6-23-2011

Athay v. Rich County Clerk's Record v. 3 Dckt. 38683

Vol 3 of

LAW CLERK

IN THE SUPREME COURT

OF THE STATE OF IDAHO

Supreme Court Docket No.

38683-2011

KYLE ATHAY,

Plaintiff/Respondent,

vs.

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.

38683

Volume 3 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, -vs- RICH COUNTY, UTAH, Defendant-Appellant, and DALE M. STACY; CHAD L. LUDWIG; GREGG ATHAY; BRENT R. BUNN; BEAR LAKE COUNTY, IDAHO, Defendants.	)	**Supreme Court Docket No.38683-2011** **CASE NO. CV-2002-000072**

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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BEAR LAKE COUNTY CASE# CV-2002-000072

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SUPREME COURT DOCKET #38683-2011
BEAR LAKE COUNTY CASE# CV-2002-000072

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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 **BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR LIMITED DISQUALIFICATION OF JUDGE/AND FURTHER BRIEF IN OPPOSITION TO MOTION FOR NEW TRIAL**

Plaintiff Kyle Athay hereby provides the following points, authorities, and arguments in opposition to the Motion for Limited Disqualification of Judge and further provides additional briefing in opposition to Defendant's Motion for A New Trial. Plaintiff contends the Motion for a New Trial has no merit and the Motion for Disqualification, having no underlying support, should also be denied.

STANDARD OF REVIEW

Because this trial court is in a far better position to weigh the persuasiveness of new trial matters the Idaho appellate courts have consistently held that the trial court's grant or denial of Motions for New Trial will be upheld unless the Court has manifestly abused the wide discretion

vested in it. *Warren v. Sharp*, 139 Idaho 599, 83 P.3d 733 (2003); *Pratton v. Gage*, 122 Idaho 848, 850, 840 P.2d 392, 394 (1992).

When this Courts exercise of discretion is reviewed on appeal, the Supreme Court would inquire:

(1) Whether the lower Court rightly perceived the issue as one of discretion;

(2) Whether the Court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices;

(3) Whether the Court reached its decision by exercise of reason. *Swallow v. Emergency Medicine of Idaho*, P.A.8, 138 Idaho 589, 592, 67 P.3d 68, 71 (2003); *Sun Valley Shopping Center, Inc. v. Idaho Power Company*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

Thus, this Court's decision, on whether to grant a new trial, is in the Court's discretion. It will not be reversed unless the Court has manifestly abused the wide discretion vested in it, *Jones v. Panhandle Distributing Inc.*, 117 Idaho 750, 792 P.2d 315 (1990); *Litchfield v. Nelson* 122 Idaho 416, 835 P.2d 651 (Idaho App 1992).

RULES AND LEGAL ANALYSIS

A. There is no conduct which prevented the Defendant from receiving a fair trial.

Motions for New Trial are governed by I.R.C.P 59(a).

On the 16th day of September 2010, the Court conducted a status conference with the parties wherein the Court informed the parties that it had discovered that certain contact had occurred between the Court's Deputy Courtroom Clerk Brandy Peck (previous reference to Brandy Persing was an error of the Plaintiff) and the Plaintiff.

The contact also included contact between Ms. Peck and the Defendant's Sheriff Dale Stacy and his wife. The Court further informed the parties that it had discovered the contact had occurred, had questioned Ms. Peck about it and instructed the contact to cease.

Near the close of the status conference the Court gave counsel for both parties the opportunity to inquire further. Neither counsel made further inquiry of the Court concerning these matters.

The Court represented that no confidential information was conveyed from the parties to the Court or jury and that no information was conveyed from the Court or jury to the parties.

It is not known and understood exactly what the Defendant's position is. Defendant has yet to connect the conduct to a reason for a new trial as set forth in I.R.C.P. 59(a).1. The Defendant must show that these "irregularities" prevented the Defendant from having a fair trial. There is absolutely no connection between what occurred between Kyle Athay and Brandy Peck which prevented Rich County Utah from receiving a fair trial.

There is absolutely no showing that the conduct effected, in any way, the fact finding function of the jury

There is absolutely now showing that bias and prejudice requirements of Idaho Code of Judicial Conduct Canon 3B(6) has been violated by the Court or its staff.

I.R.C.P.59(a) 7. indicates that if the reason for a new trial is I.R.C.P. 59(a) 1., *i.e* - "irregularity in the proceedings" - the Motion must be accompanied by an Affidavit setting forth in detail the facts relied upon in support of such Motion for A New Trial.

Kyle Athay has filed an Affidavit indicating the nature and extent of such contact. Nothing in that Affidavit would indicate that the contact effected the Court in any of its rulings

nor the jury in its tasks. Defendant has failed to file any other Affidavits stating in detail the facts upon which it relies in support of this Motion for A New Trial.

Defendant may contend that its only burden would be to show that misconduct occurred and that the burden thereafter shifts to the Plaintiff to show that the conduct could hot have effected the outcome of the trial. *Slaathaug v. Allstate Insurance Company* 132 Idaho 705, 979 P.2d 107 (1999). The Plaintiff has done so.

No information has been supplied by the Defendant suggesting that any extraneous prejudicial information was improperly brought to the jury's attention or that outside influence was improperly brought to bear on any juror. The jury has properly reached its verdict and the Court should deny Defendants Motion for A New Trial. *Myers v. A.O. Smith Harvestor Products Inc*, 114 Idaho 432, 757 P.2d 695 (Idaho App.).

This case is different than that of *Hinman v. Morrison-Knudsen Company*, 115 Idaho 869, 771 P.2d 533 (1989). In Hinman the bailiff had had a direct influence and contact with the jury itself in its deliberative and fact finding function. There, the bailiff without authority from the trial judge, denied the jury's request for certain materials. The denied materials apparently contained deposition transcripts which had been referred to in the trial and a copy of an administrative bulletin which formed the basis of the Plaintiff's contract claim. The *Hinman* trial court was correct in granting a new trial since there was a legitimate question as to whether the actions of the bailiff could have had on the deliberative and fact finding function of the jury.

In this case, the Defendant makes a quantum leap in logic from the irregularity it claims to the assertions that this irregularity had any effect on the jury. It did not and the Defendant's Motion is meritless and frivolous.

B. Defendant has waived any right to disqualify the Court for purposes of making further inquiry of the Court.

As discussed above, at the Court status conference on September 16, the Court afforded counsel the opportunity to make further inquiry about the matter. Defendant failed to make further inquiry even though it had full opportunity to do so. Now, after nearly six weeks the Defendant seeks to disqualify the Court. The Court's disclosure occurred on September 16th. Yet Defendant did not seek to disqualify the Court until October 22, 2010. Defendant did not file its Motion for New Trial until October 1, 2010. Defendant never noticed this Motion up for hearing. Defendant filed an additional Motion for a New Trial on October 22nd. This additional Motion is yet to be supported by a single affidavit or memorandum. The Court and counsel are left to guess the facts and legal basis for this motion.

Defendant is now engaged in numerous tactics to delay enforcement of the Judgment.

Despite invitation, the Defendant has yet to provide the amount of "remaining available proceeds of such insurance " I.C. 36-926. This would have been useful in the Court's determination entering Judgment. The Court was left to assume that Defendant has available insurance proceeds in excess of the $500,000.

Despite opportunity the Defendant has failed to inquire, failed to subpeona, failed to depose, and failed to investigate.

Plaintiff filed his detailed Motion for Entry of Judgment and Memorandum of Costs on August 3, 2010 (just 8 days after the jury verdict). The Court had earlier set it for hearing on August 5 2010. The Defendant filed a Motion to Continue. Hearing was held on August 19, 2010.

Since the entry of the verdict Defendant's actions have been calculated to delay the proceedings in every possible way.

Defendant's Motion to Disqualify the Court is not well taken. It has as its sole purpose delay of the proceedings. Since Defendant's counsel declined to inquire of the Court when they had a full and complete opportunity to do so, it has waived such opportunity. Defendant cannot now use disqualification as a reason for its further inquiry of the Court. Defendant now, after six weeks, states, for the first time that it intends to subpoena records and examine witnesses.

Under the language of I.R.C.P 59(a).1. there is no showing that the Defendant was prevented from having a fair trial. Further, there is no showing that what occurred here is an error.

The Court, before disqualifying itself, should review the Motion on its merits. See JUDICATURE, *Taking Disqualification Seriously*, Volume 92, Numer 1, July-August 2008 (See specifically footnotes 42, 43, and 44).

Kaufman v. American Family Mutual Insurance Co., 601 F3d. 1088 (10th Cir.2010) was a case where one party sought to have investigative and "full-blown discovery" into an ex parte communication between counsel and the Court's law clerk.

> Mere speculation that an ex parte contact has occurred or that a judge was affected by it, however, does not warrant relief or further investigation. *See West v. Grand Co.*, 967 F2d 362, 367 (10th Cir.1992) (denying due process claim because party's "contention" that the Commissioners based their decision on ex parte communications [was] pure speculation...").
>
> In this case, the single ex parte contact that occurred was promptly disclosed to Silvern. Furthermore, despite the district court's conclusion that the contact was harmless, it nevertheless awarded Silvern reasonable fees because of it. Thus, there is no basis for Silvern's claim that further disclosure or investigation of that communication is necessary.

> Moreover, Silvern's claim that other similar or even more ominous contacts may have occurred is pure speculation. Indeed, in its motion for sanctions, Silvern did not identify any other contact it feared may have taken place, suggesting only that the possibility of one improper communication required the court to order flow-blown discovery to determine whether any other ex parte communications had occurred. On such a record, we cannot say that the district court erred in refusing to order such an investigation into the possibility of other ex parte contacts.

601 F3d at 1095, 1096

A "minute clerk's" ex parte contact with a criminal Co-Defendant did not require recusal, where there was no evidence that the judge acted inappropriately or that trial court was biased in favor of Co-Defendants and against Defendant. *State v. Mims*, 769 So. 2d 44, 1997-1500 (La. App. 4 Cir. 2000).

As noted, the Court, prior to deciding whether to disqualify itself should review the Motion carefully to determine its merit. There is no merit to the Motion. There is no connection between an alleged "irregularity in the proceedings", and the Defendants failure to get a fair trial. Review of the Motion reveals only one conclusion. The underlying Motion for a New Trial has no merit, hence the Defendant's attempt to disqualify the Court, is only a maneuver and strategy to delay the proceedings. Defendant has had over six weeks to subpoena, examine, and investigate. It has done nothing. The contact between the Plaintiff and Brandy Peck, while regrettable, did not, in any way, affect the Defendant's right to receive a fair trial. Accordingly, the Court should not disqualify itself and further should deny the Defendant's Motion for a New Trial.

HARMLESS ERROR

I.R.C.P. 61 indicates that a new trial shall not be granted unless refusal to grant the new trial is "inconsistent with substantial justice". The rule further directs the Court to disregard any

error or defect in the proceeding which does not effect the "substantial rights of the parties".

Error which does not affect a substantial right of the party is considered harmless and is to be disregarded. *L&L Furniture Mart Inc v. Boise Water Corporation* 120 Idaho 107, 813 P.2d 918 (Idaho App. 1991); *Wood v. State Department of Health & Welfare*, 127 Idaho 515, 903 P.2d 102 (Idaho App. 1995).

Defendant has failed to show that denial of a new trial would be inconsistent with substantial justice. Further, Defendant has failed to show, and cannot show, that the alleged ex parte and purely social contact affected the "substantial rights" of Rich County.

The definition of harmless error and the meaning of substantial rights is aptly described in Justice Rutledge's opinion in *Kotteakos v. United States*, 66 S.Ct.1239, 328 U.S. 750, 90 L. Ed 1557 (1946)

> It comes down on its face to a very plain admonition: "Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects". * * *
>
> Easier was the command to make, than it has been always to observe. This, in part because it is general; but in part also because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. * * * That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting is crucial in another.
>
> * * *
>
> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where departure is from a constitutional norm or a specific command of Congress. * * * But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole,

> that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. (Emphasis added)

It's clear the harmless error notion of Rule 61 teaches that the proceedings are not to be disturbed because of an error that prejudiced no one. *Universal Power Systems v. Godfather's Pizza*, 818 F 2d 667, 671 (C.A. 8th).

Here there is no indication the ex parte communications reached the Court or the jury, let alone influenced it.

CONCLUSION

The Court should review Defendant's Motion for a New Trial. It has no merit and should be summarily denied.

The Motion to Disqualify, which stands on the shoulders of a meritless motion, should likewise be denied.

RESPECTFULLY SUBMITTED,

CRAIG R. JORGENSEN

CERTIFICATE OF SERVICE

I hereby certify that on the 3 day of November, 2010, I served a true and correct copy of the foregoing pleading on the following person by the means so indicated:

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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 **MOTION TO STRIKE PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR LIMITED DISQUALIFICATION OF JUDGE/AND FURTHER BRIEF IN OPPOSITION TO MOTION FOR NEW TRIAL**

Defendant Rich County, by and through undersigned counsel, hereby submits this Motion

to Strike Plaintiff's Brief in Opposition to Defendant's Motion for Limited Disqualification of Judge/and Further Brief in Opposition to Motion for a New Trial for the reasons set forth in the accompanying Memorandum.

DATED this 4 day of November, 2010.

STIRBA & ASSOCIATES

By: _____

PETER STIRBA
R. BLAKE HAMILTON
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November, 2010 I caused to be served a true copy of the foregoing **MOTION TO STRIKE PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR LIMITED DISQUALIFICATION OF JUDGE/AND FURTHER BRIEF IN OPPOSITION TO MOTION FOR NEW TRIAL** by the method indicated below, to the following:

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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 **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR LIMITED DISQUALIFICATION OF JUDGE/AND FURTHER BRIEF IN OPPOSITION TO MOTION FOR NEW TRIAL**

Defendant Rich County, by and through undersigned counsel, hereby submits this Memorandum in Support of Defendant's Motion to Strike Plaintiff's Brief in Opposition to Defendant's Motion for Limited Disqualification of Judge/and Further Brief in Opposition to Motion for a New Trial for the reasons set forth herein.

PROCEDURAL BACKGROUND

1. On October 1, 2010, Defendant Rich County filed a Motion for a New Trial.

2. On October 13, 2010 Plaintiff filed a Reply Brief to Defendant's Motion for a New Trial opposing Defendant's Motion for a New Trial.

3. On October 22, 2010, Defendant filed a Motion for Limited Disqualification of Judge.

4. The Hearing for the Motion for Limited Disqualification of Judge was set for hearing on November 4, 2010, at 2:30 in Paris, Idaho.

5. On November 2, 2010, Defendant filed a Reply Memorandum in Support of Motion for New Trial as a response to Plaintiff's brief filed October 13, 2010.

6. On November 3, 2010, Defendant received Plaintiff's Brief in Opposition to Defendant's Motion for Limited Disqualification of Judge/and Further Brief in Opposition to Motion for New Trial.

ARGUMENT

Plaintiff filed a Brief in Opposition to Defendant's Motion for Limited Disqualification of Judge/and Further Brief in Opposition to Motion for New Trial, which can effectively be broken down into two separate briefs. Each brief is deficient by itself and should be stricken by

this Court. Plaintiff's Brief in Opposition to Defendant's Motion for Limited Disqualification of Judge should be stricken because it was untimely filed. Plaintiff's Further Brief in Opposition to Motion for New Trial should be stricken because Plaintiff had already filed a responsive brief to Defendant's Motion for New Trial.

I. THIS COURT SHOULD STRIKE PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR LIMITED DISQUALIFICATION BECAUSE IT WAS UNTIMELY FILED

Plaintiff's brief filed on November 3, 2010 does not comply with the Idaho Rules of Civil Procedure and should be stricken. According to the Idaho Civil Rules of Procedure, "any brief submitted in support of a motion shall be filed with the court and served so that it is received by the parties at least fourteen (14) days prior to the hearing. Any responsive brief ***shall be filed*** with the court and served so that it is received by the parties at least seven (7) days prior to the hearing." I.R.C.P. 7(b)(3)(E)(emphasis added). The purpose of the time requirements is to "provide sufficient notice...so that the opposing party may adequately prepare to present its position." *Matter of Estate of Keeven*, 882 P.2d 457, 463 (Idaho Ct. App. 1994).

In this case the hearing is set for November 4, 2010, which means that Plaintiff had until October 28, 2010 to file a responsive brief to the Motion for Limited Disqualification of Judge and be in compliance with Idaho's rules. Plaintiff did not file a responsive brief by the October 28 deadline, which was his prerogative as there is no rule requiring Plaintiff to file a responsive brief. The rule does, however, require that should Plaintiff choose to file a responsive brief it "shall be filed" at least seven days prior to the hearing. Here, Plaintiff attempts to circumvent the rule by filing a responsive brief to the Motion for Limited Disqualification on the day before

the hearing.

