11-3-2011

Athay v. Rich County Respondent's Brief Dckt. 38683

IN THE SUPREME COURT OF THE STATE OF IDAHO

KYLE ATHAY, Plaintiff/Respondent, vs. RICH COUNTY, UTAH, a political subdivision of the State of Utah, Defendants/Appellant.	RESPONDENT'S BRIEF DOCKET NO. 38683-2011

Appeal from the District Court of the Sixth Judicial District for Bear Lake County

The Honorable Mitchell W. Brown – District Judge – Presiding

Craig R. Jorgensen
ATTORNEY AT LAW
602 South 5th Ave.
P.O. Box 4904
Pocatello, Idaho 83205-4904
Phone : 208-237-4100

Attorney for Respondent
Kyle Athay

Peter Stirba
STIRBA & ASSOCIATES
215 South State Street, Suite 750
P.O. Box 810
Salt Lake City, Utah 84110-0810

Alan Johnston
PIKE HERNDON STOSICH & JOHNSTON
151 North Ridge Ave., Suite 210
P.O. Box 2949
Idaho Falls, Idaho 83403-2949

Attorneys for Appellant
Rich County, Utah

IN THE SUPREME COURT OF THE STATE OF IDAHO

KYLE ATHAY, Plaintiff/Respondent, vs. RICH COUNTY, UTAH, a political subdivision of the State of Utah, Defendants/Appellant.	RESPONDENT'S BRIEF DOCKET NO. 38683-2011

Appeal from the District Court of the Sixth Judicial District for Bear Lake County

The Honorable Mitchell W. Brown – District Judge – Presiding

Craig R. Jorgensen
ATTORNEY AT LAW
602 South 5th Ave.
P.O. Box 4904
Pocatello, Idaho 83205-4904
Phone : 208-237-4100

Attorney for Respondent
Kyle Athay

Peter Stirba
STIRBA & ASSOCIATES
215 South State Street, Suite 750
P.O. Box 810
Salt Lake City, Utah 84110-0810

Alan Johnston
PIKE HERNDON STOSICH & JOHNSTON
151 North Ridge Ave., Suite 210
P.O. Box 2949
Idaho Falls, Idaho 83403-2949

Attorneys for Appellant
Rich County, Utah

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITY

Page

STATUTES

RULES

TREATISES

STATEMENT OF THE CASE

There were no reversible or remandable errors and the District Court's decisions should be affirmed.

Most of this appeal is the Appellant's claim that out-of-court, nonjury contact between the District Court's courtroom deputy clerk and Plaintiff Kyle Athay denied Rich County, Utah of a fair trial. The record reflects the conduct, while inappropriate, had no effect on the verdict. It was harmless error.

Appellant also asserts that judgment notwithstanding the verdict should have been granted on the premise that Rich County, Utah had not committed reckless disregard.

Appellant's claims are divided into three major categories:

1) Whether the trial court abused its discretion in not granting a new trial for "irregularity of proceedings" where the contact was not with the judge or the jury but only with the deputy clerk and was unrelated to the case;

2) Whether the trial court erred in not granting a new trial when appellant did not comply with the clear procedural requirements in bringing a Motion for New Trial and where there is substantial evidence to support the jury's verdict; and

3) Whether the trial court abused its discretion for failing to grant a judgment notwithstanding the verdict when there is substantial evidence upon which the jury could properly find the verdict.

There are other issues and sub-issues to each of these contentions.

Most factual issues relate to post trial issues. To avoid unnecessary repetition those facts relating to the Motion for Judgment Notwithstanding the Verdict will be discussed in the text of the argument.

A review of the proceedings with a focus on the District Court's post-trial decisions is appropriate. A timeline of motions and decisions show overall that the court properly disclosed the deputy clerk's contact, properly exercised it discretion, and correctly applied the law to the motions before the court.

On July 26, 2010 the jury returned a verdict awarding Kyle Athay Three Million Seven Hundred Twenty Thousand One Hundred Twenty Six Dollars ($3,720,126) and finding the Appellant Rich County thirty percent (30%) at fault. (R. Vol. I, p. 146-148).

On Aug. 4th, Plaintiff filed his Motion for Entry of Judgment. (R. Vol. II, p. 219-228).

On Aug. 17th, Defendant filed its objection thereto. (R. Vol. II, p. 229).

On Aug. 18th, Plaintiff filed a Reply Memorandum and a Memorandum of Costs. (R. Vol. II, p. 243).

On Sept. 16th, the court advised the parties in a telephone status conference, that it had learned of ex parte contact between the court's Courtroom Deputy Clerk and the Plaintiff Kyle Athay, and also between the Courtroom Deputy Clerk and Sheriff Dale Stacey (of Rich County) and his wife. At this hearing the court stated:

> Since that jury trial was concluded, I have learned of an issue that was of concern to the court dealing with what I deemed to be an ex parti [sic] communication between one member of my staff and both the Plaintiff and the representative of the Defendant in this matter. And I wanted to make the parties aware of that on the record so they were fully appraised [sic] of this situation.

It came to my attention during the course of the trial that there was an occasion where my in-the-courtroom-clerk, Brandy, had some conversations out in the hall during the course of the trial with the Plaintiff Kyle Athay. I was made aware of this and I told her at that time that she was an extension of the court and that those types of communication were not appropriate and should not continue. It came to my attention after trial – Well, let me strike that and back up just a little bit.

I inquired of her at the time what the nature of the conversations were and she indicated that they were just, you know, general in nature and in no way involved the nature of the case or any of the proceedings or those kinds of issues. That they were just general in nature regarding her and him and those types of issues. I instructed her that those communications were to be discontinued.

And after the trial, I learned that those communications had continued in the way of text messaging and I have again had discussions with her regarding those communications and the inappropriate nature of those communications. I have again been assured by her that there were no substantive issues discussed with respect to the case but again they were more of a general nature and getting to know one another, background information and those kinds of issues.

When I learned about these discussions, I did investigate a little bit further. I met with Brandy and talked to her about what the nature and extent of them were, and she disclose [sic] to me that she did have an ex parti [sic] communication with Sheriff Stacey and his wife, again dealing more general types of discussions: How is the weather? I think specifically they talked about – I guess Brandy brought some sugar cookies to court one day and they discussed recipes and those kinds of issues.

Again, the Court has attempted to diligently understand from Brandy what the nature and extent of those ex parti [sic] communications were. I have advised her of the fact that those are entirely inappropriate. Even though there was nothing substantively discovered as a result of those communications. I have told her that there is still a perception, where she is an extension of the Court; a perception of impropriety where those types of conversations are occurring and I absolutely prohibited her from having any further discussions with the parties in this matter. And I have taken in-house appropriate measures with respect to those issues of non-compliance in violation of her duties as an extension of the Court with respect to that.

> However, as I indicated, I did feel in discussing this matter with judicial counsel and with other judges, that it would be appropriate to make that disclosure on the record today and that is the purpose of this status conference today is to make the parties aware of what the Court has learned of and what the Court has done in response to those issues having arisen. (Tr. Sept. 16, 2010, p. 2, L. 15 – p. 4, L. 24,)

Also, at this same Sept. 16th Hearing, counsel for the Appellant, Mr. Blake Hamilton, stated,

> No, your honor. I appreciate being made aware of this. We did have some concerns about the communication between Brandy and the Plaintiff during the trial. I do know that. But at this time I don't know if there is anything else that we have raised. (Tr. Sept. 16, 2010, p. 5).

