

6-23-2011

Athay v. Rich County Clerk's Record v. 1 Dckt. 38683

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LAW CLERK
IN THE SUPREME COURT
OF THE STATE OF IDAHO

Supreme Court Docket No.
38683-2011

KYLE ATHAY,

Plaintiff/Respondent,

SEE AUGMENTATION RECORD

RICH COUNTY, UTAH.

Defendant/Appellant.

MITCHELL W. BROWN, District Judge
Appealed from the District Court of the **SIXTH**
Judicial District of the State of Idaho, in and for
BEAR LAKE County.

CRAIG R. JORGENSEN,
Attorney for Plaintiff/Respondent

ALAN JOHNSTON, PETER STIRBA
Attorneys for Defendant/Appellant.

FILED - COPY
JUN 23 2011
Supreme Court Court of Appeals
Entered on A/S by _____

38683

COPY

Volume 1 of

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BEAR LAKE

KYLE ATHAY,)
)
Plaintiff-Respondent,) **Supreme Court Docket No.38683-2011**
) **CASE NO. CV-2002-000072**
-vs-)
)
RICH COUNTY, UTAH,)
)
)
Defendant-Appellant,)
)
and)
)
DALE M. STACY; CHAD L. LUDWIG;)
GREGG ATHAY; BRENT R. BUNN;)
BEAR LAKE COUNTY, IDAHO,)
)
Defendants.)
_____)

CLERK'S LIMITED RECORD ON APPEAL

Appeal from the District Court of the Sixth Judicial District of the State of Idaho, in and for
the County of Bear Lake.

HONORABLE MITCHELL W. BROWN
Sixth District Judge

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DISTRICT COURT
SIXTH JUDICIAL DISTRICT
BEAR LAKE COUNTY, IDAHO

2009 NOV 19 PM 2:02

KERRY HADDOCK, CLERK

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DEPUTY _____ CASE NO.

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Attorneys for Defendant

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF BEAR LAKE

KYLE ATHAY,

Plaintiff,

v.

RICH COUNTY, UTAH,

Defendant.

Case No. CV-02-00072

**DEFENDANT'S PROPOSED JURY
INSTRUCTIONS AND SPECIAL
VERDICT FORM**

Defendant, Rich County, Utah, by and through undersigned counsel, hereby submits their proposed jury instructions pursuant to I.R.C.P. 51. Further, the Defendant requests leave to offer

such other and additional instructions as may, during the course of the trial, become appropriate. Defendant also requests that the Court submit the case to the jury on the attached special verdict form. See Attachment "A."

A. Defendant requests that the Court give stock instructions on the following subjects and principles of law:


- 1 verdict/jury's responsibility;
- 2 province of the court;
- 3 province of the jury;
- 4 statements and arguments of counsel are not evidence;
- 5 objections by counsel not to influence the jury;
- 6 review of evidence confined to evidence received in the courtroom;
- 7 direct and circumstantial evidence;
- 8 weight of the evidence;
- 9 jury's recollection controls;
- 10 credibility of witnesses;
- 11 impeachment;
- 12 reaching a verdict;
- 13 selecting a foreman; and
- 14 communications with the court.

B. In addition to the above, Defendant requests that the following instructions also be given by the Court. One original and one copy of Defendant's proposed instructions have

been attached hereto. Pursuant to I.R.C.P. 51(a)(1), the originals contain a blank space for numbering. See Attachment "B." The duplicates are numbered and contain citations. See Attachment "C."

DATED this 19 day of November, 2009.

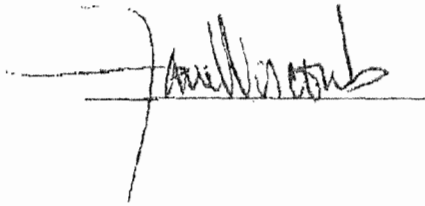
STIRBA & ASSOCIATES

By: 
R. BLAKE HAMILTON
PETER STIRBA
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of November, 2009 I caused to be served a true copy of the foregoing DEFENDANT'S PROPOSED JURY INSTRUCTIONS AND SPECIAL VERDICT FORM by the method indicated below, to the following:

Craig R. Jorgensen, Esq. Attorney at Law 1246 Yellowstone Avenue, Suite A4 P.O. Box 4904 Pocatello, ID 83205-4904 Attorney for Plaintiffs	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Facsimile
Alan Johnston E. W. PIKE & ASSOCIATES, P.A. 151 North Ridge Ave., Suite 210 P.O. Box 2949 Idaho Falls, ID 83403-2949 Attorney for Defendants	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Facsimile
Honorable Mitchell W. Brown District Judge – Resident Chambers P.O. Box 775 Soda Springs, Idaho 83276	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Facsimile



Def's Jury Instr

EXHIBIT A

Def's Jury Instr

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF BEAR LAKE

<p>KYLE ATHAY, Plaintiff, v. RICH COUNTY, UTAH, Defendant.</p>	<p>Case No. CV-02-00072 SPECIAL VERDICT</p>
--	---

We, the jury, answer the questions submitted to us in the special verdict as follows

QUESTION NO. 1. Did Sheriff Stacey act with reckless disregard while pursuing Mr. Ervin?

ANSWER: Yes _____ No _____

QUESTION NO. 2. Was Sheriff Stacey's reckless conduct, if any, a proximate cause of plaintiff's injuries?

ANSWER: Yes _____ No _____

If you have answered both of the above questions "Yes," then please answer the next two questions. If you have answered either of the questions "No," you will not answer the remaining questions, but will simply sign the verdict.

QUESTION NO. 4. Was there negligence on the part of Daryl Ervin which was a proximate cause of the accident?

ANSWER: Yes _____ No _____

QUESTION NO. 5. Was there negligence on the part of the Bear Lake County Sheriff's deputies which was a proximate cause of the accident?

ANSWER: Yes _____ No _____

QUESTION NO. 6. Was there negligence on the part of Kyle Athay which was a proximate cause of the accident?

ANSWER: Yes _____ No _____

If you answered 'No' to Questions Nos. 4, 5 and 6, you should not answer Question No. 7, but will next answer Question No. 8.

If you answered "No" to any of the preceding questions, then insert a zero (0) in the answer to the appropriate line in Question No. 7. If you answered any of the preceding questions "Yes," insert in the appropriate line in the answer to Question No. 8 the percentage of causation you find attributable to that party. Your percentages must total 100%.

QUESTION NO. 7. We find the parties contributed to the cause of the accident in the following percentages:

- (a) Daryl Ervin _____%
- (b) Sheriff Dale Stacey _____%
- (c) Bear Lake County Sheriff's Deputies _____%
- (d) Kyle Athay _____%

SPECIAL VERDICT

(c) Gregg Athay _____%

(f) Chad Ludwig _____%

(g) Wyoming Downs _____%

TOTAL 100 %

QUESTION NO. 8. What is the total amount of damages sustained by Kyle Athay as a result of the accident?

ANSWER: \$ _____

Dated this _____ day of December, 2009

FOREMAN

SPECIAL VERDICT

Def's Jury Instr

EXHIBIT B

Def's Jury Instr

JURY INSTRUCTION NO. _____

Plaintiff Kyle Athay claims that Rich County, Utah, is liable for the damages the plaintiff allegedly suffered as a result of a vehicle collision between Kyle Athay and Daryl Ervin on June 10, 1999 while Mr. Ervin was being pursued by Sheriff Stacey and Bear Lake County Deputies Gregg Athay and Chad Ludwig.

In defense, Rich County claims it is not liable because Sheriff Stacey acted with the appropriate level of care during the relevant incident and because Sheriff Stacey's conduct was not a proximate cause of plaintiffs alleged damages.

Def's Jury Instr

JURY INSTRUCTION NO. _____

Any statement by me identifying a claim of a party is not evidence in this case. I have advised you of the claims of the parties merely to acquaint you with the issues to be decided.

JURY INSTRUCTION NO. _____

The plaintiff has the burden of proving each of the following propositions:

1. That Sheriff Stacey acted with reckless disregard toward the safety of others;
2. That plaintiff was injured and damaged;
3. That Sheriff Stacey's recklessness was a proximate cause of injury and damage to plaintiff, and,
4. The elements of damage, and the amount thereof.

Def's Jury Instr

JURY INSTRUCTION NO. _____

In this case defendants have asserted the affirmative defense that the plaintiff Kyle Athay, Daryl Ervin, Bear Lake County Deputy Gregg Athay and/or Bear Lake County Deputy Chad Ludwig were negligent. Defendant has the burden of proving each of the following propositions:

1. That the plaintiff, Daryl Ervin, Deputy Gregg Athay and/or Deputy Chad Ludwig was negligent;
2. That the negligence of plaintiff, Daryl Ervin, Deputy Gregg Athay and/or Deputy Chad Ludwig was a proximate cause of the injury and damage claimed to have been suffered by the plaintiff.

JURY INSTRUCTION NO. _____

When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

JURY INSTRUCTION NO. _____

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the complained injury, loss or damage, and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons contributes concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury.

Def's Jury Instr

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JURY INSTRUCTION NO. _____

A person acts "recklessly" or with "reckless disregard" if the person's conduct creates an unreasonable risk of bodily harm, and the person actually perceives the high degree of probability that harm will result and continues in his course of conduct.

JURY INSTRUCTION NO. _____

When I use the word "negligence" in these instructions, I mean the failure to use ordinary care in the management of one's property or person. The words "ordinary care" mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something which a reasonably careful person would do, or the doing of something a reasonably careful person would not do, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

JURY INSTRUCTION NO. _____

A violation of a statute is negligence, unless (1) compliance with the statute was impossible, or (2) something over which the party had no control placed him in a position of violation of the statute, or (3) an emergency not of the party's own making caused him to fail to obey the statute or an excuse specifically provided for within the statute existed

JURY INSTRUCTION NO. _____

The statutes of the state of Idaho state that it is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances to drive or be in actual physical control of a motor vehicle within this state.

JURY INSTRUCTION NO. _____

The statutes of the state of Idaho state that upon the immediate approach of an authorized emergency or police vehicle making use of an audible or visible signal, the driver of every other vehicle must yield the right-of-way and immediately drive to a position parallel to, and as close as possible to, the nearest edge or curb of the highway lawful for parking and clear of any intersection, and stop and remain in that position until the authorized emergency or police vehicle has passed, except when otherwise directed by a peace officer.

JURY INSTRUCTION NO. _____

The statutes of the state of Idaho state that no person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with the law.

JURY INSTRUCTION NO. _____

A person driving a motor vehicle is under the influence of [an intoxicating beverage] [a drug] when, as a result of [drinking an intoxicating beverage] [using a drug], the driver's physical or mental abilities are impaired to the degree that the driver no longer has the capacity to drive a vehicle with the caution characteristic of a sober person of ordinary prudence acting under similar circumstances.

Liquor is an intoxicating beverage.

JURY INSTRUCTION NO. _____

The statutes of the state of Idaho state that every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian or any person propelling a human-powered vehicle and shall give an audible signal when necessary. Every driver shall exercise proper precaution upon observing any child or any obviously confused, incapacitated or intoxicated person.

JURY INSTRUCTION NO. _____

The statutes of the state of Idaho state that it is unlawful for the driver of a motor vehicle to willfully flee or attempt to elude a pursuing police vehicle when given a visual or audible signal to bring the vehicle to a stop.

JURY INSTRUCTION NO. _____

The statutes of the state of Idaho state that the driver of a police vehicle, when in the pursuit of an actual or suspected violator of the law, may (a) proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation, and (b) exceed the maximum speed limits so long as he does not endanger life or property.

JURY INSTRUCTION NO. _____

The statutes of the state of Idaho state that every person shall drive at a safe and appropriate speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hillcrest, when traveling upon any narrow or winding highway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

JURY INSTRUCTION NO. _____

The statutes of the state of Idaho state that a vehicle shall be driven upon the right half of the roadway.

