idaho Standard Specifications.

The Contractor will be required to pay not less than the minimum wage rates of the general wage decision for the project, as set out in the bid proposal. Such rates will be made a part of the contract covering the project. The Fair Labor Standards Act of 1938 (U.S.C.A. Title 29, Paragraphs 201-219, Chapter 8) shall apply in the employment of labor for this project.

It is the purpose of the Idaho Transportation Board to build the improvement in the shortest time consistent with good construction. Necessary equipment and an effective organization will be insisted upon.

Dated August 7, 2003

JIMMY D. ROSS, P.E.
Chief Engineer

070

FILED
JAN 23 2004
SCARSELLA BROS. INC.

SUBCONTRACT

This agreement is made this January 13, 2004 and entered into by and between

SUBCONTRACTOR: North Star Enterprises, Inc.
P. O. Box 607, Liberty Lake, Washington 99019
Phone: (509) 891-0892
Fax: (509) 922-3332
License No: 10232-A-4(7,9,12,16,17,22,25,28,32,36,38,42,47)
Vendor No: NOR003

hereafter "Subcontractor" and Scarsella Bros., Inc., PO Box 68697, Seattle, WA 98168-0697, Telephone (253) 872-7173, Fax No. (253) 395-1209, hereafter "Contractor."

RECITALS

1. The Contractor entered into the Prime Contract with Idaho Department of Transportation, hereafter "Owner" for the construction of Contract Number 6674, US 95, Electrical Substation to Smith Creek, hereafter "Project"
2. Copies of the Prime Contract are on file in the office of the Contractor and are available for examination by the Subcontractor.
3. The Subcontractor desires to perform a portion of the Prime Contract.

NOW THEREFORE, the parties agree as follows:

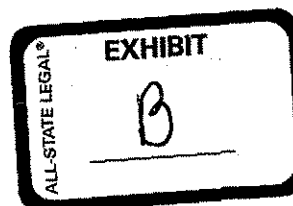
ARTICLE 1. CONTRACT DOCUMENTS

- A. The term "Prime Contract" refers to all the general, supplementary and special conditions, drawings, specifications, addenda, amendments, modifications and other documents forming or by reference made part of the contract between the Contractor and Owner.
- B. All of the aforesaid shall be considered a part of this Subcontract by reference thereto and insofar as they do not conflict with the terms and conditions of this Subcontract, they and each of them are hereby incorporated into this Subcontract as fully and particularly as if copied verbatim herein.
- C. Subcontractor agrees to be bound to Contractor by the terms of the Contract, and any amendments thereto, insofar as they are applicable to the Work described herein and shall assume toward Contractor all the obligations and responsibilities that Contractor assumes toward Owner.
- D. Subcontractor certifies that it is fully familiar with all the terms and obligations of the Contract, that it has inspected the job site, that it is familiar with the location of the job site and existing job site conditions, including, without limitation, labor, weather, supply, physical and subsurface conditions, and that it has informed himself of all conditions relating to the execution of the Work and the conditions under which the Work is to be performed.

ARTICLE 2. THE WORK

Subcontractor agrees to furnish all supervision, engineering, management, labor, tools, equipment, materials, supplies, facilities and financing and to secure all field measurements necessary to perform and to fully complete the following described work and all work incidental thereto. The term "Work" as used herein includes, without limitation, all of the aforesaid together with the following described work:

b Contractor CSA



Contractor RS

Date: 1/12/2004

A. DESCRIPTION:

North Star Enterprises, Inc.

6674

Item 203-075A	Removal of Fence	10,747 M @ \$2.00/M	\$21,494.00
Item 205-005A	Excavation Partial Trk Rntl	80 days, 8 hrs. @ \$85.00/Hr.	54,400.00
Item 617-005A	Delineator Type 1	346 Ea. @ \$17.50/Ea.	6,055.00
Item 307-010A	Open Grd Rk CapPartial Trk Rntl	126 days, 8 hrs. @ \$85.00/Hr.	85,680.00
Item 617-010A	Delineator Type 2	17 Ea. @ \$18.00/Ea.	306.00
Item 617-020A	Delineator Type 4	14 Ea. @ \$22.00/Ea	308.00
Item 618-025A	Street Monument	23 Ea. @ \$175.00/Ea.	4,025.00
Item 626-005A	Rent Constr. Sign Class A	22 SM @ \$40.00/SM	880.00
Item 626-010A	Rent Constr. Sign Class B	92 SM @ \$40.00/SM	3,680.00
Item 626-040A	Rent Constr Barr Cl B Typ III	4 Ea. @ \$150.00/Ea.	600.00
Item 626-050A	Rent Drum Class B	510 Ea. @ \$35.00/Ea.	17,850.00
Item 626-090A	Temp Pav Mrkng Tape (White)	298 M @ \$3.00/M	894.00
Item 626-095A	Temp Pav Mrkng Tape (Yllw)	11,763 M @ \$2.65/M	31,171.95
Item 626-100A	Rent Incdntl Traf Cntrl Item	1 LS @ \$2,000.00	2,000.00
Item 626-105A	Traf Control Maintenance	2,400 MnHr @ \$36.00/MnHr	86,400.00
Item 626-115A	Rent Port Tubular Markers	280 Ea. @ \$6.00/Ea.	1,680.00
Item 630-005A	Flagging	9,000 Hr. @ \$34.00/Hr.	306,000.00
Item 630-010A	Pilot Car Operation	3,000 Hr. @ \$42.00/Hr.	126,000.00
Item 634-005A	Mailbox	19 Ea. @ \$200.00/Ea.	3,800.00
Item 640-015A	Subgrade Sep Geotextile	210,000 SM @ \$1.00/SM	210,000.00
Item S911-05E	SP - Fiber Wattles	7,912 M @ \$6.50/M	51,428.00
Item S912-05D	SP - Erosion Blnkt Type 1	894 SM @ \$2.00/SM	1,788.00
Item S912-05E	SP - Erosion Blnkt Type 2	6,737 SM @ \$13.00/SM	87,581.00
Item Z-629-05A	Mobilization	1 LS @ \$20,000.00	20,000.00

\$1,124,020.95

a See attached quotation.

B. CLARIFICATIONS:

1. Performance and Payment Bonds are not required.
2. Subcontractor acknowledges the project's aspirational goal of at least 6.9% female and ~~7.2%~~ ^{3.0%} minority participation by on site employees and shall provide all required documentation of its good faith efforts and achievements for this project.
3. Subcontractor acknowledges substantial completion of the Prime Contract must be achieved in 450 working days and it has included sufficient mobilizations, manpower, tools and equipment to complete its work as scheduled. Time is of the essence.
4. Subcontractor's work INCLUDES, but is not limited to, the following:
 - a. Shop drawings, Product Data, Samples and all other Submittal requirements - To be submitted no less than 10 days from Subcontract date, or earlier, if required to meet the Project Schedule.
 - b. Subcontractor shall prearrange all deliveries and site mobilizations with Contractor's Superintendent.
 - c. Subcontractor shall stage all materials as directed by Contractor's Superintendent.
 - d. Hoisting and incidental equipment complete including all traffic control, flagging, barricades and street closure permits as may be required for Subcontractor's work.
 - e. Scaffolding and lifts as required to access all areas of work.
 - f. Protection of all adjoining finished surfaces and protection of all products until acceptance of the work.
 - g. Subcontractor shall continually and thoroughly cleanup and remove from job site bins, all waste, debris, surplus equipment and surplus materials resulting from Subcontractor's operations.
 - h. Sales Tax, Use Tax and B&O Tax. Subcontractor is responsible for all other taxes including, but not limited to, WSST on non-exempt services and materials.
 - i. Surveying and layout required to perform its work.
 - j. Becoming signatory to applicable bargaining unit agreements required by Contract or the Prime Contractor's labor agreements.

Subcontractor acknowledges project training goals of N/A and agrees to provide N/A hours toward this goal.

Subcontractor EXCLUDES the following:

1b Contractor CL

Contractor JB

Date: 1/12/2004

- C. Subcontractor shall furnish all samples, brochures, shop drawings, color charts, schedules and descriptive literature required for submission within ample time to allow for checking and to prevent any delay due to lack of approval. Subcontractor shall furnish all copies of approved and corrected submittals required for distribution. As part of Subcontractor's work, Subcontractor shall thoroughly review the submittals of its own vendors and subcontractors. All such submittals shall be approved by Subcontractor prior to transmittal to Contractor, and Contractor shall have the right to rely upon Subcontractor's approval as constituting compliance with the Contract Documents. Approval by the Owner's Architect or Engineer of any submittals furnished by Subcontractor does not relieve Subcontractor of responsibility for compliance with all requirements of the Contract and this Subcontract.
- D. Subcontractor shall commence the Work upon receipt of Contractor's notice to proceed and shall diligently prosecute the same and perform progressively as, when and in such order as directed by Contractor. Subcontractor will coordinate the schedule for the work contained herein with Contractor's Superintendent. Subcontractor recognizes that time is of the essence and will complete all work as scheduled to avoid delaying other work activities and the completion dates for the total project. If Contractor provides Subcontractor with a progress schedule, Subcontractor shall follow such schedule, which may be changed by Contractor from time to time for any reason. Subcontractor shall perform in accordance with such modified schedule(s).
- E. Subcontractor shall not be entitled to any claim for damages for performing in accordance with such modified schedules nor shall Subcontractor be entitled to any claim for damages on account of hindrances, interferences, disruptions or delays from any cause whatsoever, EXCEPT TO THE EXTENT ALLOWED BY THE PRIME CONTRACT AND ARISING FROM ACTIONS ATTRIBUTABLE TO THE OWNER.
- F. Should Subcontractor be hindered or delayed by an act or omission on the part of Contractor or those in privity of contract with Contractor, such act, hindrance or delay may entitle Subcontractor only to an extension of time in which to complete the Work and Subcontractor expressly agrees that such extension of time, if any, shall constitute Subcontractor's sole and exclusive remedy. Subcontractor shall notify Contractor in writing by certified mail of the cause of such act, hindrance or delay within five (5) days after its occurrence and agrees that failure to give such written notice shall constitute a waiver by Subcontractor to any extension of time. Such time extension, if any, is to be determined by Contractor whose decision shall be final and binding unless Contractor's decision is submitted to arbitration in accordance with THIS SUBCONTRACT.

ARTICLE 3. PAYMENT

- A. The Contractor agrees to pay the Subcontractor for performance of this Subcontract as specified herein, the estimated sum of \$1,124,020.95 (One million one hundred twenty-four thousand twenty dollars and 95/100), adjusted as required by differences between estimated and actual quantities for unit price Work and subject to additional deductions for changes agreed upon or determined, as hereinafter provided.
- B. Partial payments will be made to Subcontractor each month in an amount equal to the 95% of the value of the work completed, computed on the basis of the price set forth above, of the quantity of the Work performed hereunder, less the aggregate of previous payments, provided that such partial payments shall not become due to Subcontractor until ten (10) days after Contractor receives payment for such Work from Owner, SUBCONTRACTOR PROVIDES AN INVOICE FOR ITS ESTIMATE OF THE AMOUNT DUE AND SUBCONTRACTOR PROVIDES A CONDITIONAL LIEN RELEASE FOR PRIOR PAYMENTS. If Contractor receives payment from Owner for less than the full value of materials delivered to the site but not yet incorporated into the Work, the amount due Subcontractor on account of such materials delivered to the site shall be proportionately reduced. Payment to the Subcontractor shall not operate as approval or acceptance of work furnished hereunder.