Judge Brown then inquired, "Mr. Hamilton, I guess my one concern is, if you had some awareness of this during the course of the trial, why that issue was not raised with the court at that time." *(Id.)*

On Oct. 1st, Rich County filed its Motion for New Trial (R. Vol. II, p. 311), (hereinafter 1st or First Motion for New Trial - to be differentiated from the Second Motion for New Trial filed Oct. 22, 2010 (R. Vol. II, p. 383)), and Memorandum in Support thereof. No Affidavit was filed. This motion was brought pursuant to I.R.C.P. 59(a)(1).

On Oct. 7, the District Court entered its Memorandum Decision and Order on Plaintiff's Motion for Entry of Judgment.

On Oct. 8th, the District Court entered Judgment and I.R.C.P. 54(b) Certificate (R. Vol. II, p. 352).

On Oct. 13th, Plaintiff filed his Reply Brief to Defendant's Motion for a New Trial (R. Vol. II, p. 355) and also the Affidavit of Kyle Athay (R. Vol. II, p. 361).

On Oct. 22nd, the Appellant filed a Motion for Limited Disqualification of Judge (R. Vol. II, p. 364). Appellant also filed a Motion for New Trial or Alternatively for Judgment Notwithstanding the Verdict (R. Vol. II, p. 383), (herein the "2nd or Second Motion for New Trial"). The motion stated only that it was "pursuant to Idaho R. Civ. Proc. 50 and 59" and stated "A Memorandum in Support of this Motion will be filed in accordance with Rule 7 of the IDAHO RULES OF CIVIL PROCEDURE."

The Affidavit of Blake Hamilton was also filed (R. Vol. II, p. 377). The contents of this affidavit all related to the 1st New Trial Motion.

On Nov. 2nd, 2010 Appellant filed its Memorandum in Support of Motion for New Trial (R. Vol. II, p. 386)

On Nov. 4th, the District Court held a hearing on Appellant's Motion for Limited Disqualification.

On Nov. 18th, a hearing was held on Rich County's Motion for a New Trial. Deputy Clerk Brandy Peck and the Plaintiff Kyle Athay both testified. At this hearing Brandy Peck testified that she had exchanged telephone numbers with the Plaintiff (Tr. Nov. 18, 2010, p. 21). She further testified that she had contact with the Defendant's "technical guy."

When asked why she did not tell, neither Judge Brown, nor anyone, that she had exchanged telephone numbers and had been carrying on conversations telephonically and via text with the Plaintiff, she indicated "no, it didn't have anything to do with the trial." (Tr. Nov. 18, 2010, p. 23:25).

Ms. Peck gave testimony about the lack of contact or communication between Kyle Athay, court personnel, and the jury. (Tr. Nov. 18, 2010, p. 42:8-43:25)

Kyle Athay also gave testimony concerning the nature of his communications with Ms. Peck, "the only thing that I ever said about the trial or anything about what was going on, was the fact that I was tired and that I wanted to give up several times, and my lawyer kept me going because he is a nice guy and he tried to motivate me to keep going. That was the only thing that was ever said." (Tr. Nov. 18, 2010, p. 59:18–22).

He was also asked if he remembered that Brandy Peck asked how he thought the trial was going. He acknowledged remembering this and states his reply was "I had no idea." (Tr. Nov. 18, 2010, p. 58-59). This was consistent with his Affidavit filed Oct. 13, 2011. The Appellant introduced evidence about the number and frequency of the cell phone calls and texts between Peck and Kyle Athay.

On Nov. 29, 2010, Plaintiff filed Affidavits of six jurors stating they were unaware of the communications between Brandy Peck and Kyle Athay and they had no knowledge of such during the course of the trial. These were later stricken as untimely. (R. Vol. III, p. 492).

On Feb. 1st, 2011, Judge Brown issued his Memorandum and Decision on the 1st New Trial motion. This decision included a ruling striking Kyle Athay's Brief in Opposition to Motion for Limited Disqualification and striking six juror affidavits the Plaintiff had submitted. The decision also denied Rich County's Motion for a New Trial "based on its procedural defects" (R. Vol. III, p. 495). Judge Brown's Memorandum Decision also addressed the "merits." Judge Brown's analysis included review of the four prong test set forth in *Rueth v.*

State, 596 P.2d 75 (1978) and *Slaathaug v. Allstate Ins. Co.*, 979 P.2d 107 (1999). Judge Brown specifically recited:

> Despite this gross misconduct on the part of Peck and Athay, they both are consistent in their claims that their communication about the case was limited to generalized questions such as how do you think it is going or what do you think the jury will do. There *is no evidence* to establish that Peck *communicated to Athay* or that *Athay communicated to his attorney* any information concerning matters that Peck may have been privy to through her association with the Court. Additionally both testified that no such communications occurred. There is *no evidence* to establish that Peck or Athay communicated in an impermissible fashion with ay member of the jury or that any members of the jury observed or knew of these inappropriate communications between Peck and Athay. There is *no evidence* in the record, despite the gross misconduct of Athay and Peck, that it had any negative effect on the parties receiving a fair trial. There is *no indication* in the record that any of the critical players were in any way influenced by these ex parte communications, not the judge, not the jury, not the attorneys for the respective parties.
>
> Based upon the Affidavit of Kyle Athay and the testimony presented at the Nov. 19, 2011 hearing, the Court concludes that Athay has effectively rebutted the presumption of prejudice or as state by the Idaho Supreme Court in *Slaathaug*, Athay has established "that the conduct could not have affected the outcome of the trial." 132 Idaho at 710. (R. Vol. III, p. 499-500)(emphasis added).
>
> . . . Although this Court is troubled and embarrassed by the fact that these breaches of the Idaho Judicial Cannons occurred on its watch, this Court concludes, after a close review of this matter, that the record before it establishes that while an irregularity in the proceedings did occur, neither "party was prevented from having a fair trial" which is the standard enunciated in I.R.C.P. 59(a)(1). Therefore, the Court will **DENY** Rich County's Motion for a New Trial pursuant to I.R.C.P. 59(a)(1). (R. Vol. III, p. 501.)

On Feb. 14th, Judge Brown entered his Memorandum Decision and Order on Defendant's Motion for a New Trial (2nd), or Alternatively, for Judgment Notwithstanding the Verdict (R. Vol. III, p. 504). This decision granted Kyle Athay's Motion to Strike Defendant's Motion for a New Trial.

ADDITIONAL ISSUE ON APPEAL

RESPONDENT IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND COSTS ON APPEAL.

Respondent requests an award of attorney's fees pursuant to Idaho Code § 12-121 and I.A.R. 41. Idaho Code § 12-121 allows an award of attorney's fees in a civil action if the appeal merely invites the court to second guess the findings of the lower court. *Crowley v. Critchfield*, 145 Idaho 509, 514, 181 P.3d 435, 440 (2007).