Def's Jury Instr

JURY INSTRUCTION NO. _____

An expert witness is a witness who has special knowledge in a particular matter and may give his opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for his opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

JURY INSTRUCTION NO. _____

Certain evidence is about to be presented to you by deposition. A deposition is testimony taken under oath before the trial and preserved in writing. This evidence is entitled to the same consideration you would give had the witness testified from the witness stand.

You will only receive this testimony in open court. Although there is a record of the testimony you are about to hear, this record will not be available to you during your deliberations.

Def's Jury Instr

JURY INSTRUCTION NO. _____

A person who has a condition, pain, or disability at the time of an injury is not entitled to recover damages therefore. However, he is entitled to recover damages for any aggravation of such preexisting condition, pain, or disability proximately resulting from the injury.

If you find that before this occurrence the plaintiff had a preexisting bodily condition which was causing pain or disability, and further find that because of this occurrence the condition or the pain or the disability was aggravated, then if your verdict is in favor of the plaintiff you should consider the aggravation of the condition or the pain or the disability proximately due to such aggravation, but you should not consider any condition, pain, or disability which may have existed prior to the occurrence, or from which the plaintiff may now be suffering which was not caused or contributed to by reason of this occurrence.

You are to apportion, if possible, between the condition, pain, or disability prior to this occurrence and the condition, pain, or disability caused by this occurrence, and assess liability accordingly. If no apportionment can reasonably be made by you, then the defendants are liable for the entire damage.

JURY INSTRUCTION NO. _____

A person who has been damaged must exercise ordinary care to minimize the damage and prevent further damage. Any loss that results from a failure to exercise such care cannot be recovered.

JURY INSTRUCTION NO. _____

In this case you will return a special verdict consisting of a series of questions which you should answer. There are individual questions about the recklessness and negligence or lack of recklessness and negligence of Kyle Athay, Sheriff Dale Stacey, Daryl Ervin, Deputy Gregg Athay and Deputy Chad Ludwig and other specific questions about the amount of damages. In answering each question, you must be persuaded, considering all the evidence in the case, that your choice of answers is more probably true than not true. Since the explanations on the form which you will have are part of my instructions to you, I will read the verdict form to you and explain it. It starts:

"We, the jury, answer the questions submitted to us in the special verdict as follows:

QUESTION NO. 1. Did Sheriff Stacey act with reckless disregard while pursuing Mr. Ervin?

ANSWER: Yes _____ No _____

QUESTION NO. 2. Was Sheriff Stacey's reckless conduct, if any, a proximate cause of plaintiff's injuries?

ANSWER: Yes _____ No _____

If you have answered both of the above questions 'Yes,' then please answer the next two questions. If you have answered either of the questions 'No,' you will not answer the remaining questions, but will simply sign the verdict."

Thus, you will notice that if you should find that there was reckless conduct on the part of Sheriff

Stacey's part which was a proximate cause of the accident, then you will simply sign the verdict and inform the bailiff that you have a verdict. But if you find that there was reckless conduct on the Sheriff Stacey's part which was a proximate cause of the accident, then you go on. The verdict form continues:

"QUESTION NO. 4. Was there negligence on the part of Daryl Ervin which was a proximate cause of the accident?

ANSWER: Yes _____ No _____

QUESTION NO. 5. Was there negligence on the part of Kyle Athay which was a proximate cause of the accident?

ANSWER: Yes _____ No _____

QUESTION NO. 6. Was there negligence on the part of Bear Lake County sheriff's deputies which was a proximate cause of the accident?

ANSWER: Yes _____ No _____

If you answered 'No' to Questions Nos. 4, 5 and 6, you should not answer Question No. 7, but will next answer Question No. 8."

You are now to compare the fault of the parties.

"If you answered 'No' to any of the preceding questions, then insert a zero (0) in the answer to the appropriate line in Question No. 7. If you answered any of the preceding questions 'Yes,' insert in the appropriate line in the answer to Question No. 7 the percentage of fault you find

Def's Jury Instr

attributable to that party. Your percentages must total 100%."

The form continues:

"QUESTION NO. 7. We find the parties contributed to the cause of the accident in the following percentages:

- (a) Daryl Ervin _____%
- (b) Sheriff Dale Stacey _____%
- (c) Bear Lake County Sheriff's Deputies _____%
- (d) Kyle Athay _____%
- (e) Gregg Athay _____%
- (f) Chad Ludwig _____%
- (g) Wyoming Downs _____%

TOTAL 100 %"

The verdict form itself guides you from this point. It says:

"If the percentage of causation for the plaintiff is equal to or greater than the causation attributed to the defendant, then you will not answer Question No. 8, but will sign the verdict. If the percentage of causation attributed to the plaintiff is less than the percentage of fault attributed to defendant, then you will answer Question No. 8."

Question No. 8 is your determination of the total amount of damages sustained by the plaintiff.

Def's Jury Instr

This question asks you:

"QUESTION NO. 8. What is the total amount of damages sustained by the plaintiff Kyle Athay as a result of the accident?

ANSWER: \$ _____."

You should include in your answer to Question No. 6 the total amount of all monetary damages which you find from the evidence was sustained by the plaintiff.

Finally, you should sign the verdict.

EXHIBIT C

Def's Jury Instr

JURY INSTRUCTION NO. 1

Plaintiff Kyle Athay claims that Rich County, Utah, is liable for the damages the plaintiff allegedly suffered as a result of a vehicle collision between Kyle Athay and Daryl Ervin on June 10, 1999 while Mr. Ervin was being pursued by Sheriff Stacey and Bear Lake County Deputies Gregg Athay and Chad Ludwig.

In defense, Rich County claims it is not liable because Sheriff Stacey acted with the appropriate level of care during the relevant incident and because Sheriff Stacey's conduct was not a proximate cause of plaintiff's alleged damages.

See Complaint and Rich County Defendant's Answer, generally.

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

Def's Jury Instr

JURY INSTRUCTION NO. 2

Any statement by me identifying a claim of a party is not evidence in this case. I have advised you of the claims of the parties merely to acquaint you with the issues to be decided.

IDJI 1.05

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

JURY INSTRUCTION NO. 3

The plaintiff has the burden of proving each of the following propositions:

1. That Sheriff Stacey acted with reckless disregard toward the safety of others;
2. That plaintiff was injured and damaged;
3. That Sheriff Stacey's recklessness was a proximate cause of injury and damage to plaintiff; and,
4. The elements of damage, and the amount thereof.

IDJI 1.41.4.1 (as modified)

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

JURY INSTRUCTION NO. 4

In this case defendants have asserted the affirmative defense that the plaintiff Kyle Athay, Daryl Ervin, Bear Lake County Deputy Gregg Athay and/or Bear Lake County Deputy Chad Ludwig were negligent. Defendant has the burden of proving each of the following propositions:

1. That the plaintiff, Daryl Ervin, Deputy Gregg Athay and/or Deputy Chad Ludwig was negligent;
2. That the negligence of plaintiff, Daryl Ervin, Deputy Gregg Athay and/or Deputy Chad Ludwig was a proximate cause of the injury and damage claimed to have been suffered by the plaintiff.

GIVEN _____
 REFUSED _____
 MODIFIED _____
 COVERED _____
 OTHER _____

JURY INSTRUCTION NO. 5

When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

IDJI 1.20.1

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

JURY INSTRUCTION NO. 6

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the complained injury, loss or damage, and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons contributes concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury.

IDJI 2.30.1

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

JURY INSTRUCTION NO. 7

A person acts "recklessly" or with "reckless disregard" if the person's conduct creates an unreasonable risk of bodily harm, and the person actually perceives the high degree of probability that harm will result and continues in his course of conduct.

IDJI 2.25 (as modified)

See also I.C. § 6-901 et seq., as adopted by *Athay v. Stacey*, 146 Idaho 407 (2008)

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

JURY INSTRUCTION NO. 8

When I use the word "negligence" in these instructions, I mean the failure to use ordinary care in the management of one's property or person. The words "ordinary care" mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something which a reasonably careful person would do, or the doing of something a reasonably careful person would not do, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

- IDJI 2.20
- GIVEN _____
- REFUSED _____
- MODIFIED _____
- COVERED _____
- OTHER _____

JURY INSTRUCTION NO. 9

A violation of a statute is negligence, unless (1) compliance with the statute was impossible, or (2) something over which the party had no control placed him in a position of violation of the statute, or (3) an emergency not of the party's own making caused him to fail to obey the statute or an excuse specifically provided for within the statute existed.

IDJI 2.22 (as modified)

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

Def's Jury Instr

JURY INSTRUCTION NO. 10

The statutes of the state of Idaho state that it is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances to drive or be in actual physical control of a motor vehicle within this state.

I.C. § 18-8004

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

JURY INSTRUCTION NO. 11

The statutes of the state of Idaho state that upon the immediate approach of an authorized emergency or police vehicle making use of an audible or visible signal, the driver of every other vehicle must yield the right-of-way and immediately drive to a position parallel to, and as close as possible to, the nearest edge or curb of the highway lawful for parking and clear of any intersection, and stop and remain in that position until the authorized emergency or police vehicle has passed, except when otherwise directed by a peace officer.

I.C. § 49-625

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

JURY INSTRUCTION NO. 12

The statutes of the state of Idaho state that no person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with the law.

I.C. § 49-625
GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

Dof's Jury Instr

JURY INSTRUCTION NO. 12

A person driving a motor vehicle is under the influence of [an intoxicating beverage] [a drug] when, as a result of [drinking an intoxicating beverage] [using a drug], the driver's physical or mental abilities are impaired to the degree that the driver no longer has the capacity to drive a vehicle with the caution characteristic of a sober person of ordinary prudence acting under similar circumstances.

Liquor is an intoxicating beverage.

IDJI 2.22.2

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

JURY INSTRUCTION NO. 14

The statutes of the state of Idaho state that every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian or any person propelling a human-powered vehicle and shall give an audible signal when necessary. Every driver shall exercise proper precaution upon observing any child or any obviously confused, incapacitated or intoxicated person.

I.C. § 49-615

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

JURY INSTRUCTION NO. 15

The statutes of the state of Idaho state that it is unlawful for the driver of a motor vehicle to willfully flee or attempt to elude a pursuing police vehicle when given a visual or audible signal to bring the vehicle to a stop.

I.C. § 49-1404

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

Def's Jury Instr

60

JURY INSTRUCTION NO. 16

The statutes of the state of Idaho state that the driver of a police vehicle, when in the pursuit of an actual or suspected violator of the law, may (a) proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation, and (b) exceed the maximum speed limits so long as he does not endanger life or property.

IDJI 2.22.1 (as modified)

See also I.C. § 49-623

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

61

Def's Jury Instr

JURY INSTRUCTION NO. 17

The statutes of the state of Idaho state that every person shall drive at a safe and appropriate speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hillcrest, when traveling upon any narrow or winding highway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

I.C. § 49-654

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

62

Def's Jury Instr

JURY INSTRUCTION NO. 18

The statutes of the state of Idaho state that a vehicle shall be driven upon the right half of the roadway.

I.C. § 49-630

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

JURY INSTRUCTION NO. 19

An expert witness is a witness who has special knowledge in a particular matter and may give his opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for his opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

JURY INSTRUCTION NO. 20

Certain evidence is about to be presented to you by deposition. A deposition is testimony taken under oath before the trial and preserved in writing. This evidence is entitled to the same consideration you would give had the witness testified from the witness stand.

You will only receive this testimony in open court. Although there is a record of the testimony you are about to hear, this record will not be available to you during your deliberations.