Plaintiff's motives in filing such an obviously non-compliant brief are unclear. Plaintiff has missed the deadline and the opportunity to file a responsive brief to the Motion for Limited Disqualification of Judge. Plaintiff made no effort to contact Defendant to ask for more time to prepare and file such a pleading. Instead, Plaintiff unabashedly filed the responsive brief on November 3, 2010, the day before the hearing. Plaintiff even attempted to hide his responsive brief by piggy-backing it onto an Opposition to Motion for a New Trial. In doing so, Plaintiff has ignored the purpose of the time requirements and has not provided sufficient notice or left sufficient time for Defendants to adequately prepare to defend Plaintiffs arguments.

II. THIS COURT SHOULD STRIKE PLAINTIFF'S FURTHER BRIEF IN OPPOSITION TO MOTION FOR NEW TRIAL BECAUSE PLAINTIFF HAS ALREADY FILED A RESPONSIVE BRIEF TO THAT MOTION

Plaintiff's Further Brief in Opposition to Motion for New Trial should be stricken because Plaintiff has already filed a responsive brief to the Motion for New Trial. When briefing a motion, the Idaho Rules of Civil Procedure allow for a supporting brief, an opposition brief, and a reply brief. I.R.C.P. 7(b)(3)(E). Defendant's Motion for New Trial was filed on October 1, 2010 along with a supporting brief. Plaintiff was given adequate time to respond to Defendant's motion, and filed a responsive brief to the motion on October 13, 2010. Defendants filed a reply to Plaintiff's October 13 opposition on November 2, 2010. Now, on November 3, 2010, after Defendant has already filed a reply, Plaintiff filed a "further brief" to raise arguments not raised in his initial opposition. Plaintiff should not be allowed to file additional briefing anytime he has new thought or arguments on this issue. Defendant has responded to Plaintiff's

opposition and the briefing is concluded. Plaintiff should not be allowed to disregard the Idaho Rules of Civil Procedure, therefore, this Court should strike Plaintiffs "further brief."

CONCLUSION

Based on the foregoing, Defendant respectfully requests that this Court strike Plaintiff's Brief in Opposition to Defendant's Motion for Limited Disqualification of Judge/and Further Brief in Opposition to Motion for New Trial.

DATED this 4 day of November, 2010.

STIRBA & ASSOCIATES

By: _____
PETER STIRBA
R. BLAKE HAMILTON
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November, 2010 I caused to be served a true copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR LIMITED DISQUALIFICATION OF JUDGE/AND FURTHER BRIEF IN OPPOSITION TO MOTION FOR NEW TRIAL** by the method indicated below, to the following:

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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, Defendant.	CASE NO. CV-2002-000072 MINUTE ENTRY & ORDER

On November 4, 2010, counsel for the above-named Plaintiff, Craig R. Jorgensen, counsel for the Defendant, Peter Stirba and Alan Johnston, appeared for further proceedings. Dorothy Snarr acted as court reporter for this proceeding.

This matter was set for Defendant Rich County's Motion for Limited Disqualification of Judge. The Court advised that it was required under I.R.C.P. Rule 40(d) to first address the issue involving the Motion for Limited Disqualification of Judge. The parties provided argument.

Following argument on the Motion for Limited Disqualification, the Court **DENIED** the Motion. The Court set forth the basis for its denial on the record. The Court set Defendant, Rich County's Motion for New Trial for hearing November 18, 2010 at 1:30 p.m.

Defense counsel had previously requested a transcript of the status conference held

September 16, 2010, and has not received a copy. A transcript of the hearing, as well as an audio copy of the hearing, shall be forwarded to both parties. The Court further ordered that a transcript of the proceedings relative to Defendant's Motion for Limited Disqualification be completed and provided to counsel in advance of the hearing scheduled for November 18, 2010.

Defense counsel requested an evidentiary hearing be held regarding the issues involved in their motion for new trial which is currently scheduled for November 18, 2010. The Court heard comments and argument regarding the issue. The Court set forth on the record the parameters concerning what areas the parties would be allowed to inquire into and what areas the Court would prevent inquiry.

SO ORDERED.

DATED this 4th day of November, 2010.

MITCHELL W. BROWN
Sixth District Judge

CERTIFICATE OF MAILING/SERVICE

I hereby certify that on the 12th day of November, 2010, I mailed/served a true copy of the foregoing document on the attorney(s) / person(s) listed below by mail with correct postage thereon or causing the same to be hand delivered.

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KERRY HADDOCK,
Clerk of the Court

By _____
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IN THE SIXTH JUDICIAL DISTRICT COURT

STATE OF IDAHO, COUNTY OF BEAR LAKE

KYLE ATHAY, Plaintiff, v. RICH COUNTY, UTAH, Defendant.	Case No. CV-2002-0000072 **MEMORANDUM IN SUPPORT OF DEFENDANT RICH COUNTY'S MOTION FOR NEW TRIAL OR ALTERNATIVELY FOR JUDGMENT NOTWITHSTANDING THE VERDICT**

Defendant Rich County, Utah, by and through undersigned counsel, pursuant to Idaho R. Civ. Proc. 50 and 59, hereby submits the following Memorandum in Support of its Motion for New Trial or Alternatively for Judgment Notwithstanding the Verdict.

FACTUAL BACKGROUND[1]

1. From July 13, 2010 to July 26, 2010, a jury trial was held in this matter before Judge Mitchell W. Brown in the Sixth Judicial District Court for Bannock County located in Pocatello, Idaho.

2. In addition to Rich County, the Plaintiff originally brought suit in this matter against Sheriff Dale Stacey ("Stacey"), Captain Gregg Athay ("Athay"), Deputy Chad Ludwig ("Ludwig"), Sheriff Brent Bunn ("Bunn") and Bear Lake County, Idaho.

3. On June 10, 1999, Stacey, Athay and Ludwig pursued Daryl Ervin ("Ervin"), the drunk driver who eventually collided with the Plaintiff's vehicle, during the Idaho portion of the pursuit at issue. Ludwig's vehicle was equipped with a dashboard camera on which Ludwig recorded a short video (the "dash cam video") of the final (approximately) ten miles of the pursuit. The dash cam video was entered as Defendant's Exhibit 209 at trial.

4. The Idaho Supreme Court held that a reckless disregard standard, and not a negligence standard applies for police pursuits under I.C. § 49-623. Athay v. Stacey, 128 P.3d 897 (Idaho 2005) ("Athay I").

5. In Athay I, the Idaho Supreme Court upheld the trial court's dismissal of the Plaintiff's claims against Ludwig on Summary Judgment because Ludwig's conduct relevant to this case did not amount to reckless disregard.

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[1] On August 23, 2010, Rich County ordered a transcript of the trial proceedings from the Bear Lake County Court Reporter and provided a $2,500.00 deposit. As of November 4, 2010, Rich County has not received any portion of the transcript. The Court Reporter has estimated that a full transcript cannot be provided for at least another eight weeks and thus the factual background set forth in this Memorandum is based upon Rich County's legal counsel's trial notes and recollection of the proceedings. These facts will be supplemented when the trial transcript becomes available.

6. In Athay II, the Idaho Supreme Court upheld the trial court's dismissal of the Plaintiff's claims against Athay on Summary Judgment because Athay's conduct relevant to this case did not amount to reckless disregard. Athay v. Stacey, 196 P.3d 325 (Idaho 2008) ("Athay II").

7. On July 8, 2010, Rich County filed its Proposed Supplemental Jury Instructions and Special Verdict Form that included two additional instructions. The second proposed supplemental instruction ("law of the case instruction") read as follows:

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

8. Athay and Ludwig testified at trial. During Athay's cross-examination, the Plaintiff objected to Rich County's question concerning Athay's involvement in the lawsuit. Following a conference outside the jury's presence, the Court ruled that Rich County could ask Athay if he was sued in this matter but could not inquire further as to the legal disposition of the case or the reasons for which the case's disposition came about. During Ludwig's direct examination, the Court sustained the Plaintiff's similar objection and ruled that Rich County could only ask Ludwig if he was sued in this matter and if he was still a party, but could not inquire as to the case's legal disposition or how said disposition came about.

9. In light of the Court's limitations on Athay's and Ludwig's testimony, Rich County requested that the Court instruct the jury, consistent with Rich County's proposed supplemental instruction, that the Idaho Supreme Court held that Athay and Ludwig were not liable to the Plaintiff as a matter of law because their conduct did not amount to reckless disregard.

10. On July 22, 2010, the Court held a jury instruction conference wherein it denied Rich County's proposed law of the case instruction on I.R.E. 402 and 403 relevancy grounds. Rich County objected to the Court's failure to include the law of the case instruction because the holdings in Athay I and II are binding on this Court under the law of the case doctrine and the Idaho Supreme Court's determination that Athay's and Ludwig's conduct was not reckless disregard is directly relevant and helpful to the jury's consideration of Stacey's conduct.

11. The Court also addressed Rich County's Proposed Special Verdict Form during the July 22, 2010 jury instruction conference. The Proposed Special Verdict Form included Athay, Ludwig, and Bear Lake County among the non-parties to whom the jury could apportion fault for the Plaintiff's injuries. Rich County's Proposed Form included a question for each individual and/or entity to whom the jury may attribute fault asking the jury to first determine whether the party was negligent and whether the negligent conduct contributed to the Plaintiff's injuries. The Court advised the parties that because Athay, Ludwig and Bear Lake County were not liable as a matter of law because their conduct did not amount to reckless disregard, the Court was unsure as to whether these non-parties should be included on the special verdict form. The Court took the issue under advisement.

12. During the jury instruction conference, Rich County requested that Deby Eborn ("Eborn"), the Bear Lake County Sheriff's Department dispatcher, also be included as a non-party on the special verdict form. Rich County's request was based upon evidence presented at trial that Eborn knew of the deer-vehicle collison and decided not to inform the officers involved in the pursuit of the collision due to her belief that the pursuit would end before it reached the collision's location. The Court also took this issue under advisement.

13. The following morning, on July 23, 2010, the Court provided the Parties a copy of the instructions it intended to give to the jury and the special verdict form. The special verdict form only included Stacey, the Plaintiff and Ervin as parties to whom the jury could apportion fault. The Court did not explain the reason for omitting Eborn from the special verdict form. With respect to Bear Lake County, Ludwig, and Athay, the Court stated that because the Plaintiff could not make out a legal cause of action against these actors based on the holdings in Athay I and II, these non-parties should not be included on the special verdict form. Rich County renewed its objections made during the jury instruction conference to the Court's decision arguing that the Court's ruling was contrary to the established law and interpretation of comparative fault in Idaho.[2]

14. The Plaintiff testified at trial concerning, among other things, the damages he has suffered as a result of the accident for which he sought compensation at trial. Among the damages the Plaintiff testified he has incurred is lost earning capacity due to the limitations in the types of employment he can perform in light of his paraplegia.

15. On cross-examination, the Court prohibited Rich County from asking the Plaintiff about the reasons for which he lost his job as a substitute teacher at Bear Lake High School. The Plaintiff previously testified in his deposition that he had inappropriate relationship(s) and/or had kissed some female high school students during the time he was employed as a substitute teacher.

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[2] Rich County lodged several objections to the Court's rulings on jury instructions and the special verdict form. In the interest of accuracy, Rich County has not set forth all of objections and facts with specificity pending its receipt of the relevant portions of the trial transcript.

16. On July 26, 2010, the jury returned a verdict in favor of the Plaintiff finding Rich County 30% liable for the Plaintiff's injures and awarding the Plaintiff $2,720,126.00 in economic damages and $1,000,000.00 in noneconomic damages.

17. Following the trial, Rich County's counsel spoke to several jurors on the phone who were willing to discuss their impressions of the trial. Several jurors indicated that the jury questioned the reason for Bear Lake County's, the Bear Lake Officers' and Eborn's not being included on the special verdict form. One juror indicated that the jury generally felt that Bear Lake County should have been apportioned some fault but given their choices, the percentage of fault that would have been apportioned to Bear Lake County was instead added to Rich County's percentage. Further, another juror indicated that the jury assumed that because neither Athay nor Ludwig are still employed by Bear Lake County that they were terminated for their conduct in this case.

ARGUMENT

I. Introduction

On June 10, 1999, Ervin was being immediately pursued by Stacey, Athay and Ludwig as Ervin proceeded into and through Montpelier, Idaho and headed northward toward Bennington, Idaho. The Plaintiff originally filed suit against all three of these pursuing officers based on the theory that each officer's actions caused or contributed in some way to the accident and resulting injuries at issue. Despite the fact that the Idaho Supreme Court held that neither Athay's nor Ludwig's conduct rose to the level of reckless disregard, the Plaintiff did not attempt to distinguish Stacey's actions during the Idaho portion of the pursuit from the legally proper conduct of Athay or Ludwig. To the contrary, the Court permitted the Plaintiff's use of Athay's

and Ludwig's actions as a means of *demonstrating* that Stacey was in fact reckless and Rich County should be held liable for the Plaintiff's injuries, including cross-examination of both Athay and Ludwig as to the propriety of their conduct.

On the other hand, Rich County was prohibited from arguing the converse inference from the collective conduct of the three pursuing officers. The Court excluded testimony and failed to instruct the jury that both Athay and Ludwig were not liable because neither officer acted in reckless disregard as a matter of law. Rich County was further prevented from making the argument that because Athay's and Ludwig's conduct was proper in the pursuit context, that Stacey's conduct must likewise be appropriate unless the jury was convinced that there were sufficient facts to set Stacey's conduct apart from that of the other officers, that he could not be liable for the Plaintiff's injuries.

Idaho Rule of Civil Procedure 59(a) "specifically permits the granting of a new trial based on insufficient evidence and errors in law occurring at trial." Coombs v. Curnow, 219 P.3d 453, 462 (Idaho 2009). A new trial is the appropriate remedy when evidence was erroneously admitted during the course of the trial or when a jury verdict is based upon incorrect instructions on the law or confusing or misleading special verdict form. *See* Id.; *see also* Le'Gall v. Lewis County, 923 P.2d 427, 431 (Idaho 1996) (*citing* Cosgrove v. Merrell Dow Pharmaceuticals, Inc., 788 P.2d 1293, 1300-1301 (Idaho 1990); Walton v. Potlatch Corp., 781 P.2d 229 (Idaho 1991). A trial judge may also grant a new trial if s/he "determines that the verdict in not in accord with the clear weight of the evidence." Hudelson v. Delta Intern. Machinery Corp., 127 P.3d 147, 151 (Idaho 2005) (*quoting* Karlson v. Harris, 97 P.3d 428, 435 (Idaho 2004)).

When a court's error(s) "affect[s] the substantial rights of the parties," such that a refusal to grant a new trial or set aside a verdict "appears ... inconsistent with substantial justice," the act or omission is not "harmless error" and a new trial should be granted. I.R.C.P. 61. Here, the Court's exclusion of relevant testimony and evidence and failure to correctly instruct the jury as to the applicable law seriously diminished Rich County's right to a fair trial wherein it could fully and accurately present its defense. Rich County's Motion for New Trial should thus be granted.

Where there is insufficient evidence to support the jury's verdict, a trial court may enter judgment notwithstanding the verdict ("JNOV") pursuant to I.R.C.P. 50. *See* Coombs, 219 P.3d at 462; Bates v. Seldin, 203 P.3d 702, 704-705 (Idaho 2009). Unlike a motion for a new trial under I.R.C.P. 59, on a motion for JNOV the court does not consider the admissibility or competency of the evidence, but instead considers all of the evidence submitted to the jury as it existed on the record, regardless of whether the evidence was properly admitted or excluded. *See* Coombs, 219 P.3d at 461-462. There was insufficient evidence presented at trial for the jury to conclude that Stacey acted in reckless disregard for the safety of others thus giving rise to Rich County's liability for the accident that caused the Plaintiff's injuries. There was also inadequate evidence to support the jury's economic damage award of $2,720,126.00 and thus the Court should enter judgment for Rich County.

II. Grounds For Which a New Trial Should Be Granted.

A. The Court Erroneously Failed to Include Bear Lake County and the Bear Lake County Officers on the Fault Apportionment Section of the Special Verdict Form.