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- C. Subcontractor further agrees that no payment, whether progress or final payment, made under this Subcontract, or certificate thereof, shall operate as approval or acceptance of Work furnished hereunder or be evidence of performance by Subcontractor hereunder, either wholly or in part, and that no payment or certificate therefor shall be construed to be an acceptance of defective or improper materials, equipment or workmanship or any element of Subcontractor's performance determined to be at variance with this Subcontract or the Contract. No payment or certificate therefor shall constitute a waiver by Contractor of any right to require fulfillment of all the terms, covenants and conditions of this Subcontract nor shall such payment or certificate alter the effectiveness of any warranties, implied or expressed, which attach to any work performed by Subcontractor, or to any equipment or materials furnished by Subcontractor.
- D. Subcontractor shall submit in writing to Contractor a complete and accurate schedule of values of the various parts of the Work, aggregating the total sum of this Subcontract, itemized and detailed as required by Contractor and supported by such evidence as to its completeness and correctness as Contractor may require. This schedule when approved by Contractor shall be used as the basis for making payments hereunder unless it is found to be in error or in conflict with the procedures or determinations of Owner regarding progress payments to Contractor. This requirement to submit a schedule of values to Contractor shall be in addition to any submittals required by the Contract or Owner.
- E. Upon complete performance of this Subcontract by Subcontractor, final written approval and acceptance of Subcontractor's Work by Owner, furnishing by Subcontractor of a complete release of any and all claims arising out of this Subcontract and receipt of all paperwork required by the Prime Contract, Contractor will make final payment to Subcontractor of the balance due under this Subcontract within ten (10) days after Contractor receives full and final payment from Owner under the Contract.
- F. Contractor may deduct from any amounts due or to become due to Subcontractor any sum or sums owed by Subcontractor to Contractor; and in the event Subcontractor fails to perform any obligation of this Subcontract, or in the event of the assertion by other parties of any claim or lien against the Contractor or the premises arising out of the Subcontractor's performance of this Subcontract, the Contractor shall have the right to retain out of any payments due or to become due to the Subcontractor an amount sufficient to completely protect the Contractor from any and all loss, damage or expense thereof, until the situation has been satisfactorily remedied or adjusted by the Subcontractor.

ARTICLE 4. BONDING

- A. If called for by Contractor, Subcontractor shall furnish a performance bond and a payment bond, each in an amount equal to the full Subcontract price. Such bonds shall be on forms furnished by and with sureties satisfactory to Contractor. Subcontractor shall pay premium for bonds.
- B. Contractor shall have the right to call for bonds at any time.
- C. Should Subcontractor fail to furnish the required bonds, Contractor shall have the right to declare Subcontractor to be in default and to take over the Work pursuant to the provisions of this Subcontract and/or to withhold all payments due hereunder. The furnishing of said bond by the Subcontractor is a condition precedent to the Subcontractor's right to receive partial payment for Work performed hereunder. The waiver of partial payment shall not constitute an excuse or reason for nonperformance.

ARTICLE 5. CHANGES

- A. Contractor may at any time by written order of Contractor's authorized representative, and without notice to Subcontractor's sureties, and without invalidating this Subcontract, order extra work or make changes in, additions to and omissions from the Work to be performed under this Subcontract and Subcontractor shall promptly proceed with the performance of this Subcontract as so changed.

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- B. Such changes to the Subcontract and appropriate increases or decreases in the Subcontract price will be made by the issuance of a written Subcontract Modification executed by the Contractor. If Subcontractor objects to or otherwise disagrees with such Subcontract Modification, Subcontractor shall so notify Contractor in writing within ten (10) days of the date such change is ordered, submitting with such notification a claim for equitable adjustment. If Subcontractor fails to so notify the Contractor, such modification becomes final and accepted by Subcontractor and becomes part of the Subcontract between the parties.
- C. It is expressly agreed that, except in an emergency endangering life or property, no additions or changes to the Work shall be made except upon Contractor's written order and Contractor shall not be liable to Subcontractor for any extra labor, materials or equipment furnished without such written order. No officer, employee or agent of Contractor is presently authorized or will hereafter be authorized to direct any extra or changed work by oral order.
- D. Changes in the Prime Contract initiated by the Owner and for acts or omission of the Owners and/or defects in the Prime Contract documents, the Subcontractor shall submit any claims it may have including notice thereof for adjustment in the price, schedule or other provisions of the Subcontract to the Contractor in writing in sufficient time and form to allow the contractor to process such claims within the time and in the manner provided for and in accordance with the applicable provisions of the Prime Contract documents. Subcontract adjustments shall be made only to the extent and in the manner that the Contractor is entitled to relief from or must grant relief to the Owner.
- E. For changes directed by the Contractor which were not initiated by the Owner or Owner's Representative and do not arise out of acts, errors or omission of the Owner or Owner's Representative or defects in the Prime Contract documents, Subcontractor shall be entitled to equitable adjustment in the Subcontract price, provided Subcontractor gives Contractor written notice of its intent to claim such an adjustment prior to performing such changed Work. Failure to provide such notice shall be deemed to prejudice the Contractor and constitute a waiver of such claims by Subcontractor.

ARTICLE 6. PROSECUTION OF THE WORK

- A. Should Subcontractor fail in any respect to prosecute the Work with promptness and diligence and in such manner so as not to delay Contractor or the progress of the Project, or if the progress of the Work is such that in Contractor's sole opinion the completion of the Work or any part thereof within the time specified is doubtful and Contractor gives Subcontractor written notice thereof, Subcontractor agrees to take all action necessary to ensure the completion of the Work or any part thereof within the time specified, including but not limited to any or all of the following: increase construction manpower in critical quantities and crafts; increase the number of working hours per shift; increase the number of shifts per working day; increase the number of working days per week; increase the amount of construction equipment; or, perform any combination of the foregoing actions. Subcontractor agrees that it shall have no claim for any adjustment in the Subcontract price or reimbursement because of extra expenses occasioned by compliance with this section. Compliance with this section shall not release or relieve Subcontractor from any other obligation or liability assumed under this Subcontract, nor shall such compliance prevent or stop Contractor from enforcing any other right or collecting any damages or costs to which it is entitled under this Subcontract.
- B. Before proceeding with any item of Work, Subcontractor shall accurately inspect and check all previously completed and surrounding work done by Contractor or others. Failure of Subcontractor to detect and report in writing to Contractor any defects or discrepancies shall be an admission by Subcontractor that the previously completed and surrounding work has been done in a proper manner. Subcontractor, however, will not be responsible for latent defects in the work done by Contractor or others, which could not have been discovered by such inspection.
- C. Subcontractor will employ no person whose employment on or in connection with this Subcontract may be objectionable to Contractor, and Subcontractor will remove any such person when objected to by Contractor. At all times when its Work is being performed on the job site, Subcontractor shall assign to and keep on the Project a competent superintendent who shall have full authority to act for Subcontractor in all matters pertaining to this Subcontract.
- D. If Subcontractor becomes insolvent, or institutes or has instituted against it bankruptcy proceedings, or makes a general assignment for the benefit of creditors, or if a receiver is appointed for the benefit of its creditors, or if a receiver is appointed on account of its insolvency, such event or events could impair or frustrate Subcontractor's performance of this Subcontract. Accordingly, it is agreed that upon the occurrence of any such event, Contractor shall be entitled to request of Subcontractor or its receiver or court-appointed successor adequate assurances of future performance. Pending receipt of adequate assurances of performance and actual performance in accordance therewith, Contractor shall be entitled to take over the Work without notice to Subcontractor.

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- E. Contractor reserves the right, in its sole and exclusive discretion, with or without cause, to terminate this Subcontract, as to all or any part of the Work, for Contractor's convenience at any time prior to completion of the Work, by written notice effective upon Subcontractor's receipt of notice or such later time as such notice may provide. In such event, Subcontractor shall cease performance of the Work at the time provided, shall secure and protect any portion of the Work then performed and all materials and equipment theretofore furnished, and shall promptly notify all of its subcontractors and suppliers to the same effect. Subcontractor, for itself and for all of its subcontractors and suppliers, shall thereafter present to Contractor a termination inventory in writing describing the nature, quantity, cost and location of all materials and equipment theretofore furnished or ordered for the Work, and shall, at Contractor's option, assign to Contractor such subcontracts and purchase orders as Contractor may direct. Subcontractor shall take such actions as Contractor may direct or as may be reasonable to terminate, cancel, assign, assemble, return, sell or otherwise account for the termination inventory and shall thereafter account to Contractor for all costs of labor, materials, equipment and overhead incurred by Subcontractor pursuant to this Subcontract, and all credits realized upon termination. Such accounting shall be supported by such documentation, and shall be subject to such verification, as Contractor shall reasonably require. Contractor shall thereupon pay to Subcontractor the amount of Subcontractor's net costs incurred together with an allowance of ten percent (10%) as general overhead and profit, but in no event more than the Subcontract price, less such amount as Subcontractor may have previously received as partial payment upon the Subcontract price. The cost principles and procedures of Part 31 of the Federal Acquisition Regulation of the United States of America in effect on the date of this Subcontract shall govern all costs claimed, agreed to or determined under this paragraph. Subcontractor shall not be entitled to any lost profit on uncompleted Subcontract work or any indirect costs, expenses or damages arising out of the termination.
- F. If Prime contract is terminated for the convenience of the Owner, the termination settlement under this Subcontract shall be as provided in the Prime Contract. The subcontractor shall not be entitled to receive any greater amount that the Contractor may on behalf of the Subcontractor recover from the Owner for such termination.
- G. Upon determination by a court of competent jurisdiction that termination of Subcontractor or its successor in interest pursuant to any provisions of this Subcontract was wrongful, such termination will be deemed converted to a termination for convenience and the Subcontractor's remedies shall be limited to those set forth in Article 6, Paragraph E above.
- H. The quality of the workmanship and materials furnished and installed under this Subcontract shall be of the highest level and shall, in all respects, be of industry accepted standards for quality and workmanship. Any work or materials, which do not exhibit the highest level of standards for quality and workmanship, shall be removed and replaced at no additional charge to the Owner or Contractor.
- a) Subcontractor will identify, by name, the individual within its organization who will be responsible for managing all Quality Control issues related to the materials/services provided by the Subcontractor as part of this agreement.
 - b) Subcontractor will provide within thirty (30) days of award a Quality Control Plan that assures the conformance of all equipment, materials and work to the requirements of applicable sections of the Specifications. The aforementioned Quality Control Plan will describe the Subcontractor's process to assure compliance to specifications in all applicable stages of performance including design inspection, testing, handling, packaging, shipping, storage and site construction activities.
 - c) Subcontractor will provide access as needed to its own facilities as well as the facilities of Subcontractor's sub-tier suppliers for the purpose of quality control inspections, quality control audits and expediting visits.

ARTICLE 7. TERMINATION FOR DEFAULT

- A. If at any time Subcontractor shall: (a) become insolvent or be unable to pay its debts as they mature or commit any act of bankruptcy or have filed or suffered to be filed a petition of bankruptcy against Subcontractor or have a receiver or trustee appointed or suffered the appointment of a receiver or trustee to take charge of its property or to be adjudicated bankrupt; (b) fail to pay promptly when due all bill and charges for labor, materials, equipment and services used in the performance of this Subcontract or required to be paid by this Subcontract; (c) fail or refuse to proceed with or to properly perform its Work as directed by Contractor or; (d) fail or refuse to properly perform or abide by any term or condition of this Subcontract; then Subcontractor shall be deemed in default and Contractor may give Subcontractor written notice of such default.
- B. If Contractor determines that Subcontractor has not remedied such default within five (5) days after the date of Contractor's notice, Contractor, by Subcontract or otherwise, at its option may, without prejudice to any other right or remedy, take over the Work or any part thereof and complete the same at the expense of Subcontractor, or without taking over the Work, may furnish the necessary equipment, materials and workmen to remedy the situation at the expense of Subcontractor.