Attorney's fees may also be awarded under section 12-121 if the appeal is brought or defended frivolously, unreasonably, or without foundation. *Id.*

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE IT DISCRETION IN DENYING THE FIRST MOTION FOR NEW TRIAL

A. The appellant was not denied a fair trial because any inappropriate contact did not influence the judge or the jury.

1. Standard of Review.

The determination of a new trial motion is largely within the discretion of the Trial Court and the Appellate Court will not overrule the denial of the motion absent a manifest abuse of discretion. *Rowett v. Kelly Canyon Ski Hill, Inc.,* 102 Idaho 708, 709, 639 P.2d 6, 7 (1981); *Lanham v. Idaho Power Co.*, 130 Idaho 486, 943 P.2d 912 (1997); *Burggraf v. Chaffin*, 121 Idaho 171, 173, 823 P.2d 775, 777 (1991).

The test for determining whether the court has abused its discretion consists of three inquiries: 1) whether the court correctly perceived the issue as one of discretion; 2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and 3) whether the court reached it decision through an exercise of reason. *Lanham v. Idaho Power Co.*, 130 Idaho 486, 943 P.2d 912 (1997); *Jones v. Panhandle Distributors, Inc.*, 117 Idaho 750, 792 P.2d 315 (1990); *Schaffer v. Curtis-Perrin,* 141 Idaho 356, 109 P.3d 1098 (2005).

2. Because the communication in question was not with the judge or jury, any alleged irregularity in the proceedings had no effect on the trial and did not affect the substantial rights of Appellant Rich County, Utah.

Appellant's First Motion for New Trial asserted as grounds that the District Court's Deputy Clerk, Brandy Peck ("Peck") had contact with the Plaintiff. (R. Vol. II, p. 311-319).

The Plaintiff provided evidence that there was no improper contact between the clerk and the jury, or between Plaintiff Kyle Athay and the court or jury. (R. Vol. III, p. 49). The Plaintiff and the clerk did not talk or text about the trial, jury or the lawyers. See also transcript of Nov. 18, 2010 Hearing p. 58-61.

The record is clear that the contact between the clerk and Kyle Athay had no influence on the jury. There is absolutely no indication that Judge Brown abused his discretion in so finding and in denying the New Trial Motion.

3. The contact was harmless error, not warranting a new trial.

There is no evidence that the contact affected the court or jury's deliberative process in any way. Appellant spends a great deal of energy and argument attempting to demonstrate that the relationship which developed between the courtroom Deputy Clerk and Plaintiff Kyle Athay somehow taints the proceedings to the point that it justified having a new trial.[1] While the events are regrettable and were of great concern to the Trial Court, they are nonetheless, harmless error (I.R.C.P. 61). That Rule, in pertinent part, states:

> " . . . and no error or defect in any ruling or order or in anything done or admitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a

[1] Appellant even argues the matter was "rotten to the core." (Tr. Nov. 18, 2010, p. 90, L. 4) and suggesting, without evidence, that the Plaintiff and Peck had exchanged "salacious" photos. (Tr. Nov. 18, 2010, p. 88, L. 18-19)

> judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." I.R.C.P. 61 (2003)(emphasis added).

"This Court will not reverse the trial court if an alleged error is harmless.... [I]f an error did not affect a party's substantial rights or the error did not affect the result of the trial, the error is harmless and not grounds for reversal." *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 504, 95 P.3d 977, 986 (2004). Appellant has failed to show that its substantial rights were affected. Appellant has failed to show the contact affected the result of the trial.

In another recent case, this Court held that because of an appellant's failure to point out how a different ruling would have led to information that might have changed the outcome, the party had "not demonstrated that he suffered any prejudice." *Taylor v. McNichols*, 149 Idaho 826, 836, 243 P.3d 642, 652 (2010). The Court continued, "Pursuant to I.R.C.P. 61, entitled 'Harmless error', courts are instructed to disregard error that does not affect the substantial rights of a party. *Id.*

In this case, the deputy clerk-plaintiff contact did not affect any substantial right and granting a new trial would not have changed the outcome; it would only give defendant another chance with a different jury. This contact did not taint the jury's view of the parties or the evidence, it did not cause the clerk to improperly influence the judge or jury in any party's favor. Classically, it was harmless error.

Rich County claims irregularity, prejudice and loss of substantial right, yet has provided no instances when Judge Brown's decisions amount to an abuse of discretion or have deprived it of a fair trial.

B. Judge Brown did not abuse his discretion in deciding not to disqualify himself.

Appellant asserts Judge Brown abused his discretion by failing to disqualify himself from hearing the Appellant's New Trial Motion pertaining to the clerk / party contact. (Appellant's Brief, p. 23-27). Because the District Court fully appreciated the seriousness of the issue and applied appropriated standards in exercising his discretion, there was no error in not disqualifying himself.

1. Standard of Review.

Denial of a Motion to Disqualify will be reviewed by the Appellate Court on an abuse of discretion standard. *Bell v. Bell*, 122 Idaho 520, 835 P.2d 1331 (Ct. App. 1992); *Pizzuto v. State*, 127 Idaho 469, 903 P.2d 58 (1985).

2. Because there is no showing of bias, Judge Brown properly exercised his discretion in deciding not to disqualify himself.

Disqualification of a judge is an unusual step which cuts to the core of the court's function and independence.

> "It is enough for present purposes to say the following: First, judicial rulings alone almost never constitute valid basis for a bias or partiality motion . . . and can only, in the rarest circumstances evidence the degree of favoritism or antagonism required . . . almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep

> seated favoritism and antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540 at 555-56, 114 S.Ct. 1147 at 1157, 127 L.Ed.2d 474 at 490-91(1994).

The thinking from the *Liteky* case was followed in this Court's decision in *Bach v. Bagely*, 148 Idaho 784, 229 P.3d 1146 (2010), wherein Bach had sought to disqualify a district judge. This Court stated, "accordingly, as *Liteky* demonstrates, the standard for recusal of a judge, based simply on information that he has learned in the course of judicial proceedings, is extremely high." *See id* at 1154 (emphasis added).

Appellant cannot demonstrate Judge Brown had, in any degree, a bias which prevented him from acting properly on the First Motion for New Trial. His bench comments made at the hearing demonstrate he took the matter seriously and was "100 percent confident" in his lack of bias. Here Judge Brown properly perceived the disqualification motion as one of discretion. Judge Brown acted within the outer boundary of his discretion consistent with legal standards, and reached his decision through the exercise of reason.

On Nov. 4th, 2010, Judge Brown stated from the bench as follows:

> "The issue as this court sees it is, is this court in a position pursuant to Rule 40(d) to fairly, impartially and in an unbiased manner make a determination concerning the Defendant's Motion for a New Trial. And my response to that is, without a doubt, yes, I am. And I can assure you that if there is an adequate showing under Rule 40(d)2 [sic], or excuse me. That is the rule for disqualification. Under Rule 59 for a Motion for New Trial, the court feels absolutely, 100 percent confident that I can adequately assess those issues and I can make a determination." (Tr. Nov. 4, 2010, p. 29).

Appellant Rich County insists Peck's conduct created a situation where Judge Brown was required to disqualify himself. For example, Appellant states:

> In other words, to grant Rich County's motion, Judge Brown would have to admit that his own actions directly or indirectly necessitated a new trial. There is no doubt that despite his assertions to the contrary, Judge Brown could not possible make a fair determination on this issue and should have granted Rich County's Motion for Disqualification. (Appellant's Br. p. 24).