Idaho law provides that a court, at the request of any party, may direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence or comparative responsibility attributable to each and every tortfeasor who either caused or contributed to the occurrence in question, whether or not they are parties to the case. Van Brunt v. Stoddard, 39 P.3d 621, 627 (Idaho 2001) (*citing* Pocatello Indus. Park Co. v. Steel W., Inc., 621 P.2d 399, 403 (Idaho 1980)); I.C. § 6-802 (2010); *see also* Lasselle v. Special Products Co., 677 P.2d 484, 485 (Idaho 1983). Where there is evidence that a non-party's conduct was causally connected to the Plaintiff's injuries, the non-party should be included among those to whom the jury may apportion a percentage of fault on the special verdict form. Van Brunt, 39 P.3d at 627-628. True apportionment cannot be achieved until all actors who caused or contributed to the incident at issue are included. Id.; *see also* Pocatello Indus. Park Co., 621 P.2d at 403.

Over Rich County's objections, the Court declined to include Bear Lake County, the Bear Lake County Officers, and Deby Eborn on the Special Verdict Form because Bear Lake County and the Bear Lake County officers actors could not be held liable to the Plaintiff as a matter of law because the officers did not act with reckless disregard and were properly dismissed from the case.[3]

[3] The Court also declined to include Deby Eborn on the special verdict form despite the fact that she has never been a party in this matter and her conduct has never been subject to judicial scrutiny. Further, as a police dispatcher, Eborn would not be subject to the reckless disregard standard of conduct in I.C. §9-623 and should have been included on the special verdict form upon a showing of causal negligence.

The Court's analysis is flawed as it contradicts the purpose and meaning of I.C. § 6-801 as interpreted by Idaho courts. There is no dispute that fault may be apportioned to non-parties in a special verdict form including individuals against whom claims were previously dismissed. *See* Vannoy v. Uniroyal Tire Co., 726 P.2d 648, 650 (Idaho 1985). (*quoting* Lasselle, 677 P.2d at 485 ("It is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tortfeasors either by operation of law or because of a prior release."). Unknown parties may also be included on special verdict forms. *See* Jensen v. Shank, 585 P.2d 1276 (Idaho 1978). Undeniably, it is logically impossible for non-parties and individuals whose identity is unknown to be held legally liable for a plaintiff's injuries and thus the Court's basis for removing Ludwig, Athay, and Bear Lake County from the special verdict form was incorrect.

In order to determine whether to include a given party on a special verdict form, "the question is not whether a judgment would or could be rendered against that person, but whether or not his conduct ... caused or contributed to the accident and injuries." Vannoy, 726 P.2d at 655-656. The Idaho Supreme Court has highlighted the distinction between legal "liability" and "responsibility" or "causation" that is considered on a special verdict form:

> "It is not necessary to establish that all persons included on the verdict form would be liable for some or all of the damages attributable to their conduct or their product. Indeed, in many instances, it will not be possible to establish liability for various reasons including immunity, settlement, failure to join as a party, unknown identity, statute of limitations, or numerous other possible causes."

Id. at 655. It is for the jury to determine whether an actor's a actor's conduct was causally connected to the plaintiff's injuries and only "in the rare situation in which reasonable minds

could not reach different conclusions [may] the trial court [be] justified in removing the issue from the consideration of the jury." Id. (*quoting* Fouche v. Chrysler Motors Corp., 692 P.2d 345 (Idaho 1984) (pincite omitted)).

There was substantial evidence introduced at trial that the actions of Athay, Ludwig and Eborn causally contributed to the accident and the Plaintiff's injuries and thus the factual issue of apportionment should have been left to the jury. The Court's reasoning that because Athay's and Ludwig's conduct did not amount to reckless disregard exempted them from apportionment is incorrect because the reckless disregard standard is merely a legal level of *liability* at which the protections of the Idaho Tort Claims Act ceases to immunize police officers for their conduct within the scope of their employment. The Supreme Court's holding that Ludwig and Athay did not act with reckless disregard did not include a determination that these officers were not negligent and/or that their conduct in no way contributed or proximately caused the Plaintiff's injuries.

The Court's removal of Bear Lake County, Ludwig and Athay from the special verdict form was erroneous and based on incorrect and exceptional interpretation of the vast body of Idaho case law on this issue. Further, the Court's decision not to include Eborn on the special verdict form, particularly absent any reason for doing so, was similarly in error and the Court should grant a new trial.

B. The Court Failed to Instruct the Jury on the Relevant Law of the Case.

When, in deciding a case on appeal, the Idaho Supreme Court "states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon

subsequent appeal...." Swanson v. Swanson, 5 P.3d 973, 976 (Idaho 2000) (*citing* Suitts v. First Sec. Bank of Idaho, 713 P.2d 1374, 1380 (Idaho 1985)). Trial courts must ensure a remanded case is tried "in light of and in consonance with" the law as set forth by the appellate court in that particular case. 5 P.3d at 976 (*citing* Creem v. Northwestern Mut. Fire Ass'n of Seattle, Wash., 74 P.2d 702, 703 (Idaho 1937)). The law of the case doctrine "protects against relitigation of settled issues and assures obedience of *inferior* courts to decisions of *superior* courts." 5 P.3d at 977 (*quoting* NAACP, Detroit Branch v. Police Officers Ass'n, 676 F.Supp. 790, 791 (E.D. Mich. 1988) (emphasis in original).

In Athay I, the first issue addressed by the Idaho Supreme Court was that the appropriate standard of liability for police pursuits under I.C. § 49-623 was "reckless disregard" as opposed to negligence. 128 P.3d at 902. Clearly, the Court's decision on the standard of conduct by which the Defendants' conduct should be judged is "precedent to be followed in successive stages of [the] same litigation," and in fact has been followed since the Athay I opinion was issued. Swanson, 5 P.3d at 977. While the Court noted that it had previously defined reckless disregard in the context of Idaho's guest statute, Athay I was the first case in which the reckless disregard standard was applied to police pursuits and thus the first time any court considered what police officer conduct would amount to reckless disregard and tort liability. 128 P.3d at 902.

To determine whether Ludwig's acted with reckless disregard, the Court evaluated Ludwig's actions on June 10, 1999, including: 1) Ludwig's unsuccessful attempt to stop the fleeing vehicle with spike strips despite not having a description of the fleeing vehicle or seeing the vehicle's license plate number; 2) Ludwig's joining in the pursuit behind Athay and Stacey and remaining involved for roughly eight miles; and 3) Ludwig's involvement in the pursuit

through Montpelier, including "fanning out," for greater visibility. 128 P.3d at 907. The Court concluded that "there is absolutely nothing in the record showing that Deputy Ludwig operated his vehicle with reckless disregard for the safety of others or that his conduct induced Ervin to continue fleeing at a high rate of speed." Id. This conclusion, like that pronouncing the applicable standard of conduct, became the law of the case. The Plaintiff could not, and did not, pursue his legal claims against Ludwig following the Court's decision because the Court made a binding determination that as a matter of law, Ludwig's actions did not render him liable for the Plaintiff's injuries.

Similarly in Athay II, the Court considered Athay's liability for his actions relevant to this matter, including: 1) Athay's dispatching Ludwig to attempt to stop the fleeing vehicle with spike strips; 2) Athay's joining in pursuit behind Stacey and remaining involved until the pursuit's termination; 3) Athay's calling ahead to request police traffic control assistance as the pursuit passed through Montpelier; 4) Athay's denial of Ludwig's request to attempt to catch up to the fleeing vehicle based on his belief the vehicle would slow down and/or stop; 5) Athay's observing the vehicle fishtail and telling the other officers to back off; and 6) Athay's calling ahead to Caribou County to request that another officer attempt to stop the vehicle with spike strips. 196 P.3d at 333-334. The Court concluded "Deputy Athay did not engage in conduct that met the standard of reckless disregard." Id. at 334.

At trial, the Plaintiff elicited testimony from both Athay and Ludwig that suggested their actions were *not* taken with public safety and prudence in mind, thus implying that Athay's and Ludwig's conduct was with reckless disregard.[4] In light of the Idaho Supreme Court's prior

[4] Notably, the Plaintiff extensively cross-examined Ludwig regarding his use of spike strips to attempt to stop the

determinations that Ludwig's and Athay's conduct listed above did not amount to reckless disregard, Rich County fully expected it would be able to refute the Plaintiff's suggestions by introducing testimony that the claims against Ludwig and Athay were dismissed and that the Court would instruct the jury that Ludwig's and Athay's conduct was not reckless disregard as a matter of law. The Court denied Rich County the ability to clarify the Plaintiff's mischaracterization of Ludwig's and Athay's conduct and simultaneously allowed the Plaintiff to capitalize on an incorrect statement of the law of the case, thereby greatly impinging upon the trial's fairness as to Rich County.

When a trial court's instructions to the jury misstate the applicable law and mislead the jury or prejudice a party, a new trial should be granted. Lawton v. City of Pocatello, 886 P.2d 330, 338 (Idaho 1994) (*citing* Manning v. Twin Falls Clinic & Hosp., Inc., 830 P.2d 1185 (Idaho 1992). The trial court's failure to instruct the jury that Athay's and Ludwig's conduct was not reckless disregard as a matter of law, particularly after allowing Athay's and Ludwig's testimony that they had been sued but were no longer parties in this case, mislead the jury by inviting the legally incorrect assumption that all or part of Athay's and Ludwig's actions were with reckless disregard and that Stacey's conduct was likewise reckless.[5]

Further, the Court based its decision not to instruct the jury on the law of the case because such instruction was irrelevant to a determination of Stacey's conduct. The law of the case as to

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fleeing vehicle. The Plaintiff inquired as to the extent of Ludwig's training and experience using spike strips, the conditions surrounding his deployment of spike strips in this case and questioned whether Ludwig had actually used the spike strips correctly since only one of Ervin's tires was deflated. Rich County will supplement this factual recitation when the relevant portions of the trial transcript become available.

[5] Rich County represents that based on its conversations with several jurors after the trial's conclusion, the jury was actually mislead to believe that Athay and Ludwig had lost their jobs with the Bear Lake County Sheriff's Department based on their involvement and conduct in this matter and/or that Bear Lake County admitted some responsibility for the Plaintiff's injuries and had reached a settlement so that they were no longer parties to this case.

Athay's and Ludwig's conduct is clearly helpful to the jury's consideration of Stacey's conduct and is highly probative of whether Stacey, who except for initiating the pursuit in Utah, behaved nearly identically to Ludwig and Athay who were deemed not reckless, acted with reckless disregard thereby subjecting Rich County to liability for the Plaintiff's injuries.

As explained above, Athay I was the first time the Idaho Supreme Court analyzed police officer conduct in a high-speed pursuit under the reckless disregard standard. In reaching its decision that Ludwig and Athay were not reckless, the Supreme Court compared Athay's and Ludwig's actions to those taken by Stacey and essentially set forth a benchmark of conduct that falls short of reaching reckless disregard. Here, the jury should have been afforded the same opportunity to view Stacey's actions with the benefit of the Idaho Supreme Court's decision so that, consistent with the Athay I and II Court's instructions for remand, it could determine whether Stacey's conduct was somehow different and/or more inappropriate than that of Athay and Ludwig.

The Court's failure to instruct on the law of the case was incredibly prejudicial to Rich County because it misstated the relevant and binding law that has clear implications on the jury's consideration of Stacey's conduct. The Athay I and Athay II Courts' determination that neither Athay nor Ludwig acted with reckless disregard for the safety of others cannot be fairly characterized as prejudicial to the Plaintiff because it is simply the law of this case and is highly probative of whether Stacey's conduct amounted to reckless disregard. The Court's decision is therefore erroneous and a new trial should be granted.

C. Rich County Was Prevented From Full Cross Examination of the Plaintiff as to His Employment Opportunities and Thus the Economic Damages He Suffered.

Among the damages the Plaintiff claimed he suffered due to the injuries he sustained from the accident at issue was a significant reduction in his earning capacity. The Plaintiff testified at trial concerning the limitations his paraplegia placed on the types of jobs he could perform in the Bear Lake County area.

To refute the Plaintiff's testimony that it was only his injuries that limited his ability to obtain gainful employment, Rich County attempted to cross-examine the Plaintiff about some of the reasons the Plaintiff may have lost his job with the Bear Lake School District, among other jobs. The Court sustained the Plaintiff's objections to Rich County's questions concerning the Plaintiff's admitted inappropriate relationships with one or more female Bear Lake High School students where and while he was employed as a substitute teacher. This evidence should have been admitted because it is relevant to the damages the Plaintiff claims he owed. If there were other factors of the Plaintiff's own choosing that have negatively impacted the Plaintiff's earning capacity, that evidence is directly relevant to the jury's determination of an appropriate damages award. The Court's exclusion of this evidence affected Rich County's substantial right to fully present its defense and cross-examine adverse witnesses and thus a new trial should be granted.

II. Grounds For Which the Court Should Enter Judgment Notwithstanding the Verdict or Grant a New Trial.

A. There Was Insufficient Evidence Presented at Trial to Find Rich County Liable for the Plaintiff's Injuries.

In Athay I, the Idaho Supreme Court determined that Idaho Code § 49-623 creates a reckless disregard standard applicable to police pursuits such as the one at issue. 128 P.3d at 902. Idaho Code § 49-623 provides:

> (1) The driver of an authorized emergency or police vehicle, when responding to an emergency call, or when in the pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions stated.
>
> (2) The driver of an authorized emergency or police vehicle may:
>
> (a) Park or stand, irrespective of the parking or standing provisions of this title;
>
> (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
>
> ...
>
> (4) The foregoing provision 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.

I.C. § 49-623.

The Athay I Court defined reckless disregard as, "the type of conduct engaged in by the driver when he actually perceives the danger and continues his course of conduct." 128 P.3d at

902. The Idaho Supreme Court elaborated on this definition of reckless disregard in Athay II, stating:

> "To constitute reckless disregard, the actor's conduct must not only create an unreasonable risk of bodily harm but, as we held in *Athay I*, the actor must actually perceive the high degree of probability that harm will result and continue 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."

196 P.3d at 332, *See also* Harris v. State, 847 P.2d 1156, 1160 (Idaho, 1992).

Based on the Idaho Supreme Court's prior holdings in this matter, the Plaintiff, in order to hold Sheriff Stacey liable for any of Plaintiff's injuries or other damages, needed to show that Sheriff Stacey had actual knowledge of the high probability that another motorist could be hit and seriously injured by the fleeing motorist and despite that knowledge, continued his course of conduct. The Plaintiff also needed to show that Sheriff Stacey's conduct in pursuing Daryl Ervin's vehicle created an unreasonable risk of bodily harm. The Plaintiff ***failed*** to do so and thus did not present sufficient evidence to hold Rich County liable for the Plaintiff's injuries.

As stated, *supra*, the Athay I Court, in an attempt to determine whether Ludwig acted with reckless disregard, evaluated Ludwig's actions on June 10, 1999, including: 1) Ludwig's unsuccessful attempt to stop the fleeing vehicle with spike strips despite not having a description of the fleeing vehicle or seeing the vehicle's license plate number; 2) Ludwig's joining in the pursuit behind Athay and Stacey and remaining involved for roughly eight miles; and 3) Ludwig's involvement in the pursuit through Montpelier, including "fanning out," for greater visibility. 128 P.3d at 907. The Court concluded that "there is absolutely nothing in the record

showing that Deputy Ludwig operated his vehicle with reckless disregard for the safety of others or that his conduct induced Ervin to continue fleeing at a high rate of speed." Id.

Similarly in Athay II, the Court considered Athay's liability for his actions relevant to this matter, including: 1) Athay's dispatching Ludwig to attempt to stop the fleeing vehicle with spike strips; 2) Athay's joining in pursuit behind Stacey and remaining involved until the pursuit's termination; 3) Athay's calling ahead to request police traffic control assistance as the pursuit passed through Montpelier; 4) Athay's denial of Ludwig's request to attempt to catch up to the fleeing vehicle based on his belief the vehicle would slow down and/or stop; 5) Athay's observing the vehicle fishtail and telling the other officers to back off; and 6) Athay's calling ahead to Caribou County to request that another officer attempt to stop the vehicle with spike strips. 196 P.3d at 333-334. The Court concluded "Deputy Athay did not engage in conduct that met the standard of reckless disregard." Id. at 334.

Therefore at trial, the Plaintiff needed to establish that Sheriff Stacey's conduct differed from Ludwig's and Athay's to the extent that it would rise to the level of reckless disregard. The only difference the Plaintiff was able to show was that Sheriff Stacey initiated the pursuit in Utah and continued to follow the fleeing vehicle into Wyoming and into Idaho. However, in finding that Ludwig and Athay's conduct did not amount to reckless disregard, the Idaho Supreme Court already determined that the pursuit was justified and thus initiating it could not amount to reckless disregard. Therefore, at trial the Plaintiff failed to establish that Sheriff Stacey acted with reckless disregard.