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- C. If Contractor takes over the Work pursuant to this Section, it is specifically agreed that Contractor may take possession of the premises and all materials, tools, equipment, drawings and appliances of Subcontractor at the site for the purpose of completing the Work covered by this Subcontract.
- D. Subcontractor shall pay to Contractor a sum equal to Contractor's total cost, including but not limited to all monies expended and all costs, losses, damages and extra expense, including all management, administrative and other direct and indirect expenses, plus attorneys' fees, incurred by Contractor because of such default, together with all such costs incident to taking over and completing the Work or any part thereof or furnishing the necessary equipment, material or workmen. Subcontractor's liability shall include without limitation all payments made, expenses and losses incurred, damages sustained and obligations assumed by Contractor in good faith and under the belief that such payments or assumptions were necessary, whether or not they were actually necessary or required, including but not limited to payments made in settlement or compromise of claims or payment of judgments arising out of or related to the Work.
- E. Subcontractor agrees that should Owner terminate the Contract then Subcontractor's remedies shall be as, and only as, provided for in the Contract and that Subcontractor shall be paid only such sums as shall be paid by Owner for the account of Subcontractor, excluding such amounts as may be paid for Contractor's overhead and profit, if any.
- F. Contractor's determination that Subcontractor is in default and that Subcontractor has failed to remedy such default as required herein, made in good faith and under the belief that a default existed and that Subcontractor failed to remedy such default, shall be conclusive as to Contractor's right to proceed as provided herein. Any action by Contractor which is, or is subsequently determined to be, without default or sufficient default by Subcontractor, or is otherwise determined to be, for any reason, improper, wrongful or in breach of the terms and provisions of this Subcontract, shall be treated, for all purposes, as a termination provided for under Article 6, paragraph E.

ARTICLE 8. DELAYS

- A. In the event the Subcontractor's performance of this subcontract is delayed or interfered with by acts of the Owner, Contractor or other subcontractors, it may request to the extension of time for the performance of same, as hereinafter provided, but shall not be entitled to any increase in the Subcontract price or to damages or additional compensation as a consequence of such delays or interference, except to the extent that the Prime Contract entitles the Contractor to compensation for such delays and then only to the extent of any amounts that the Contractor may, on behalf of the Subcontractor, recover from the Owner for such delays.

ARTICLE 9. LABOR

- A. All labor used by Subcontractor throughout the Work shall be acceptable to Owner and Contractor and shall be of a standing or affiliation that will permit the work of the Project to be carried on harmoniously and without delay and will in no case or under any circumstances cause any disturbance, interference, or delay to the progress of the Project. Failure at any time to comply with any of the provisions of this Section will constitute default by Subcontractor, and Contractor shall have all of the rights contained in THIS SUBCONTRACT with regard to such default.
- B. If, by reason of strikes, picketing, refusals to work or disputes of any nature, whether the result of disputes with Contractor, Subcontractor or other persons, Subcontractor should be persistently, repeatedly, or for a total of five (5) consecutive days, unable to supply enough properly skilled craftspeople/personnel/employees or proper materials to execute the Work, then Contractor may either directly or by engaging other Subcontractors, furnish the materials and/or employ the craftspeople/personnel/employees necessary to continue the performance of the Work, at the expense of Subcontractor, and Contractor shall have all rights set forth in THIS SUBCONTRACT for Subcontractor's default. Notwithstanding any provision thereof, Subcontractor shall be an independent contractor, maintaining control over its employees and operations and neither Subcontractor nor anyone employed by Subcontractor shall be deemed to be the servant, employee or agent of Contractor or Owner.

ARTICLE 10. SUBMITTALS

All drawings of the Subcontractor shall be submitted through the Contractor for approval of the Owner or Owner's Representative and all other communications between the Subcontractor and the Owner or Owner's Representative with respect to the Work shall be transmitted through the Contractor.

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ARTICLE 11. INDEMNIFICATION

- A. Subcontractor agrees to defend, indemnify and hold harmless Project Owner, Owner's Architect/Engineer, Contractor and all of its subsidiaries, as well as their employees, agents, and principals (collectively, "Indemnitees"), from and against all liability or claims of liability (including attorney's fees) for property damage, bodily injury (including death), or other personal injury, including claims by employees of Subcontractor or their lower tier contractors, arising from or related to Subcontractor's work or operations pursuant to this Subcontract, including the preparation to perform such work or operations and the use of equipment in the performance of such work or operations.
- B. In the event that Subcontractor is separately renting and/or leasing equipment to Contractor as part of this Subcontract, Subcontractor additionally agrees to defend, indemnify and hold harmless Indemnitees from and against all liability or claims of liability (including attorney's fees) for property damages, bodily injury (including death), or other personal injury, directly or indirectly arising from any act or negligence caused or claimed to be caused by Subcontractor, or any failure in the equipment or any component thereof caused or claimed to be caused by defects, or deficiencies in the manufacture, subsequent modification by Subcontractor or working of the equipment.
- C. Subcontractor agrees, except in jurisdictions where prohibited by law, that its obligation and duty to defend, indemnify and hold harmless Indemnitees is not dependent upon Subcontractor's fault or negligence, but is limited only to the extent that the claims or liability must arise out of or relate to the Subcontractor's work or operations. Similarly, except in jurisdictions where prohibited by law, Subcontractor agrees to defend, indemnify and hold harmless Indemnitees from and against any liability to or claim of liability by Subcontractor's employees and waives any immunity under workers compensation laws, to the extent necessary, to give effect to this defense and indemnity obligation.
- D. Subcontractor agrees that its duty and obligation to defend, indemnify and hold harmless is not affected or limited by the negligence of the Indemnitees, except that Subcontractor is not obligated to defend, indemnify or hold harmless any Indemnitee whose negligence or fault is the sole legal and proximate cause of the injuries or damages that give rise to the liability or claims of liability.
- E. Subcontractor agrees that its duties and obligations under this Section are distinct from, independent of, and not intended to be coextensive with its insurance obligations, as set forth in Article 12, below.
- F. Subcontractor specifically and expressly waives any immunity that may be granted under the Washington State Industrial Insurance Act, Title 51 RCW. Further, the indemnification obligation under this Subcontract shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable to or for any third party under worker's compensation acts, disability benefits acts or other employee benefits acts; provided Subcontractor's waiver of immunity by the provision of this paragraph extends only to claims against Subcontractor by Contractor and does not include, or extend to, any claims by Subcontractor's employees directly against Subcontractor, Subcontractor's duty to indemnify Contractor for liabilities or losses other than for bodily injury to persons or damage to property shall apply only to the extent of the fault of the Subcontractor or its agents or employees, sub-subcontractors or suppliers of any tier, except in situations where fault is not a requirement for liability, in which case indemnity will be provided to the extent the liability or loss was caused by Subcontractor or its agents or employees, sub-subcontractors or suppliers of any tier.
- G.

SUBCONTRACTOR AND CONTRACTOR CERTIFY THAT THIS INDEMNIFICATION AGREEMENT AND WAIVER OF SUBCONTRACTOR'S IMMUNITY UNDER THE WASHINGTON STATE INDUSTRIAL INSURANCE ACT, TITLE 51 RCW, WAS MUTUALLY NEGOTIATED BY THE PARTIES.

Subcontractor signature

C. L. Anderson

Contractor signature

[Signature]

ARTICLE 12. INSURANCE

- A. Subcontractor agrees to obtain, maintain and pay for such workers compensation and employer's liability insurance as required by law. The employer's liability insurance shall have limits of at least the following:

Employer's Liability

\$1,000,000 each accident

\$1,000,000 each disease

Sub Contractor [Signature]

Date: 1/12/2004

\$1,000,000 each employee per disease

- B. Subcontractor agrees to obtain, maintain and pay for Contractor's Equipment Floater coverage on all equipment utilized by Subcontractor in the performance of this Subcontract and all equipment rented and/or leased to Contractor by Subcontractor as part of this Subcontract. Such Contractor's Equipment Floater coverage shall cover the full value of the equipment and shall include an endorsement waiving subrogation against the Indemnitees. Any deductibles or self-insured retentions and/or loss of use shall be the sole responsibility of Subcontractor.
- C. Subcontractor agrees to obtain, maintain and pay for Commercial General Liability insurance and Commercial Automobile Liability insurance with per occurrence and aggregate limits of at least the following (Umbrella or Excess coverage may be utilized to arrive at these limits of Insurance):

Commercial General Liability
(combined single limit for bodily injury and property damage)
\$2,000,000 per occurrence
\$2,000,000 annual aggregate (project specific)

Commercial Automobile Liability
(combined single limit for bodily injury and property damage)
\$2,000,000 per occurrence

- D. Said insurance is to be on a CG 20 10 11 85 or equivalent form and issued by a company satisfactory to Contractor. The Commercial General Liability coverage provided by Subcontractor shall be on an occurrence form and include as a minimum, standard insurance industry coverage for contractual liability coverage, products and completed operations coverage, broad form property damage coverage, personal injury coverage, an endorsement waiving subrogation against the Indemnitees and an Additional Insured endorsement per Article 12.G. If the Commercial General Liability coverage contains a general aggregate limitation, then such coverage shall be endorsed to provide a specific aggregate for work performed under this Subcontract.
- E. The Commercial Automobile Liability coverage provided by Subcontractor shall include owned, non-owned and hired motor vehicles coverage, an endorsement waiving subrogation against the Indemnitees and an Additional Insured endorsement.
- F. Subcontractor agrees to obtain, maintain and pay for either a standard ISO Commercial General Liability policy with a Pollution exclusion that provides for limited sudden and accidental coverage or a Pollution Liability policy. The limit of insurance (under either form of coverage) shall be a per occurrence and aggregate amount of at least \$1,000,000. Either coverage shall protect against the actual or alleged liability and costs arising from the sudden and accidental release or discharge of pollutants and/or hazardous materials arising from the Subcontractor's work. If a stand alone policy is provided it may extend coverage on an occurrence or claims-made basis (if coverage is on a claims-made basis, the coverage retro-date shall not be later than the start date of this Subcontract). Any deductible or self-insured retention shall be the sole responsibility of the Subcontractor.
- G. Subcontractor agrees that Project Owner, Owner's Architect/Engineer, AND SCARSELLA BROS., Inc. and their employees, agents and principals (also referred to collectively as, "Additional Insureds") are to be expressly made Additional Insureds under all such liability policies. These liability policies will provide Additional Insureds with insurance coverage entitling them to a defense and indemnity from and against any liability or claim of liability arising out of or in any way related to Subcontractor's work or operations pursuant to this Subcontract, including preparation to perform such work or operations.
- H. Subcontractor agrees to have made Additional Insureds such other entities as required by the Owner in the Contract documents.
- I. Subcontractor's insurance coverage shall apply regardless of Subcontractor's own fault or negligence, or lack thereof, and will not be limited to the Additional Insureds vicarious or respondent superior liability for the acts or omissions of Subcontractor. Moreover, such additional insurance coverage will apply independently of, and not coextensively with, Subcontractor's indemnity obligations, stated in Section 11, above. The additional insurance coverage required by this Section is intended to be broader in scope and effect than Subcontractor's indemnity obligations and will apply to any claims or liability arising out of Subcontractor's work or operations, even if Subcontractor's indemnity obligations do not apply or are prohibited by law.
- J. The additional insurance required by this Section on behalf of the Additional Insured will apply to bodily injury and/or property damage claims arising from the Subcontractor's operations regardless of the fault, negligence or proximate cause (or alleged fault, negligence or proximate cause) of any Additional Insured and regardless of whether the Subcontractor is named or not named in the claim or complaint.
- K. Subcontractor agrees that the additional insurance required by this Section will be primary and non-contributory, and not coextensive with, any insurance purchased by any Additional Insured.

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- L. Subcontractor agrees that no later than ten (10) days before beginning any work under this Subcontract, Subcontractor will provide Contractor with a Certificate of Insurance, on Contractor's Certificate of Insurance Form, demonstrating that the insurance required by this Section was purchased and is in effect. Subcontractor will also provide Contractor with a copy of the Additional Insured Endorsement or such other policy language demonstrating that the insurance policy complies with the requirements of this Section. The Certificate of Insurance will expressly entitle Contractor to thirty (30) days notice, by certified mail, before any insurance policy referred to therein is modified or canceled.
- M. Subcontractor agrees that its failure to obtain or maintain the insurance required by this Section, or to provide a satisfactory Certificate of Insurance, shall be deemed to be a material breach of this Subcontract, and shall entitle Contractor to cancel this Subcontract and/or recover damages at its election.