IDJI 1.22

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

65

Not's Trial Instr

JURY INSTRUCTION NO. 21

A person who has a condition, pain, or disability at the time of an injury is not entitled to recover damages therefore. However, he is entitled to recover damages for any aggravation of such preexisting condition, pain, or disability proximately resulting from the injury.

If you find that before this occurrence the plaintiff had a preexisting bodily condition which was causing pain or disability, and further find that because of this occurrence the condition or the pain or the disability was aggravated, then if your verdict is in favor of the plaintiff you should consider the aggravation of the condition or the pain or the disability proximately due to such aggravation, but you should not consider any condition, pain, or disability which may have existed prior to the occurrence, or from which the plaintiff may now be suffering which was not caused or contributed to by reason of this occurrence.

You are to apportion, if possible, between the condition, pain, or disability prior to this occurrence and the condition, pain, or disability caused by this occurrence, and assess liability accordingly. If no apportionment can reasonably be made by you, then the defendants are liable for the entire damage.

IDJI 9.02

- GIVEN _____
- REFUSED _____
- MODIFIED _____
- COVERED _____
- OTHER _____

66

Def's Jury Instr

JURY INSTRUCTION NO. 22

A person who has been damaged must exercise ordinary care to minimize the damage and prevent further damage. Any loss that results from a failure to exercise such care cannot be recovered.

IDJI 9.14

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

JURY INSTRUCTION NO. 23

In this case you will return a special verdict consisting of a series of questions which you should answer. There are individual questions about the recklessness and negligence or lack of recklessness and negligence of Kyle Athay, Sheriff Dale Stacey, Daryl Ervin, Deputy Gregg Athay and Deputy Chad Ludwig and other specific questions about the amount of damages. In answering each question, you must be persuaded, considering all the evidence in the case, that your choice of answers is more probably true than not true. Since the explanations on the form which you will have are part of my instructions to you, I will read the verdict form to you and explain it. It starts:

"We, the jury, answer the questions submitted to us in the special verdict as follows:

QUESTION NO. 1. Did Sheriff Stacey act with reckless disregard while pursuing Mr. Ervin?

ANSWER: Yes _____ No _____

QUESTION NO. 2. Was Sheriff Stacey's reckless conduct, if any, a proximate cause of plaintiff's injuries?

ANSWER: Yes _____ No _____

If you have answered both of the above questions 'Yes,' then please answer the next two questions. If you have answered either of the questions 'No,' you will not answer the remaining questions, but will simply sign the verdict."

- GIVEN _____
- REFUSED _____
- MODIFIED _____
- COVERED _____
- OTHER _____

Def's Jury Instr

Thus, you will notice that if you should find that there was reckless conduct on the part of Sheriff Stacey's part which was a proximate cause of the accident, then you will simply sign the verdict and inform the bailiff that you have a verdict. But if you find that there was reckless conduct on the Sheriff Stacey's part which was a proximate cause of the accident, then you go on. The verdict form continues:

"QUESTION NO. 4. Was there negligence on the part of Daryl Ervin which was a proximate cause of the accident?

ANSWER: Yes _____ No _____

QUESTION NO. 5. Was there negligence on the part of Kyle Athay which was a proximate cause of the accident?

ANSWER: Yes _____ No _____

QUESTION NO. 6. Was there negligence on the part of Bear Lake County sheriff's deputies which was a proximate cause of the accident?

ANSWER: Yes _____ No _____

If you answered 'No' to Questions Nos. 4, 5 and 6, you should not answer Question No. 7, but will next answer Question No. 8."

You are now to compare the fault of the parties.

"If you answered 'No' to any of the preceding questions, then insert a zero (0) in the answer to

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

the appropriate line in Question No. 7. If you answered any of the preceding questions 'Yes,' insert in the appropriate line in the answer to Question No. 7 the percentage of fault you find attributable to that party. Your percentages must total 100%."

The form continues:

"QUESTION NO. 7. We find the parties contributed to the cause of the accident in the following percentages:

- (a) Daryl Ervin _____ %
- (b) Sheriff Dale Stacey _____ %
- (c) Bear Lake County Sheriff's Deputies _____ %
- (d) Kyle Athay _____ %
- (e) Gregg Athay _____ %
- (f) Chad Ludwig _____ %
- (g) Wyoming Downs _____ %

TOTAL 100 %"

The verdict form itself guides you from this point. It says:

"If the percentage of causation for the plaintiff is equal to or greater than the causation attributed to the defendant, then you will not answer Question No. 8, but will sign the verdict. If the

percentage of causation attributed to the plaintiff is less than the percentage of fault attributed to

- GIVEN _____
- REFUSED _____
- MODIFIED _____
- COVERED _____
- OTHER _____

defendant, then you will answer Question No. 8."

Question No. 8 is your determination of the total amount of damages sustained by the plaintiff.

This question asks you:

"QUESTION NO. 8. What is the total amount of damages sustained by the plaintiff Kyle Athay as a result of the accident?

ANSWER: \$ _____."

You should include in your answer to Question No. 6 the total amount of all monetary damages which you find from the evidence was sustained by the plaintiff.

Finally, you should sign the verdict.

IDJI 1.43.1 (as modified)

GIVEN _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

Def's Jury Instr

DISTRICT COURT
 SIXTH JUDICIAL COURT
 BEAR LAKE COUNTY IDAHO
 Nov 20, 2009 3:15 pm
 DATE TIME
 CLERK

CRAIG R. JORGENSEN (#1990)
 Attorney At Law
 920 E. Clark
 P.O. Box 4904
 Pocatello, Idaho 83205-4904
 Telephone: (208) 237-4100
 Facsimile: (208) 237-1706
 Attorney for Plaintiff

DEPUTY

CASE NO.

**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BEAR LAKE**

KYLE ATHAY,)
)
 Plaintiff,)
)
 vs.)
)
 RICH COUNTY, UTAH,)
 A political subdivision of the State of Utah;)
)
 Defendants.)

CASE NO. CV-02-00072

**PLAINTIFF'S REQUESTED
 INSTRUCTIONS AND SPECIAL
 VERDICT FORM**

COMES NOW, the Plaintiff and hereby submits and requests the court give the jury the following instructions, No. 1- 16.

Plaintiff anticipates and further requests the court give its usual "stock instructions".

RESPECTFULLY SUBMITTED this 20 day of November, 2009.


 CRAIG R. JORGENSEN

INSTRUCTION NO. ____

These instructions explain your duties as jurors and define the law that applies to this case. It is your duty to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. Your decision should be based upon a rational and objective assessment of the evidence. It should not be based on sympathy or prejudice.

It is my duty to instruct you on the points of law necessary to decide the case, and it is your duty to follow the law as I instruct. You must consider these instructions as a whole, not picking out one and disregarding others. The order in which these instructions are given or the manner in which they are numbered has no significance as to the importance of any of them. If you do not understand an instruction, you may send a note to me through the Bailiff, and I will try to clarify or explain the point further.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and any stipulated or admitted facts. While the arguments and remarks of the attorneys may help you understand the evidence and apply the instructions, what they say is not evidence. If an attorney's argument or remark has no basis in the evidence, you should disregard it.

The production of evidence in court is governed by rule of law. At times during the trial, I sustained an objection to a question without permitting the witness to answer it, or to an offered exhibit without receiving it into evidence. My rulings are legal matters, and are solely my responsibility. You must not speculate as to the reason for any objection which was made or my ruling thereon, and in reaching your decision, you may not consider such a question or exhibit or speculate as to what the answer or exhibit would have shown.

Remember, a question is not evidence and should be considered only as it gives meaning to the answer.

There were occasions where an objection was made after an answer was given or the remark was made, and in my ruling on the objection, I instructed that the answer or remark be stricken, or directed that you disregard the answer or remark and dismiss it from your minds. In your deliberations, you must not consider such answer or remark, but must treat it as though you had never heard it.

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom, all of the experience and background of your lives.

There is no magical formula for evaluating testimony. In your everyday affairs, you determine for yourselves whom you believe, what you believe, and how much weight you attach to what you are told. The considerations you use in making the more important decisions in your everyday dealings are the same considerations you should apply in your deliberations in this case.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. _____

When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

Plntf's Jury Instr

INSTRUCTION NO. _____

When I use the words "reckless disregard for the safety of others", I mean that the driver perceives the danger and continues his course of conduct.

IDJ2.20

Athay v. Stacey 142 P.3d 897 at 902

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

Plntf's Jury Instr

INSTRUCTION NO. _____

When I use the word "negligence" in these instructions, I mean the failure to use ordinary care in the management of one's property or person. The words "ordinary care" mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something which a reasonably careful person would do, or the doing of something a reasonably careful person would not do, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

INSTRUCTION NO. ____

The Plaintiff has the burden of proof on each of the following propositions:

1. That the Defendant committed reckless disregard for the safety of others.
2. That the Defendant's reckless disregard was a proximate cause of the Plaintiff's injuries.
3. That the Plaintiff has suffered damages.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the Plaintiff. If you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the Defendant.

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

On the Defendant's claim of comparative negligence against the Plaintiff, the Defendant has the burden of proof on each of the following propositions:

1. That the Plaintiff was negligent.
2. That the Plaintiff's negligence was a proximate cause of Plaintiff's injuries.

You will be asked the following question on the jury verdict form:

Was there negligence on the part of the Plaintiff Kyle Athay , which was a proximate cause of Plaintiff's injuries?

If you find from your consideration of all the evidence that each of these propositions has been proved, then you should answer this question "Yes." If you find from your consideration of all the evidence that any of these propositions has not been proved, then you should answer this question "No."

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. ____

When I use the expression "proximate cause," I mean a cause that, in natural or probable sequence, produced the injury, and/or the loss or the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons or entities contributes concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury.

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

INSTRUCTION NO. ____

By giving you instructions on the subject of damages, I do not express any opinion
as to whether the plaintiff is entitled to damages.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. ____

If the jury decides the Plaintiff is entitled to recover from the Defendant, the jury must determine the amount of money that will reasonably and fairly compensate the Plaintiff for any damages proved to be proximately caused by the Defendant's acts.

The elements of damage the jury may consider are:

A. Non-economic damages

1. The nature of the injuries;
2. The physical and mental pain and suffering, past and future;
3. The impairment of abilities to perform usual activities;
4. The disfigurement caused by the injuries; and
5. The aggravation caused to any preexisting condition.

B. Economic damages

1. The reasonable value of necessary medical care received and expenses incurred as a result of the injury, and the present cash value of medical care and expenses reasonably certain and necessary to be required in the future;
2. The reasonable value of the past earnings lost as a result of the injury;
3. The present cash value of the future earning capacity lost because of the injury, taking into consideration the earning power, age, health, life expectancy, mental and physical abilities, habits, and disposition of the Plaintiff, and any other circumstances shown by the evidence.
4. The reasonable value of necessary services provided by another in doing things for the Plaintiff which, except for the injury, the Plaintiff would ordinarily have performed, and the present cash value of such services reasonably certain to be required in the future;

5. Whether the Plaintiff has proved any of these elements is for the jury to decide.

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

INSTRUCTION NO. _____

One of the questions for you to determine is whether or not Sheriff Dale Stacey was acting within the scope of his authority.

An agent within the scope of his authority is he is engaged in the transaction of business which has been assigned to him by his principal, or if he is doing anything which may reasonably be said to have been contemplated as a part of his employment. It is not necessary that an act or failure to act must have been expressly authorized by Rich County.

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

INSTRUCTION NO. _____

One is the agent of another person at a given time if he is authorized to act for, or in the place of, such other person. The term "agent" includes servants and employees; and the term "principal" includes employers.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. _____

Sheriff Dale Stacey was the agent of Rich County Utah at the time of the transaction described by the evidence. Therefore, any performance done by Sheriff Dale Stacey is the act of Rich County Utah

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

INSTRUCTION NO. _____

The Bailiff is now going to escort you to the premises involved in this case. At the premises, you are not to make any measurements, perform any tests, or conduct any demonstrations. The view is not to be considered as evidence in this case, but is provided only to help you understand the evidence.