B. There is Insufficient Evidence in the Record to Support the Jury's Economic Damage Award Against Rich County.

The jury awarded Plaintiff $2,720,126.00 in economic damages. However, even taking the Plaintiff's; projections of economic loss, projection of the present value of Plaintiff's life care plan, and the plaintiff's medical bills, it is unclear how the Jury awarded $2,720,126.00 in economic damages. Furthermore, the Plaintiff's projections of economic loss and the present value of Plaintiff's life care plan are not supported by the evidence introduced at trial.

For example, at trial Plaintiff's economic expert specifically testified that these numbers were merely theoretical and presented the worst case scenario for the Plaintiff. Specifically, regarding the projected economic loss, the Plaintiff testified that he was making more than he had prior to the accident, he had no desire to move, and that he had no desire to gain any further education. Despite these facts the Plaintiff's economic expert projected the Plaintiff's economic loss at $842,259.00 or $762,054.00. Also, regarding the projected present value of life care plan the Plaintiff testified that he had not had daily assistance nor would he use daily assistance, would not use or require psychological services, and again he had no desire to gain any further education. Despite this evidence the Plaintiff's economic expert included these items in his projection of the present value of life care plan. Simply put the evidence in the record does not support the Jury's economic damage award against Rich County.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court grant Rich County's Motion for New Trial or Alternatively for Judgment Notwithstanding the Verdict.

DATED this 4 day of November, 2010.

STIRBA & ASSOCIATES

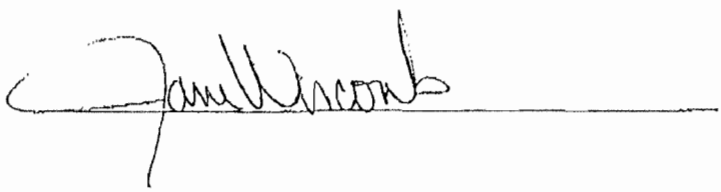
By: _____

PETER STIRBA
R. BLAKE HAMILTON
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November, 2010 I caused to be served a true copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANT RICH COUNTY'S MOTION FOR NEW TRIAL OR ALTERNATIVELY FOR JUDGMENT NOTWITHSTANDING THE 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	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (✓) Facsimile
Alan Johnston PIKE HERNDON STOSICH & JOHNSTON 151 North Ridge Ave., Suite 210 P.O. Box 2949 Idaho Falls, ID 83403-2949	( ) 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



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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.	**SUBPOENA** **[Kyle Athay]** Case No. CV-02-00072 Judge Mitchell W. Brown

The State of Idaho to: Kyle D. Athay
c/o Craig Jorgensen, Esq.
920 East Clark
Pocatello, ID 83205-4094

4/46

Subpoena (K Athay)

YOU ARE COMMANDED:

[X] to appear in the Court at the place, date and time specified below to testify in the above case.

[ ] to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

[X] to produce or permit inspection and copying of the following documents or objects, including electronically stored information, at the place, date and time specified below.

1. Any and all documents indicating your wireless phone service number and wireless carrier/provider company name.

2. Any and all records pertaining to the wireless phone service number(s) in your name or used by you, which are dated or were prepared between July 1, 2010 and October 1, 2010, including, but not limited to:

   a. Billing statements and records, prepared or retained by your wireless service provider or kept electronically or otherwise by you including incoming and/or outgoing call detail records, sent and/or received text message records, and/or text and/or picture message records.

   b. Any other documents pertaining in any way to sent and/or received text messages, including, but not limited to, records of text message content, records of the identity and/or phone number to which you sent text messages or from which you received text messages, records of picture message data including any photos sent to or received by you, and any other phone call, data or other records.

[ ] to permit inspection of the following premises at the date and time specified below.

PLACE, DATE AND TIME:

Place: Sixth District Court
Bear Lake County Courthouse
7 East Center
Paris, Idaho 83261

Date: November 18, 2010

Time: 1:30 p.m.

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above that you may be held in contempt of court and that the aggrieved party may recover from you the sum of $100.00 and all damages which the party may sustain by your failure to comply with this subpoena.

DATED this 5 day of November, 2010.

STIRBA & ASSOCIATES

By: R. Blake Hamilton

PETER STIRBA
R. BLAKE HAMILTON
Attorneys For Defendant

Subpoena (K Athay)

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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.	**SUBPOENA** **[Brandy Peck]** Case No. CV-02-00072 Judge Mitchell W. Brown

The State of Idaho to: Kyle D. Athay
c/o Craig Jorgensen, Esq.
920 East Clark
Pocatello, ID 83205-4094

Subpoena (B Peck)

4/9

YOU ARE COMMANDED:

[X] to appear in the Court at the place, date and time specified below to testify in the above case.

[ ] to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

[X] to produce or permit inspection and copying of the following documents or objects, including electronically stored information, at the place, date and time specified below.

1. Any and all records pertaining to the wireless phone service for phone number (208) 240-4162, or any other wireless phone number in your name or used by you, which are dated or were prepared between July 1, 2010 and October 1, 2010, including, but not limited to:

   a. Billing statements and records, prepared or retained by your wireless service provider or kept electronically or otherwise by you including incoming and/or outgoing call detail records, sent and/or received text message records, and/or text and/or picture message records.

   b. Any other documents pertaining in any way to sent and/or received text messages, including, but not limited to, records of text message content, records of the identity and/or phone number to which you sent text messages or from which you received text messages, records of picture message data including any photos sent to or received by you, and any other phone call, data or other records.

[ ] to permit inspection of the following premises at the date and time specified below.

Subpoena (B Peak)

PLACE, DATE AND TIME:

Place:	Sixth District Court Bear Lake County Courthouse 7 East Center Paris, Idaho 83261
Date:	November 18, 2010
Time:	1:30 p.m.

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above that you may be held in contempt of court and that the aggrieved party may recover from you the sum of $100.00 and all damages which the party may sustain by your failure to comply with this subpoena.

DATED this 5 day of November, 2010.

STIRBA & ASSOCIATES

By: R. Blake Hamilton

PETER STIRBA
R. BLAKE HAMILTON
Attorneys For Defendant

Subpoena (B Peck)

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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.	**SUBPOENA DUCES TECUM** **[T-Mobile]** Case No. CV-02-00072 Judge Mitchell W. Brown

The State of Idaho to: Corporation Service Company
T-Mobile Registered Agent (Idaho)
1401 Shoreline Drive
Suite 2
Boise, ID 83702

Subpoena Duces Tecum (T Mobile) 452

YOU ARE COMMANDED:

[ ] to appear in the Court at the place, date and time specified below to testify in the above case.

[ ] to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

[X] to produce or copy the following documents, including electronically stored information in your possession, custody, or control and mail or deliver to R. Blake Hamilton at the law offices of Stirba & Associates at the place, date and time specified below.

1. **Any and all cellular phone records, which are dated or were prepared between July 1, 2010 and October 1, 2010, retained for T-Mobile cellular customer Brandalynn (Brandy) Mann Peck, Wireless Number (208) 240-4162, including, but not limited to:**

   a. **Billing records.**

   b. **Call detail records.**

   c. **Text detail and content records.**

   d. **Photos or other phone data stored online or electronically.**

   e. **Subscriber information.**

[ ] to permit inspection of the following premises at the date and time specified below.

Subpoena Duces Tecum (T Mobile) 4/53

PLACE, DATE AND TIME:

Place:	Stirba & Associates 215 South State Street Suite 750 Salt Lake City, Utah 84111
Date:	November 12, 2010
Time:	5:00 p.m.

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above that you may be held in contempt of court and that the aggrieved party may recover from you the sum of $100.00 and all damages which the party may sustain by your failure to comply with this subpoena.

DATED this 5 day of November, 2010.

STIRBA & ASSOCIATES

By: Blake Hamilton

PETER STIRBA
R. BLAKE HAMILTON
Attorneys For Defendant

Subpoena Duces Tecum (T mobile) 3 454

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Facsimile: (208) 237-1706
Attorney for Plaintiff

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 REPLY BRIEF IN OPPOSITION TO MOTION FOR A NEW TRIAL**

COMES NOW the Plaintiff, and provides the following points, authorities, and arguments in opposition to the Defendant's Motion for a New Trial and alternative Motion to Judgment Notwithstanding the Verdict.

Summary of Plaintiff's Position

1. This Court is given wide discretion to deny Defendant's Motion for a New Trial and won't be overturned absent an abuse of discretion.

2. There is no proof the Bear Lake County officers breached any duty of either the reckless disregard standard or a negligence standard.

3. Defendant's proof at trial was that all officers, including the Bear Lake County

officers, acted carefully and without negligence.

4. The Bear Lake County officers have been fully adjudicated as not having committed reckless disregard. There is no proof they acted with negligence.

5. Defendant's attempt to equate itself with the absolved Bear Lake County officers is, and was, an inappropriate attempt to coattail itself into a more favorable light to the jury.

6. Defendant cannot complain about it's lack of cross-examination opportunities of the Plaintiff. If Defendant seriously wanted to show negative impacts on Plaintiff's employability it could and should have called employers rather than make an underhanded attempt at character assassination. Proof offered through this kind of cross examination had limited probative value which was far outweighed by it's prejudicial effects. The Court was proper in limiting such inappropriate examination.

7. The proof offered at trial was more than sufficient to show Rich County's continuing and complete breach of it's duty. Sheriff Stacy made numerous choices to continue his dangerous pursuit all the while knowing that the pursuit and the dangers connected therewith created a high probability of danger.

8. There was sufficient evidence to support the jury's award of economic damage against Rich County. Plaintiff's proof of these economic damages was supported by expert testimony, logic, and credibility. The economic damage proof offered by the Defendant was not credible. The jury was proper in finding the award of economic damages it did.

9. The Defendant has not met it's burden by showing sufficient grounds for a new trial. Defendant has failed to provide timely statement of it's grounds for a new trial in violation of the provisions of IRCP 59(a) and 59(b).

10. Assuming, *arguendo*, that there were errors in the proceedings, such errors are harmless. Granting a new trial, or a judgment notwithstanding the verdict would be inconsistent with substantial justice. Nothing that occurred in the trial affected the substantial rights of the Defendant.

Standard of Review

When reviewing a trial judge's grant of a new trial on appeal, appellate courts apply the abuse of discretion standard. *Karlson v. Harris* 140 Idaho 561, 97 P.3d 428 (2004). A trial judge has wide discretion to grant or deny a request for a new trial and will not be overturned on appeal absent a showing of a manifest abuse of discretion. Appellate Court will primarily focus upon the process used by the trial court in reaching his decision, not upon the result of that decision. The trial judge is in a far better position than the Appellate Court to weigh the demeanor, credibility, and testimony of witnesses and the persuasiveness of all the evidence. The inquiry on appeal is going to be:

(1) Whether the trial judge correctly perceived the issue of one of discretion;

(2) Whether the trial judge acted within the outer boundaries of his discretion and consistently with the legal standards applicable to the specific available choices and;

(3) Whether the trial judge reached his decision by exercise of reason.

DISCUSSION

I.

It was not necessary to include Bear Lake County officers on the special verdict form.

(A) Idaho statutory comparative negligence scheme.

Defendant asserts that the Court should have included Bear Lake County officers on the special verdict form. Defendant asserts further that inclusion was needed for apportionment of fault. (See Defendant's Memorandum page 9-15).

The Court was correct in not including these non parties on the special verdict form. Defendant's arguments fails to recognize Idaho statutory scheme relating to comparative negligence. Further Defendant's arguments are inconsistent with proof offered at trial. See specifically Idaho Code Section 6-801; 6-802; and 6-803. .

Idaho's legislature adopted the "individual rule" when it enacted comparative negligence. *Beitzel v. Orton*, 120 Idaho 709, 713, 827 P.2d 1160 (1992). The negligence of the Plaintiff must be compared against each individual Defendant in determining whether Plaintiff can recover.

The Idaho Supreme Court has analyzed the statutory scheme on numerous occasions.

In 2001, the Supreme Court decided *Van Brunt v. Stoddard*, 126 Idaho 681, 687, 39 P.3d 621, 627 (2001) and there declined to include a non party on a special verdict form. The Court noted the assertion that a passenger should be listed on the special verdict and said:

> "Testimony by Hopkins that he felt partially responsible for the accident did not, in and of itself, make him contributorily negligent. We conclude that, having found no breach of duty by Hopkins and no causal connection between his actions and the resultant injuries to Van Brunt, the District Court properly excluded Hopkins from the special verdict form. 39 P.3d at 688. (Emphasis added)

In 2009 the Supreme Court decided *Jones v. Crawforth*, 147 Idaho 11, 205 P3.d 660 (2009). The Supreme Court noted, after discussing *Van Brunt*;

> Nevertheless, before a non party is included on a special verdict form, "there must be a showing that the requisite elements of a cause of action against them have been presented at trial [citation omitted]. The court in *Van Brunt* found that the District Court had properly excluded a non party from the special verdict form because no causal connection between his actions and the injury of the Plaintiff were shown. 136 Idaho App. 687-88,

> 39 P.3d 627-28. In contrast, in *Le'Gall v. Lewis County*, 192 Idaho 182, 923 P.2d 427 (1996), this Court found that a non party actor should have been included on the special verdict form after evidence was presented that the actor had a duty, had breached that duty, and there was a causal connection between the breech and the injury. 129 Idaho185, 923 P.2d 430, the Court found that, based on that evidence, a jury could have concluded the actor had negligently contributed to the injury. *id.* Therefore, to include a non party on a special verdict form the elements of a cause of action must have been presented at trial. (Emphasis added) 147 Idaho at 18

(B) There is no proof the Bear Lake officers committed any breach of duty.

In the case at hand, Defendant Rich County has presented no evidence that Bear Lake County officers were guilty of either reckless disregard or negligence. On the contrary, Defendant's whole approach to the case was to show that all of the officers were careful.

The Bear Lake County officers, in a police pursuit context and pursuant to statute, owed only a duty to Kyle Athay to not act with reckless disregard. It has been fully and completely adjudicated that such duty has not been breached. Since there is no cause of action which could be made out against the Bear Lake County deputies, they need not be included on the special verdict form. It has been fully and completely adjudicated, on the merits, that the duty they owed, (not to commit reckless disregard) has not been breached. Therefore, pursuant to the holding in *Jones v. Crawford*, the Court did not need to include non party Bear Lake County officers on the special verdict form.

The Bear Lake County officers did not owe a duty of due care to the Plaintiff. Defendant will argue that the Bear Lake County officers were negligent and that thus negligence is a reason they should be included on the special verdict form. However, the officers, did not owe a duty of reasonable care, the negligence standard, to Kyle Athay. By statute, they were free to be negligent toward Kyle Athay. If there is no duty there can be no breach and there is no cause of action.

Defendant offers no proof and no argument that the Bear Lake County officers were negligent. On the contrary, it went to great lengths to present a case that all the officers were careful. The events and holding in *Jones v. Crawforth* is instructive. *Jones v. Crawforth* was a medical malpractice case. Mrs. Jones died when a pressure cuff was used to speed up reinfusion of her blood during surgery. Air was introduced into her blood stream which created a deadly embolism.

The transfusor (B and B Auto Transfusion Services) sought to have the hospital (HTV) and the employer of the anesthesiologist involved (ACTV) included on the special verdict form. The District Court declined and the Supreme Court affirmed. The rationale for declining to include these alleged actors on the special verdict form was that B and B had failed to prove that HTV and ACTV had violated the standard of care owed by a health care provider.

Here, Defendant Rich County could not and did not prove that the Bear Lake County officers acted outside of the requisite standard of care. The duty these officers owed was to not commit reckless disregard. It has been fully and completely adjudicated that they did not act with reckless disregard. This was a clear determination of the Idaho Supreme Court and was the law of the case. The duty to act without negligence did not apply in this case. Even assuming, arguendo, that it did, there is no proof that the Bear Lake County officers acted with negligence. Once again, Rich County's presentation at trial was that all the officers were careful.

It is illogical and inconsistent with the purposes of Summary Judgment to apportion fault in this case where the Supreme Court has ruled there was no fault. When this matter was argued at trial, Plaintiff cited *Bowie v. Young*, 813 So.2d 562, 568-570 (LA App. 3 Circuit 2002).

> Although the article [statute] is silent regarding dismissed, non-negligent Defendants, we believe that it is illogical to consider these parties in the allocation

> of fault when it has previously been determined that they did not cause or contribute to the injury as required by the article. Further, such a reading of the article would result in the possibility of penalizing the Plaintiff by forcing the allocation of fault to non-negligent previously dismissed parties thereby reducing her recovery. Such an application of the law would be absurd.