ARTICLE 13. LIENS AND CLAIMS

- A. Subcontractor expressly agrees that as a part of its obligations under this Subcontract, it shall pay all bills for labor, materials, supplies, equipment and Subcontract work in connection with the Work. In order to protect the Project, Owner and Contractor from all claims, liens and encumbrances of any nature, it is expressly agreed that payment of money otherwise due Subcontractor need not be made by Contractor until all labor, material, tools, equipment, fees, permits, taxes and other charges in connection with the Work have been fully paid. Releases therefor showing payment in full shall be furnished by Subcontractor to Contractor prior to Contractor's payment of any and all sums to Subcontractor. Subcontractor shall deliver its work free from all claims, encumbrances or liens and Subcontractor expressly agrees that monies received for the performance of this Subcontract shall be held in trust by Subcontractor and first used for labor, material and equipment entering into or used in connection with the Work and said monies shall not be diverted to apply to obligations of Subcontractor on other projects or for other purposes. Should Subcontractor fail or refuse to remove any liens or encumbrances, Contractor shall have the right to take whatever action is deemed necessary for their removal, including but not limited to obtaining a lien bond and Subcontractor expressly agrees to reimburse Contractor for all costs and expense (including attorney's fees) so incurred. Subcontractor further agrees to defend and hold Contractor harmless from all claims, encumbrances and liens growing out of the performance of this Subcontract and Subcontractor agrees that it will at its own cost and expense (including attorney's fees) remove all liens or encumbrances which attach to any part of the project and which arise in any way out of the performance of this Subcontract.
- B. Should Owner file a claim, counterclaim or cross claim against Contractor relating to, or arising out of, in whole or part, performance Of Subcontractor's Work, Subcontractor and its surety agree to be bound to Contractor to the same extent that Contractor is bound to Owner by the terms of the Contract and shall likewise be bound by all rulings, decisions or determinations made pursuant to the Contract, including but not limited to the final decision of an appeal board, arbitration or court of competent jurisdiction whether or not Subcontractor or its surety is a party to such proceeding. If called for by Contractor, Subcontractor shall defend at no cost to Contractor all claims, or that portion thereof, relating to or arising out of the performance of Subcontractor's Work, and shall become a party to such proceeding or determination.
- C. As to any claim by Subcontractor on account of acts or omissions of Owner, or its representatives, Contractor agrees to present to Owner, in Contractor's name, all of Subcontractor's claims for extras and equitable adjustments and to further invoke on behalf of Subcontractor those provisions of the Contract for determining dispute. Subcontractor shall have full responsibility for preparation and presentation of such claims and shall bear all expenses thereof, including attorney's fees. Subcontractor agrees to be bound by the procedure and final determinations as specified in the Contract and agrees that it will not take any other action with respect to any such claims and will pursue no independent litigation with respect thereto or any dispute resolution procedures. Subcontractor shall not be entitled to receive any greater amount from Contractor than Contractor is entitled to and actually does receive from Owner on account of Subcontractor's claims less any markups entitled to or costs incurred by Contractor. Subcontractor shall accept such amount, if any, as full discharge of all such claims. With respect to such claims, Subcontractor shall give written notice to Contractor within sufficient time to permit Contractor to give notice to Owner within the time allowed by the Contract. Failure to give such notice shall constitute a waiver of such claim.
- D. Notwithstanding paragraph C of this Section, Contractor shall have the right, at any time, to settle or otherwise dispose of any claim by Subcontractor on account of acts or omissions of Owner or its representatives. Should Contractor exercise this right, Contractor shall determine the amount, if any, to be paid to Subcontractor on account of such claim. Such decision shall be final and binding unless Contractor's decision is submitted to arbitration in accordance with paragraph E of this Section.

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- E. Should a dispute arise which is not controlled or determined by the above paragraphs of this Section or other provisions of this Subcontract, then said dispute shall be settled by Contractor's written decision with respect to such dispute. Such written decision shall be conclusive and shall be final and binding on Subcontractor and its surety unless Subcontractor, within thirty (30) days following the receipt of such written decision, shall file a demand for arbitration in accordance with the then current rules of the Construction Industry Arbitration Rules of the American Arbitration Association, unless the parties mutually agree otherwise. If such demand is filed, then the dispute shall be decided by arbitration in accordance with such Rules, before three (3) neutral arbitrators. Each Party shall be responsible for and bear the cost of its own Attorney's fees and expenses and an equal portion of the Arbitrator's costs and expenses. Such responsibility of each party to bear its own Attorney's fees and expenses and an equal portion of the Arbitrator's costs and expenses shall apply regardless of any other legal action related to the matter being arbitrated. This agreement to arbitrate shall be specifically enforceable and the arbitration decision shall be final and binding as between Contractor and Subcontractor and its surety. If arbitration is conducted involving Owner, Contractor or any other party concerning or in any way relating to responsibility under this Subcontract, any dispute relating to the Work required or alleged to be required herein this Subcontract, or Subcontractor, then Subcontractor expressly agrees to a consolidated or joint arbitration, if and as called for by Contractor.
- F. Subcontractor shall proceed diligently with the Work pending final determination of any dispute or claim.
- G. The provisions of this Section shall survive the completion or termination of this Subcontract.
- H. Subcontractor covenants and expressly agrees that if for any reason the Subcontract is not completed as contemplated herein or if any dispute shall arise over the entitlement or the rights of Subcontractor, Subcontractor's sole recourse shall be an action as provided herein to enforce the several terms and provisions of this Subcontract, and no action shall lie in favor of Subcontractor in the nature of quantum meruit, quantum valebant, quasi-contract, or any other theory of law or equity.
- I. Subcontractor agrees to reimburse Contractor for any and all liquidated or actual damages that may be assessed against and collected from Contractor which are attributable to or caused by Subcontractor's failure to perform the Work required by this Subcontract within the time fixed or in the manner provided for herein, and in addition thereto, agrees to pay to Contractor such other or additional damages, including attorneys' fees, as Contractor may sustain by reason of Subcontractor's delay or failure to perform in accordance with this Subcontract. The payment of such damages shall not release Subcontractor from any liability assumed hereunder or its obligation to otherwise fully perform this Subcontract.

ARTICLE 14. POSSESSION PRIOR TO COMPLETION

Whenever it may be useful or necessary for the Contractor to do so, the Contractor shall be permitted to occupy and/or use any portion of the Work which has been wither partially or fully completed by the Subcontractor before final inspection and acceptance thereof by the owner, but such use and/or occupation shall not relieve the Subcontractor of its guarantee of said Work nor of its obligation to make good at its own expense any defect in materials and/or workmanship which may occur or develop prior to Contractor's, subcontractors or suppliers, by the Subcontractor or its agents or employees.

ARTICLE 15. OTHER CONTRACTS

It is understood and agreed that the work provided for in this Subcontract constitutes only a part of the work being performed for the Owner by the Contractor and other subcontractors. The Subcontractor, therefore, agrees to perform the Work called for in this Subcontract in such a manner that it will not injure, damage or delay other Work performed by the Contractor or any other subcontractor or suppliers, by the Subcontractor or by its agents or employees.

ARTICLE 16. INDEPENDENT CONTRACTOR

The Subcontractor specifically agrees that it is, or prior to the start of the Work will become, and will remain during the performance of this Subcontract, and independent contractor.

ARTICLE 17. COMPLIANCE WITH LAW

- A. Subcontractor agrees to fully comply with all Federal, state and local laws, ordinances, codes, rulings and regulations and expressly agrees to hold Contractor harmless from any and all liability with respect thereto. Subcontractor shall pay all taxes, contributions to trust funds, licenses and fees of every nature imposed or charged by any governmental authority or labor agreement upon the labor, material or other things used in the performance of the Work or upon the transaction between Contractor and Subcontractor. In the event Contractor is held liable to pay any such charges, Subcontractor agrees to supply Contractor with all records necessary to compute the same and to fully reimburse Contractor upon demand for the amount (including penalties and interest) paid by Contractor.

Date: 1/12/2004

- B. Subcontractor agrees to pay all royalties and license fees, to defend all suits or claims for infringement of any patent rights involved in the Work under this Subcontract and to indemnify and hold Contractor harmless from all loss, cost or expense on account of such use or infringement by Subcontractor.

ARTICLE 18. SAFETY

- A. Subcontractor shall take all reasonable safety precautions pertaining to its Work and the conduct thereof and Subcontractor shall comply with Contractor's Safety Program. Subcontractor shall comply with all applicable laws, ordinances, rules, regulations and orders issued by any public or governmental body or authority, whether federal or otherwise, including but not limited to occupational safety and health legislation and in addition, the safety measures called for by the Contractor.
- B. Subcontractor, its project supervision and personnel shall attend and participate in safety meetings and programs as required by Contractor.
- C. Subcontractor shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb and without regard to the additional cost of suitable material or safety appliances and devices.
- D. Without limiting the foregoing, Subcontractor shall provide protection to prevent damage, injury or loss to:
- i) All employees on the Project and all other persons who may be affected thereby;
 - ii) All the work and all materials and equipment to be incorporated therein, whether in storage on or off the site, under the care, custody or control of the Subcontractor or any of its lower tier contractors, and;
 - iii) Other property at the site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures, and utilities not designated for removal, relocation or replacement in the course of construction.
- E. Subcontractor shall give all notices and comply with all applicable laws, ordinances, rules, regulations including State and Federal Hazardous Communication Regulations and lawful orders of any public authority bearing on the safety of persons, property or environment or their protection from damage, injury or loss. In the event that Subcontractor fails to comply with such applicable laws, ordinances, rules, regulations and lawful orders, Subcontractor shall indemnify, defend and hold Contractor harmless from any and all liability, damages, citations, penalties and costs arising therefrom.
- F. Subcontractor shall designate a responsible member of its organization at the site whose duty shall be the prevention of accidents. This person shall be the Subcontractor's superintendent unless otherwise designated by the Subcontractor in writing to the Contractor.
- G. Prior to starting its work, Subcontractor shall submit a Safety Plan for the work. Submission of such Safety Plan is for Contractor's information only and the submission of such Safety Plan shall in no way relieve Subcontractor from the obligations set forth under this provision "Safety Precautions and Programs."
- H. Contractor's "Subcontractor Disciplinary Action Policy" will be strictly enforced. The program is initiated when "life threatening and/or repeat violations" occur. The program is progressive in nature, ranging from written corrective warnings up to and including possible take over of Subcontractor's work for default for the continued safety performance failures.
- I. Subcontractor shall hold Contractor harmless from all suits, citations, penalties, losses, damage, costs (including attorney's fees) arising in whole or in part from any alleged safety violation.

ARTICLE 19. DRUG AND ALCOHOL TESTING REQUIREMENTS

- A. The Contractor has implemented a drug and alcohol testing program that shall apply to this Project. Subcontractor agrees that it, its employees and its lower tier contractors and their employees shall be bound by the Drug and Alcohol Policy implemented by the Contractor. Adherence to same shall be a condition of employment for all employees stationed at this Project site.
- B. Under this program, Contractor has employed a lab, which will conduct drug and alcohol testing. Testing shall be conducted for all employees, including all supervisory and craft employees, and subcontractors at every tier. Employees who fail the drug/alcohol screen administered by the selected lab shall not be employed or perform any work at the Project site. Testing costs charged by Contractor's selected lab shall be paid for by Contractor. All other costs associated with or arising out of Contractor's testing program shall be borne by the Subcontractor.

Date: 1/12/2004

- C. The Subcontractor shall comply with all provisions of Contractor's drug and alcohol testing program. In the event of Subcontractor's noncompliance, this Subcontract may be canceled, terminated or suspended, in whole or in part, and Contractor may complete the work and charge the cost to Subcontractor in accordance with THIS SUBCONTRACT.

ARTICLE 20. LOWER TIER CONTRACTORS

- A. Subcontractor agrees that any contract it enters into with a subordinate or lower tier contractor for the performance of any aspect of Subcontractor's work under this Subcontract shall expressly bind such other contractor to the language and requirements of this Attachment, making such obligations applicable to the subordinate or lower tier contractor to the same extent as to Subcontractor.
- B. Subcontractor shall also require its subordinate contractor to likewise bind and obligate any additional lower tier or subordinate contractors with which it contracts for any portion of the work under this Subcontract. The purpose of this provision is to require any lower tier contractors, regardless of level, to comply with the Indemnity, Insurance, Drug & Alcohol Testing and Safety requirements of this Subcontract. Subcontractor is responsible for ensuring compliance of all lower tier contractors with the requirements of this Section.