Appellant implies that the District Court improperly denied this motion because to grant it would be to admit that the other motions were also improperly decided. This is circular reasoning that, if extended, would create a catch-22 for every appeal involving a motion to disqualify. The fact that there were other motions to be denied did not change the standard on the disqualification issue.

C. Appellant's knowledge of the contact and failure to raise it during trial constitutes a waiver of its right to complain about "irregularity in the proceedings."

During the Sept. 16, 2010 telephone status conference, counsel for Rich County, Utah informed the Court that they had been aware of contact occurring between the Court's clerk and Kyle Athay, but chose not to report it. (Tr. Sept. 16, 2010, p.5:4-8)

"When the complaining party or its counsel knows of alleged juror misconduct before the verdict is returned, but keeps silent, any right to claim misconduct is waived." *Beale v. Speck*, 127 Idaho 521, 535, 903 P.2d 110, 124 (Ct. App. 1995); See also *Pacheco v. Safeco Ins. Co. of America*, 116 Idaho 794, 780 P.2d 116 (1989). In *Pacheco*, a witness for the insurer defendant in the case gave a juror a three block ride in his car. The plaintiff complained about it on appeal, but had failed to raise the issue in trial.

> When jury misconduct is alleged, there must be a showing of prejudice. *Black v. Reynolds,* 109 Idaho 277, 707 P.2d 388 (1985). Here, no testimony was presented that the juror and the witness discussed the case. In any event, when the complaining party or his counsel know of the alleged jury misconduct before the

> verdict is returned, but keeps silent, any right to claim misconduct is waived. *Moore v. Adams*, 273 Oregon 576, 542 P.2d 490 (1975). In this case, Pacheco has failed to show prejudice and further, his counsel knew of the alleged misconduct prior to the verdict, but kept silent. The trial court properly exercised its discretion in ruling that the alleged misconduct did not prejudice the trial. *Id.* 780 P.2d at123.

No juror contact was made by any party, nor by the clerk Brandy Peck.

In *Beale*, the appellant complained that one of the jurors failed to inform the court during voir dire that she knew Beale from previous contact. The appellant, Christine Beale, stated in an affidavit that following voir dire, but before the jury returned its verdict, she recalled that the juror had formerly lived in the same neighborhood as Beale and had been turned down for employment at Beale's daycare business. *Beale*, 127 Idaho at 535, 903 P.2d at 124. The Court of Appeals concluded that Beale's failure to inform the court, prior to the verdict, of her previous contact with the juror constitutes a waiver of the issue of alleged juror misconduct. *Id.*

Since there was not jury contact, legal analysis on jury contact law is not wholly applicable in this case, as the Appellant contends. Nevertheless, Idaho precedent is clear that any claim of error by misconduct can be waived when the party knows of it and says nothing. Whether it is juror misconduct or the unique inappropriate conduct in this case, the general principle holds true that a party should not be allowed to watch things play out and have the option to cry "foul" later.

Once again, there is no juror misconduct involving the judge or jury in this case. However, Appellant asserts a right to a new trial based on an irregularity in the proceedings. I.R.C.P.59(a)(1). The asserted irregularity, like that in *Beale*, is one the Appellant knew about,

failed to bring to anyone's attention, and has therefore waived the issue. Appellant as much as admits that if Plaintiff's counsel were aware of the contact it would have been corrected. (Appellant's Br. p. 37)(Tr. Nov. 18, 2010, p. 92, L. 6-8).

Appellant should have pointed out the inappropriate contact as soon as it was aware of it, and by not doing so has waived the right to claim it was error.

D. The rationale of *Rueth v. State* is inapplicable here because there is no judge or jury contact.

Appellant places heavy reliance on the case of *Rueth v. State*, 100 Idaho 203, 596 P.2d 75 (1978) (Appellant's Br. p. 33-37).

Because *Rueth* dealt with juror contact and since, in this case, no such contact existed, the rationale of *Rueth* does not apply. As noted in Judge Brown's September 16, 2010 telephone status conference, the Judge had discovered that his courtroom deputy clerk Brandy Peck had contact with the sheriff of Rich County and his wife, and also the Plaintiff Kyle Athay. Obviously, it is the contact with the Plaintiff which concerns the Appellant.

Judge Brown, after extensive briefing, arguments, affidavits and testimony concluded there was:

> . . . no evidence to establish that Peck communicated to Athay or that Athay communicated to his attorney any information concerning matters that Peck may have been privy to through her association with court. Additionally, both (Peck and Athay) testified that no such communications occurred. There is no evidence to establish that Peck or Athay communicated in any impermissible fashion with any members of the jury or that any members of the jury observed or knew of these inappropriate communications between Peck and Athay. There is no evidence in the record, despite the gross misconduct of Athay and Peck, that it had any negative effect on the parties receiving a fair trial. There is no indication in the record that any of the critical players were in any way influenced by these

> ex parte communications, not the judge, not the jury, not the attorneys for the respective parties. (R. Vol. III, p. 499)(emphasis added).

In *Rueth*, the questioned contact was between the court and the jurors. During jury deliberations the jurors had a question, but counsel for the Defendant could not be found. The court went ahead and gave some instruction and communication to the jurors without the presence of the Defendant or its counsel. *Rueth*, 100 Idaho at 205, 596 P.2d at 77. The record in *Rueth* was very poor and this Court so found. That poor record and the lack of specifics of the court's communications to the jury was the basis of the decision to grant a new trial. *Id.*

Here it is established clearly in the record that no out of court contact occurred between Kyle Athay, the court, or any juror. Thus, the reasoning of *Rueth* is inapplicable. Even if this Court chooses to somehow adopt the analysis in *Rueth* to non-jury contacts this Court has tempered the effects and tests of *Rueth*.

In *State v. Randolph*, 102 Idaho 153, 627 P.2d 782 (1981) the Court was confronted with the absence of defendant's counsel when deliberating jurors had a question. The jurors had asked for the definition of "control" in a possession of marijuana case. The defendant's counsel could not be located, the trial judge, after discussing the matter with the prosecuting attorney, personally typed a reply on the same sheet of paper as the question had been propounded, giving a definition for the term "control." Thereafter, the jury returned a guilty verdict. At hearings for a mistrial and / or new trial, the judge acknowledged the impropriety of his conduct, but rejected the automatic presumption of prejudicial error and denied the motion for new trial.

On appeal, the defendant argued the four step tests of *Rueth* applied. This Court stated,

> The question becomes whether the communication affected the jury. We hold that the State has clearly demonstrated that the communication did not affect the jury in any manner other than harmless, and therefore the verdict shall stand.
>
> We are aware that the *Rueth* standard, on its face, precludes affirmation except where it appears that the communication could not have had *any* effect on the jury. However, we do not find this to require literal application. Such literal application would result in a *per se* reversal for *all* such communications, an approach already rejected by this Court in *Rueth*: "A *per se* rule requiring reversal in all instances would appear to be unwise." We agree with the sentiments expressed by Chief Justice Traynor of the California Supreme Court that automatic reversal would engender "public disaffection with the judicial process" and is a lazy way to review which would "insidiously lower the standards of justice." R. Traynor, The Riddle of Harmless Error 35, 49 (1970). However, we do not simply pay lip service to the *Rueth* procedure and then tacitly discount it by our holding. Rather, we find that the application of *Rueth* must necessarily be tempered by countervailing considerations of this Court's appellate responsibility to determine whether the error below was harmless or prejudicial. *Id.* at 784.