Likewise, in this case it is absurd to include the Bear Lake County officers on the special verdict form. They have been adjudicated as not having committed reckless disregard. There is no proof they acted with negligence. Defendant's own proof at trial was to show the officers acted carefully. It is inconsistent and absurd for Defendant to define the case arguing the officers were careful and in the same breath claim they were negligent.

Defendant at trial, and still in it's present motion, attempted to equate it's conduct with that of Deputies Ludwig and Athay. In effect, Defendant wanted to, and still wants to, coattail itself into a defense verdict by attaching itself to the Supreme Court's finding that the Bear Lake County officers have been adjudicated as not having breached the standard of care. Defendant states "the only difference the Plaintiff was able to show was that Sheriff Stacy initiated the pursuit in Utah and continued to follow the fleeing vehicle into Wyoming and to Idaho" (Defendant's Memorandum page 19). This statement alone is a classic example of the Defendant's continuous "spin" on the facts and on the proceedings. It also clearly exposes the Defendant's flawed theory and it's giving information to the jury about the finding of the Supreme Court absolving the Bear Lake County officers. Had such been allowed at trial it would have confused the jury. The Court was correct in excluding the Bear Lake County officers from the special verdict form.

II.

The Court was correct in limiting the Defendant's cross examination of the Plaintiff.

Plaintiff now complains of, and asserts as grounds of a new trial, that it was limited in it's

opportunities of cross examination of the Plaintiff. Defendant's claim is that it should have been allowed the opportunity to cross examine Kyle Athay about his relationships of a personal nature. It claims that these factors "of the Plaintiff's own choosing" negatively impacted his earning capacity.

Rather than call employers, both former and prospective, Defendant embarked on a course of character assassination. Defendant did cross examine Kyle Athay on these issues and did elicit some admissions. If Defendant feels that it should have been allowed further opportunities of character examination, it need only consult the Idaho Rules of Evidence. IRE 403 would clearly indicate Defendant's attempted cross examination was of such limited probative value that was far outweighed by the prejudicial effects. Further, this underhanded attempt at introducing character evidence was improper under IRE 404.

The Court was correct in cutting off further and continued cross examination of this nature.

III.

Judgment notwithstanding the verdict.

(A) Liability Issue.

Defendant claims the proof offered at trial is insufficient to find Rich County liable. Defendant points to no specific deficits except to continue to argue that it's conduct did not differ from that of Deputies Ludwig and Athay.

In considering the Motion on the grounds of insufficient evidence the Court is required to undertake a two part analysis. First, the Court should consider whether the verdict was against the weight of the evidence and if the ends of justice would be served by vacating the verdict. Then the Court must consider whether a different result would follow in a retrial. *Litchfield v. Nelson* 122

Idaho 416, 835 P.2d 651 (Idaho App. 1992).

Simply because the evidence is in conflict is not enough to set aside the verdict and grant a new trial. The Court is free to weigh the conflicting evidence for itself. *Quick v. Crane* 111 Idaho 759, 727 P.2d 1187 (1986). Here, the jury was presented with proof, that on numerous occasions, despite his knowledge of the high probability of the dangers of his pursuit, Sheriff Stacy chose to continue the pursuit at numerous times and places in three states and over a distance of 63 miles.

It was not Plaintiff's burden to show that Sheriff Stacy's conduct differed from others. Plaintiff need only show that Sheriff Stacy's conduct violated the standard. Clearly Plaintiff did so and the jury agreed.

(B) There is sufficient evidence to support the jury's economic damage award.

This case is one where the jury was offered two sets of expert witnesses regarding economic losses. Plaintiff offered his life care specialist and economist. Defendant also offered the testimony of Dr. Jansen as well as it's own economist.

Simple review of that record would show that the proof offered by the Defendant was not credible. For example, Defendant's economist made claims that some of the best jobs in Bear Lake County were at the helmet factory or that Plaintiff was really better off since he could now become a teacher or a computer technician.

The jury was free to believe any witness offered. Clearly they found the figures and proof offered by Plaintiff's experts to be credible and supported by common sense.

Defendant asks the Court to substitute it's own judgment for that of the jury. Defendant had full and complete opportunity to rebut evidence offered by the Plaintiff. There is no indication that the award arrived at by the jury was excessive or was arrived at by passion or prejudice. The

Court should deny the Motion for a New Trial and/or Judgment Notwithstanding the Verdict. *Curtis v. Firth* 125 Idaho 229, 869 P.2d 229 (1994); *Barnet v. Eagle Helicopters Inc*, 123 Idaho 361, 848 P.2d 419 (1993); *Packard v. Joint School District Number 171*, 104 Idaho 604, 661 P.2d 770 (Idaho App. 1983).

(C) Errors, if any were harmless.

An error in the admission of evidence is disregarded unless the ruling affected a substantial right of the party. *Idaho School For Equal Educational Opportunity v. State*, 129 P.3d 1199, 142 Idaho 459 (2005); *Slack v. Kelleher* 104 P.3d 958, 140 Idaho 916 (2004).

Here there is substantial and competent evidence to support the jury's finding with regard to the liability of the Defendant and the amount of Plaintiff's damages. Defendant's assertion that it was not allowed to cross examine the Plaintiff as it wished, or that the proof did not support they jury's finding of reckless disregard on Sheriff Stacy's part, did not affect substantial rights of the Defendant and was harmless error. *Gilbert v. City of Caldwell*, 112 Idaho 386, 732 P.2d 355 (Idaho App. 1987); *L&L Furniture Mart Inc. v. Boise Water Corporation*, 120 Idaho 107, 813 P.2d 918 (Idaho App. 1991); *Martin v. Hackworth*, 127 Idaho 68, 896 P.2d 976 (1995).

CONCLUSION

Defendant's Motions are meritless and should be denied.

RESPECTFULLY SUBMITTED this 12 day of November, 2010.

CRAIG R. JORGENSEN

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of November, 2010, I served a true and correct copy of the foregoing pleading on the following person by the means so indicated:

[✓] First Class
[ ] Hand-Delivery
[✓] Facsimile

Peter Stirba
STIRBA AND HATHAWAY
P.O. Box 810
Salt Lake City, Utah 84110-0810

[✓] First Class
[ ] Hand-Delivery
[✓] Facsimile

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Attorneys for Defendant

IN THE SIXTH JUDICIAL DISTRICT COURT

STATE OF IDAHO, COUNTY OF BEAR LAKE

KYLE ATHAY, Plaintiff, v. RICH COUNTY, UTAH, Defendant.	**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT RICH COUNTY'S MOTION FOR NEW TRIAL OR ALTERNATIVELY FOR JUDGMENT NOTWITHSTANDING THE VERDICT** Case No. CV-2002-0000072 Judge Mitchell W. Brown

Reply Memorandum Def's Mot'n New Trial

Defendant Rich County, Utah, by and through undersigned counsel, hereby submits the following Reply Memorandum in Support of its Motion for New Trial or Alternatively for Judgment Notwithstanding the Verdict.

ARGUMENT

I. The Court's Failure to Include Bear Lake County, Gregg Athay, Chad Ludwig and Deby Eborn on the Special Verdict Form Was Incorrect Under Idaho Law and A New Trial Should Be Granted.

A. The Plaintiff Presented Substantial Evidence at Trial of the Causal Nexus Between Athay's, Ludwig's and Eborn's Negligent Actions and the Plaintiff's Injuries.

Under Idaho law, it is undisputed that non-parties may be included on a special verdict form, just as this Court did when it included the drunk driver, Daryl Ervin ("Ervin"), on the special verdict form at issue. *See* Van Brunt v. Stoddard, 39 P.3d 621, 627 (Idaho 2001) (*citing* Pocatello Indus. Park Co. v. Steel W., Inc., 621 P.2d 399 (Idaho 1980); Lasselle v. Special Products Co., 677 P.2d 484 (Idaho 1980)). The reason for including non-parties is that "true apportionment cannot be achieved unless it includes all tortfeasors guilty of causal negligence either causing or contributing to the occurrence in question, whether or not they are parties to the case." Van Brunt, 39 P.3d at 627 (*citing* Pocatello Indus. Park, 621 P.2d at 787). Whether a non-party's conduct was a contributing factor to the plaintiff's injuries is a question of law determined by considering the duty imposed on the non-party's behavior. Id.

In Van Brunt, the defendant, Stoddard, argued that his non-party passenger should have been included on the special verdict form based on the passenger's testimony at trial that he felt partially responsible for Stoddard's driving pattern that resulted in a collision with the Plaintiff's motorcycle. 39 P.3d at 627. The passenger testified that he indicated where Stoddard was

supposed to turn to get to a bank after which Stoddard abruptly turned and hit the Plaintiff, causing injury. Id. The Court stated that the passenger did not breach his duty to exercise the care and caution of a reasonably prudent passenger and that the passenger's testimony alone did not make him contributorily negligent. Id. at 628. Since there was no causal connection between the passenger's actions and the resultant injuries to the plaintiff, the passenger was properly excluded from the special verdict form. Id.

Here, Rich County argued, consistent with the Idaho Supreme Court's decisions in Athay I and Athay II that Sheriff Stacey, like Gregg Athay and Chad Ludwig, did not act with reckless disregard for the safety of others. Conversely, the Plaintiff repeatedly pointed to aspects of both Ludwig's and Athay's conduct to show that all of the officers' conduct taken together showed disregard for public safety that continued in the face of the known risk that an accident could occur. For example, the Plaintiff engaged in extensive cross-examination of Chad Ludwig regarding the propriety of his use of spike strips to stop Ervin's vehicle and questioned both Athay and Ludwig as to why they did not abandon the pursuit entirely when it became clear that Ervin was not going to voluntarily stop his vehicle.

The Athay I Court held that I.C. § 49-623 established a reckless disregard standard of care for officers engaged in a police pursuit and that Ludwig's conduct did not breach this standard of care. Athay I, at 902, 906-907. The Athay II Court held that Gregg Athay's conduct likewise did not breach the reckless disregard standard of care. Athay II, at 333-334. However, regardless of the standard of care under I.C. § 49-623, "every driver of a vehicle should exercise due care to avoid colliding with any pedestrian or any person propelling a human-powered vehicle...," and "shall exercise proper precaution upon observing any ... obviously confused,

incapacitated or intoxicated person." I.C. § 49-615 (2010). Neither the Athay I nor Athay II Courts took up the issue of whether Athay or Ludwig breached the duty of all drivers to exercise general due care and take proper precautions under I.C. § 49-615. The Plaintiff's assertion that "by statute [the officers] were free to be negligent toward Kyle Athay," not only ignores the law, but also defies rationality. Plaintiff's Reply Brief, p. 5.

There was significant evidence introduced at trial that a jury could find that Athay and Ludwig breached the standard of care set forth in I.C. § 49-615.[1] In this situation, the issue of whether the Bear Lake County officers' conduct caused or contributed to the Plaintiff's injuries should have been left to the jury's consideration. *See* Vannoy v. Uniroyal Tire Co., 726 P.2d 648, 655 (Idaho 1985). The standard of conduct required to hold the Bear Lake County officers liable under I.C. § 49-623 is not the only standard that applies to the officers' conduct: police officers must still act with reasonable prudence and due care when they operate a vehicle even if they cannot be held legally *liable* for their negligence. *See* Vannoy, 726 P.2d at 655-656. The Court's exclusion of Ludwig, Athay and Bear Lake County from the special verdict form did not comply with Idaho law and substantially prejudiced Rich County thus warranting a new trial.

B. The "Individual Rule" Only Applies In Cases of Joint and Several Liability and Has No Application to this Case.

In his responsive Brief, the Plaintiff argues that the Bear Lake County officers were properly left off of the special verdict form because Idaho has adopted the "individual rule" for comparative negligence. Under Idaho law, a plaintiff may only recover damages from a party

[1] The Plaintiff's Reply Brief does not take issue with Rich County's argument that Doby Eborn also should have been included on the special verdict form. As Ms. Eborn was not operating a vehicle on the evening in question, she plainly would not be subject to the duty imposed by I.C. § 49-615. However, there was sufficient evidence presented at trial to find that Ms. Eborn was negligent in failing to inform the pursuing officers of the deer vehicle collision up ahead on the roadway and that the officers may have abandoned pursuit had they known that information. It was legally incorrect for the court to exclude Ms. Eborn from the special verdict form and a new trial is thus appropriate.

whose percentage of negligence or comparative responsibility is greater than that of the plaintiff. I.C. § 6-801 (2010). In cases where the plaintiff seeks to recover against multiple parties under a theory of joint and several liability, the "individual rule" applies to determine which of the multiple actors' negligence or comparative responsibility exceeds the negligence or comparative responsibility attributed to the plaintiff by comparing the plaintiff's fault to each individual party. I.C. § 803(3) (2010).

The individual rule has no application to the instant case because Ervin, Stacey, Eborn and the Bear Lake County officers are not joint tortfeasors. In Athay I, the Idaho Supreme Court explained, "[t]wo or more persons can be joint torfeasors if they 'unite in an act which constitutes a wrong to another, intending at the time to commit it, or doing it under circumstances which fairly charge them with intending the consequences which follow,'" or "if the wrongful conduct of each of [the actors] was a proximate cause of an indivisible injury." Athay v. Stacey, 128 P.3d 897, 906-907 (Idaho 2005) (*quoting* Griffin v. Clark, 42 P.2d 297, 302-303 (Idaho 1935)). The Court concluded that there was "no evidence... that Sheriff Stacey and Deputies Athay and Ludwig united together intending to commit a wrong against anyone," or, after concluding that Ludwig did not act with reckless disregard, that each actor engaged in wrongful conduct. Id. In Athay II, the Court concluded that Gregg Athay did not act with reckless disregard and thus he could likewise not be found jointly and severally liable for the Plaintiff's injuries. Athay v. Stacey, 196 P.3d 325, 333-334 (Idaho 2008). The Athay II Court also concluded that Ervin and Stacey were not joint tortfeasors because they were not pursuing a common plan or design. Id. at 340.

Since the parties whom Rich County sought to include on the special verdict form could not be held jointly and severally liable to the Plaintiff, the individual rule has no application to this case. Even if the rule did apply, the rule's application would be irrelevant to the issues raised in Rich County's Motion for New Trial/JNOV because the jury determined that the Plaintiff did not contribute to his injuries and thus would be able to recover from all tortfeasors. The Plaintiff's argument is inconsequential to the issue of whether Bear Lake County, Eborn and the Bear Lake County officers should have been included on the special verdict form.

II. Rich County's Cross Examination of the Plaintiff Was Improperly Limited so as to Warrant a New Trial.

At trial, the Plaintiff argued that the Plaintiff's paraplegia has reduced his earning capacity because of his physical limitations as to types of work he can actually perform and the fact that the Plaintiff requires more time off for medical appointments than an employee who does not have paraplegia and thus fewer employers are willing to hire the Plaintiff in the first place. The Plaintiff sought compensation for his diminished earning capacity in the form of economic damages to which two experts, Helen Woodard and Jerome Sherman, testified at length.

On direct examination, the Plaintiff testified regarding his employment history both before and since the accident. The Plaintiff testified that he worked for some period of time as a substitute teacher at Bear Lake High School and that he enjoyed this job, but did not explain why he was no longer employed there other than to insinuate that it was due to a circumstance attendant to his paraplegia.

On cross examination, Rich County attempted to impeach the Plaintiff's testimony by asking him questions about some of the reasons for the Plaintiff losing his job with Bear Lake High School and the Movie Gallery that were entirely unrelated to the Plaintiff's injuries, including inappropriate relationships with at least two high school students while he was substitute teaching and similar complaints from female coworkers at Movie Gallery. Rich County's purpose for asking these questions was to present evidence that the Plaintiff's paraplegia was not wholly responsible for his diminished earning capacity and has instead been largely due to the Plaintiff's behavior as an employee. This evidence is directly relevant to the jury's determination of an economic damages award and was thus erroneously excluded.

Rich County did not intend to cross-examine the Plaintiff on this subject to impeach his personal character. Any negative reflection on the Plaintiff's character that this evidence may have caused is purely coincidental and not of Rich County's design. The Plaintiff's argument that Rich County could have called the Plaintiff's former employers and coworkers is equally untenable. The Court excluded evidence of this subject matter on relevancy grounds. Calling a different witness in an attempt to elicit the same information would not change the Court's ruling that the evidence was irrelevant to the issues presented at trial.

Damages was undoubtedly a significant issue in the Plaintiff's case and among the damages sought was the Plaintiff's reduced earning capacity. However, the Plaintiff is not entitled to compensation for his alleged inability to secure and maintain gainful employment if this inability stems from reasons entirely unrelated to the Plaintiff's injuries, his physical limitations and attendant medical needs. Rich County was entitled to present evidence and cross-examine the Plaintiff as to these reasons, particularly because this evidence had been previously

substantiated during the Plaintiff's own deposition. Without this testimony, the jury did not have all of the relevant information to correctly award the Plaintiff economic damages for diminished earning capacity to Rich County's substantial prejudice. A new trial is appropriate to allow Rich County to present this evidence to rebut the Plaintiff's testimony.