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

INSTRUCTION NO. _____

You were taken out to view the premises involved in this case. What you observed there is not to be considered evidence. You should consider your view of the premises only as a means of understanding and applying the evidence produced here in trial.

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

Plntff's Jury Instr

INSTRUCTION NO. ____

In this case, you will be given a Special Verdict Form to use in returning your verdict. This form consists of a series of questions that you are to answer. I will read the verdict form to you now.

“We, the Jury, answer the questions submitted to us in the Special Verdict as follows:

“QUESTION NO. 1. Was there reckless disregard for the safety of others on the part of the Defendant Sheriff Dale Stacey, which was the proximate cause of the accident”?

Answer: ____ Yes ____ No.

If you answered the above question “Yes”, then please answer Questions No. 2 and 3. If you answered the above question “No”, then simply sign the verdict form and inform the Bailiff that you are done.

The verdict form continues.

“QUESTION NO. 2. Was there negligence on the part of the Daryl Ervin which was the proximate cause of the accident”?

“QUESTION NO. 2. Was there negligence on the part of the Plaintiff Kyle Athay which was the proximate cause of the accident”?

Answer: ____ Yes ____ No.

If you answered “No” to Questions No. 2 and 3, then you will not answer Question No. 4, but will next answer Question No. 5.

If you answered “Yes” to both prior questions, then answer Question No. 4.

QUESTION NO. 4: We find that the parties contributed to the cause of the accident in the following percentages:

Plntf's Jury Instr

- (a) The Plaintiff Kyle Athay _____%
 - (b) The Defendant Dale Stacey _____%
 - (c) Daryl J. Ervin _____%
- TOTAL 100%

The verdict form itself guides you from this point. It says:

“If the percentage of negligence for the Plaintiff is 50% or more, then you will not answer any further questions, but will sign the verdict”.

“If the percentage of negligence for the Plaintiff is less than 50%, you will answer Question No. 4”.

QUESTION NO. 4 is your determination of the total amount of damages sustained by the Plaintiff. This question asks you:

“QUESTION NO. 4: What is the total amount of damages sustained by the Plaintiff Kyle Athay as a result of the accident”? Answer: \$ _____

You should include in your answer to Question No. 4 the total amount of all monetary damages which you find from the evidence was sustained by the Plaintiff.

Finally, you should sign the verdict form as explained in another instruction.

GIVEN _____
 REFUSED _____
 MODIFIED _____
 COVERED _____
 OTHER _____

INSTRUCTION NO. ____

On retiring to the jury room, select one of your number as a Foreman, who will preside over your deliberations.

Appropriate forms of verdict will be submitted to you with any instructions. Use only the ones conforming to your conclusions and return the others unused.

A verdict may be reached by three-fourths of your number, or nine of you. If your verdict is unanimous, your Foreman alone will sign it; but if nine or more, but less than the entire jury agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdict, you will notify the Bailiff, who will then return you into open court.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

Plntf's Jury Inst

**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BEAR LAKE**

KYLE ATHAY,)	
)	
Plaintiff,)	CASE NO. CV-02-00072
)	
vs.)	
)	
RICH COUNTY, UTAH,)	SPECIAL VERDICT
A political subdivision of the State of Utah;)	
)	
Defendants.)	

WE THE JURY, answer the questions submitted to us in the special verdict as follows:

“QUESTION NO. 1: Did the Defendant Sheriff Dale Stacey commit reckless disregard of the rights of others, which was a proximate cause of the accident?”

Answer: Yes _____ No _____.

If you answered question 1 “Yes,” then please answer Questions No. 2 and 3. If you answered questions 1 “No” then simply sign the verdict form and inform the Bailiff that you are done.

If you answered Question No. 1 “Yes”, please answer Question 2 and 3. If you answered the above question “No”, then simply sign the verdict form and inform the Baillif that you are done.

“QUESTION NO. 2: Was there comparative responsibility on the part of Daryl Ervin which was a proximate cause of the accident?”

Answer: Yes _____ No _____.

“QUESTION NO.3: Was there comparative responsibility on the part of Kyle Athay which was a proximate cause of the accident?” Answer: Yes _____ No _____.

If you answered “No” to Questions 2 and 3, then you will not answer Question No. 4, but will answer Question No. 5.

If you answered “Yes” to both prior Questions, then answer Question No. 4.

You are now to compare the responsibility of the parties. Insert in the answer to Question No. 4, the percentage of comparative responsibility you find attributable to each party. Your percentages must total 100%.

“QUESTION NO.4: We find that the parties contributed to the cause of the accident in the following percentages:

- | | | |
|-----|---------------------------|--------|
| (a) | The Defendant Dale Stacey | _____% |
| (b) | Daryl J. Ervin | _____% |
| (d) | The Plaintiff Kyle Athay | _____% |
| | TOTAL | 100% |

The verdict form itself guides you from this point. It says:

“If the percentage of comparative responsibility for the Plaintiff is 50% or more, then you will not answer any further questions, but will sign the verdict.”

“If the percentage of comparative responsibility for the Plaintiff is less than 50% you will answer Question No. 5.

Question No 5 is your determination of the total amount of damages sustained by the Plaintiff. This question asks you:

“QUESTION NO. 5: What is the total amount of damages sustained by the Plaintiff Kyle Athay as a result of the accident?” Answer: \$ _____.

You should include in your answer to Question No. 5 the total amount of all monetary damages which you find from the evidence, was sustained by the Plaintiff.

Finally, you should sign the verdict form as explained in another instruction.

DATED this _____ day of December, 2009

FOREMAN

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Idaho Falls, ID 83403-
Telephone: (208) 528-6444
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Attorneys for Defendant

DISTRICT COURT
SIXTH JUDICIAL DISTRICT
BEAR LAKE COUNTY, IDAHO

2010 JUN 29 PM 4:51

KERRY HADDOCK, CLERK

DEPUTY _____ CASE NO.

**IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF BEAR LAKE**

<p>KYLE ATHAY, Plaintiff, v. RICH COUNTY, UTAH, Defendant.</p>	<p>Case No. CV-02-00072 DEFENDANT'S PROPOSED JURY INSTRUCTIONS AND SPECIAL VERDICT FORM</p>
--	---

Defendant Rich County, Utah, by and through undersigned counsel, hereby submits its proposed jury instructions pursuant to I.R.C.P. 51. Further, the Defendant requests leave to offer

Def's Jury Instr

such other and additional instructions as may, during the course of the trial, become appropriate. Defendant also requests that the Court submit the case to the jury on the attached special verdict form. *See* Attachment "A."

A. Defendant requests that the Court give stock instructions on the following subjects and principles of law:

1. verdict/jury's responsibility;
2. province of the Court;
3. province of the jury;
4. statements and arguments of counsel are not evidence;
5. objections by counsel not to influence the jury;
6. review of evidence confined to evidence received in the courtroom;
7. direct and circumstantial evidence;
8. weight of the evidence;
9. jury's recollection controls;
10. credibility of witnesses;
11. impeachment;
12. reaching a verdict;
13. selecting a foreman; and,
14. communications with the Court.

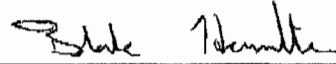
B. In addition to the above, Defendant requests that the following instructions also be given by the Court. One original and one copy of Defendant's proposed instructions have

Def's Jury Instr

been attached hereto. Pursuant to I.R.C.P. 51(a)(1), the originals contain a blank space for numbering. See Attachment "B." The duplicates are numbered and contain citations. See Attachment "C."

DATED this 29 day of June, 2010.

STIRBA & ASSOCIATES

By: 
R. BLAKE HAMILTON
PETER STIRBA
Attorneys for Defendant

Def's Jury Instr

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2010 I caused to be served a true copy of the foregoing **DEFENDANT'S PROPOSED JURY INSTRUCTIONS AND SPECIAL VERDICT FORM** by the method indicated below, to the following:

Craig R. Jorgensen, Esq.
Attorney at Law
1246 Yellowstone Avenue, Suite A4
P.O. Box 4904
Pocatello, ID 83205-4904
Attorney for Plaintiffs


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- Hand Delivered
- Overnight Mail
- Facsimile

Alan Johnston
E. W. PIKE & ASSOCIATES, P.A.
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P.O. Box 2949
Idaho Falls, ID 83403-2949
Attorney for Defendants

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Honorable Mitchell W. Brown
District Judge – Resident Chambers
P.O. Box 775
Soda Springs, Idaho 83276

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile



Def's Jury Instr

Exhibit "A"

JURY INSTRUCTION NO. _____

Plaintiff Kyle Athay claims that Rich County, Utah, is liable for the damages the Plaintiff allegedly suffered as a result of a vehicle collision between Kyle Athay and Daryl Ervin on June 10, 1999, while Mr. Ervin was being pursued by Sheriff Stacey and Bear Lake County Deputies Gregg Athay and Chad Ludwig.

In defense, Rich County claims it is not liable because Sheriff Stacey acted with the appropriate level of care during the relevant incident and because Sheriff Stacey's conduct was not a proximate cause of Plaintiff's alleged damages. Defendant further claims that the incident was caused solely or partially by the negligence of Daryl Ervin, Gregg Athay, Chad Ludwig, Bear Lake County, Kyle Athay, and Wyoming Downs.

Additionally, Rich County claims that if Sheriff Stacey's conduct is found to be reckless, this conduct falls outside the scope of Stacey's employment with Rich County and thus Rich County cannot be held liable for any injuries proximately caused by Stacey's recklessness.

This instruction is not intended to be a statement of facts nor what the evidence in this case has shown, but rather it is merely a summary by the Court of the respective claims made by the parties in this case.

Def's Jury Instr

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AND ASSOCIATES

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Clerk of the Court
Bear Lake County Courthouse

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Honorable Mitchell W. Brown
Resident Chambers

(208) 547-4759

Craig R. Jorgensen
Attorney at Law

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Alan Johnston
E.W. Pike & Associates

(208) 528-6447

From:

R. Blake Hamilton
Stirba & Associates

Subject:

Athay v. Rich County – Case No. CV-02-00072

Date:

June 29, 2010

No. of Pages:

46 including cover sheet

COMMENTS:

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Def's Jury Instr

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JURY INSTRUCTION NO. _____

The burden of proof is upon a party making a claim to establish its claim by a preponderance of the evidence.

By "burden of proof" it is meant the obligation resting on the party or parties who assert a proposition to establish the same by a preponderance of the evidence presented in this case, regardless of which party may have produced such evidence.

By "preponderance of the evidence" is meant that evidence which is most convincing and satisfying in the controversy between the parties, regardless of which party may have produced such evidence. It means the greater weight of the evidence, or that the evidence has a greater probability of truth when compared to the evidence opposed to it.

JURY INSTRUCTION NO. _____

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience, has become an expert in an art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case you should consider such expert opinion and should weight the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

JURY INSTRUCTION NO. _____

It is your duty to hear and determine this case the same as if it were between individuals. The fact that the Plaintiff is an individual and the Defendant is a county in the State of Utah should make no difference whatsoever to you. You should return a true and just verdict according to the facts and the law as I give it to you, without reference to the county or individual character of any party.

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JURY INSTRUCTION NO. _____

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional caution and skill are to be admired and encouraged, the law does not demand them as a general standard of conduct.

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JURY INSTRUCTION NO. _____

Negligence is the failure to do what a reasonable and prudent person would have done under the circumstances, or doing what such person under such circumstances would not have done. The fault may lie in acting or in omitting to act.

Def's Jury Instr

JURY INSTRUCTION NO. _____

A person acts "recklessly" or with "reckless disregard" if the person's conduct creates an unreasonable risk of bodily harm, and the person actually perceives the high degree of probability that harm will result and continues in his course of conduct.