In *State v. Bland*, 9 Idaho 796, 76 P. 780 (1904) the judge made a personal, off-record appearance in the jury room. In *Rueth* there was jury contact but all written record of the communication was destroyed. In *Hinman v. Morrison-Knudsen Co.*, 115 Idaho 869, 771 P.2d 533 (1989), the conduct of the bailiff and his interaction with the jury was in question. Because there was juror contact and prejudice those cases compelled new trials under the *Rueth* four step procedure.

Because juror contact was not involved *Rueth's* tests do not apply and, even if the tests apply, they have been met by the Respondent. The tests are tempered by *Randolph's* holding that the error must be prejudicial and not harmless. In *Randolph* there was juror contact but it was not erroneous or prejudicial. Here there is neither juror

contact nor prejudicial effect. Appellant's argument would call for a *per se* reversal and that is not the law.

The Randolph court framed the issue: "The question becomes whether the communication affected the jury." *Randolph*, 102 Idaho at 155, 627 P.2d at 784. In this case, the clear answer is no. The Appellant has failed to supply a specific instance where the communication affected the jury. Kyle Athay has provided specifics which satisfy *Rueth's* requirements. The Appellant has failed to provide a specific instance where Judge Brown abused his discretion. Appellant has failed to provide a single circumstance which would yield a different result. Appellant has failed to provide any authority which show a trial judge's actions similar to Judge Brown's were an abuse of discretion.

E. Even if the rationale of *Rueth* applies, Respondent met any and all tests and burdens.

Rueth adopts a four step test in analyzing out of court and juror communications. The effect of these four steps is to shift, to the non-complaining party, the burden of showing what the communication was and its effect.

In response to Rich County's Motion for New Trial (First) Kyle Athay filed an affidavit explaining the nature and extent of his contact with the court's deputy clerk. (R. Vol. II, p. 361-363). This affidavit alone satisfied any *Rueth* prong regarding the communications and their lack of effect. In addition to Kyle Athay's affidavit, Judge Brown conducted a hearing at which Kyle Athay testified and confirmed the matters in his affidavit. Brandy Peck also testified (Tr. Nov. 18, 2010, p. 19-48). Both indicated the communications were phone calls and text messages and

were of a social nature and that the sole communication regarding the trial itself was when Peck inquired of Athay about how he felt the case would go and his response was that he had "no clue" or "no clue." (R. Vol. II, p. 361-363);(Tr. Nov. 18, 2010, p. 59); Affidavit of Kyle Athay (R. Vol. II, p.361-363). Appellant attempts to characterize Peck's upbeat conversations as helpful in the trial. (App. Br. 17, para. 46.c). An equally valid characterization is that her positive attitude was helpful to Kyle Athay, in general, in dealing with his paraplegia.

Under the *Rueth* test, it is not necessary that the exact words of every single communication be shown. The communications were, by their nature, social and not related to the trial proceedings. Kyle Athay has clearly shown the nature of the communications and their lack of prejudicial effect.

F. Judge Brown properly exercised his discretion in denying Rich County's First Motion for a New Trial for a procedural deficiency. His analysis of the motion on the merits also justified a denial of the motion.

Judge Brown concluded the Appellant's Motion for New Trial was procedurally defective because it did not support its First New Trial Motion with an affidavit. (R. Vol. III, p. 495). However, Judge Brown also carefully addressed the merits and denied the New Trial Motion, finding, "neither party was prevented from having a fair trial." (R. Vol. III, p. 501).

1. Standard of Review.

Appellant's procedural default makes the Standard of Review focus on the specifics of the Rule of Procedure.

"Therefore, upon a Motion for a New Trial on those grounds (irregularity in the proceedings – Rule 59(a)(1,)) that require a supporting affidavit, the court is not required to act

in the absence of such affidavit." *Harris v. Alessi*, 141 Idaho 901, 905, 120 P.3d 289, 293 (Idaho Ct. App. 2005); *Ernst v. Hemenway and Moser Co., Inc.,* 120 Idaho 941, 944, 821 P.2d 996, 999 (Idaho Ct. App. 1991); *Johannsen v. Utterbeck*, 146 Idaho 423, 196 P.3d 341 (2008); *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 245 P. 3d 992 (2010).

2. Analysis.

Appellant defaulted in failing to supply the affidavit which I.R.C.P. 59 clearly required. The court is not required to act in the absence of such affidavit. Appellant will possibly suggest that the affidavit requirement is superfluous, since the facts for the "irregularity" were supplied by the Court. Such argument is not germane since the court had already investigated the matter and found no substantive issues were discussed by Peck and Athay. The lack of an affidavit put Respondent to a disadvantage because he was not provided with the particulars of what the Appellant would assert. The New Trial Motion implied there were going to be factual grounds besides those Judge Brown had investigated, disclosed, and found to be harmless. This Court is not required to act in the absence of an affidavit. Judge Brown's investigation found no prejudicial effect.

3. Judge Brown's Decision on the Merits.

Judge Brown was proper in denying the First Motion for New Trial for its procedural default. Moreover, Judge Brown also addressed the merits and properly denied the motion on substantive grounds. (R. Vol. III, p. 495). Again there is an abuse of discretion standard of appellate review of the trial court's decision on a motion for a new trial. *Hei v. Holzer,* 145 Idaho 563, 569, 181 P.3d 489, 495 (2008). This Court in *Hei* stated, "This Court will not

overrule the trial court concerning a request for . . . new trial pursuant to Idaho R. Civ. P. 59(a)(5) or a request for a new trial pursuant to Idaho R. Civ. P. 59(a)(6) where the trial court did not abuse its discretion, and where the trial court stated the reasons for its ruling with sufficient particularity." *Id.*

The record is clear Judge Brown understood and applied the correct standard (R. Vol. III, p. 496). He carefully considered the Affidavit of Kyle Athay (R. Vol. II, p. 361-363) which explained the communication and demonstrated the lack of effect. Judge Brown also had the benefit of the testimony given at the Nov. 18, 2010 hearing. He was correct in concluding that Kyle Athay had effectively rebutted any presumption of prejudice (citing *Slaathaug v. Allstate Ins. Co.*, 979 P.2d 107 (1999)) and established that the contact could not have affected the outcome of the trial. (R. Vol. III, p. 469-500). Judge Brown was correct in finding neither party was prevented from having a fair trial. (R. Vol. III, p. 501).

Judge Brown did not abuse his discretion. He stated his reasons with sufficient particularity and this Court should not disturb his finding.

II.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING AND STRIKING APPELLANT'S SECOND MOTION FOR A NEW TRIAL.

A time line of events surrounding the Second Motion is helpful in showing that the District Court properly exercised its discretion in denying the motion.