ARTICLE 21. PROTECTION OF WORK

- A. Subcontractor specifically agrees that it is responsible for the protection of its Work until final completion and acceptance thereof by Owner and that it will make good or replace, at no expense to Contractor, any damage to its Work, which occurs prior to said final acceptance.
- B. Subcontractor will accept responsibility for all damage caused by Subcontractor which shall be deemed to include, without limiting the generality of the foregoing, cleaning of walls, floors and other surfaces soiled by Subcontractor. However, Subcontractor will not be responsible for any damage existing at the time Subcontractor begins work of which Subcontractor notifies Contractor in writing prior to commencing work hereunder.
- C. Any damage to Subcontractor's Work inflicted by another subcontractor shall be repaired by Subcontractor and be billed by Subcontractor to the subcontractor responsible therefor. Subcontractor will give written notice to Contractor and the party responsible for the damage before making repairs. If any dispute arises between Subcontractor and another subcontractor as to which is responsible for any item of damage, the dispute shall be submitted to Contractor for decision and its determination as to responsibility shall be final and binding on Subcontractor, unless Contractor's decision is submitted to arbitration in accordance with THIS SUBCONTRACT.

ARTICLE 22. DISPUTES

- A. In the case of any dispute directly between the Subcontractor and the Contractor, the Contractor may elect such dispute, in its sole discretion, to be settled by binding arbitration pursuant to the provisions of RCW 7.04, or the then existing rules of the American Arbitration Association, or other arbitration body or tribunal.
- B. Subcontractor shall be bound by Contractor's determination, made in good faith, as to apportionment of any amounts received from owner for claimants, including Contractor and other subcontractors, whose work is affected by any act or omission of the Owner or Owner's Representative.
- C. The Subcontractor shall proceed diligently with the Work, pending final determination pursuant to any Disputes clause or pursuant to any other action taken with respect to a claim or claims.

ARTICLE 23. ATTORNEY FEES

Should either party employ an attorney to institute suit or demand arbitration to enforce any provision thereof, to protect its interest in any manner arising out of the Subcontractor, to collect damages for breach of this Subcontractor, to recover on a surety bond given by a party in the Subcontractor, to file or remove a lien or to defend against any and all such claims, then the party in whose ultimate favor the final decision is rendered, regardless of offsets or the number of claims that party was either unsuccessful, had denied or were dismissed, shall be entitled as a separate and distinct part of any award, decision or judgment, an award of its reasonable attorneys' fees, all costs, expenses, charges, expended or incurred herein, as well as expert witness fees,

Date: 1/12/2004

consultant fees, cost time and expenses paid to any witnesses, as well as all time of the parties, principals and staffs (employees), at their normal hourly or salaried rate, as a separate and distinct part of any decision, award or judgment.

ARTICLE 24. TAXES

Subcontractor shall pay all taxes, licenses and fees of every nature which may be imposed or charged by any governmental authority upon the labor, material or other things used in the performance of the Work or upon the transaction between Contractor and Subcontractor.

ARTICLE 25. CONTRACTOR'S EQUIPMENT

When available and at the discretion of Contractor, Subcontractor may be allowed to use Contractor's hoisting facilities or Contractor's tools, scaffolding, equipment or other facilities. Subcontractor warrants that it has inspected such tools or equipment, accepts them "as is" and accepts full responsibility for them. In the event that Subcontractor uses an operator supplied by Contractor, Subcontractor agrees that it has exclusive direction, supervision and control over that operator. Subcontractor agrees that it will defend, indemnify and hold harmless Contractor and its subsidiaries, including Contractor and their principals, employees, agents and insureds from and against any and all claims, liability, costs (including without limitation attorney's fees) or property damage, including physical damage to such hoisting facilities, tools, scaffolding, equipment or other facilities, arising from or related to Subcontractor's or its employees, agents, or Subcontractor's lower tier subcontractor's use of Contractor's hoisting facilities, operators, tools, scaffolding, equipment or other facilities, including liability or costs arising from the operator's sole negligence or liability related to a defective condition of the hoisting facilities, tools, scaffolding, equipment or other facilities, and also including injury to Contractor's employees. The obligations under this paragraph are in addition to all other obligations assumed by Subcontractor, including but not limited to Subcontractor's assumed liability for injury as stated in the insurance and indemnity requirements set forth herein.

ARTICLE 26. FURNISHED MATERIAL

In the event that the Contractor or Owner, or their suppliers or subcontractors, elect to furnish material to the Subcontractor for use in connection with this Subcontract, then the cost of handling, storing and installing such material shall be considered as included in the Subcontract price. The Subcontractor shall be responsible for all such materials upon delivery to it, whether delivered F.O.B. point of origin or F.O.B. sit-site (except that any transportation charges paid by the Subcontractor, in the event of delivery F.O.B. point of origin, shall be reimbursed to Subcontractor) and shall pay all demurrage and storage charges which accrue after delivery. Furnished material lost or damaged after delivery, from any cause whatsoever, and shall be replaced by or at the expense of the Subcontractor. Subcontractor shall, within forty-eight (48) hours after delivery of furnished material, inspect the same and immediately report, in writing, to the Contractor any shortages, damages or defects therein, which are reasonably observable by proper inspection. Failure to inspect and report as specified shall be treated as unqualified acceptance by Subcontractor of the material involved.

ARTICLE 27. EQUAL OPPORTUNITY

If the Prime Contract contains any provision which prohibits discrimination on the basis of race, color, religion, sex or national origin, or if any law, regulation or order has any application thereto and is applicable to this Subcontract, then Subcontractor hereby agrees to comply with such provision, law, regulation or order. In the event that any such provision, law, regulation or order requires the physical attachment of specific wording to this Subcontract, then such attachments shall be furnished by the Contractor and shall be considered a part of this Subcontract by reference thereto as called for by the Contractor.

ARTICLE 28. OWNER'S REPRESENTATIVE.

The words "Owner's Representative" as used herein include the owner's design engineer, architect or any person or entity appointed by the Owner to supervise the work of the Contractor on behalf of the Owner.

ARTICLE 29. ASSIGNMENT

The Subcontractor shall obtain the written consent of the Contractor prior to assigning or subletting any of the Work, in whole or in part. Subcontractor may assign the proceeds of the Work after providing adequate written assurances to and approved by Contractor that all its labor-suppliers and other creditors for the Work will be paid and upon obtaining the consent of Subcontractor surety and the acknowledgment of the assignee on forms provided by the Contractor.

Date: 1/12/2004

ARTICLE 30. ORDER OF PRECEDENCE AND PAROLE EVIDENCE

- A. Subcontractor agrees to comply with the terms, covenants, conditions, and provisions of the Contract and shall complete the Work in strict accordance with the plans, specifications, schedules, drawings and other contract documents and further agrees not to violate any term, covenant, condition or provision of the Contract. Any enumeration herein of any specific items of work, materials or equipment shall not be construed to exclude other items. If any provision herein is inconsistent with the Prime Contract, the specific provision herein shall govern.
- B. Subcontractor enters into this Subcontract based upon its own investigation of all relevant matters and is in no way relying upon any opinions or representations of Contractor. Any failure by Subcontractor to gain all necessary knowledge and familiarize himself with the available information will not relieve Subcontractor from responsibility for estimating properly the difficulty or cost of successfully performing the Work nor from the satisfactory performance thereof. Contractor assumes no responsibility for any interpretations or conclusions made by Subcontractor on the basis of information made available by Owner, Contractor or others. This Subcontract shall constitute the entire understanding of the parties and is the complete and exclusive statement of all the terms and conditions of the agreement between Contractor and Subcontractor and all the representations of the parties and supersedes all prior oral or written agreements or representations. This Subcontract shall not be varied, supplemented, qualified or interpreted by any prior course of dealing between the parties or by any usage or trade, except as otherwise provided herein.
- C. The Contractor assumes no responsibility for any understandings or representation made by any of its officers or agents prior to the execution of the Subcontract, unless such understandings or representation by the Contractor are expressly stated in this Subcontract.

ARTICLE 31. SEVERABILITY AND WAIVER

- A. The parties hereto intend for the terms, covenants, conditions and provisions of the Subcontract to be divisible so that should any provision or term of this Subcontract now or at any time during the term hereof be in conflict with any Federal, state or municipal law, regulation, or ordinance, or any applicable judicial or arbitration decision, then such provision shall continue in full effect only to the extent permitted. In the event any provision of this Subcontract is thus held inoperative, the remaining provisions of this Subcontract shall nonetheless remain in full force and effect as if the invalidated portion did not appear when this Subcontract was executed.
- B. A waiver by Contractor of any breach or violation by Subcontractor of any provision hereof or of the Contract shall not constitute a waiver of any further or additional breach of such provision or of any other provision. No provision of this Subcontract, including these Subcontract General Provisions, may be waived by Contractor except in writing and this Subcontract may only be amended by issuance of a Subcontract modification by Contractor.

ARTICLE 32 CAPTIONS

Captions are for convenience only and shall be given no weight in construing this agreement.

ARTICLE 33. NOTICES

All notices shall be in writing addressed to the parties at the addresses set out in this Subcontract unless subsequently changed in conformance with this notice provision and shall be considered as delivered on the third business day after the date of mailing if sent certified mail or received in all other cases, including telecopy or other printed electronic medium or personal delivery.

ARTICLE 34. WARRANTY

Date: 1/12/2004

Subcontractor shall guarantee its Work to the same extent that Contractor is obligated to guarantee its work under the Contract, and to such greater extent as required by law, but in any event shall guarantee its Work against all defects in materials or workmanship for a period of one (1) year from the date of final acceptance of the Project by Owner. Subcontractor agrees to provide such further guarantees, warranties, bonds and assurances as required by the Contract or as customary in the type of construction called for on the Project. Nothing herein shall relieve Subcontractor of liability for direct and consequential damages arising from any failure to perform the obligations of this Subcontract.

ARTICLE 35. JOBSITE APPEARANCE

Subcontractor shall comply with Contractor's Jobsite Appearance/Storage Program. Additionally, Subcontractor shall comply with and is apprised that extremely crowded conditions will exist at the jobsite. Subcontractor will coordinate its work with and obtain Contractor's Superintendent's prior approval of Subcontractor's schedule for delivery, installation and/or placement of its materials, equipment and crew shacks on the jobsite.

Both parties have read and understand this Subcontract. This Subcontract constitutes the entire Subcontract, and supersedes all prior proposals and agreements. The Contractor assumes no responsibility or representation made by any of its officers or agents or any other persons during or prior to the execution of this Subcontract unless such understanding or representations are expressly stated herein. No provision of this Subcontract including without limitation, the Subcontract price, Scope of Work and/or Terms and Conditions, may be waived or changed, except by way of the issuance of a Subcontract Modification by Contractor.

IN WITNESS WHEREOF, Contractor and Subcontractor have executed this agreement in duplicate by their proper officers or duly authorized agents.

SUBCONTRACTOR

BY: C. L. Anderson
SIGNATURE
BY: C. L. Anderson, Pres.
NAME/TITLE

DATE: 1/21/04

SCARSELLA BROS., INC.

BY: Robert Scarsella
Robert Scarsella, Vice President

DATE: Jan. 27, 2004

This subcontract contains the provisions required by US DOT Form PR-1273, conforms to the Request to Subcontract, ITD Form DH-315, and bears in the required signatures.