Actual knowledge of the high degree of probability that harm will result does not require knowledge of the actual person or persons at risk, or the exact manner in which they would be harmed. It only requires knowledge of the high degree of probability of the kind of harm that the injured party suffered.

JURY INSTRUCTION NO. _____

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the complained injury, loss or damage, and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons contributes concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury.

JURY INSTRUCTION NO. _____

In order to recover on his claim against Defendant, the Plaintiff must establish the following elements in order to recover:

First: That Sheriff Stacey acted with reckless disregard toward the safety of others,

Second: That Sheriff Stacey's recklessness was a proximate cause of injury and damage to Plaintiff, and

Third: That Sheriff Stacey's conduct is imputable to Rich County.

If you find that the Plaintiff has established each of the following by a preponderance of the evidence, your verdict will be for the Plaintiff. Otherwise, your verdict will be for the Defendant.

JURY INSTRUCTION NO. _____

The Defendant claims that Daryl Ervin, was negligent and that his negligence solely or partially proximately cause the accident and Plaintiff's injuries. Defendant claims Daryl Ervin was negligent in that he failed to use due care in:

- (a) Driving when he knew or should have known he was intoxicated; and/or
- (b) Fleeing a Police Officer; and/or;
- (c) Keeping his vehicle under reasonably safe and proper control; and/or
- (d) Failing to drive at such a speed as was safe, reasonable and prudent under

the circumstances, having due regard to the width, surface, curvature and condition of the highway, the traffic thereon, the visibility, and any actual or potential hazards then existing.

JURY INSTRUCTION NO. _____

In this case the law requires that you determine whether the negligence of any other party contributed to the accident as a proximate cause. Bear Lake County Deputies Gregg Athay and Chad Ludwig, the other officers involved in the pursuit, Kyle Athay, and/or the Wyoming Downs are all parties whose conduct may have contributed to the accident.

You will address the issue of the possible negligence of each of the above parties as you answer the special verdict form.

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JURY INSTRUCTION NO. _____

The statutes of the State of Idaho state that the driver of a police vehicle, when in the pursuit of an actual or suspected violator of the law, may (a) proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation, (b) exceed the maximum speed limits so long as he does not endanger life or property, and (c) disregard regulations governing direction of movement or turning in specified directions.

JURY INSTRUCTION NO. _____

A violation of a statute is negligence, unless (1) compliance with the statute was impossible, or (2) something over which the party had no control placed him in a position of violation of the statute, or (3) an emergency not of the party's own making caused him to fail to obey the statute or an excuse specifically provided for within the statute existed

JURY INSTRUCTION NO. _____

In the State of Idaho it is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances to drive or be in actual physical control of a motor vehicle within this state. The evidence in this case is that Daryl Ervin had a blood alcohol level of .13 or .11, which is above the legal limit.

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JURY INSTRUCTION NO. _____

It is a felony in the State of Idaho for the driver of a motor vehicle to willfully flee or attempt to elude a pursuing police vehicle when given a visual or audible signal to bring the vehicle to a stop.

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JURY INSTRUCTION NO. _____

The statutes of the State of Idaho state that every person shall drive at a safe and appropriate speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hillcrest, when traveling upon any narrow or winding highway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

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JURY INSTRUCTION NO. _____

The statutes of the State of Idaho state that no person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with the law.

Def's Jury Instr

JURY INSTRUCTION NO. _____

The statutes of the State of Idaho state that a vehicle shall be driven upon the right half of the roadway.

JURY INSTRUCTION NO. _____

The statutes of the State of Idaho state that upon the immediate approach of an authorized emergency or police vehicle making use of an audible or visible signal, the driver of every other vehicle must yield the right-of-way and immediately drive to a position parallel to, and as close as possible to, the nearest edge or curb of the highway lawful for parking and clear of any intersection, and stop and remain in that position until the authorized emergency or police vehicle has passed, except when otherwise directed by a peace officer.

Def's Jury Instr

JURY INSTRUCTION NO. _____

The statutes of the State of Idaho state that every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian or any person propelling a human-powered vehicle and shall give an audible signal when necessary. Every driver shall exercise proper precaution upon observing any child or any obviously confused, incapacitated or intoxicated person.

JURY INSTRUCTION NO. _____

The statutes of Idaho state that the primary responsibility of the county sheriff to enforce all penal provisions of any and all statutes of the state of Idaho. In order to carry out this duty to preserve the peace, the county sheriff is required to prevent and suppress all breaches of the peace which may come to his knowledge and arrest all persons who attempt to commit or who have committed a public offense.

JURY INSTRUCTION NO. _____

An agency relationship exists where one, called the "principal," has authorized another, called the "agent," to act on behalf of the principal. Agency requires the consent of the principal, which may be express or implied. The term "principal" includes employers and the term "agent" includes employees.

JURY INSTRUCTION NO. _____

The principal is responsible for the acts of its agent that are within the agent's scope of authority.

JURY INSTRUCTION NO. _____

Conduct is within the scope of the agent's authority if it occurs while the agent is engaged in the duties that the agent was asked or expected to perform and relates to those duties. It is not necessary that a particular act or failure to act be expressly authorized by the principal to bring it within the scope of the agent's authority. Conduct for the benefit of the principal that is customarily connected with, or reasonably necessary for the performance of such duties is within the scope of the agent's authority.

JURY INSTRUCTION NO. _____

I will now instruct you concerning the Plaintiff's claims of damages. The fact that I give you instructions regarding damages does not mean that I believe the Plaintiff is entitled to recover any damages in this case. Instructions about damages are given to you merely as a guide in the event you find from a preponderance of the evidence that the Plaintiff is entitled to recover. If you find the issues in favor of the Defendant, you shall disregard my instructions about damages.

JURY INSTRUCTION NO. _____

If you find the issues in favor of the Plaintiff and against the Defendant, it will be your duty to award the Plaintiff such damages, if any, as you may find from a preponderance of the evidence will fairly and adequately compensate Plaintiff for any injury and damage he has sustained as a proximate result of the Defendant's negligence complained of by Plaintiff.

JURY INSTRUCTION NO. _____

If you should find that Plaintiff is entitled to a verdict, in arriving at the amount of the award you should include:

- (a) Any reasonable and necessary expense to the Plaintiff for medical, surgical, hospital and other services, care and supplies which you find by a preponderance of the evidence has already been incurred as a result of the accident or which you find by a preponderance of evidence will be required to be expended in future treatment of the Plaintiff as a result of the accident in question; and,
- (b) The reasonable value of the time, if any, shown by the evidence in the case to have been necessarily been lost up to date by Plaintiff since the injury because of being unable to pursue his occupation as a result of the injury. In determining this amount, you should consider any evidence of Plaintiff's earning capacity, his earnings, the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned during the time so lost had Plaintiff not been disabled; and,
- (c) Also, such sum as will reasonably compensate Plaintiff for any loss of future earning power caused by the injury in question which you find from the evidence in the case that Plaintiff will probably suffer in the future. In determining this amount, you should consider what Plaintiff's health, physical ability and earning power were before the accident and what they are now; the nature and extent of Plaintiff's injuries,

whether or not they probably will be permanent; or, if not permanent, the extent of their duration; all to the end of determining, first, the effect, if any, of Plaintiff's injury upon his future earning capacity; and, second, the present value of any loss of future earning power which you find from the evidence in the case that Plaintiff will probably suffer in the future as a result of the injury in questions; and,

(d) Such sum as will compensate Plaintiff reasonably for any pain, suffering and mental anguish already suffered by him and resulting from the injury in question and for any pain, suffering and mental anguish which you find from the evidence in the case that Plaintiff will probably suffer in the future from the same cause.

JURY INSTRUCTION NO. _____

You are the sole judges of the amount of damages, if any, sustained by Plaintiff. You are not bound to accept any opinion offered by any expert witness on the issue of damages, nor are you required to accept any method, reason or theory on which any expert relies. There is no precisely accurate method by which to calculate the damages claimed by Plaintiff. If you find by a preponderance of the evidence that the Plaintiff has incurred some damage, you are not bound to employ any particular method in determining the amount of damage, but you may use your own sense, judgment and experience in determining what is reasonable and fair.

JURY INSTRUCTION NO. _____

Damages must be reasonable. If you should find that the Plaintiff is entitled to a verdict, you may award only such damage as will reasonably compensation Plaintiff for such injury and damage as you may find from a preponderance of the evidence that Plaintiff has sustained.

You are not permitted to award any damages that are speculative. If you decide to award any damages, you can award only such damages as you may find the Plaintiff has proved by a preponderance of the evidence. Damages that are possible, but not probable, are speculative and cannot be awarded.

JURY INSTRUCTION NO. _____

A person who has a condition, pain, or disability at the time of an injury is not entitled to recover damages therefore. However, he is entitled to recover damages for any aggravation of such preexisting condition, pain, or disability proximately resulting from the injury.

If you find that before this occurrence the Plaintiff had a preexisting bodily condition which was causing pain or disability, and further find that because of this occurrence the condition or the pain or the disability was aggravated, then if your verdict is in favor of the Plaintiff you should consider the aggravation of the condition or the pain or the disability proximately due to such aggravation, but you should not consider any condition, pain, or disability which may have existed prior to the occurrence, or from which the Plaintiff may now be suffering which was not caused or contributed to by reason of this occurrence.

You are to apportion, if possible, between the condition, pain or disability prior to this occurrence, and the condition, pain or disability caused by this occurrence, and assess liability accordingly. If no apportionment can reasonably be made by you, then the Defendant is liable for the entire damage.

JURY INSTRUCTION NO. _____

If you should find that the Plaintiff is entitled to recover any damages for any loss of income or for any expenditure of medical expenses that will not occur until some time in the future, you must reduce any such damages to their present value. You calculate the present value on the assumption that any money you might award, except the amount currently needed, will be invested so as to yield the highest interest or return that is available with reasonable security.

JURY INSTRUCTION NO. _____

With regard to diminished future income, the Plaintiff has a duty to minimize his damages by making reasonable efforts to seek employment in any work that he is capable of performing and by earning as much as he can. If you find that the Plaintiff is entitled to be compensated for loss of future income, then you must reduce his damages by all sums the Plaintiff could reasonably be expected to earn from the employment, which Plaintiff is required to pursue in mitigation of his loss.

JURY INSTRUCTION NO. _____

The standard table of mortality which the Court has judicially noticed and received in evidence, in this case may be considered by you in determining how long the Plaintiff may live. According to the table of mortality, the life expectancy in this country for a male person 26 years of age is 77.

Life expectancy, as shown by a mortality table, is merely an estimate of the probable average remaining length of life of all persons in the United States of a given age and sex, and that estimate is based upon a limited record of experience. So, the inference which may reasonably be drawn from life expectancy, as shown by the table, applies only to one who has the average health and exposure to danger of people of that age and sex.

In determining the reasonably certain life expectancy of the Plaintiff, you should consider, in addition to what is shown by the table of mortality, all other facts and circumstances in evidence in the case bearing upon the life expectancy of the Plaintiff, including his occupation, habits, past health record and present state of health.

When considering life expectancy, in determining any reasonable certain future damage, you will bear in mind, of course, the distinction between entire-life expectancy and work-life expectancy.

Those elements of damages that are related to future income should be measured only by the Plaintiff's remaining work-life expectancy, not his entire life expectancy.

JURY INSTRUCTION NO. _____

It is your duty, as jurors, to consult with one another and to deliberate with a view of reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But, do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case,

Exhibit "B"

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF BEAR LAKE

<p>KYLE ATHAY, Plaintiff, v. RICH COUNTY, UTAH, Defendant.</p>	<p>Case No. CV-02-00072 SPECIAL VERDICT</p>
---	---

We, the jury, answer the questions submitted to us in the special verdict as follows:

QUESTION NO. 1. Did Plaintiff establish by a preponderance of evidence that Sheriff Stacey acted with *reckless disregard* while pursuing the intoxicated motorist, Daryl Ervin?