III. The Plaintiff Does Not Dispute Rich County's Arguments Regarding the Court's Failure to Instruct the Jury on the Law of the Case.

The Plaintiff's Reply Brief in Opposition to Motion for a New Trial contains no arguments or other such response to Rich County's assertion that the Court's failure to instruct the jury on the relevant law of the case was legally incorrect and high prejudicial to Rich County and should thus warrant a new trial. It must be assumed that the Plaintiff does not dispute Rich County's argument and the Court should decide this issue based on the Plaintiff's Motion for New Trial/JNOV alone.

Briefly, the Court should have instructed the jury as to the Idaho Supreme Court's determinations in Athay I and Athay II that both Athay's and Ludwig's conduct did not amount to reckless disregard. When the Idaho Supreme Court "states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case and much be adhered to throughout its subsequent progress," including in a trial court on remand. Swanson v. Swanson, 5 P.3d 973, 976 (Idaho 2000) (*citing* Suitts v. First Sec. Bank of Idaho, 713 P.2d 1374, 1380 (Idaho 1985)). The trial court is charged with ensuring a remanded case is tried "in light of and in consonance with" the law of that particular case. Id. (citing Creem v. Northwestern Mut. Fire Ass'n of Seattle, Wash., 74 P.2d 702, 703 (Idaho 1937)).

This trial was not conducted "in light of," and in accord with the law of this case due to the Court's failure to instruct the jury that Athay and Ludwig did not act with reckless disregard

for the safety of others. The law of this case is that there is nothing that Ludwig or Athay did or failed to do that amounted to reckless disregard. Rich County should have been able to point out that fact in its closing argument as a way of telling the jury that they must find something different and more egregious about Stacey's conduct in order to conclude that he acted with reckless disregard and thereby hold Rich County liable because this is the law of the case as pronounced by the Idaho Supreme Court. At the very least, the Court should have instructed the jury on this point because it is truly not argument; it is simply the law that must be abided by in this matter. Rich County should be granted a new trial because the Court failed to instruct the jury and conduct the trial in consonance with the established and relevant law of the case to Rich County's substantial prejudice.

IV. There Is Insufficient Evidence to Support the Jury's Finding that Sheriff Stacey Acted With Reckless Disregard and the Jury's Economic Damages Award.

In order to prevail at trial, the Plaintiff was required to show that Sheriff Stacey acted with reckless disregard for the safety of others or, said another way, that Sheriff Stacey breached the duty of care set forth under I.C. § 49-623. To meet his burden, the Plaintiff was required to present evidence that Sheriff Stacey had actual knowledge of the high probability that another motorist could be hit and seriously injured by the fleeing motorist and despite that knowledge, continued his course of conduct. The Plaintiff also needed to show that Sheriff Stacey's conduct in pursuing a fleeing, intoxicated motorist created an unreasonable risk of bodily harm. Rich County cannot be held liable because the Plaintiff presented no evidence that Stacey's conduct was different and more egregious than Ludwig's or Athay's appropriate and not reckless conduct.

The sole distinction between Stacey's conduct and that of the other officers drawn by the Plaintiff was that Sheriff Stacey initiated the pursuit in Utah and continued to follow the fleeing vehicle into Wyoming and into Idaho. However, in finding that Ludwig and Athay's conduct did not amount to reckless disregard, the Idaho Supreme Court already determined that the pursuit was justified and thus initiating it could not amount to reckless disregard. Therefore, at trial the Plaintiff failed to establish that Sheriff Stacey acted with reckless disregard and the Court should set aside the jury's verdict and grant Rich County's Motion for Judgment Notwithstanding the Verdict.

Also, the jury's $2,720,126.00 economic damages award is unsupported by the evidence introduced at trial. Based on the Plaintiff's economic damages evidence, including projections of economic loss, projection of the present value of Plaintiff's life care plan, and the plaintiff's medical bills, it is unclear how the Jury reached the $2,720,126.00 figure, particularly since the Plaintiff testified that there were a number of projected costs that he has not and would likely never incur, such as further education and training, home care, etc. thereby preventing the jury from awarding compensation for these items. Since the economic damage award is against the overwhelming weight of the evidence produced at trial, the Court should enter judgment notwithstanding the verdict as to this issue.

CONCLUSION

Based on the foregoing, Rich County respectfully requests that its Motion for New Trial or Alternatively for Judgment Notwithstanding the Verdict be granted.

DATED this 16th day of November, 2010.

STIRBA & ASSOCIATES

By: _____

PETER STIRBA
R. BLAKE HAMILTON
Attorneys for Defendant

Reply Memordam Def's Moth New Trial
476 11

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2010, a true copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT RICH COUNTY'S MOTION FOR NEW TRIAL OR ALTERNATIVELY FOR JUDGMENT NOTWITHSTANDING THE VERDICT** was served 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

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile
( ) Electronic Filing

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

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile
( ) Electronic Filing

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

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile
( ) Electronic Filing

Reply Memorandum Def's Mot'n New Trial
477 12

11/16/2010

KYLE ATHAY
-VS-
RICH COUNTY UTAH

BEAR LAKE COUNTY-SIXTH JUDICIAL DISTRICT **CV0200072**

SHERIFF'S RETURN ON **SUBPOENA DUCES TECUM** – SHERIFF'S# 1014849

RECEIVED BY SHERIFF ON 11/15/2010

I CERTIFY THAT I SERVED A COPY OF THE **SUBPOENA DUCES TECUM [VERIZON WIRELESS]** TO

VERIZON WIRELESS SERVICES LLC

ON 11/16/2010 @ 11:10 HRS,

VERIZON WIRELESS SERVICES LLC
%STANLEY THARP (CT CORPORATION SYSTEM, REGISTERED AGENT)
1111 W JEFFERSON STREET #530
BOISE, ID 83702

I RETURN THE SERVED **SUBPOENA DUCES TECUM** AND ASSESS MY FEES OF: $55.00 ***PAID BY ADVANCE FEES***.

GARY RANEY, SHERIFF
ADA COUNTY, IDAHO

BY Kelly J. Adams
DEPUTY KELLY ADAMS 4485

STIRBA & ASSOCIATES
ZAC HODDY
215 S STATE STREET STE 750
SALT LAKE CITY, UT 84111

1/4254/4485

Subpoena Duces Tecum (Verizon Wireless)
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ADA COUNTY SHERIFF'S OFFICE
CIVIL SECTION

AFFIDAVIT OF SERVICE DEPUTY_____CASE NO.

KYLE ATHAY,
Plaintiff,
-VS-

RICH COUNTY, UTAH,
Defendant.

BEAR LAKE COUNTY-SIXTH JUDICIAL DISTRICT
COURT CASE NO: CV0200072
SHERIFF'S CASE NO 1014849

SERVE TO: Verizon Wireless Services LLC
%CT CORPORATION SYSTEM, REGISTERED AGENT
ADDRESS: 1111 W JEFFERSON STREET STE 530 BOISE, ID 83702

I, Kelly Adams, CERTIFY THAT I PERSONALLY
(DEPUTY'S PRINTED NAME)

SERVED A COPY OF THE

- SUBPOENA DUCES TECUM [Verizon Wireless]

TO: CT Corp. Sandra Thorp
(NAME OF INDIVIDUAL RECEIVING DOCUMENTS)

AT: 1111 W. Jefferson St. #530 Boise
(ADDRESS)

ON: 11/16/10 (DATE) AT: 1110 (TIME)

K. Cal
(SIGNATURE) ADA#: 9485

SUBSCRIBED AND SWORN TO before me this 16th day of November 2010

Notary Public for Idaho
Residing at Boise, Ada County
My Commission Expires 4/10/2015

SHERRI WYATT
NOTARY PUBLIC
STATE OF IDAHO

Subpoena Duces Tecum (Verizon Wireless)
x 29

ALAN JOHNSTON (Idaho Bar No. 7709)
PIKE HERNDON STOSICH & JOHNSTON
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215 South State Street, Suite 750
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Salt Lake City, UT 84110-0810
Telephone: (801) 364-8300
Telefax: (801) 364-8355

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.	**SUBPOENA DUCES TECUM** **[Verizon Wireless]** Case No. CV-02-00072 Judge Mitchell W. Brown

The State of Idaho to: CT Corporation System
Verizon Wireless Services, LLC Registered Agent (Idaho)
1111 W. Jefferson Suite 530
Boise, ID 83702

Subpoena Duces Tecum (Verizon Wireless)
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YOU ARE COMMANDED:

[ ] to appear in the Court at the place, date and time specified below to testify in the above case.

[ ] to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

[X] to produce or copy the following documents, including electronically stored information in your possession, custody, or control and mail or deliver to R. Blake Hamilton at the law offices of Stirba & Associates at the place, date and time specified below.

1. **Any and all cellular phone records, which are dated or were prepared between July 1, 2010 and October 1, 2010, retained for Verizon Wireless cellular customer Kyle Athay, Wireless Number (208) 251-0668, including, but not limited to:**

   a. **Billing records.**

   b. **Call detail records.**

   c. **Text detail and content records.**

   d. **Photos or other phone data stored online or electronically.**

   e. **Subscriber information.**

[ ] to permit inspection of the following premises at the date and time specified below.

Subpoena Duces Tecum (Verizon Wireless)
JSI

PLACE, DATE AND TIME:

Place:	Stirba & Associates 215 South State Street Suite 750 Salt Lake City, Utah 84111
Date:	November 16, 2010
Time:	5:00 p.m.

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above that you may be held in contempt of court and that the aggrieved party may recover from you the sum of $100.00 and all damages which the party may sustain by your failure to comply with this subpoena.

DATED this 12 day of November, 2010.

STIRBA & ASSOCIATES

By: _____

PETER STIRBA
R. BLAKE HAMILTON
Attorneys For Defendant

Subpoena Duces Tecum (Verizon Wireless)
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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, Defendant.	CASE NO. CV-2002-000072 MINUTE ENTRY & ORDER

On November 18, 2010, counsel for the above-named Plaintiff, Craig R. Jorgensen, counsel for the Defendant, Peter Stirba and Alan Johnston, appeared for further proceedings. Dorothy Snarr acted as court reporter for this proceeding.

This matter was set for Defendant Rich County's Motion for New Trial dealing with ex parte communications, Defendant's Motion for New Trial or Alternatively for Judgment Notwithstanding Verdict, Plaintiff's Motion to Strike Defendant's Motion for New Trial and Motion to Shorten Time.

The Court advised that it would first take up Defendant's Motion for New Trial arising out of the ex parte communications involving the Plaintiff and the Court's courtroom clerk, Brandy Peck. The Court reiterated the parameters concerning what areas the parties would be allowed to

inquire which were enunciated in the previous hearing. The Court heard Rich County's objections to these limitations, overruled the same and proceeded with the evidentiary hearing regarding this motion. Counsel for Defendant requested the prospective witnesses be excused from the courtroom pending their testimony and the Court GRANTED said motion without objection from Plaintiff.

An evidentiary hearing was held regarding the Defendant's Motion for New Trial. Mr. Stirba called Brandy Peck, who was sworn and testified under direct and cross. Following the witness's testimony, counsel for the Defendant requested a closed conference with only the Court, staff and counsel. The courtroom was cleared of witnesses and spectators. Mr. Stirba renewed his Motion for Limited Disqualification of the Court and provided argument. Mr. Jorgensen responded. The Court DENIED the motion and set forth its rationale on the record.

Counsel for the Defendant called Kyle Athay, who was sworn and testified under direct and cross. The Defendant called Blake Hamilton, who testified by telephone. Mr. Hamilton was sworn and testified under direct and cross. Defendant's counsel offered Exhibit A, a 302 page summary of the Plaintiff, Kyle Athay's cell phone records from Verizon Wireless. The records were not received by Defendant's counsel at their office in Utah until today because of time constraints regarding the subpoena process of procuring the records from Verizon. Mr. Stirba will overnight copies of the exhibit to the Court and opposing counsel and requested the exhibit be admitted. Mr. Jorgensen reserved his objection until after receipt of the exhibit. The Court reserved ruling on the admission of the evidence until after it is received and reviewed by opposing counsel. Following argument on the motion, the Court will take this matter under advisement after Exhibit A is received and reviewed.

The Court heard argument on the Defendant's Motion for New Trial or in the Alternative

Judgment Notwithstanding Verdict and the Plaintiff's Motion to Strike the Defendant's Motion for New Trial.

Following argument on the motions, the Court will take all the issues UNDER ADVISEMENT and issue a decision in due course. SO ORDERED.

DATED this 18th day of November, 2010.

MITCHELL W. BROWN
Sixth District Judge

CERTIFICATE OF MAILING/SERVICE

I hereby certify that on the 24th day of November, 2010, I mailed/served a true copy of the foregoing document on the attorney(s) / person(s) listed below by mail with correct postage thereon or causing the same to be hand delivered.

ATTORNEY(S) / PERSON(S)

Craig R. Jorgensen
Attorney at Law
P.O. Box 4904
Pocatello, ID 83205-4904

Faxed 237-1706

Peter Stirba
Blake Hamilton
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Alan Johnston
E.W. PIKE & ASSOCIATES, P.A.
P.O. Box 2949
Idaho Falls, ID 83403-2949

Faxed 528-6447

By _____
Deputy Clerk

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, Defendant.	Case No. CV-2002-00072 **MEMORANDUM DECISION AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL**

This matter is before the Court for consideration of Defendant's, Rich County, Utah (Rich County), Motion for a New Trial. Rich County claims it is entitled to a new trial pursuant to Rule 59 of the Idaho Rules of Civil Procedure.[1] In addition to the Motion for a New Trial, a number of ancillary motions have arisen. These motions are: (1) Rich County's Motion to Strike Plaintiff's Brief in Opposition to Defendant's Motion for Limited Disqualification of Judge / and Further Brief in Opposition to Motion for

[1] Rich County has also filed a Motion for New Trial or Alternatively for Judgment Notwithstanding the Verdict. This is an entirely separate and distinct motion and will be addressed in a separate Memorandum Decision and Order.

New Trial; (2) Rich County's Motion to Strike the Affidavits of Jennifer Attebery, Ann Marie Hysell, Amy Burns, Cheryl Leann Shuler, Michael Jay Skerrit, and Cheri Ann Nichols (hereinafter Motion to Strike Juror Affidavits); and (3) Rich County's Motion to Strike Plaintiff's Supplemental Brief in Opposition to Defendant's Motion for New Trial. This matter proceeded to hearing on November 18, 2010. This hearing not only consisted of oral argument on the motion, but included the submission of evidence, both testimonial and documentary evidence. Following this argument the Court took the matter under advisement. However, following the evidentiary hearing and oral arguments, additional matters were submitted and objected to; therefore, the Court actually took this matter in its entirety under advisement on December 3, 2010. The Court now issues its decision regarding the motions identified above.

COURSE OF PROCEEDINGS

In July of 2010 a ten (10) day jury trial was conducted in Pocatello, Idaho.[2] Following the jury trial, the jury returned a verdict in favor of the Plaintiff, Kyle Athay (Athay).

On September 16, 2010, the Court conducted a status conference. At said status conference the Court advised the parties that it had learned that during the course of trial and after the completion of the trial there had been ex parte communications between the Court's courtroom clerk, Brandy Peck (Peck), and Athay and the representative of Rich County, Sheriff Dale Stacey and his wife. The Court advised the parties of the nature and extent of those communications as the Court understood them at that time. *See* Transcript of proceedings conducted on September 16, 2010.

[2] Venue in this matter was changed for trial purposes only pursuant to stipulation of the parties from Bear Lake to Bannock County.

On October 1, 2010, Rich County filed its Motion for New Trial, alleging that the ex parte communications constituted an irregularity and that the Court should grant its request for a new trial pursuant to Rule 59 of the Idaho Rules of Civil Procedure.

On October 8, 2010, the Court entered Judgment relative to the Jury's Verdict rendered incident to the jury trial in this matter.

DISCUSSION

The Court will first address the ancillary motions and then address Rich County's Motion for a New Trial.