See Schabu
Resident Engineer

Date 2/20/04

North Star Enterprises, Inc.
P.O. Box 607
Liberty Lake, WA 99019
(509) 891-0892
FAX (509) 922-3332
DBE CERTIFIED
Equal Opportunity Employer

Job: ELECTRICAL SUBSTATION TO SMITH CREEK
Bid Date: Sept. 9, 2003

Item Number	Quantity	Unit	Description	Price per Unit	Total
*203-075	10747	M	Removal of Fence	2.00	21494.00
*212-010	30	EA	Straw Bale	20.00	600.00
*212-020	310	M	Silt Fence	15.00	4650.00
*617-005	346	EA	Delineator TY 1	17.50	6055.00
*617-010	17	EA	Delineator TY 2	18.00	306.00
*617-020	14	EA	Delineator TY 4	22.00	308.00
*618-025	23	EA	Street Monuments	175.00	4025.00
626-005	22	M2	Rent Const Sign CL A	40.00	880.00
626-010	92	M2	Rent Const Sign CL B	40.00	3680.00
626-040	4	EA	Rent Const. Barr CL B TY III	150.00	600.00
626-050	510	EA	Rent Drum CL B	35.00	17850.00
626-090	298	M	Temp Pave Marking Tape (White)	3.00	894.00
626-095	11763	M	Temp Pave Marking Tape (Yellow)	2.65	31171.95
626-100	1	LS	Rent Incidental Trl Crtl Item	2000.00	2000.00
626-105	2400	MNHR	Traffic Control Maintenance	36.00	86400.00
626-115	280	EA	Rent Portable Tubular Markers	6.00	1680.00
630-005	9000	HR	Flagging	34.00	306000.00
630-010	3000	HR	Pilot Car Operation	42.00	126000.00
*634-005	19	EA	Mailbox	200.00	3800.00
*640-015	210000	M2	Subgrade Separation Geotextile	1.00	210000.00
*911-05E	7912	M	Fiber Wattles	6.50	51428.00
*912-05D	894	M2	Erosion Blanket Type 1	2.00	1788.00
*912-05E	6737	M2	Erosion Blanket Type 2	13.00	87581.00
629-05A	1	LS	Mobilization	20000.00	20000.00

989,190.95

NOTES:

One addendum acknowledged

*Optional Items

We have 2 - 4 axle Dump Trucks with 3 axle pups available to haul gravel, hot mix etc., (no large material) @ \$ 85.00 per hour. Add \$12.00 per hour for overtime rate and \$25.00 per hour for double time rate.

Tier fees by others

Work on Sundays & Holidays add \$20.00 per hr. per ea. to item # 630 - 005 & 626-105.

We are not responsible for job delays beyond our control due to late shipments from material suppliers.

Bond not included if needed add 2 1/2 %

C. L. Anderson, Pres. 087

15

SPECIAL PROVISIONS

IDAHO FEDERAL AID PROJECT NO. NH-STP-4110(110)

US 95, Electrical Substation to Smith Creek

Latah and Benewah Counties

The following Special Provisions and all addenda issued, supplement or modify the 1999 State Standard Specifications, April 2003 Supplemental Specifications, FHWA-1273 Federal Aid Contract Provisions, Dispute Review Board Special Provision (DRB), SP-Training, Tribal Special Provisions, Civil Rights Special Provisions, QA Special Provisions, and General Wage Decision ID030001.

SOURCE AND COST OF MATERIALS

Approved Contractor Furnished Sources are specified for this Project: The Contractor shall be required to furnish the source or sources for all materials on this project.

Department leased source LT-24 is available to the Contractor as a Contractor Furnished Source. The Contractor assumes all responsibility to ensure the source is suitable for the project requirements. The Contractor assumes the responsibility for the quality and quantity of material. The Contractor shall be required to provide source investigation, sampling, quality testing, and permitting prior to using this or any other Department controlled or owned source. If the Contractor's written request for use of a Department owned or controlled source is approved; a source plat and agreement will be prepared by the State. The Engineer will require 14 calendar days to prepare these documents. Access to Department owned or controlled sources shall not be permitted until a fully executed agreement is returned to the Engineer. The Contractor shall be required to pay any fees or royalties applicable for the use of these sources.

COMPLETION TIME AND LIQUIDATED DAMAGES

All work shall be completed within Four Hundred Sixty Five (465) Working Days after the Notice to Proceed.

The amount of Liquidated Damages for failure to complete the work on time on this project will be \$7,700.00 per day.

CONTRACTOR'S NOTES

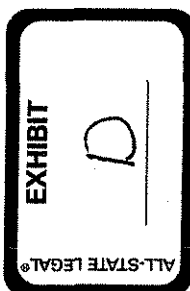
USE TAX

5/00

The exercise of control over State-owned material by a Contractor who is improving real property (roadways, etc.) will incur the imposition of a use tax.

Bidders are advised to consult Section 63-3609, Idaho Code, and IDAPA 35, Title 01, Chapter 02, Sales Tax Administrative Rule 012, "Contractors Improving Real Property", and Rule 013, "Road and Paving Contractors", or contact the Idaho State Tax Commission for guidance. (Telephone No. (208) 334-7691)

In the case of aggregates the amount of this tax will differ depending on whether the material is obtained from a State-owned material source or whether it is obtained from a State-owned stockpile. Use tax is due on the fair market value of the material, and the crushed value shall be higher than for unprocessed material.



the Wetland Mitigation Summary shall be paid for under their respective items. Items not paid for separately but required as part of the work shall be considered incidental to wetland mitigation work.

COUNTY AND PRIVATE ROAD APPROACHES

Access to US 95 from the County road and private approaches shall be maintained at all times. Prior to starting construction that affects approaches, the Contractor shall contact each property owner to discuss the property owners impacts and any alternative method of access to US 95 from the affected property. The Contractor shall give the property owner the name and phone number of the Contractor's representative to contact during construction. The Contractor shall keep a written record of conversations with the property owners regarding construction and property access issues. The Contractor shall provide a copy of contact records with all property owners to the Engineer.

APPROACHES

For approach construction, use layouts in the Approach Plan and Profiles shown on sheets 66 through 103 of the Plans, not layouts depicted in the Right-of-Way Plans.

MINERAL MOUNTAIN REST AREA

Mineral Mountain Rest Area is a public roadside rest facility located within the project limits. The Contractor shall maintain public access to the rest area at all times. The rest area is intended for use by the traveling public only. The Contractor shall not use the rest area for equipment parking nor material storage during construction. The Contractor shall not allow any of his employee's nor Subcontractor's employee's to park private vehicles within the rest area limits. The Contractor shall furnish separate toilet facilities for construction workers. Any material tracked into the rest area from the project shall be removed by the Contractor at no additional cost to the State.

MULCH MIXTURE

Pay Item call-outs throughout the Plan sheets for Item 621-015A, Mulch Mixture shall be paid for under Item 621-055A, Mulch Mixture as shown in the Roadway Summary.

REMOVE AND RESET SIGN

Pay Item call-outs throughout the Plan sheets for Item S616-05A, Remove and Reset Sign shall be paid for under Item S-901-05Q – Remove and Reset Sign as shown in the Roadway Summary.

NATIONAL QUALITY INITIATIVE IMPLEMENTATION

10/98

The intent of this project is to improve the smoothness of the riding surface while prolonging the life of the pavement. The surfacing process selected will prolong the life of the pavement, however, only a combined effort by the Contractor and ITD personnel can result in a smooth, high quality pavement for the general public.

Every effort must be taken to provide smooth joints, to eliminate segregation, roller marks, and screed indentation due to stopping and starting of the paving machine. A combined, conscientious effort on behalf of all Contractor and ITD personnel will result in a smooth ride for the public.

Michael E. Kelly, ISB #4351
Peg M. Dougherty, ISB #6043
LOPEZ & KELLY, PLLC
1100 Key Financial Center
702 W. Idaho Street
Post Office Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
2800.005\MSJ - Affidavit of Counsel.wpd

STATE OF IDAHO
COUNTY OF KOOTENAI } ss
FILED:

2007 JUN 28 PM 2: 24

CLERK DISTRICT COURT

Kelly
DEPUTY

ORIGINAL

Attorneys for Defendant State of Idaho,
Department of Transportation

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

JOHN E. EWING, and NOREEN
EWING,

Plaintiffs,

vs.

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION

Defendant.

Case No. CV 06-7599

**AFFIDAVIT OF COUNSEL IN
SUPPORT OF DEFENDANT STATE
OF IDAHO'S MOTION FOR
SUMMARY JUDGMENT**

STATE OF IDAHO)
: ss.
County of Ada)

I, Michael E. Kelly, being first sworn, do hereby depose and state under penalty of perjury:

1. That I am an attorney of the firm of Lopez & Kelly, PLLC, and one of the attorneys representing the Defendant State of Idaho in the above-captioned matter and as such am familiar with the facts and circumstances of this case and make this affidavit based upon my own personal knowledge;

2. That attached hereto as Exhibit "E" is a true and correct copy of the plaintiff's Answer to Interrogatory No. 10 in Plaintiff's Responses to Defendant's First Set of Interrogatories and Request for Production.

FURTHER THIS AFFIANT SAITH NAUGHT.

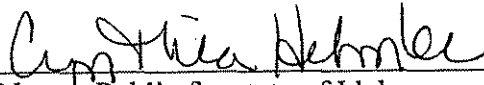
DATED this 25 day of June, 2007.

LOPEZ & KELLY, PLLC

By: 

Michael E. Kelly, Of the Firm
Attorneys for Defendant State of Idaho,
Department of Transportation

SUBSCRIBED AND SWORN before me this 25th day of June, 2007.



Notary Public for state of Idaho

Residing at: Boise, Idaho

My commission expires: 2/6/10

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of June, 2007, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Michael J. Verbillis, P.A.
601 E. Sherman Avenue, Suite 3
Post Office Box 519
Coeur d'Alene, ID 83816-0519
Telephone: (208) 667-9475
Facsimile: (208) 664-1161

- ☒ U.S. Mail
- ☐ Hand-Delivered
- ☐ Overnight mail
- ☐ Facsimile



Michael E. Kelly

INTERROGATORY NO. 9: Please set forth the name and address of each and every employer you had for the five years preceding the accident referred to in your Complaint and have had since that date. Also include in your answer to this Interrogatory the names of your immediate supervisor or supervisors for each such employer.

ANSWER: North Star Enter., Lake Washington, Noreen Ewing, Lynn Anderson, Sunrise Lane, Liberty

REQUEST FOR PRODUCTION NO. 6: If you are claiming lost wages in this lawsuit, please produce true and correct copies of your joint or single federal and state income tax returns for the years 2000-2005.

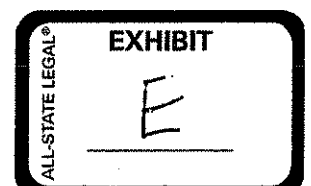
ANSWER: These will be provided.

INTERROGATORY NO. 10: If you jointly or singly are now receiving or have ever received any disability pension, income, social security payments, insurance or any workman's compensation from any agency, company, person, corporation, estate or government, please state:

- (a) The nature of any such payment;
- (b) The date you received such income;
- (c) For what injuries or disability you received it and how such injury occurred or disability arose;
- (d) By whom paid;
- (e) Whether or not you now have any present disability as a result of such injuries or disability;
- (f) If so, the nature; and extent of such disability;
- (g) Whether or not you had any disability at the time of the incident referred to in your Complaint, and if so, the nature and extent of such disability;
- (h) The amounts of money paid on your behalf by the insurer to medical care providers;
- (i) Whether the insurer is claiming subrogation rights based upon the payments identified above in subsection (h); and
- (j) Whether you or your attorney are representing the insurer's subrogation rights.

ANSWER: a. workers' compensation;

- b. from 6/22/06 to present;
- c. for back and shoulder injuries;
- d. State Insurance Fund;
- e. yes - back and shoulder;
- f. cannot do my work because of my back and shoulder injuries;



- g. no;
- h. unknown;
- i. yes, and any subrogation will be handled by my attorney;
- j. yes.

REQUEST FOR PRODUCTION NO. 7: Please produce all documents which are referred to in or support your Answer to Interrogatory No. 10 above.

ANSWER: See attached.

INTERROGATORY NO. 11: Have you entered into a release, settlement, agreement, compromise, covenant or any other type of agreement with any person, firm or corporation as a result of the accident referred to in your Complaint? If so, please set forth the name and address of the person, firm or corporation, the type of agreement or instrument by which you compromised, settled or released any claims, the date thereof, and the amount of consideration received by you for the same.

ANSWER: No.

REQUEST FOR PRODUCTION NO. 8: Please produce copies of any and all documents to which you refer in your Answer to Interrogatory No. 11 above.