ANSWER: Yes _____ No _____

QUESTION NO. 2. If Sheriff Stacey acted with reckless disregard, was his recklessness a proximate cause of the Plaintiff's accident?

ANSWER: Yes _____ No _____

QUESTION NO. 3. If Sheriff Stacey acted with reckless disregard, was his reckless conduct established by a preponderance of evidence to be within the scope of his employment with Rich County and, therefore, attributable to Rich County?

Def's Jury Instr

ANSWER: Yes _____ No _____

If you have answered each of the Questions Nos. 1, 2 and 3 "Yes," then please answer the following questions. If you have answered any of the Questions Nos. 1, 2 and 3 "No," you will not answer the remaining questions, but will simply sign the verdict.

QUESTION NO. 4. Was the intoxicated motorist, Daryl Ervin, **negligent** and was his **negligence** a proximate cause of the Plaintiff's accident?

ANSWER: Yes _____ No _____

QUESTION NO. 5. Was there **negligence** on the part of Gregg Athay that was a proximate cause of the Plaintiff's accident?

ANSWER: Yes _____ No _____

QUESTION NO. 6. Was there **negligence** on the part of Chad Ludwig that was a proximate cause of the Plaintiff's accident?

ANSWER: Yes _____ No _____

QUESTION NO. 7. Was there **negligence** on the part of the Bear Lake County that was a proximate cause of the Plaintiff's accident?

ANSWER: Yes _____ No _____

QUESTION NO. 8. Was there **negligence** on the part of the Plaintiff, Kyle Athay that was a proximate cause of the Plaintiff's accident?

ANSWER: Yes _____ No _____

SPECIAL VERDICT

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Def's Jury Instr

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QUESTION NO. 9. Was there *negligence* on the part of the Wyoming Downs that was a proximate cause of the Plaintiff's accident?

ANSWER: Yes _____ No _____

If you answered "No" to Questions Nos. 4, 5, 6, 7, 8 *and* 9, you should not answer Question No.10, but will next answer Question No. 11.

If you answered "No" to any of the preceding questions, then insert a zero (0) in the answer to the appropriate line in Question No. 11. If you answered any of the preceding questions "Yes," insert in the appropriate line in the answer to Question No. 11 the percentage of causation you find attributable to that party.

QUESTION NO. 10. We find the parties contributed to the cause of the Plaintiff's injuries in the following percentages:

- (a) Rich County _____%
- (b) Daryl Ervin _____%
- (c) Gregg Athay _____%
- (d) Chad Ludwig _____%
- (e) Bear Lake County _____%
- (f) Kyle Athay _____%
- (g) Wyoming Downs _____%

TOTAL 100 %

SPECIAL VERDICT

Def's Jury Instr

QUESTION NO. 11. What is the total amount of damages sustained by Kyle Athay as a result of the accident?

ANSWER: \$ _____

Dated this ____ day of July, 2010

FOREPERSON

SPECIAL VERDICT

4

Def's Jury Instr

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DISTRICT COURT
SIXTH JUDICIAL COURT
BEAR LAKE COUNTY IDAHO
July 8, 2010

DATE

TIME
CLERK

DEPUTY

CASE NO.

ALAN JOHNSTON (Idaho Bar No. 7709)
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Attorneys for Defendant

**IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF BEAR LAKE**

KYLE ATHAY,	Case No. CV-02-00072
Plaintiff,	DEFENDANT'S PROPOSED SUPPLEMENTAL JURY INSTRUCTIONS AND SPECIAL VERDICT FORM
v. RICH COUNTY, UTAH,	
Defendant.	

Defendant Rich County, Utah, by and through undersigned counsel, hereby submits its proposed supplemental jury instructions pursuant to I.R.C.P. 51. One original and one copy of

Defendant's proposed instructions have been attached hereto. Pursuant to I.R.C.P. 51(a)(1), the originals contain a blank space for numbering. See Attachment "A." The duplicates are numbered and contain citations. See Attachment "B."

DATED this 8 day of July, 2010.

STIRBA & ASSOCIATES

By:



R. BLAKE HAMILTON

PETER STIRBA

Attorneys for Defendant

Def's Suppl Jury Instr 142

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of July, 2010 I caused to be served a true copy of the foregoing **DEFENDANT'S PROPOSED SUPPLEMENTAL JURY INSTRUCTIONS AND SPECIAL VERDICT** by the method indicated below, to the following:

Craig R. Jorgensen, Esq.
Attorney at Law
1246 Yellowstone Avenue, Suite A4
P.O. Box 4904
Pocatello, ID 83205-4904
Attorney for Plaintiffs

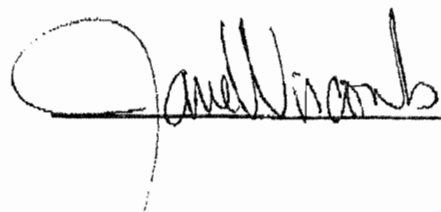
- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Alan Johnston
E. W. PIKE & ASSOCIATES, P.A.
151 North Ridge Ave., Suite 210
P.O. Box 2949
Idaho Falls, ID 83403-2949
Attorney for Defendants

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Honorable Mitchell W. Brown
District Judge - Resident Chambers
P.O. Box 775
Soda Springs, Idaho 83276

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile



Def's Suppl Jury Instr

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JURY INSTRUCTION NO. _____

The law of this case is that Mr. Daryl John Ervin, Jr., pled guilty to the felony crimes of eluding a police officer and aggravated driving under the influence of alcohol.

Under Idaho law, I.C. § 49-1404, a person is guilty of eluding a police officer if the driver of a motor vehicle willfully flees or attempts to elude a pursuing police vehicle when given a visual or audible signal to bring the vehicle to a stop, and while so doing: (a) travels in excess of thirty (30) miles per hour above the posted speed limit; (b) causes damage to the property of another or bodily injury to another; (c) drives his vehicle in a manner as to endanger or likely to endanger the property of another or the person of another; or (d) leaves the state.

Under Idaho law, I.C. § 18-8006, a person is guilty of aggravated driving under the influence of alcohol if a person, while under the influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol, drugs and/or any other intoxicating substances, or who has an alcohol concentration of 0.08 or more, as shown by analysis of his blood, urine or breath, drives or is in actual physical control of a motor vehicle within this State, whether upon a highway, street or bridge, or upon public or private property open to the public and causes great bodily harm, permanent disability or permanent disfigurement to any person other than himself.

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JURY INSTRUCTION NO. _____

The law of this case is that the Idaho Supreme Court had determined that the actions of Bear Lake County Officers Greg Athay and Chad Ludwig during the pursuit of Mr. Daryl John Ervin, Jr. did not, as a matter of law, amount to reckless disregard.

Def's Suppl Jury Instr

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Instruction for Question No. 5: You will reach this question if you have found that the Sheriff Dale Stacey acted with reckless disregard and either or both Kyle Athay and Daryl Ervin were negligent, which reckless disregard and negligence caused the injuries to Kyle Athay. In this question, you are to apportion the fault between these parties in terms of a percentage. As to each party or entity to which you answered "Yes" to questions 2, 3, and 4, determine the percentage of fault for that party or entity, and enter the percentage on the appropriate line. If you answered "No" to any of the above questions, insert a "0" or "Zero" as to that party or entity. Your total percentages must equal 100%.

Question No. 5: What is the percentage of fault (if any) you assign to each of the following:

Sheriff Dale Stacey, agent of Rich County,	<u>30</u> %
Kyle Athay	<u>0</u> %
Daryl Ervin	<u>70</u> %

Total must equal 100%

If the percentage of fault you assigned to the Kyle Athay is equal to or greater than the percentage of fault you assigned to the Rich County, Utah, you are done. Sign the verdict and advise the Bailiff. If the percentage of fault assigned to Kyle Athay is less than the percentage of fault you assigned to Sheriff Dale Stacey, agent of Rich County, answer the next question.

Question No. 6: What is the total amount of damage sustained by the Kyle Athay as a result of the accident?

Answer to Question No. 6: We assess Kyle Athay's damages as follows:

1. Economic damages, as defined in the Instructions:
\$ 2,720,126
2. Non-economic damages, as defined in the Instructions:
\$ 1,000,000

Special Verdict Form

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DATED this 26th day of July, 2010.

Paul E. Allen

Foreperson

Robert B. ...

Juror

...

Juror

...

Juror

Ann Hysell

Juror

Amy Burns

Juror

Elyse ...

Juror

...

Juror

Jacquelyn ...

Juror

Juror

Juror

Juror

INSTRUCTION NO. 1

Your duties are to determine the facts, to apply the law set forth in my instructions to those facts, and in this way to decide of your own opinion of what the law is or should be, or what either side may state the law to be. You must consider them as a whole, not picking out one and disregarding others. The order in which the instructions are given has no significance as to their relative importance. The law requires that your decision be made solely upon the evidence before you. Neither sympathy nor prejudice should influence you in your deliberations. Faithful performance by you of these duties is vital the administration of justice.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts. The production of evidence in Court is governed by rules of law. At times during the trial, an objection may be made to a question asked a witness, or to a witness' answer, or to an exhibit. This simply means that I am being asked to decide a particular rule of law. Arguments on the admissibility of evidence are designed to aid the Court and are not to be considered by you nor affect your deliberations. If I sustain an objection to a question or to an exhibit, the witness may not answer the question or the exhibit may not be considered. Do not attempt to guess what the answer might have been or what the exhibit might have shown. Similarly, if I tell you not to consider a particular statement or exhibit you should put it out of your mind, and not refer to it or rely on it in your later deliberations.

During the trial I may have to talk with the parties about the rules of law which should apply in this case. Sometimes we will talk here at the bench. At other times I will excuse you from the courtroom so that you can be comfortable while we work out any

problems. You are not to speculate about any such discussions. They are necessary from time to time and help the trial run more smoothly.

Some of you have probably heard the terms "circumstantial evidence," "direct evidence" and "hearsay evidence." Do not be concerned with these terms. You are to consider all the evidence admitted in this trial.

However, the law does not require you to believe all the evidence. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it.

There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves whom you believe, what you believe, and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

In deciding what you believe, do not make your decision simply because more witnesses may have testified one way than the other. Your role is to think about the testimony of each witness you heard and decide how much you believe of what the witness had to say.

A witness who has special knowledge in a particular matter may give an opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for the opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

INSTRUCTION NO. 2

If during the trial I may say or do anything which suggests to you that I am inclined to favor the claims or position of any party, you will not permit yourself to be influenced by any such suggestion. I will not express nor intend to express, nor will I intend to intimate, any opinion as to which witnesses are or not worthy of belief, what facts are or are not established; or what inferences should be drawn from the evidence. If any expression of mine seems to indicate an opinion relating to any of these matters, I instruct you to disregard it.

INSTRUCTION NO. 3

There are certain things you must not do during this trial:

1. You must not associate in any way with the parties, any of the attorneys or their employees, or any of the witnesses.
2. You must not discuss the case with anyone, or permit anyone to discuss the case with you. If anyone attempts to discuss the cause with you, or to influence your decision in the case, you must report it to me promptly.
3. You must not discuss the case with other jurors until you retire to the jury room to deliberate in the close of the entire case.
4. You must not make up your mind until you have heard all of the testimony and have received my instructions as to the law that applies to the case.
5. You must not contact anyone in an attempt to discuss or gain a greater understanding of the case.
6. You must not go to the place where any alleged even occurred.