1. Motion to Strike Plaintiff's ... Further Brief in Opposition to Motion for New Trial

Rich County has moved to Strike that portion of Athay's Brief in Opposition to Defendant's Motion for Limited Disqualification of Judge / And Further Brief in Opposition to Motion for New Trial, dealing with the Motion for New Trial. This brief was filed on November 3, 2010, only one day before the hearing on said motion was scheduled to be heard. The basis for Rich County's objection and Motion to Strike is that Athay had previously submitted a reply brief to Defendant's Motion for a New Trial. *See* Plaintiff's Reply Brief to Defendant's Motion for New Trial filed on October 13, 2010. Rich County submits that Athay's conduct is in violation of the rules of motion practice outlined in Rule 7 of the Idaho Rules of Civil Procedure. Specifically Rule 7(b)(3)(E) which provides as follows:

> Any brief submitted in support of a motion shall be filed with the court, and served so that it is received by the parties, at least fourteen (14) days prior to the hearing. Any responsive brief shall be filed with the court, and served so that it is received by the parties, at least seven (7) days prior to the hearing. Any reply brief shall be filed with the court, and served so that it is received by the parties, at least two (2) days prior to the hearing.

The hearing on the Motion for a New Trial was originally set for argument on November 4, 2010. However, it was not argued to the Court until November 18, 2010.[3] As such, Rich County had fourteen (14) days in which to address and respond to any arguments asserted by Athay and/or amy case law cited to and relied upon by Athay.

The Court recognizes and agrees with Rich County's interpretation of I.R.C.P 7(b)(3)(E). Athay's submission of that portion of its brief titled Further Brief in Opposition to Motion for New Trial was beyond the scope of what is contemplated by Rule 7. Rule 7 clearly allows for only one "responsive brief" to be filed by the non-moving party and that it shall be filed at least seven (7) days prior to the hearing.

However, the Court does not intend to strike this submission. Rich County, as stated above, had notice of the arguments and case law being relied upon by Athay. These issues were argued and responded to at the time of the hearing. Most importantly this Court does not intend to be limited in its ability to conduct its own independent research regarding this issue. Certainly any law that the Court finds in conducting this research it intends to utilize and rely upon in addressing Rich County's Motion for a New Trial.

As stated by the Idaho Court of Appeals in *Matter of Estate of Keeven*, 126 Idaho 290, 296, 882 P.2d 457, 463 (Ct.App.1994):

> This Court recognizes the importance of the civil rules concerning the time requirements for filing and service of motions. We do not condone a litigant's disregard of these time restrictions. However, the purpose of such rules is to provide sufficient notice of issues to be addressed and relief sought so that the opposing party may adequately prepare to present its position. The notice rules are not jurisdictional ...

[3] The reason this motion was continued until November 18, 2010 was the requirement of the rule that the Court first address and rule on the Motion for Limited Disqualification before it had jurisdiction to take up any other issue. *See* I.R.C.P 40(d)(5).

This Court agrees with this statement. Further, the Court concludes that based the manner in which the timing of the hearing played out, due to the Motion for Limited Disqualification, Rich County had adequate notice of any additional arguments and law cited to by Athay and adequate opportunity to prepare to meet and address those arguments and the law. Therefore, the Court finds that no prejudice has occurred and that Rich County's Motion to Strike that portion of Athay's Brief in Opposition to Defendant's Motion for Limited Disqualification of Judge / And Further Brief in Opposition to Motion for New Trial, dealing with the Motion for New Trial is hereby **DENIED.**

2. Motion to Strike Juror Affidavits.

Rich County has also filed its Motion to Strike Juror Affidavits. The basis for this motion is again based upon the untimeliness of their submission. The hearing on Rich County's Motion for a New Trial was conducted on November 18, 2010. At the time of the argument the Court inquired concerning whether either party had interviewed and was planning to submit testimony in accordance with Rule 606(b) of the Idaho Rules of Evidence concerning "whether [any] extraneous prejudicial information was improperly brought to bear upon any juror." Both parties advised that no interviews with jurors had been conducted and that there would be no testimony concerning such extraneous prejudicial information.

Eleven (11) days after the hearing, on November 29, 2010, Athay filed the Affidavits of six (6) jurors, Michael Jay Skerritt, Cheryl Leann Shuler, Ann Marie Hysell,

Amy Burns, Cheri Ann Nichols and Jennifer Attebery. On December 1, 2010, Rich County filed its Motion to Strike the juror affidavits.

Rich County's Motion for a New Trial is brought pursuant to Rule 59(a)(1) of the Idaho Rules of Civil Procedure. Specifically, Rich County argues that due to irregularities in the proceedings of this jury trial, the ex parte communications between Peck and Athay, Rich County is entitled to a new trial. Rule 59(c) of the Idaho Rules of Civil Procedure deals with the issue of the time requirements for submitting affidavits either in support of or in opposition to a motion for a new trial brought pursuant to I.R.C.P. 59. This rule provides as follows:

> When a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has fourteen (14) days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty one (21) days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

With respect to the present motion Rich County did not file any affidavits in support of its motion for a new trial. However, it did file its motion and supporting memorandum on October 1, 2010. Therefore, this Court concludes that I.R.C.P. 59(c) requires that Athay's submissions in opposition to this motion for new trial, including affidavits, were required to be filed on or before October 15, 2010. In fact, Athay did file his Reply Brief to Defendant's Motion for a New Trial and the Affidavit of Kyle Athay on October 13, 2010.

However, Athay did not file the juror affidavits until after the November 18, 2010 hearing on this motion. Nor did Athay move the Court in a timely fashion and upon good cause shown for an additional twenty one (21) days. Therefore, it is clear that the juror affidavits in question were not submitted in a timely fashion under I.R.C.P. 59(c).

Unfortunately the Court concludes that it must strike the juror affidavits filed by Athay in this proceeding. Despite the Court's belief that the juror affidavits would be extremely enlightening on the issue of whether or not any of the jurors observed any of the inappropriate conduct involving Athay and Peck and whether or not any impermissible contact was brought to bear upon them by way of Athay or Peck, Athay's failure to comply with the procedures prescribed by the Idaho Rules of Evidence and the Idaho Rules of Civil Procedure preclude the Court from considering these juror affidavits. Athay did not file these affidavits within the fourteen (14) days allotted by Rule 59(c). Neither did Athay request an additional twenty one (21) days as allowed by the rule upon a showing of "good cause." Rather, Athay disregarded the procedure and filed the affidavits eleven (11) days after the hearing on this motion.

In *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 650, 827 P.2d 656, 663 (1992) the Idaho Supreme Court while addressing this issue stated as follows:

> Watson also appeals the decision of the district court declining to reconsider its order to grant a new trial in light of the second set of juror affidavits. Watson's motion for reconsideration of the trial court's order granting a new trial was based on I.R.C.P. 59(e), 60(b)(1), (3) and (6) and was made nearly a year after the initial motion for new trial had been filed by International Harvester. At the time Watson submitted the second set of ten juror affidavits, including five supplemental affidavits from the jurors relied upon by International Harvester in its initial motion for new trial. The trial court denied the motion to reconsider on the ground that Watson had ample opportunity to raise all of the issues and present the new evidence in the form of juror affidavits when International Harvester's motion for a new trial was previously argued. **The trial court correctly ruled that Watson had not complied with the time requirements of I.R.C.P. 59(c) in filing the affidavits opposing International Harvester's motion for new trial and it did not err in refusing to consider Watson's second set of affidavits.** [Emphasis Added]

In the present case, the rule is clear regarding the timelines associated with the submissions of affidavits both in support of and in opposition to a motion for a new trial under I.R.C.P. 59. Those timelines were not complied with by Athay with respect to the juror affidavits. It would contravene the clear objectives of the rule to allow those affidavits for consideration at this stage of the proceedings on the motion for a new trial. Further, it would prejudice the rights of Rich County to prepare to defend against these affidavits, either by way of argument or submission of its own affidavits. For these reasons the Court will **GRANT** Rich County's Motion to Strike the Juror Affidavits and the same will be stricken from the record and will not be considered by the Court with respect to Rich County's Motion for a New Trial.

3. Motion to Strike Plaintiff's Supplemental Brief in Opposition to Defendant's Motion for a New Trial

Following argument on Rich County's Motion for New Trial on November 18, 2010, Athay filed a Motion to File an Additional Brief and a Supplemental Brief in Opposition to Defendant's Motion for a New Trial. Both of these submissions were filed on November 30, 2010, roughly twelve (12) days after the hearing on Rich County's motion. Rich County filed its motion to strike these submissions on December 2, 2010.

Utilizing the same analysis used above as it relates to section 1 of this Memorandum Decision and Order, this Court must **GRANT** Rich County's Motion to Strike Athay's Supplemental Brief in Opposition to Defendant's Motion for a New Trial. This Supplemental Brief in Opposition to Defendant's Motion for a New Trial was filed after the hearing and after the time requirements established by I.R.C.P. 7. Rich County did not have an opportunity to consider the arguments and the authority submitted by Athay in this brief. Nor did Rich County have an opportunity to reply to the arguments

and authority submitted in that submission. Inasmuch as Rich County has not been afforded an opportunity to respond, the Court will **GRANT** Rich County's Motion and Strike the Supplemental Brief in Opposition to Defendant's Motion for a New Trial and will not consider the same in its deliberation related to Rich County's Motion for a New Trial.[4]

Rich County's Motion for a New Trial

A. Failure to Support Motion for New Trial with Affidavits.

Rich County filed its Motion for a New Trial on October 1, 2010. In support of this motion Rich County submitted its Memorandum in Support of Defendant's Motion for New Trial. This Memorandum was likewise filed on October 1, 2010.

Rule 59 of the Idaho Rules of Civil Procedure controls the procedure for filing motions for a new trial. Specifically Rule 59(a)(7) provides that:

> [A]ny motion for a new trial based upon any of the grounds set forth in subdivision 1, 2, 3, or 4 must be accompanied by an affidavit stating in detail the facts relied upon in support of such motion for a new trial. ...

The Idaho Supreme Court has consistently held that it is mandatory that a party seeking a new trial pursuant to I.R.C.P. 59(a)(1) must comply with the affidavit requirement of I.R.C.P. 59(a)(7). *See Kuhn v. Coldwell Banker Landmark, Inc.*, 2010 WL 5186683 (December 23, 2010) (*Kuhn*) and *Johannsen v. Utterbeck*, 146 Idaho 423, 429, 196 P.3d 341, 347 (2008). In *Kuhn*, the Idaho Supreme Court stated as follows:

> We affirm the district court's denial of appellants' Rule 59(a)(1), (4), (6) and (7) motions for a new trial because appellants failed to file the required documentation within the time lines set out in the rule. A motion for a new trial under I.R.C.P. 59(a)(1) and (4) "*must* be accompanied by

[4] Despite the Court's ruling in this matter, the Court continues to reserve the right to conduct its own independent research regarding the issues raised in this motion and to the extent it deems appropriate rely upon any case law or other appropriate authority in rendering its decision.

> an affidavit stating in detail the facts relied upon in support of such motion for the new trial." Idaho R. Civ. P. 59(a)(7) (emphasis added). Affidavits supporting a motion for new trial must be served with the motion. Idaho R. Civ. P. 59(c). Appellants' motion for a new trial was not accompanied by an affidavit and, thus, was procedurally defective. *Johannsen,* 146 Idaho at 429, 196 P.3d at 347. As such, the court properly denied appellants' rule 59(a)(1) and (4) motions for a new trial.

2010 WL 5186683 at p. 4.

This Court has previously struck the juror affidavits submitted by Athay that were filed in opposition to the Rich County's Motion for a New Trial based upon Athay's non-adherence to the requirements of I.R.C.P. 59(e) and the Court's similar adherence to procedure also leads to the conclusion that Rich County's Motion for New Trial pursuant to I.R.C.P. 59(a)(1) is procedurally defective for its failure to support the motion with an affidavit. As such the Court must **DENY** Rich County's Motion for a New Trial based upon its procedural defects.[5]

B. Merits of Rich County's Motion for a New Trial.

However, the Court also feels compelled, based upon the allegations of irregularity and ex parte communications involving Peck, to address the merits of Rich County's request for a new trial.

On two separate occasions the Court set forth in detail to the parties the nature and extent of the communications that occurred between Peck and Athay as related to the Court by his clerk. *See* Transcript of proceedings conducted on September 16, 2010

[5] The Court recognizes that Rich County did file an Affidavit of R. Blake Hamilton in Support of Defendant Rich County's Reply Memorandum in Support of Motion for New Trial. However, the title of this affidavit belies the underlying procedural problem with said affidavit. The affidavit was not filed contemporaneous with the Motion for a New Trial as is required by I.R.C.P. 59(a)(7). This defect is jurisdictional to a Motion for a New Trial brought pursuant to I.R.C.P. 59(a)(1).

and Transcript of proceedings on Motion for Limited Disqualification of Judge, pp. 24-29.[6]

On November 18, 2010, the Court held a hearing on Rich County's Motion for a New Trial which included an evidentiary hearing where Peck and Athay were both sworn and testified.

In considering a party's motion for a new trial Rule 59(a)(1) of the Idaho Rules of Civil Procedure "allows a trial court to grant a new trial 'on all or part of the issues' in an action where there was an '[i]rregularity in the proceedings of the court, jury or adverse party ... by which either party was prevented from having a fair trial.'" *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 708, 979 P.2d 107, 110 (1999) (*Slaathaug*). In exercising its discretion the Court must: (1) correctly perceive the issue as one of discretion; (2) act within the outer boundaries of that discretion and consistent with the legal principles applicable to specific choices; and (3) the trial court's decision must be the product of reasoned decision making. *Schaeffer v. Curtis-Perrin*, 141 Idaho 356, 358, 109 P.3d 1098, 1100 (2005); *Sun Valley Shopping Ctr. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). If the Court properly exercises its discretion as outlined above, the appellate courts will not disturb the trial court's decision. *Id.* at 94.

In *Slaathaug* the Idaho Supreme Court discussed the evolution of the case law dealing with a motion for new trial under I.R.C.P 59(a)(1). It traced this evolution back to the case of *Rueth v. State*, 100 Idaho 203, 208, 596 P.2d 75, 80 (1979) (*Rueth*).[7] In

[6] The Court has since learned that the communications were even more extensive than the Court was originally lead to believe. This has been well documented in the submissions as well as the evidentiary hearing conducted on November 18, 2010. *See* Transcript of Hearing on Motions dated November 18, 2010.

[7] *Reuth* dealt with the ex parte communications of the trial judge rather than the ex parte communication of the judges court room clerk which is the circumstance in the present case.

Slaathaug the Supreme Court noted that it had adopted the "four prong analysis" enunciated in *Reuth* "in determining [if] irregularities were sufficient to warrant granting a new trial." 132 Idaho at 710.

The "four prong analysis" set forth in *Reuth* provides as follows:

> (1) It is for the losing party, in the first instance, to show that there was some communication off the record and not in open court. (2) The burden then shifts to the winning party to show what the communication was. If he cannot show what it was, the verdict must be set aside. (3) If he can show what the communication was but it appears to have been of such a character that it may have affected the jury, then the verdict must be set aside. (4) Only if it is made clearly to appear that the communication could not have had any effect, can the verdict be allowed to stand.

100 Idaho at 209.

In the present circumstance there is no dispute that prong number 1 of the *Reuth* analysis has been met. It was established without question when the Court disclosed the irregularity to the parties on September 18, 2010. Therefore, pursuant to the *Reuth* analysis the burden then shifted to Athay "to show what the communication was." As established by *Reuth*, if he cannot establish what the communication was then "the verdict must be set aside."

In an effort to meet this shifting of burdens, Athay submitted his affidavit. In this affidavit he states that a few days after the trial commenced he met Brandy Perkins.[8] Affidavit Kyle Athay, p.1, ¶ 3. He claims that he and Peck exchanged social pleasantries. *Id.* p.2, ¶ 3. This initial meeting took place during a break in the proceedings. *Id.* at p. 1, ¶ 3. Athay continues that either that same day or the next day, again during a break, he and Peck spoke and exchanged telephone numbers. *Id.* at p.2, ¶ 4. Athay states that

[8] Throughout his affidavit Athay refers to the Court's courtroom clerk as Brandy Perkins. Her actual name is Brandy Peck. Any references in Athay's Affidavit are actually references to Peck.

"thereafter we would telephone each other or text each other when the trial was not in session." *Id.* at p.2, ¶ 5. He further states that since he traveled from Montpelier, Idaho to trial in Pocatello every day that they may have talked or texted during my trips home, but mainly when I was at home." *Id.*

Athay further states that:

> At no time did we ever discuss the case and the trial. Ms. Perkins did not communicate anything to me that she knew with regard to the judge's and jury's activities, thinking or court proceedings. At no time did I inquire of her about the case. I recall one occasion when she asked me how I thought the case would go. I responded I had "no clue." The calls were about our children and their activities. Ms. Perkins was upbeat in our conversations and that was helpful to me. I thought Ms. Perkins' role was limited to "swearing people in." Our relationship was entirely casual.
>
> ***
>
> I did not discuss my contacts with Ms. Perkins with my attorney. The contact was so mundane, social in nature, and so unrelated to the case I did not feel it was important. ... I observed Ms. Perkins having conversations with many people connected with the trial. I did not sense our contact was any different. I had no contact or communication with Judge Brown or any Juror except during proceedings in open court.