ANSWER: N/A

INTERROGATORY NO. 12: Was there an insurance agreement under which any person or entity carrying on an insurance business was liable to directly satisfy part or all of your original claim including medical and/or person injury aspects thereof? If so, please state:

- (a) The name of the insurance company issuing said policy;
- (b) The policy number;
- (c) The effective coverage dates;
- (d) The named insured of the policy;
- (e) The type of the policy, i.e., liability, etc.;
- (f) The applicable policy limits; and
- (g) Whether there is any contention by the insurance company or any of its representatives that there was no coverage under the policy. If there is such a contention, please state:
 - (1) The nature of the contention; and
 - (2) By whom the contention is being made;
- (h) The amounts of money paid on your behalf by the insurer to medical care providers;

Michael E. Kelly, ISB #4351
Peg M. Dougherty, ISB #6043
Heather Conder, ISB #7057
LOPEZ & KELLY, PLLC
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702 W. Idaho Street
Post Office Box 856
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Telephone: (208) 342-4300
Facsimile: (208) 342-4344
2800.005\Disclosure - Expert Witnesses.wpd

Attorneys for Defendant State of Idaho,
Department of Transportation

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

2007 JUN 29 PM 3:42

CLERK DISTRICT COURT

Sherry Huff
DEPUTY

ORIGINAL

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JOHN E. EWING, and NOREEN
EWING,

Plaintiffs,

vs.

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION

Defendant.

Case No. CV 06-7599

**STATE OF IDAHO'S DISCLOSURE
OF EXPERT WITNESSES**

Defendant, the State of Idaho, by and through its counsel of record, Lopez & Kelly, PLLC, hereby file its Disclosure of Expert Witnesses pursuant to the Court's pretrial Scheduling Order, Notice of Trial Setting and Initial Pretrial Order dated May 7, 2007.

EXPERT WITNESSES

- (1) Dr. John M. McNulty, M.D.
740 McKinley Ave
Kellogg, ID 83837

It is anticipated that Dr. McNulty will testify in regard to his findings subsequent to his

095


review of the Plaintiffs' medical records and his independent medical examination of the Plaintiff, John Ewing.

The Defendant reserves the right to modify or amend this disclosure and reserves the right to call any and all witnesses identified by the Plaintiffs.

DATED this 25 day of June, 2007.

LOPEZ & KELLY, PLLC

By: _____

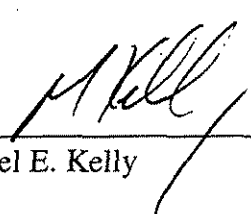

Michael E. Kelly, Of the Firm
Attorneys for Defendant State of Idaho,
Department of Transportation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of June, 2007, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Michael J. Verbillis, P.A.
601 E. Sherman Avenue, Suite 3
Post Office Box 519
Coeur d'Alene, ID 83816-0519
Telephone: (208) 667-9475
Facsimile: (208) 664-1161

☒ U.S. Mail
☐ Hand-Delivered
☐ Overnight mail
☐ Facsimile



Michael E. Kelly

MICHAEL J. VERBILLIS
 Attorneys and Counselors at Law
 601 E. Sherman Ave., Suite 3
 P.O. Box 519
 Coeur d'Alene, Idaho 83816-0519
 Telephone: (208) 667-9475
 Facsimile: (208) 664-1161

ATTORNEY FOR PLAINTIFF

STATE OF IDAHO } SS
 COUNTY OF KOOTENAI }
 FILED: 3:30 PM
 HY

2007 JUL 17 PM 3:29

CLERK DISTRICT COURT
Cady
 DEPUTY

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

JOHN E. EWING, and NOREEN EWING,)

Plaintiffs,)

vs.)

STATE OF IDAHO, DEPARTMENT
 OF TRANSPORTATION,)

Defendant.)

CASE NO. CV-06-7599

**PLAINTIFFS' REPLY BRIEF IN
 SUPPORT OF MOTION FOR PARTIAL
 SUMMARY JUDGMENT**

Defendant, State of Idaho, has filed a responsive brief to Plaintiff's Motion and its own Motion and Brief seeking Summary Judgment. Four chief arguments are advanced, viz, that the State is a category one statutory employer of the Plaintiff; that even if not a category one employer, the situs of the accident determines as a matter of law that the State is immune; that no duty is owed to Plaintiff beyond that which would be owed to a licensee; and finally, that the recreational use statute bars recovery.

DISCUSSION

A. The State Is Not A Category One Statutory Employer of the Plaintiff

Defendant misreads the statutory framework and the applicable case law with respect to the definition of a Category One Statutory Employer.

Idaho Workers' Compensation law has long provided as a safety net, workers' compensation coverage in fact patterns where an irresponsible subcontractor has failed to provide workers' compensation. In that setting, the prime contractor becomes the statutory employer and has the exposure for workers' compensation. A statutory employer under the recent amendments to the Workers' Compensation laws is immune from tort responsibility (as we noted, the common law doctrine enunciated in *Runcorn vs. Shearer Lumber Prods.* held otherwise). The recent change in Idaho Code §72-223 made it clear that an otherwise negligent party was immune from civil liability in fact patterns where that party would be deemed a statutory employer.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

Using the analysis from *Robison vs. Bateman-Hall, Inc.*, it is clear that the prime contractor in the *Robison* case was a statutory employer. Efforts by the Appellant in that case to drape the cloak of immunity bottomed upon their status as a landowner and were not successful. Likewise, in the case at bar, the landowner cannot claim Category One Statutory Employer status for the plain and simple reason that they are the landowner and not the prime contractor. Querie the result when the prime contractor has no workers' compensation coverage along with the direct employer (subcontractor). In such a mythical fact pattern, the landowner may well be deemed the Category One Statutory Employer because the statutory framework would impose responsibility in the absence of workers' compensation insurance by both the direct employer and the prime contractor. Or as Harry Truman once said, "the buck stops here."

2. The Site of the Accident Is Pivotal To A Correct Analysis Of This Case.

The State blandly concludes that since the accident took place within the boundaries of the highway road project, that the statutory immunity applies. This would be correct had Plaintiff fallen on the shoulder of the highway, on the road bed, or anywhere else inside the area in which contract work was being provided for by Scarsella Bros., Inc. and/or Plaintiff's direct employer. As the facts in this case reveal, it was mere serendipity that this rest area happened to be within the boundary of the construction project. It is important to note that absolutely no work was being provided at the rest area by Scarsella Bros., Inc. or any of its subcontractors. Querie, would be State argue in the same vein had the rest area been located a quarter of a mile outside the limits of the contract area by saying, "since the Highway Department owns all the highways in Idaho, anytime a person falls in any adjacent or pertinent property, that person may not sue so long as he coincidentally happens to be working for a subcontractor on any State job?" Another absurd possibility could exist had Plaintiff been a traveling flagger from Pocatello, who was injured on this worksite. Would be State then argue that since the gentleman was involved in a highway project somewhere else in the state and since he fell and was injured on property owned by ITD, that therefore, he was disqualified from bringing suit?

As the court in *Robison* indicated, the owner of the premises is not a statutory employer unless he is a virtual proprietor of the business there carried on. The business carried on at the rest area is the business of providing a pleasant place for motorists to pull off the highway, to relieve themselves and to rest before re-entering the highway. As Plaintiff has endeavored to point out in his opening brief, there is no nexus between the activities carried on at the rest area and the Plaintiff's status as an employee of a subcontractor on an adjacent highway road project. Absent such a nexus, the case law cited by Defendant is inapposite.

3. Plaintiff Was An Invitee At The Time Of The Accident.

It is urged by Defendant that no affirmative duty to inspect for dangerous conditions was owed to the Plaintiff as he was a licensee, rather than an invitee. Plaintiff disagrees with the characterization of Mr. Ewing as a licensee.

The Supreme Court had an opportunity to rule on an analogous fact pattern involving a municipality in the case of *Tomich vs. City of Pocatello*, 127 Idaho 394, 901 P.2d. 501 (1995). In that case, the City of Pocatello maintained a municipal airport. The City was sued for common law negligence for not providing a safe tie down area for pilots of small aircraft. Indeed, the City was negligent by not inspecting the tie down areas for faulty or dangerous tie down equipment.

Citing the same case relied upon by Defendant in its brief, *Holzheimer vs. Johannesen*, 125 Idaho 397, 871 P.2d. 814 (1994), the Supreme Court held that the Plaintiff in that case, Tomich, was an invitee inasmuch as he used the airport to land and hanger his airplane. The business conducted at an airport, as such, was to provide a landing strip and an area for tie downs for visiting aviators. It was specifically urged by the City that since Mr. Tomich was using the airport and his airplane, for that matter, for recreational purposes, that he should be characterized as a licensee since he was "a visitor who goes upon the premises of another with the consent of the landowner in pursuit of the visitor's purpose." Id. at 399. This argument was rejected by the Supreme Court, the Court having held that the business of the airport was to provide a landing strip and a tie down area for visiting aviators. And, it was as much a business purpose, even though no money changed hands, as any other business purpose.

Likewise, in this case, even though the Idaho Transportation Department is not involved in any commercial enterprise with respect to the rest area, the business "conducted at that site" is parking, restroom facilities, water, picnic tables, and a place for pets to relieve themselves. That endeavor or "business" is vital to the traveling public. Accordingly, any person that enters upon that property is there as such for the convenience of the landowner as they are for their own convenience. Indeed, the State of Idaho certainly wants to encourage travel and tourism within the State and in doing so prides itself in having up-to-date modern facilities for the motoring public. To suggest that that is not a business activity by the State is to ignore why we have roads to begin with.

Moreover, even if one would classify the Plaintiff as a licensee rather than an invitee, Defendant cannot prevail on this record, because there is absolutely no evidence that the Defendant was unaware of the dangerous condition on the property. Additional discovery should be undertaken for this question to be more fully fleshed out. And, even if one assumes Plaintiff is a licensee rather

than an invitee, as suggested herein, this record does not support the conclusions associated with his purported status as a licensee.

4. The Recreational Use Statute Does Not Apply To This Particular Fact Pattern.

As a final asserted obstacle to Plaintiff's cause of action, Defendant asserts that the statutory protections under Idaho Code §36-1604, the so-called Recreational Use Statute, bar recovery. It is urged by the Defendant, that a person entering a rest area, in particular this rest area, is doing so under the guise of recreational use and that any person who is injured by virtue of the condition of the property is barred from bringing an action. In other words, the State of Idaho, which spends millions of dollars a year promoting the State for tourism and presumably a sizeable amount of money for rest areas so that the motoring public can have a pleasant experience in driving through the State and enjoying its natural beauty, wants to establish a shield for the five minute "potty break." As the undersigned advances with age, he can certain respect that fact that being able to relieve himself after several hours behind the wheel is certainly a recreational delight.

Having written the foregoing, it would be ludicrous to assume that the legislature intended that the highway department should be not responsible for injuries that take place on its rest areas anymore so that they would be on the highway for faulty construction, improper signing, or numerous other human errors that can lead to tragedies on our roadways. John Ewing was no more using the rest area for recreational purposes than any other member of the motoring public or neighborhood. He was simply using the restroom facilities and the picnic table during a work break and there was nothing recreational about his activity or presence at this site.

Moreover, John Ewing, like every other person that drives an automobile in the State of Idaho, pays considerable highway use taxes every time he fills up his tank. To suggest that he is using the roadway and hence the appurtenant structures, therefore, without a fee is to ignore the reality of the pricing structure for gasoline at the pump. Indeed, the dollars that financed this particular project where Mr. Ewing was engaged in flagging activities came almost exclusively from dedicated funds from gasoline taxes. That is a matter of public record of which the Court can take judicial notice.

Thus, it is urged that (1) Mr. Ewing was not involved in recreational use of the property where he was seriously injured and (2) he is certain paying his fair share, just like every other member of the motoring public that drives an automobile in the State of Idaho. Just like there is no free lunch, there is no free highway system.

5. Conclusion.

In conclusion, it is respectfully submitted for the reasons set forth herein, that the Plaintiff is entitled to a summary judgment on the question of the inapplicability of Idaho Code §72-223 and the Defendant is not entitled to a summary judgment, but must respond in court as any other tortfeasor who has behaved negligently.

Respectfully submitted,

DATED this 17 day of July, 2007.