Appellant filed its Second Motion for New Trial on Oct. 22, 2010 (R. Vol. II, p. 383). The motion itself contains 54 words and no statement of facts or law upon which it is based. It does not state under which sub-section of I.R.C.P. 59 it is brought. (R. Vol. III, p.383).

Fourteen days later, on Nov. 5, 2010 Appellant filed its Memorandum. (R. Vol. III, p. 424).

On Nov. 18, 2010, the District Court held a hearing and heard testimony and argument on both the 1st Motion for New Trial and argument on the 2nd Motion for New Trial. (R. Vol. III, p. 483; Tr. Nov. 18, 2010 Hearing).

On Feb. 1, 2011, the District Court issued its Memorandum Decision, denying the Appellant's 1st Motion for New Trial.

On Feb. 14, 2011, the District Court entered its Memorandum Decision, denying the Appellant's 2nd Motion for New Trial (R. Vol. III, p. 504-517).

Appellant contends the District Court erred in granting Kyle Athay's Motion to Strike the New Trial Motion (R. Vol. III, p. 456, para. 9). As noted above, Appellant's Oct. 22, 2010 Motion for New Trial contains *no* factual grounds. It does not even recite which portion of I.R.C.P. 59 under which it is brought. In his Memorandum Decision, which strikes the

Appellant's New Trial Motion, the District Court relied on *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 245 P. 3d 992 (2010). (R. Vol. III, p. 508). *Kuhn* was decided Dec. 23, 2010, concluding that motions for new trial must be filed within fourteen (14) days and must provide a particularized statement of the factual grounds.

While *Kuhn* was decided after briefing and argument were closed in this case, it hardly expresses new law. It appears the District Court felt that *Kuhn* overruled *Nations v. Bonner Bldg. Supply*, 113 Idaho 568, 746 P.2d 1027 (Ct. App. 1987). However, the law pertaining to the requirement to support a Rule 59(a)(6)and(7) motion with a particularized statement has been the law since adoption of the Rules of Civil Procedure. Appellant contends that it had a right, pursuant to I.R.C.P. 7, to file its Memorandum (particularized statement?) within fourteen days. However, Rule 7 itself is to the contrary. The Rules provides a brief may be filed within fourteen (14) days for some motions - but Rule 7 does have an important unless provision. I.R.C.P. 7(b)(3) states, in pertinent part:

"(3) *Time limits for filing and serving motions, affidavits, and briefs.*

Unless otherwise ordered by the court, which order may for cause shown be made on ex parte application, or specified elsewhere in these rules" (emphasis added).

I.R.C.P. 59(a)(7) states unequivocally that, . . . "any motion based on subdivision 6 or 7 must set forth the factual grounds therefore with particularity" (emphasis added). Appellant cannot claim that I.R.C.P. 7's fourteen day buffer applies. The requirement for particularized statement is mandatory and important. The prevailing party is interested in moving the case along quickly and is entitled to know the factual and legal grounds upon which the motion is

based. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977); *Fignani v. City of Lewiston*, 94 Idaho 196, 484 P.2d 1036 (Idaho 1971). Giving a new trial movant fourteen days following judgment to file his motion and another fourteen days to file a brief is contrary to the requirements and purposes of I.R.C.P 59(a)(7). See also 11C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2818 (1973)(discussing counterpart federal rule).

In *Johannsen v. Utterbeck*, 146 Idaho 423, 196 P.3d 341 (2008) a party had filed new trial motions asserting grounds under I.R.C.P. 59(a)(1),(2),(5),(6). This Court had noted that the Appellant in *Johannsen* had "procedurally defaulted on this ground [59(a)(1)] by failing to file an affidavit."

As to the ground I.R.C.P. 59(a)(6), the *Johannsen* Court noted, "any motion for a new trial based on insufficiency of the evidence, must 'set forth the factual grounds therefore with particularity.' I.R.C.P. 59(a)(7)." *Id.* at 348. In *Black v. Reynolds*, 109 Idaho 277, 707 P.2d 388 (1985) this Court affirmed a trial court's denial of a new trial and not reaching the merits when the movant failed to provide a particularized statement.

It is immaterial whether *Kuhn* overruled the decision of the Court of Appeals in *Nations*. (Appellant's Br. p. 41). The law, has always clearly been, that a Rule 59(a)(6) and (7) motion must contain a particularized statement of the factual grounds. Appellant procedurally defaulted and the District Court did not abuse its discretion in granting Kyle Athay's Motion to Strike the New Trial Motion and denying the Motion for New Trial.

A. The District Court did not err in relying on *Kuhn v. Coldwell Banker.*

Rich County argues Judge Brown's application of *Kuhn* is "a gross misreading and misunderstanding of Idaho case law." (Appellant's Br. p. 41).

Kuhn was decided on Dec. 23, 2010 after Briefing and Argument had closed in this case. *Kuhn* affirmed a district court decision to deny a motion for new trial because the appellant there "failed to file the required documentation within the time lines set out in the rule." 140 Idaho at 248, 245 P.3d at 1000.

> . . . similarly, in order to timely file a motion for new trial under sub-sections (6) and (7), 'the motion *must* set forth the factual grounds therefore with particularity.' Idaho R. Civ. P. 59(a)(7) (emphasis in original). Appellant's motion for new a trial fails to provide any factual grounds, and only suggests that the motion '*will* be supported by a memorandum in support of alternative motions that will be filed with the court' (emphasis in original).

The Appellant's procedural default committed in *Kuhn* is the same fatal mistake committed here by Rich County, Utah.

As discussed earlier, *Kuhn* did not announce a new rule of law. This Court has consistently required a particularized statement as part of an I.R.C.P. 59(a)(6) and (7) motion. *Black v. Reynolds*, 109 Idaho 277, 707 P.2d 388 (1985); *Johannsen v. Utterbeck*, 146 Idaho 423, 196 P.3d 341 (2008); *Scafco Boise, Inc. v. Rigby*, 98 Idaho 432, 566 P.2d 381 (1977); *Luther v. Howland*, 101 Idaho 373, 613 P.2d 666 (1980).

While Judge Brown did opine that *Kuhn* overruled the Court of Appeals' decision in *Nations v. Bonner Bldg. Supply*, 113 Idaho 568, 746 P.2d 1027 (Ct. App. 1987), this opinion was

not a reversible error. In deciding *Kuhn* this Court did not cite or discuss *Nations*. It is a stretch to say *Kuhn* overruled *Nations* and announced a new rule of law.

Judge Brown did not abuse his discretion and was correct in denying Rich County's New Trial Motion for procedural defaults. It is well settled that where an order of a lower court is correct, but based on an erroneous theory, the order will be affirmed upon the correct theory. See *Andre v. Morrow*, 106 Idaho 455, 459, 680 P.2d 1355 (1984); *Kuhn, id* at 245 P.3d at 1000.

B. Judge Brown used the correct theory for his decision.

Kuhn expressed the law correctly. Judge Brown was wrong in his interpretation of the timing and development of the law. Because *Kuhn* did not announce a new rule of law and because Judge Brown was correct, there is no requirement to analyze this matter for retroactive application.

Rich county claims it relied on the interpretation of I.R.C.P. 59 (*Nations*) as it existed prior to *Kuhn*. Rich County's interpretation was wrong and its reliance misplaced. The Court of Appeals decision in *Nations* is narrow, fact-specific, and unique to the post-trial procedures followed by the trial court. *Nations* was an appeal from an order *granting* a new trial.