INSTRUCTION NO. 4

During your deliberations, you will be entitled to have with you my instructions concerning the law that applies to this case, the exhibits that have been admitted into evidence and any notes taken by you in the course of the trial proceedings.

If you take notes during the trial, be careful that your attention is not thereby diverted from the witness or his testimony; and you must keep your notes to yourself and not show them to other persons or jurors until the jury deliberations at the end of the trial.

INSTRUCTION NO. 5

Any statement by me identifying a claim of a party is not evidence in this case. I have advised you of the claims of the parties merely to acquaint you with the issues to be decided.

INSTRUCTION NO 6

In this case the Plaintiff, Kyle Athay, claims that these are the facts: That on June 10, 1999, Dale Stacey, Sheriff of Rich County, Utah, began pursuing Daryl Ervin near Randolph, Utah and continued to pursue him until Ervin collided with the Plaintiff, seriously injuring him. Thus, the Plaintiff seeks recovery for his damages.

Jury Instr

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INSTRUCTION NO. 7

Plaintiff Kyle Athay claims that Rich County, Utah, is liable for the damages the Plaintiff allegedly suffered as a result of a vehicle collision between Kyle Athay and Daryl Ervin on June 10, 1999, while Mr. Ervin was being pursued by Sheriff Stacey and Bear Lake County Deputies Gregg Athay and Chad Ludwig.

In defense, Rich County claims it is not liable because Sheriff Stacey acted with the appropriate level of care during the relevant incident and because Sheriff Stacey's conduct was not a proximate cause of Plaintiff's alleged damages. Defendant further claims that the incident was caused solely or partially by the recklessness of Daryl Ervin, and may have been caused by the negligence of others.

Additionally, Rich County claims that if Sheriff Stacey's conduct is found to be reckless, this conduct falls outside the scope of Stacey's employment with Rich County and thus Rich County cannot be held liable for any injuries proximately caused by Stacey's recklessness.

This instruction is not intended to be a statement of facts nor what the evidence in this case has shown, but rather it is merely a summary by the Court of the respective claims made by the parties in this case.

Jury Instr

INSTRUCTION NO. 8

I have previously instructed you that this accident occurred on June 10, 1999. The date of the accident and the length of time that has elapsed since it occurred is not something for you to speculate about or to concern yourself with as you hear the evidence and deliberate. All civil cases take time to get to trial and you are not to attach any significance to the fact that this case is now going to trial and the event in question occurred in 1999.

Jury Instr

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INSTRUCTION NO. 1

These instructions explain your duties as jurors and define the law that applies to this case. It is your duty to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. Your decision should be based upon a rational and objective assessment of the evidence. It should not be based on sympathy or prejudice.

It is my duty to instruct you on the points of law necessary to decide the case, and it is your duty to follow the law as I instruct. You must consider these instructions as a whole, not picking out one and disregarding others. The order in which these instructions are given or the manner in which they are numbered has no significance as to the importance of any of them. If you do not understand an instruction, you may send a note to me through the bailiff, and I will try to clarify or explain the point further.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and any stipulated or admitted facts. While the arguments and remarks of the attorneys may help you understand the evidence and apply the instructions, what they say is not evidence. If an attorney's argument or remark has no basis in the evidence, you should disregard it.

The production of evidence in court is governed by rule of law. At times during the trial, I sustained an objection to a question without permitting the witness to answer it, or to an offered exhibit without receiving it into evidence. My rulings are legal matters, and are solely my responsibility. You must not speculate as to the reason for any objection, which was made, or my ruling thereon, and in reaching your decision you may not consider such a question or exhibit or speculate as to what the answer or exhibit would have shown.

Remember, a question is not evidence and should be considered only as it gives meaning to the answer.

There were occasions where an objection was made after an answer was given or the remark was made, and in my ruling on the objection I instructed that the answer or remark be stricken, or directed that you disregard the answer or remark and dismiss it from your minds. In your deliberations, you must not consider such answer or remark, but must treat it as though you had never heard it.

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. There is no magical formula for evaluating testimony. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The considerations you use in making the more important decisions in your everyday dealings are the same considerations you should apply in your deliberations in this case.

INSTRUCTION NO. 2

During your deliberations, you will be entitled to have with you my instructions concerning the law that applies to this case, the exhibits that have been admitted into evidence and any notes taken by you in the course of the trial proceedings.

If you take notes during the trial, be careful that your attention is not thereby diverted from the witness or his testimony; and you must keep your notes to yourself and not show them to other persons or jurors until the jury deliberations at the end of the trial.

Jury Instr

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INSTRUCTION NO. 3

Certain evidence was presented to you by deposition. A deposition is testimony taken under oath before the trial and preserved in writing. This evidence is entitled to the same consideration you would give had the witness testified from the witness stand.

You will only receive this testimony in open court. Although there is a record of the testimony you are about to hear, this record will not be available to you during your deliberations.

Jury Instr

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INSTRUCTION NO. 4

Evidence may be either direct or circumstantial. Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves the fact, by proving one or more facts from which the fact at issue may be inferred.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

INSTRUCTION NO. 5

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience, has become an expert in an art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

INSTRUCTION NO. 6

In this case, certain evidence was admitted for a limited purpose. I called your attention to this when the evidence was admitted. I remind you that whenever evidence was admitted for a limited purpose, you must not consider such evidence for any purpose other than the limited purpose for which it was admitted.

Jury Instr

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INSTRUCTION NO. 7

Rich County, Utah is the Defendant in this case and is a county in the State of Utah. Rich County is entitled to the same fair and unprejudiced treatment that an individual would be under like circumstances. You should decide this case with the same impartiality that you would use in deciding a case between individuals.

Jury Instr

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INSTRUCTION NO. 8

You are instructed that Sheriff Dale Stacey, Deputy Sheriff Gregg Athay, Deputy Sheriff Chad Ludwig and Bear Lake County are not parties to this action. You are not to speculate or consider in your deliberations the disposition of any claims associated with Bear Lake County and/or Deputy Sheriffs Gregg Athay or Chad Ludwig, or Sheriff Dale Stacey. You should consider only the case as it relates to Rich County, Utah.

INSTRUCTION NO. 9

When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

INSTRUCTION NO. 10

When I use the word "negligence" in these instructions, I mean the failure to use ordinary care in the management of one's property or person. The words "ordinary care" mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something which a reasonably careful person would do, or the doing of something a reasonably careful person would not do, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

INSTRUCTION NO. 11

There was a certain statute in force in the state of Idaho at the time of the occurrence in question which provided that:

It is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol drugs and/or any other intoxicating substances, or who has an alcohol concentration of 0.08 or more as shown by analysis of his blood, urine or breath, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public.

A violation of the statute is negligence.

Jury Instr

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INSTRUCTION NO. 12

There was a certain statute in force in the state of Idaho at the time of the occurrence in question which provided that:

Any driver of a motor vehicle who willfully flees or attempts to elude a pursuing police vehicle when given a visual or audible signal to bring the vehicle to a stop ... and while so doing:

- (a) Travels in excess of thirty (30) miles per hour above the posted speed limit;
 - (b) Causes damage to the property of another or bodily injury to another;
 - (c) Drives his vehicle in a manner as to endanger or likely to endanger the property of another or the person of another; or
 - (d) Leaves the state;
- is guilty of a felony.

A violation of the statute is negligence.

INSTRUCTION NO. 13

There was a certain statute in force in the state of Idaho at the time of the occurrence in question which provided that:

No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. Consistent with the foregoing, every person shall drive at a safe and appropriate speed when approaching and crossing an intersection or railroad grade crossing, when approaching and going around a curve, when approaching a hillcrest, when traveling upon any narrow or winding highway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

A violation of the statute is negligence.

INSTRUCTION NO. 14

There was a certain statute in force in the state of Idaho at the time of the occurrence
in question which provided that:

No person shall drive a motor vehicle at such a slow speed as to impede
the normal and reasonable movement of traffic except when reduced speed
is necessary for safe operation or in compliance with the law.

A violation of the statute is negligence.

INSTRUCTION NO. 15

There was a certain statute in force in the state of Idaho at the time of the occurrence in question which provided that:

(1) Upon all highways of sufficient width a vehicle shall be driven upon the right half of the roadway except as follows:

(b) When an obstruction exists making it necessary to drive to the left of the center of the highway. Any person doing so shall yield the right-of-way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within a distance as to constitute an immediate hazard;

A violation of the statute is negligence.

INSTRUCTION NO. 16

There was a certain statute in force in the state of Idaho at the time of the occurrence in question which provided that:

(1) Upon the immediate approach of an authorized emergency or police vehicle making use of an audible or visible signal ... the driver of every other vehicle shall yield the right-of-way and immediately drive to a position parallel to, and as close as possible to, the nearest edge or curb of the highway lawful for parking and clear of any intersection, and stop and remain in that position until the authorized emergency or police vehicle has passed, except when otherwise directed by a peace officer.

(2) This section shall not operate to relieve the driver of an authorized emergency or police vehicle from the duty to drive with due regard for the safety of all persons using the highway.

A violation of the statute is negligence.

INSTRUCTION NO. 17

(1) The driver of an authorized emergency or police vehicle may exercise the privileges set forth below, when responding to an emergency call, or when in the pursuit of an actual or suspected violator of the law, or when responding to a fire alarm. When necessary to warn, the vehicle being operated at the time must make use of an audible signal having a decibel rating of at least one hundred (100) at a distance of ten (10) feet and/or display a flashing light visible in a 360 degree arc at a distance of one thousand (1,000) feet, under normal atmospheric conditions.

(2) Under the above circumstances, the driver may:

- (a) Park or stand, irrespective of the parking or standing provision of law;
- (b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
- (c) Exceed the maximum speed limits so long as he does not endanger life or property;
- (d) Disregard regulations governing direction of movement or turning in specified directions.

(3) The foregoing provisions shall not relieve the driver of an authorized emergency or police vehicle from the duty to drive with due regard for the safety of all persons, nor shall these provisions protect the driver from the consequences of his reckless disregard for the safety of others.

INSTRUCTION NO. 18

A person acts with reckless disregard if the person's conduct creates an unreasonable risk of bodily harm, and the person actually perceives the high degree of probability that harm will result and he continues in his course of conduct.

Actual knowledge of the high degree of probability that harm will result does not require knowledge of the actual person or persons at risk or the exact manner in which they would be harmed. It only requires knowledge of the high degree of probability of the kind of harm that the injured party suffered.

INSTRUCTION NO. 19

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the complained injury, loss or damage, and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

There may be one or more proximate causes of an injury. When the negligent conduct and/or reckless disregard of two or more persons or entities contribute concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury.

INSTRUCTION NO. 20

The term "agent" refers to a person authorized by another, called the "principal," to act for or in the place of the principal. The principal is responsible for any act of the agent within the agent's scope of authority.

INSTRUCTION NO. 21

Conduct is within the scope of the agent's authority if it occurs while the agent is engaged in the duties that the agent was asked or expected to perform and relates to those duties. It is not necessary that a particular act or failure to act be expressly authorized by the principal to bring it within the scope of the agent's authority. Conduct for the benefit of the principal that is incidental to, customarily connected with, or reasonably necessary for the performance of such duties is within the scope of the agent's authority.

INSTRUCTION NO. 22

The plaintiff has the burden of proof on the following proposition:

1. That Sheriff Dale Stacey's conduct on June 10, 1999 was within the scope of his authority as an agent of Rich County, Utah.

If you find from your consideration of all the evidence that this proposition has been proved, then you should answer this question "yes." If you find from your consideration of all the evidence that this proposition has not been proved, then you should answer this question "no."

INSTRUCTION NO. 23

The plaintiff, Kyle Athay, has the burden of proof on each of the following propositions:

1. That Sheriff Dale Stacey acted with reckless disregard.
2. That the Kyle Athay was injured.
3. That the conduct of Sheriff Dale Stacey amounting to reckless disregard was a proximate cause of the injury to Kyle Athay.
4. The elements of damage and the amounts thereof.