MICHAEL J. VERBILLIS

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of July, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael E. Kelly, Esq.
Lopez & Kelly, PLLC
1100 Key Financial Center
702 West Idaho Street
Boise, ID 83701

☐ U.S. MAIL, Postage Prepaid
☐ HAND DELIVERED
☐ OVERNIGHT MAIL
☒ TELECOPY (FACSIMILE)



MICHAEL J. VERBILIS

Michael E. Kelly, ISB #4351
Peg M. Dougherty, ISB #6043
LOPEZ & KELLY, PLLC
1100 Key Financial Center
702 W. Idaho Street
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2800.005\MSJ. Prop Ord v2.wpd

STATE OF IDAHO }
COUNTY OF KOOTENAI }
FILED: 8-14-07
AT 1:00 PM
CLERK, DISTRICT COURT
Shari R. [Signature]
DEPUTY

Attorneys for Defendant State of Idaho,
Department of Transportation

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

JOHN E. EWING, and NOREEN
EWING,

Plaintiffs,

vs.

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION

Defendant.

Case No. CV 06-7599

**ORDER GRANTING DEFENDANT
STATE OF IDAHO'S MOTION FOR
SUMMARY JUDGMENT**

This matter having come before the Court on July 24, 2007, on Plaintiffs John E. and Noreen Ewing's Motion for Partial Summary Judgment and Defendant State of Idaho, Department of Transportation's Motion for Summary Judgment, and the Court, having reviewed the records, files, briefing, affidavits and pleadings on file herein, and having heard oral argument and being fully advised, does hereby find as follows:

(1) The State of Idaho, Department of Transportation ^{could qualify, in different circumstances, as} is a category one statutory

employer of Plaintiff John Ewing pursuant to Idaho Code Section 72-223(1), but is

a statutory employee circumstances of and the nature of
not entitled to immunity due to the ~~fact that~~ the accident at issue ~~occurred at the~~ the

104

ask
8/14/07
the
employment
relationship

~~Mineral Mountain Rest Area adjacent to the highway project while the Plaintiff was on a break.~~

- (2) Whether Plaintiff John Ewing was an invitee or a licensee at the time of the accident at issue is a question of fact; and
- (3) Idaho Code Section 36-1604, commonly referred to as the "recreational use statute" applies to the Mineral Mountain Rest Area where the accident at issue occurred and the State, as the landowner is protected from liability by virtue of the recreational use statute.

Based on the findings of the Court, IT IS HEREBY ORDERED and THIS DOES ORDER that summary judgment is GRANTED against Plaintiffs John E. and Noreen Ewing and in favor of Defendant State of Idaho, Department of Transportation dismissing with prejudice all claims of the Plaintiffs and that Plaintiffs' Motion for Partial Summary Judgment is hereby DENIED.

DATED this 14 day of August, 2007.



Charles W. Hosack, District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of August, 2007, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Michael E. Kelly
Peg M. Dougherty
Lopez & Kelly, PLLC
Post Office Box 856
Boise, Idaho 83701-0856
Telephone: (208) 342-4300
Facsimile: (208) 342-4344

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☐ Overnight mail
☐ Facsimile

Michael J. Verbillis, P.A.
601 E. Sherman Avenue, Suite 3
Post Office Box 519
Coeur d'Alene, ID 83816-0519
Telephone: (208) 667-9475
Facsimile: (208) 664-1161

☒ U.S. Mail
☐ Hand-Delivered
☐ Overnight mail
☐ Facsimile



Clerk of Court

MICHAEL J. VERBILLIS
Attorneys and Counselors at Law
601 E. Sherman Ave., Suite 3
P.O. Box 519
Coeur d'Alene, Idaho 83816-0519
Telephone: (208) 667-9475
Facsimile: (208) 664-1161

ATTORNEY FOR APPELLANT

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

759280/281
2007 AUG 27 PM 12:59 *the*

CLERK, DISTRICT COURT

Kathleen
DEPUTY

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

JOHN E. EWING, and NOREEN EWING,)

Appellants,)

vs.)

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION,)

Respondent.)

CASE NO. CV-06-7599

NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENT, STATE OF IDAHO, DEPARTMENT OF
TRANSPORTATION, AND THE PARTY'S ATTORNEYS, Michael E. Kelly, Lopez &
Kelly, PLLC, AND THE CLERK OF THE ABOVE ENTITLED COURT.

1. The above-named Appellants, John E. Ewing and Noreen Ewing, appeal against the
above-named respondent to the Idaho Supreme Court from the Order Granting Summary Judgment
to Defendant, entered on August 14, 2007, by the Honorable Charles W. Hosack.

2. That the party has a right to appeal to the Idaho Supreme Court, and the order
described in ¶1 above is an appealable order pursuant to Rule 11(a)(1).

3. The primary issue on appeal is whether or not John Ewing, Appellant herein, was
correctly barred from suing the State of Idaho when he was injured on real property owned by the
State of Idaho under the immunity conferred under the recreational use statute, Idaho Code §36-
1604.

4. There has been no order entered sealing all or any portion of the record.

5. No reporter's transcript is requested.

6. The Appellants request the following documents to be included in the clerk's record
in addition to those automatically included under Rule 28, I.A.R.: e.g.

NOTICE OF APPEAL - 1

- a. all pleadings filed by both parties; and
- b. all motion papers filed by both parties, together with supporting affidavits, exhibits thereto and briefing.

7. I certify:

- a. that a copy of this notice of appeal has been served on the reporter;
- b. that the estimated fee for preparation of the clerk's record has been paid or will be promptly paid upon presentation; and
- c. service has been made on all parties required to be served pursuant to Rule

20.

DATED this 27 day of August, 2007.

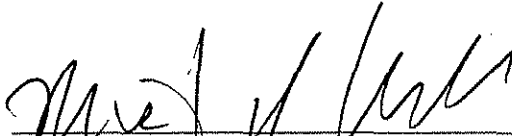

MICHAEL J. VERBILLS
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on the 27 day of August, 2007, a true and correct copy of the foregoing was sent via facsimile transmission to:

Michael E. Kelly, Esq.
Lopez & Kelly, PLLC
1100 Key Financial Center
702 West Idaho Street
Boise, ID 83701

Joanne Schueller
Court Reporter
324 W. Garden Ave.
P.O. Box 9000
Coeur d'Alene, ID 83816-9000


MICHAEL J. VERBILLS

Michael E. Kelly, ISB #4351
Peg M. Dougherty, ISB #6043
LOPEZ & KELLY, PLLC
1100 Key Financial Center
702 W. Idaho Street
Post Office Box 856
Boise, Idaho 83701
Telephone: (208) 342-4300
Facsimile: (208) 342-4344
2800.005\Notice of Cross Appeal.wpd

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2007 SEP 14 AM 10:44

CLERK DISTRICT COURT

Carolyn Vinter
DEPUTY CLERK
ORIGINAL

Attorneys for Defendant State of Idaho,
Department of Transportation

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

JOHN E. EWING, and NOREEN
EWING,

Cross-Respondents,

vs.

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION

Cross-Appellant.

Case No. CV 06-7599

NOTICE OF CROSS-APPEAL

TO: THE ABOVE-NAMED CROSS-RESPONDENTS, JOHN E. EWING AND NOREEN EWING, AND THE PARTIES' ATTORNEY, MICHAEL J. VERBILLIS, P.A. AND THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named cross-appellant, State of Idaho, Department of Transportation, appeals against the above-named cross-respondents to the Idaho Supreme Court from the Order Granting Summary Judgment against Plaintiffs/Cross-Respondents John E. and Noreen Ewing and

in favor of Defendant/Cross-Appellant State of Idaho, Department of Transportation, entered on the 14th day of August, 2007, Honorable Charles Hosack presiding.

2. The State of Idaho, Department of Transportation, has a right to cross-appeal to the Idaho Supreme Court, and the order described in paragraph 1 above is an appealable order under and pursuant to Rule 11(a)(1), I.A.R.

3. The issue in this cross-appeal is whether the Defendant/Cross-Appellant State of Idaho, Department of Transportation was a category one statutory employer of Plaintiff Cross-Respondent John E. Ewing pursuant to Idaho Code § 72-223(1) and thus, entitled to immunity from liability for the accident at issue.

4. No reporter's transcript is requested.

5. The Cross-Appellant requests no additional documents to be included in the clerk's record other than those automatically included under Rule 28, I.A.R. and those designated by the appellant in the initial notice of appeal.

6. I certify:

(a) That a copy of this notice of cross-appeal and any request for additional transcript have been served on the reporter.

(b) That the Cross-Appellant is exempt from paying the estimated transcript fee pursuant to Rule 23(a), I.A.R. and Idaho Code § 67-2301, as it is an agency of the State of Idaho.

(c) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 12 day of September, 2007.

LOPEZ & KELLY, PLLC

By: 

Michael E. Kelly, Of the Firm
Attorneys for Defendant State of Idaho,
Department of Transportation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of September, 2007, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Michael J. Verbillis, P.A.
601 E. Sherman Avenue, Suite 3
Post Office Box 519
Coeur d'Alene, ID 83816-0519
Telephone: (208) 667-9475
Facsimile: (208) 664-1161

- | | |
|-------------------------------------|----------------|
| <input checked="" type="checkbox"/> | U.S. Mail |
| <input type="checkbox"/> | Hand-Delivered |
| <input type="checkbox"/> | Overnight mail |
| <input type="checkbox"/> | Facsimile |



Michael E. Kelly

IN THE SUPREME COURT OF THE STATE OF IDAHO
2007 OCT -1 AM 8:04

John E. Ewing & Noreen Ewing ^{DEPUTY}

Appellant,

State Of Idaho, Department Of
Transportation

Respondent.

Supreme Court No. 34541
District Court No. CV 2006-7599


DISTRICT COURT
CLERK'S MOTION
FOR EXTENSION OF
TIME TO FILE RECORD

Comes now LaNae Robinson, Deputy Court Clerk for Kootenai County, and hereby moves this court for an order extending the time to prepare and serve the appeal record until 11-12-2007, 2007.

- 112

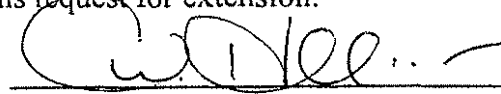
DATED this 27th day of Sept, 2007.

DANIEL J. ENGLISH


Deputy Clerk

RECOMMENDATION

I am the District Judge assigned this case and, following review of the foregoing motion, recommend ☒ approval ☐ disapproval of this request for extension.


District Judge

ORDER

Upon consideration of the foregoing motion and good cause appearing, therefore,
IT HEREBY IS ORDERED that the appeal record in this case shall be filed in
this Court on or before _____, 20__.

For the Supreme Court

Stephen W Kenyon, Clerk

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

JOHN E EWING and NOREEN EWING

Plaintiffs/Appellants
Cross-Respondents

v.

STATE OF IDAHO, DEPARTMENT OF
TRANSPORTATION

Defendant/Respondent.
Cross-Appellant

CASE NO. CV 06-7599

SUPREME COURT
NO. 34541

CLERK'S CERTIFICATE

I, Daniel J. English, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the above and foregoing Record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct Record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I certify that the Attorneys for the Appellants and Respondents were notified that the Clerk's Record were complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail, postage prepaid, on the 28 day of

Nov, 2007

I do further certify that the Clerk's Record will be duly lodged with the Clerk of the Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at
Kootenai, Idaho this 28 day of Nov, 2007

DANIEL J. ENGLISH
Clerk of District Court

By

Janna Barker

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

JOHN E EWING and NOREEN EWING

Plaintiffs-Appellants -
Cross-Respondents

vs.

STATE OF IDAHO, DEPARTMENT OF
TRANSPORTATION

Defendant/Respondent-
Cross-Appellant

CIVIL CASE NO.
CV 06-7599

DOCKET NO
34541

CLERK'S CERTIFICATE OF SERVICE

I, Daniel J. English, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Clerk's Record to each of the Attorneys of Record in this cause as follows:

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IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Kootenai, Idaho this 28 day of Nov, 2007

DANIEL J. ENGLISH
Clerk of the District Court

By: Joanna Barker

Deputy