In *Nations*, Judge Burnett quoted *Luther v. Howland:* "In the event that a motion for a new trial fails to allege the grounds with sufficient particularity, the trial court should ordinarily deny the motion and this Court will affirm the denial on appeal." *Nations* 113 Idaho at 572, 746 P.2d at 1031.

III.

THE DISTRICT COURT DID NOT ERR IN DENYING RICH COUNTY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

A. Standard of Review.

The standard of review of a grant or denial of a motion for JNOV is the same as that of the trial court when ruling on the motion. *Gillingham Const., Inc. v. Newby-Wiggins Const., Inc.*, 142 Idaho 15, 121 P.3d 946 (2005); *Quick v. Crane*, 111 Idaho 759, 764, 727 P.2d 1187, 1192 (1986). A jury verdict must be upheld if there is evidence of sufficient quantity and probative value that reasonable minds could have reached a similar conclusion to that of the jury. *Hudson v. Cobbs*, 118 Idaho 474, 797 P.2d 1322 (1990). In reviewing a grant or denial of a motion for JNOV, the court may not reweigh evidence, consider witness credibility, or compare its factual findings with that of the jury. *Griff, Inc. v. Curry Bean Co., Inc.*, 138 Idaho 315, 319, 63 P. 3d 441, 445 (2003). The court reviews the facts as if the moving party had admitted any adverse facts, drawing reasonable inferences in favor of the non-moving party. *Hunter v. State Dep't of Corrs., Div. of Prob. & Parole*, 138 Idaho 44, 47, 57 P.3d 755, 758 (2002); *See Harris v. Alessi*, 141 Idaho 901, 120 P.3d 289 (Ct. App. 2005); *Johannsen v. Utterbeck*, 146 Idaho 423, 196 P.3d 341 (2008).

B. Appellant's Contention.

Appellant contends that the District Court erred in not granting its Motion for Judgment Notwithstanding the Verdict upon the singular ground that Plaintiff had failed to introduce evidence that Sheriff Stacey acted with reckless disregard. (Appellant's Br. p. 46).

C. Judge Brown recognized a multitude of facts supporting the verdict and correctly decided there was substantial evidence to conclude Sheriff Stacey acted with reckless disregard.

The District Court gave the jury an instruction on reckless disregard which faithfully followed this Court's clarification and definition. *Athay I* (*Athay v. Stacey*, 142 Idaho 360, 128 P.3d 897 (2005)) and *Athay II* (*Athay v. Stacey*, 146 Idaho 407, 196 P.3d 325 (2008)) spell out the standard of conduct for police pursuits. Appellant does not contend the Court's instruction to the jury was erroneous.

Appellant tries to escape liability by riding on the coattails of other defendants who were previously dismissed. Appellant claims that since other officers (Bear Lake County Deputies Greg Athay and Chad Ludwig) were adjudicated as not having committed reckless disregard, that therefore Respondent Kyle Athay had some duty to prove that Sheriff Stacey's conduct was "different and more egregious." (Appellant's Br. p. 46). This syllogism is fallacious. Appellant wrongly claims that this Court has already determined that the pursuit was justified. (R. Vol. III, p. 442, Appellant's Br. p. 47).

This Court concluded in *Athay I* as to Deputy Ludwig that "There is absolutely nothing in the record that Deputy Ludwig operated his vehicle with reckless disregard for the safety of others or that his conduct induced Ervin to continue fleeing at a high rate of speed." *Athay v. Stacey,* 142 Idaho 360, 370, 128 P.3d 897, 907 (2005) (*Athay I).* This Court's conclusions in Athay II as to Deputy Gregg Athay were as follows: "From the point he joined in the pursuit until he told the officers to back off about a mile later, Deputy [Gregg] Athay did not engage in

conduct that met the standard of reckless disregard." *Athay v. Stacey*, 146 Idaho 407, 416, 196 P.3d 325, 334 (2008). (*Athay II*)

Kyle Athay's burden at trial was to show that Rich County Sheriff Stacey had committed reckless disregard. It was not his burden to equate or dis-equate Stacey's conduct from that of Greg Athay or Chad Ludwig. Respondent met his burden at trial by showing numerous circumstances and situations wherein Sheriff Stacey acted with reckless disregard.

In ruling on Respondent's Motion for Judgment Notwithstanding the Verdict, Judge Brown found a chain of fifteen specific facts "which the jury could have relied upon to reach its conclusions that Stacey's conduct reached the level of reckless disregard." (R. Vol. III, p. 511-513).

(1) Stacey initiated a stop of Daryl Ervin (Ervin) near Sage Creek Junction in Rich County, Utah. The purpose of the intended stop was due to erratic driving behavior and suspicion of DUI;

(2) However, Ervin did not stop; instead he fled and a high speed pursuit ensued;

(3) The pursuit, which began in Utah, continued through Wyoming and into Idaho;

(4) The testimony at trial established that it was between 63 to 66 miles from the scene of the attempted stop to the scene of the Athay/Ervin accident;

(5) This pursuit involved law enforcement personnel from Rich County, Utah, Lincoln County, Wyoming and Bear Lake County, Idaho;

(6) The pursuit involved speeds in excess of 96 miles per hour;

(7) The pursuit went through two populations centers, Cokeville, Wyoming and Montpelier, Idaho;

(8) The evidence established that this high speed pursuit was ongoing while there was other traffic on the road. In fact it was established that the utility of the spike

strips was impaired because of other vehicles in close proximity to the strips when Ervin came through that area;

(9) The testimony established that the deployment of spike strips was not successful in stopping or even slowing the Ervin vehicle;

(10) For a period of approximately eleven (11) miles the Ervin vehicle was driving on three (3) tires and the remnants of a fourth which had been destroyed during the spiking incident;

(11) Despite the destruction of one of the tires on the Ervin vehicle, the high speed pursuit continued at speeds in excess of 96 miles per hour;

(12) There was testimony that Ervin went through Montpelier, Idaho at high rates of speed;

(13) There was testimony that at times, between the point where the spike strips were deployed and the accident occurred, Ervin was operating his vehicle without his headlights being activated;

(14) There was testimony concerning collision between the Ervin vehicle and a truck being pulled into the Ranch Hand and testimony concerning Ervin's vehicle starting to fishtail as it accelerated after leaving Montpelier proper;

(15) Finally, Sheriff Stacey testified that he knew that there were risks to the traveling public involved in this high speed pursuit.

There are numerous instances where Sheriff Stacey, knowing of the inherent dangers of this 95 mile per hour plus pursuit – chose to continue the chase.

For example, during Stacey's first attempt to stop Ervin's Mustang, the Mustang accelerated and Stacey could only keep up "for about half a mile." (Tr. 3rd day, p. 143, L. 4).

When asked whether he decided to continue to chase the Mustang, he replied: "Like I said, I would continue to follow the vehicle, yes." (Tr. 3rd day, p. 143, L. 7-8)(emphasis added).