You will be asked the following question on the jury verdict form:

Did Sheriff Dale Stacey act with reckless disregard, and if so, was the reckless disregard a proximate cause of the injuries to Kyle Athay?

If you find from your consideration of all the evidence that each of these propositions has been proved, you should answer this question "Yes." However, if you find that any of these propositions has not been proved, then Kyle Athay has not met the burden of proof required and you should answer this question "No."

INSTRUCTION NO. 24

In this case, the defendant, Rich County, has alleged that Kyle Athay was negligent.

On this defense, Rich County has the burden of proof on each of the following propositions:

1. The Kyle Athay was negligent.
2. The negligence of Kyle Athay was a proximate cause of his own injuries.

You will be asked the following question on the jury verdict form:

Was the Kyle Athay negligent, and if so was Kyle Athay's negligence a proximate cause of his injuries?

If you find from your consideration of all the evidence that each of these propositions has been proved, you should answer this question "Yes." However, if you find that any of these propositions has not been proved, then the Rich County has not met the burden of proof required and you should answer this question "No."

INSTRUCTION NO. 24(a)

In this case, the defendant has alleged that Daryl Ervin an individual not a party to this lawsuit, was negligent. On this defense, the defendant has the burden of proof on each of the following propositions:

1. That Daryl Ervin was negligent.
2. The negligence of Daryl Ervin was a proximate cause of Kyle Athay's injuries.

You will be asked the following question on the jury verdict form:

Was Daryl Ervin negligent, and if so was Daryl Ervin's negligence a proximate cause of the plaintiff's injuries?

If you find from your consideration of all the evidence that each of these propositions has been proved, you should answer the question "Yes." However, if you find that any of these propositions has not been proved, then Rich County has not met the burden of proof required and you should answer this question "No."

INSTRUCTION NO. 25

By giving you instructions on the subject of damages, I do not express any opinion as to whether Kyle Athay is entitled to damages.

INSTRUCTION NO. 26

If the jury decides Kyle Athay is entitled to recover from Rich County, the jury must determine the amount of money that will reasonably and fairly compensate Kyle Athay for any damages proved to be proximately caused by the reckless disregard of Rich County's agent Sheriff Dale Stacey.

The elements of damage the jury may consider are:

A. Non-economic damages

1. The nature of the injuries;
2. The physical and mental pain and suffering, past and future;
3. The impairment of abilities to perform usual activities;
4. The disfigurement caused by the injuries;
5. The aggravation caused to any preexisting condition.

B. Economic damages

1. The reasonable value of necessary medical care received and expenses incurred as a result of the injury and the present cash value of medical care and expenses reasonably certain and necessary to be required in the future;
2. The reasonable value of the past earnings lost as a result of the injury;
3. The present cash value of the future earning capacity lost because of the injury, taking into consideration the earning power, age, health, life expectancy, mental and physical abilities, habits, and disposition of Kyle Athay, and any other circumstances shown by the evidence.
4. The reasonable value of necessary services provided by another in doing things for Kyle Athay, which, except for the injury, Kyle Athay would ordinarily have

performed and the present cash value of such services reasonably certain to be required in the future;

Whether Kyle Athay has proved any of these elements is for the jury to decide.

INSTRUCTION NO. 27

A person who has a pre-existing condition or disability is entitled to recover damages for the aggravation of such preexisting condition, if any, that is proximately caused by the occurrence. The person is not entitled to recover damages for the pre-existing condition or disability itself.

If you find that before the occurrence causing the injuries in this case Kyle Athay had a preexisting bodily condition or disability, and further find that because of the new occurrence in this case the pre-existing condition or disability was aggravated, then you should consider the aggravation of the condition or disability in fixing the damages in this case. You should not consider any condition or disability that existed prior to the occurrence, or any aggravation of such condition that was not caused or contributed to by reason of this occurrence.

You are to apportion, if possible, between the condition or disability prior to this occurrence and the condition or disability caused by this occurrence, and assess liability accordingly. If no apportionment can reasonably be made by you, then Rich County, Utah is liable for the entire damage.

INSTRUCTION NO. 28

When I use the phrase "present cash value" as to any damage that may accrue in the future, I mean that sum of money determined and paid now which, when invested at a reasonable rate of interest, would be sufficient to pay the future damages at the time and in the amount the future damages will be incurred.

INSTRUCTION NO. 29

A person who has been damaged must exercise ordinary care to minimize the damage and prevent further damage. Any loss that results from a failure to exercise such care cannot be recovered.

INSTRUCTION NO. 30

Under a standard table of mortality, the life expectancy of a male age 37 is 77 years. This figure is not conclusive. It is an actuarial estimate of the average probable remaining length of life based upon statistical samples of death rates and ages at death in this country. This data may be considered in connection with all other evidence relating to the probable life expectancy, including the subject's occupation, health, habits, and other activities.

INSTRUCTION NO. 31

In this case, you will be given a special verdict form to use in returning your verdict. This form consists of a series of questions that you are to answer. I will read the verdict form to you now.

We, the Jury, answer the special interrogatories as follows:

Question No. 1: Was Sheriff Dale Stacey's conduct on June 10, 1999 within in the scope of his authority as an agent of Rich County, Utah?

Answer to Question No. 1: Yes No

Question No. 2: Did Sheriff Dale Stacey's conduct amount to reckless disregard, and if so, was this reckless disregard a proximate cause of Kyle Athay's injuries?

Answer to Question No. 2: Yes No

If you answered "No," to either question 1 or 2 you are done. Sign the verdict as instructed and advise the Bailiff. If you answered this question "Yes," continue to the next question.

Question No. 3: Was Kyle Athay negligent, and if so, was this negligence a proximate cause of his own injuries?

Answer to Question No. 3: Yes No

Question No. 4: Was Daryl Ervin negligent, and if so was his negligence a proximate cause of the Kyle Athay's injuries?

Answer to Question No. 4: Yes No

If you answered "Yes" to either or both of questions 3 and 4, answer Question No. 5. If you answered "No" to both Questions 3 and 4, then skip to Question No. 6.

Instruction for Question No. 5: You will reach this question if you have found that the Sheriff Dale Stacey acted with reckless disregard and either or both Kyle Athay and Daryl Ervin were negligent, which reckless disregard and negligence caused the injuries to Kyle Athay. In this question, you are to apportion the fault between these parties in terms of a percentage. As to each party or entity to which you answered "Yes" to questions 2, 3, and 4, determine the percentage of fault for that party or entity, and enter the percentage on the appropriate line. If you answered "No" to any of the above

questions, insert a "0" or "Zero" as to that party or entity. Your total percentages must equal 100%.

Question No. 5: What is the percentage of fault (if any) you assign to each of the following:

Sheriff Dale Stacey, agent of Rich County,	_____ %
Kyle Athay	_____ %
Daryl Ervin	_____ %

Total must equal 100%

If the percentage of fault you assigned to the Kyle Athay is equal to or greater than the percentage of fault you assigned to the Rich County, Utah, you are done. Sign the verdict and advise the Bailiff. If the percentage of fault assigned to Kyle Athay is less than the percentage of fault you assigned to Sheriff Dale Stacey, agent of Rich County, answer the next question.

Question No. 6: What is the total amount of damage sustained by the Kyle Athay as a result of the accident?

Answer to Question No. 6: We assess Kyle Athay's damages as follows:

1. Economic damages, as defined in the Instructions:
\$ _____
2. Non-economic damages, as defined in the Instructions:
\$ _____

INSTRUCTION NO. 32

In deciding this case, you may not delegate any of your decisions to another or decide any question by chance, such as by the flip of a coin or drawing of straws. If money damages are to be awarded or percentages of fault are to be assigned, you may not agree in advance to average the sum of each individual juror's estimate as the method of determining the amount of the damage award or percentage of fault.

INSTRUCTION NO. 33

On retiring to the jury room, select one of your number as a foreman, who will preside over your deliberations.

An appropriate form of verdict will be submitted to you with any instructions. Follow the directions on the verdict form, and answer all of the questions required of you by the instructions on the verdict form.

A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you shall have agreed upon each of the required questions in the verdict, you should fill it out as instructed, and have it signed. It is not necessary that the same nine agree on each question. If your verdict is unanimous, your foreman alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdicts, you will notify the bailiff, who will then return you into open court.

INSTRUCTION NO. 34

I have given you the rules of law that apply to this case. I have instructed you regarding matters that you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing arguments to you and then you will retire to the jury room for your deliberations.

Each of you has an equally important voice in the jury deliberations. Therefore, the attitude and conduct of jurors at the beginning of the deliberations are important. At the outset of deliberations, it is rarely productive for a juror to make an emphatic expression of opinion on the case or to state how he or she intends to vote. When one does that at the beginning, one's sense of pride may be aroused and there may be reluctance to change that position, even if shown that it is wrong. Remember that you are not partisans or advocates, but you are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views. Deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

INSTRUCTION NO. 35

If it becomes necessary during your deliberations to communicate with me, you may send a note signed by one or more of you to the bailiff. You should not try to communicate with me by any means other than such a note.

During your deliberations, you are not to reveal to anyone how the jury stands on any of the questions before you, numerically or otherwise, unless requested to do so by me.

INSTRUCTION NO. 36

You have now completed your duties as jurors in this case and are discharged with the sincere thanks of this Court. You may now discuss this case with the attorneys or with anyone else. For your guidance, I instruct you that whether you talk to the attorneys, or to anyone else, is entirely your own decision. It is proper for you to discuss this case, if you want to, but you are not required to do so, and you may choose not to discuss the case with anyone at all. If you choose to talk to someone about this case, you may tell them as much or as little as you like about your deliberations or the facts that influenced your decisions. If anyone persists in discussing the case over your objection, or becomes critical of your service, either before or after any discussion has begun, you may report it to me.

Query for Judge Brown,

How do the two parts of the
question#2 relate to each other? If

the second part is answerable as

yes, is the first part necessarily
answerable only as yes?

Respectfully,

Jennifer Atchery
for the Jury

rec'd by Judge Brown @ 4:20 P.M.
7.23.10

The jury must first determine that Sheriff Dale Stacey's conduct amounted to reckless disregard; if the answer to that question is yes, then the jury must make a separate finding that Sheriff Stacey's conduct, amounting to reckless disregard, was a proximate cause of Kyle Athay's injuries.

Jury Instr

199

Answer
to Question
#1 from
July 14

Query to Judge Brown -

We may be facing a split vote that cannot be resolved into a $\frac{2}{3}$ (nine votes) one way or another. If it comes to that (a "hung jury"), how do we regard that to you?

Respectfully

Jennifer Atkeson
for the Jury

rec'd by Judge Brown
@ 5:10 PM.

Question
#2

I encourage you to continue to deliberate, continue to read the instructions, and review the evidence. I would direct your attention to the admonishment of the Court contained in instruction #34.

Jury Instr

201

Answer to
Question
#2

Judge Brown,

Our verdict form has only one sign-off sheet, yet our instructions seem to indicate that it does not have to be the same nine jurors who are in agreement on each question. We anticipate that may not be the case. How is it that we can use only one sign-off sheet?

Respectfully,

Jennifer Attkerry
for the Jury

Rec'd by Judge
Brown @ 9:05 a/m

Question
#3

The Court would refer you back to jury instruction #33 and the language in the 3rd paragraph. In answering the specific question asked, there must be at least nine of you agree on each question, before moving to the next question, if the Special Verdict Form requires you to do so. Each question answered, does not have to be answered by the same nine or more jurors. Whichever question is the last question on the form that you are going to answer, the nine or more who agreed on that question are the nine who shall sign the verdict form.

Answer to
Question
#33

Jury Instr

203