When asked whether he felt the Mustang had no intention of stopping for him, Sheriff Stacey replied, "Yes." (Tr. 3rd day, p. 143, L. 20-25). Sheriff Stacey was asked if he decided, at that point in time, to still continue the pursuit. His reply was that he would contact law enforcement in Lincoln County, Wyoming, the place the pursuit was then headed. No assistance was available, yet Sheriff Stacey continued to chase the vehicle, or as he prefers to call it, "follow." (Tr. 3rd day, p. 144, L. 1-25).

At Sage Junction in Wyoming (US 30) the pursuit turned left and headed to Cokeville, Wyoming. Sheriff Stacey chose to continue at speeds "somewhere between 90 to 95 miles an hour."(Tr. 3rd day, p. 147, L. 10). He stated he did not gain on the Mustang until it reached Cokeville, Wyoming when the Mustang slowed down. (Tr. 3rd day, p. 147, L. 19 – p. 148, L. 8).

As the Mustang left Cokeville, he was asked, "And did you decide then to continue the chase?" (Tr. 3rd day, p. 148, L. 15). He replied, "I decided to continue to follow the Mustang, yes." (Tr. 3rd day, p. 148, L. 15), at speeds "around 90 miles an hour." (Tr. 3rd day, p. 148, L. 20) (emphasis added).

Sheriff Stacey further testified that:

"Q. But when you got to Cokeville and it slowed to 45, you were, what did you say, a mile behind?

A. I was when he got to the Cokeville, yes.

Q. He slowed down to 45 and you caught up?

A. Yes.

Q. And you were close enough you could read his plate?

A. I got close enough to read his plate and make sure it was still the same vehicle.

Q. And then he took off?

A. Yes.

Q. And you took off as well?

A. I followed him, yes." (Tr. 3 day, p. 163, L. 23 – p. 164, L. 10)(emphasis added).

As the pursuit headed toward and entered Idaho, Sheriff Stacey acknowledged not gaining on the suspect and "it was not leaving me either." (Tr. 3rd day, p. 148, L. 20-25). When asked whether he decided to continue the chase (Tr. 3rd day, p. 152, L. 25 – p. 153, L. 1) he repLied:

"I still decided that I would continue to follow the vehicle, but I did slow down when I got into Idaho." (Tr. 3rd day, p. 153, L. 2-3)(emphasis added).

An attempt was made in Idaho to spike the tires of the Mustang. (Tr. 3rd day, p. 153 – 156). Despite obvious "major tire damage" and being within 100 yards, the Mustang sped up. Sheriff Stacey was asked,

"Q. And did you decides [sic] at that time to continue the chase?" to which he replied:

A. I decided that I would continue to follow him and the other officers by that time were also following." (Tr. 3rd day, p. 156, L. 8-12)(emphasis added).

"Q. And so we have gone over the spike stripes, he slowed to 50, you are a hundred yards behind but he speeds up to 90?

"Q. And you are following him at 90?"

A. Yes." (Tr. 3 day, p. 157, L. 10-14)(emphasis added).

"Q. How far behind were you as you went through Montpelier?

A. Maybe half a mile.

Q. And the Mustang sped up as it left town; is that correct?

A. I think so, yes.

Q. And you decided to continue the chase?

A. I decided that I would continue to follow the Mustang." (Tr. 3 day, p. 158, L. 18-23)(emphasis added).

It was clear to the jury that Sheriff Stacey's presence behind the Mustang provided the inducement to the high speed. Stacey told the Lincoln County Wyoming dispatcher: "I'm about caught back up to him. He keeps slowing down and then he'll speed up and then he slows down until I catch him, and then he speeds up again. Just passed milepost 2." See Defendant's Ex. 205, p. 41, L. 14-17.

Yet he chose, time after time, in the face of futility, to continue his 90 mph chase. He had the vehicle plate number, the address of the registered owner was readily available. It's clear the jury could easily conclude his repeated choice to continue the chase was a catalyst to Ervin's continued speed.

Further indications of Sheriff Stacey's cognizance of the high hazards of the chase and his decision to continue are set forth in his trial testimony. He agrees that a pursuit ends in one of three ways. The first is that the driver voluntarily pulls over. The second is the vehicle experiences mechanical failure. The third is that an accident occurs. In the first fifty miles of pursuit voluntary termination and mechanical failure did not occur. After fifty miles and now on

just three tires it was apparent the Mustang would not stop voluntarily and it was still outrunning Sheriff Stacey. There was one way the pursuit would end – an accident. In the face of this Sheriff Stacey chose to continue his course of conduct. (Tr. 3rd day, p. 165, L. 2 – p. 168 L. 7).

A jury verdict will not be overturned if it is supported by substantial and competent evidence. By substantial it does not mean that the evidence be uncontradicted. The evidence must be of sufficient quantity and probative value that reasonable minds could conclude the verdict was proper. *Smith v. Great Basin Grain Co.,* 98 Idaho 266, 561 P.2d 1299 (1977); *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986); *Hibbler v. Fisher*, 109 Idaho 1007, 712 P.2d 708 (Ct. App. 1985).

Here, Judge Brown was correct in concluding there was substantial evidence to support the verdict.

CONCLUSION

Judge Brown did not abuse his discretion in denying Appellant's motions for new trial. Appellant was not deprived of a fair trial.

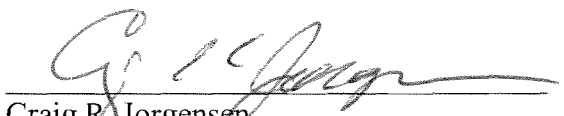
Judge Brown did not abuse his discretion in not disqualifying himself.

Judge Brown was correct in denying the Appellant's Motion for Judgment Notwithstanding the Verdict because there was ample evidence upon which the jury could find that Sheriff Stacey had committed reckless disregard of the safety of others.

The errors, if any, were inconsequential harmless error.

For these reasons, Kyle Athay requests the Court affirm the District Court and award him attorneys fees and costs.

DATED this 31st day of October, 2011



Craig R. Jorgensen
Attorney for Plaintiff-Respondent

IN THE SUPREME COURT OF THE STATE OF IDAHO

KYLE ATHAY, Plaintiff/Respondent, vs. RICH COUNTY, UTAH, a political subdivision of the State of Utah, Defendants/Appellant.	CERTIFICATE OF SERVICE DOCKET NO. 38683-2011

Appeal from the District Court of the Sixth Judicial District for Bear Lake County

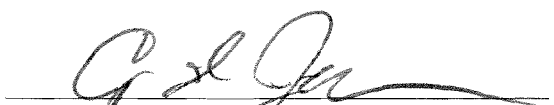
The Honorable Mitchell W. Brown – District Judge – Presiding

CERTIFICATE OF SERVICE

I CERTIFY that on the 31st day of October, 2011, I served two bound copies of a true and correct copy of the Respondent's Brief by First Class Mail, Postage Prepaid, and addressed to each of the following:

Peter Stirba, STIRBA & ASSOCIATES
215 South State Street, Suite 750
P.O. Box 810
Salt Lake City, Utah 84110-0810

Alan Johnston, PIKE HERNDON STOSICH & JOHNSTON
151 North Ridge Ave., Suite 210
P.O. Box 2949
Idaho Falls, Idaho 83403-2949



Craig R. Jorgensen
Attorney for Plaintiff-Respondent