Id. at pp. 3, ¶¶ 6 and 8.

The evidentiary hearing held by the Court on November 18, 2010 in which both Peck and Athay testified, confirmed the extent of the ex parte communications between Peck and Athay. In addition, it also established without question that both had significantly understated the extent of these ex parte communications in their prior disclosures.[9] The evidence established that there had been significant contact via cell phones and text messaging both during the course of the trial as well as after the jury verdict had been rendered. It established that there were communications both during the

[9] Peck had previously had conversations with the Court, which were made known on the record to the parties and their counsel during the hearings of September 18, 2010 and the November 4, 2010.

course of the day during trial as well as after hours. It was established that the parties had downloaded photographs and forwarded photographs via text messaging. It was even established that there is a possibility that one text message was sent during the time frame that the Court and counsel were addressing and dealing with a question from the jury during its deliberations.

Despite this gross misconduct on the part of Peck and Athay, they both are consistent in their claims that their communication about the case was limited to generalized questions such as how do you think it is going or what do you think the jury will do. There is no evidence to establish that Peck communicated to Athay or that Athay communicated to his attorney any information concerning matters that Peck may have been privy to through her association with the Court. Additionally both testified that no such communications occurred. There is no evidence to establish that Peck or Athay communicated in an impermissible fashion with any members of the jury or that any members of the jury observed or knew of these inappropriate communications between Peck and Athay. There is no evidence in the record, despite the gross misconduct of Athay and Peck, that it had any negative effect on the parties receiving a fair trial. There is no indication in the record that any of the critical players were in any way influenced by these ex parte communications, not the judge, not the jury, not the attorneys for the respective parties.

Based upon the Affidavit of Kyle Athay and the testimony presented at the November 18, 2010 hearing, the Court concludes that Athay has effectively rebutted the presumption of prejudice or as stated by the Idaho Supreme Court in *Slaathaug*, Athay

has established "that the conduct could not have affected the outcome of the trial." 132 Idaho at 710.

Rich County has argued, both in its written submissions and in oral argument at the hearing, that the *Rueth* presumption cannot be rebutted absent a verbatim reproduction of the contents of all telephone communication by way of text or otherwise. *See* Memorandum in Support of Defendant Rich County's Motion for a New Trial, p.5 ("The communication was in the form of text messages. These written communications must be produced to Defendant.") and Defendant Rich County's Reply Memorandum in Support of Motion for New Trial, p. 6 ("Here, the Plaintiff admits he is unable to disclose, precisely what the communications were. ... Without full disclosure of the improper communication's content, particularly during the trial, Rich County cannot conclude that the jury's deliberations and verdict were not affected by Peck's relationship with the Plaintiff.")

However, the Court does not accept Rich County's contention that the standard announced in *Rueth* and applied by the Idaho Supreme Court is as rigid as argued by Rich County. It would appear that Rich County would have the standard be a per se rule; that if it cannot be shown "precisely" what the communication was then prejudice is presumed and reversal is warranted. However, *Rueth* rejected such a harsh rule holding that "a Per se rule requiring reversal in all instances would appear to be unwise." 100 Idaho at 207. The *Reuth* Court also noted that "it is not without reason that procedural

irregularities involving communication between the trial court and jury are judged by a far stricter standard than those between jurors and other court officials." [10]

This Court concludes, in the exercise of its discretion, that Athay has met his burden of "showing what the communication was", prong two of the *Reuth* test. Although the verbatim texts cannot be retrieved and there are no transcripts of the conversations between Peck and Athay, the content and nature of the communications are clear. The communications were in pursuit of a "friendship" or "social relationship." Although the extent of the communications was grossly understated by both parties, there is no evidence and no reason for this Court to find that they in any way diminished the integrity of the actual trial proceeding, as such the fourth prong of the *Rueth* test has been met and the verdict shall be allowed to stand..

Although this Court is troubled and embarrassed by the fact that these breaches of the Idaho Judicial Cannons occurred on its watch, this Court concludes, after a close review of this matter, that the record before it establishes that while an irregularity in the proceedings did occur, neither "party was prevented from having a fair trial" which is the standard enunciated in I.R.C.P 59(a)(1). Therefore, the Court will **DENY** Rich County's Motion for a New Trial pursuant to I.R.C.P. 59(a)(1).

CONCLUSION

Based upon the foregoing analysis, the Court hereby **DENIES** Rich County's Motion to Strike ... Further Brief in Opposition to New Trial filed by Athay. In addition, the Court **GRANTS** Rich County's Motion to Strike Juror Affidavits and also **GRANTS**

[10] In this instance the communications did not involve the judge. There is also no evidence that the communications involved the jury either collectively or individually. The communications were limited to a courtroom clerk, Peck, and the Plaintiff, Athay.

Rich County's Motion to Strike Plaintiff's Supplemental Brief in Opposition to Defendant's Motion for New Trial. Finally, the Court will **DENY** Rich County's Motion for a New Trial filed pursuant to I.R.C.P. 59(a)(1) both for its procedural defects as well as the substantive record before the Court on this motion.

IT IS SO ORDERED.

DATED this 1st day of February, 2011.

MITCHELL W. BROWN
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date below, I served a true and correct copy of the foregoing document on the attorney(s) or person(s) listed below in the manner indicated.

Attorney(s)/Persons(s):	Method of Service:
Craig R. Jorgensen Attorney at Law 1246 Yellowstone Avenue, Suite A4 Post Office Box 4904 Pocatello, Idaho 83205-4904 Telephone: (208) 237-4100 Facsimile: (208) 237-1706	[ ] U.S. Mail/Postage Prepaid [ ] Overnight Mail [X] Facsimile [ ] Hand Delivered
Peter Stirba R. Blake Hamilton STIRBA & ASSOCIATES 215 South State Street, Suite 750 Post Office Box 810 Salt Lake City, Utah 84110-8300 Telephone: (801) 364-8300 Facsimile: (801) 364-8355	[ ] U.S. Mail/Postage Prepaid [ ] Overnight Mail [X] Facsimile [ ] Hand Delivered
Alan Johnston E.W. PIKE & ASSOCIATES, P.A. 151 North Ridge Ave., Suite 210 PO Box 2949 Idaho Falls, ID 83403-2949 Telephone: (208) 528-6444 Facsimile: (208) 528-6447	[ ] U.S. Mail/Postage Prepaid [ ] Overnight Mail [X] Facsimile [ ] Hand Delivered

DATED this 1st day of February, 2011.

KERRY HADDOCK
Clerk of the District Court

By: Kim Ullrich
Deputy Clerk

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, Defendant.	Case No. CV-2002-00072 **MEMORANDUM DECISION AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL OR ALTERNATIVELY FOR JUDGMENT NOTWITHSTANDING THE VERDICT**

This matter is before the Court for consideration of Defendant's, Rich County, Utah (Rich County), Motion for a New Trial or Alternatively for Judgment Notwithstanding the Verdict. In conjunction with this motion the Plaintiff, Kyle Athay (Athay) filed a Motion to Strike Defendant's Motion for New Trial and Memorandum. Both parties have filed briefs in support of and in opposition to these respective motions.

The Court will first address Athay's Motion to Strike Defendant's Motion for New Trial and Memorandum.

1. ATHAY'S MOTION TO STRIKE

Athay has moved to strike Rich County's Motion for New Trial or Alternatively for Judgment Notwithstanding the Verdict on the grounds that Rich County's motion is procedurally defective pursuant to Rule 59(a)(7) of the Idaho Rules of Civil Procedure. Rule 59(a)(7) of the Idaho Rules of Civil Procedure provides in relevant part that "any motion based on subdivisions 6 or 7 must set forth the factual grounds therefore with particularity."

Athay relies upon the cases of *Nation v. Bonner Bldg. Supply*, 113 Idaho 568, 746 P.2d 1027 (Ct.App.1987) (*Nation*) and *Hells Canyon Excursion Inc. v. Oakes*, 111 Idaho 123, 721 P.2d 223 (Ct.App.1986) (*Hells Canyon*). The Court finds that the *Hells Canyon* case provides no significant guidance on this issue. However, the *Nation* case appears to be nearly identical, procedurally to the case at bar. In *Nation*, seven (7) days after judgment had been entered "Nation's attorney filed and served a motion for new trial." 113 Idaho at 570.[1] "The motion requested simply 'that the Plaintiff be granted a new trial ... upon ... grounds that will be set forth during hearing of this matter.'" *Id.* At the hearing the Defendant challenged the procedural defects in Plaintiff's motion, namely the failure to state with particularity the grounds upon which a new trial was being sought. The trial court, rather than finding the motion for new trial to be procedurally defective and striking the same, set a briefing schedule allowing Nation to supplement its motion by arguing with particularity in a supplemental brief that there was insufficient evidence to support the jury verdict.

[1] At the time of this case, the time requirement in which to file a motion for a new trial was ten (10) days. Under the current rule it is fourteen (14) days.

This is much the same circumstance the Court is faced with. In this case, Rich County filed its Motion for New Trial on October 22, 2010. The Court entered judgment on the jury's verdict on October 8, 2010. Therefore, Rich County's Motion for New Trial was filed on the fourteenth day after judgment was entered and was timely pursuant to Rule 59(b) of the Idaho Rules of Civil Procedure. However, like the motion for new trial in *Nation*, Rich County's motion does not set forth with particularity the factual grounds for its motion. On November 5, 2010, Rich County filed its Memorandum in Support of Defendant's Motion for New Trial or Alternatively for Judgment Notwithstanding the Verdict. In this memorandum, Rich County does set forth with particularity its factual grounds for requesting a new trial.

The Court, after reading the *Nation* decision concludes that the decision rather than supporting Athay's position that the Court should strike Rich County's Motion for a New Trial, supports a conclusion that the Court should not strike Rich County's Motion for a New Trial. In *Nation* the Idaho Court of Appeals stated as follows:

> Bonner contends that the district judge lacked jurisdiction to grant a new trial because Nations' motion, although filed within ten days of judgment, did not satisfy the particularity requirement during the ten day period. It is well established that a trial court lacks the authority to consider a motion which is not timely under Rule 59(b). [Citations Omitted] However, it is not so clear that the ten-day period is a jurisdictional cutoff for satisfying the particularity requirement under Rule 59(a).

113 Idaho at 570. In resolving this question the Court of Appeals states as follows:

> Policy considerations aside, Bonner argues that the case law ties the particularity requirement to the timeliness requirement. We find no such explicit nexus.

113 Idaho at 571. The Court of Appeals goes on to conclude that the trial court, in the exercise of its discretion, could "deny a nonparticularized motion" but that the rule "did not mean that he invariably must do so." 113 Idaho at 571-72.

Thus if the analysis were complete with the Court's reading and interpretation of *Nation*, the Court would conclude that it was within the Court's discretion to determine whether or not to dismiss the motion for new trial or strike the same as requested by Athay. The Court would also refuse Athay's request to strike based upon the logic and holding in *Nation*. However, based upon the current state of the law the Court cannot conclude its analysis at this juncture.

In the recent case of *Kuhn v. Coldwell Banker Landmark, Inc.* 2010 WL 5186683 (*Kuhn*) the Idaho Supreme Court addressed this same issue. Although the Supreme Court did not address *Nations* directly, this Court can reach only one conclusion, that conclusion being that *Kuhn* has overruled the Court of Appeals holding in *Nation*. In *Kuhn*, the Idaho Supreme Court affirmed the trial court's denial of an appellant's Rule 59(a)(6) and (7) motion for new trial. In doing so it stated as follows:

> [i]n order to timely file a motion for new trial under subsections (6) and (7), the motion "*must* set forth the factual grounds therefore with particularity." Idaho R. Civ. P. 59(a)(7) (emphasis added). Appellants' motion for a new trial fails to provide any factual grounds, and only suggests that the motion "will be supported by a Memorandum in Support of Alternative Motions that will be filed with the Court." The judgment in this matter was filed on February 5, 2003. Appellants' new trial motion, which was strictly generic in nature, was filed on February 14. It was not until May 5, 2003, that appellants filed their memorandum specifying the grounds for the motion, together with their supporting affidavits. Because there was not factual support filed in support of these motions within the fourteen-day period prescribed by the rule, the district court properly denied the motion.

2010 WL 5186683 at p.4. Thus it appears that the holding in *Kuhn* is that a motion for new trial pursuant to I.R.C.P. 59(a)(6) or (7) requires **both** that the motion be filed within fourteen days, and that the motion or brief in support of the motion must set forth a particularized statement of the factual grounds for the motion for a new trial also to be filed within fourteen (14) days after judgment has been entered. Further, the failure to do so is jurisdictional and creates a fatal defect to the motion for a new trial. This is the conclusion that must be drawn from *Kuhn*. In fact in *Kuhn* the trial court denied the motion for a new trial on the merits of the motion and the Supreme Court noted that "although the court denied the motion based on the merits of appellants' claim, it is well-settled that '[w]here an order of a lower court is correct, but based on an erroneous theory, the order will be affirmed upon the correct theory.'" 2010 WL 5186683 at p.4.

Therefore, based upon the fact that Rich County's Motion for New Trial, although timely under I.R.C.P. 59(b), is fatally flawed because it does not set forth with particularity the factual basis for its claim for new trial pursuant to the requirements of I.R.C.P. 59(a)(7). Although Rich County did file a memorandum in support of its request for a new trial which contained a detailed and particularized statement of the grounds for the new trial, it was not filed within the required fourteen (14) days post entry of judgment.

Therefore, the Court will **GRANT** Athay's Motion to Strike Motion for New Trial and Memorandum.

2. RICH COUNTY'S RULE 59(a)(6) AND (7) MOTION FOR NEW TRIAL

Based upon the Court's ruling on Athay's Motion to Strike Rich County's Motion for New Trial, the Court need not address the merits of Rich County's Motion for a New

Trial. Rich County's Motion for New Trial is **STRICKEN** and **DISMISSED** due to its procedural non-compliance with I.R.C.P. 59(a)(7).

3. RICH COUNTY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Rule 50(b) of the Idaho Rules of Civil Procedure controls the analysis of a party's motion for judgment notwithstanding a jury verdict (J.N.O.V.). Specifically, this rule provides that a motion for judgment N.O.V. shall be served not later than fourteen (14) days after entry of the judgment. A party may also bring such a motion without regard to whether or not that party made a motion for a directed verdict at the time of trial.

In the present instance Rich County's alternative motion for J.N.O.V. was filed within fourteen (14) days of the Court entering judgment on the jury verdict. Therefore, the motion is timely and there are no procedural hurdles to this Court's consideration of the same.

The trial court's responsibility when presented with a motion for J.N.O.V. is discussed in *Schwan's Sales Enterprises v. Idaho Transp.*, 142 Idaho 826, 830, 136 Idaho 297, 301 (2006).

> When a trial judge receives such a motion, the judge begins the inquiry by asking him or herself whether there is substantial evidence in the record upon which the jury could properly find a verdict for the party against whom the judgment notwithstanding the verdict is sought. *See Quick v. Crane,* 111 Idaho 759, 763, 727 P.2d 1187, 1191 (1986). The judge's task in answering this question is to review all the evidence and draw all the reasonable inferences therefrom in the light most favorable to the non-moving party. *Id.* at 764, 727 P.2d at 1192. (The party seeking a judgment notwithstanding the verdict admits the truth of all the other side's evidence and every legitimate inference that can be drawn from it. *Stephens v. Stearns,* 106 Idaho 249, 252-53, 678 P.2d 41, 44-45 (1984).) The judge is not an extra juror, though; there is no weighing of evidence or passing on the credibility of witnesses or making of independent findings on factual issues. *Gmeiner v. Yacte,* 100 Idaho 1, 4, 592 P.2d 57, 60 (1979). Instead, the judge must determine whether the evidence is substantial-that is,

whether it is of sufficient quality and probative value that reasonable minds could arrive at the same conclusion as did the jury. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 736, 518 P.2d 1194, 1198 (1974).[2]

In the present case, Rich County asserts that this Court should enter a judgment in its favor despite the jury verdict in this matter. Rich County asserts two separate grounds for this Court to grant this relief. First, Rich County asserts that the Court should grant it J.N.O.V. because Athay's proof with respect to the liability of Sheriff Dale Stacey (Stacey), as a matter of law, is deficient. Second, Rich County asserts that the evidence regarding Athay's damages was insufficient to support an award of $2,720,126.00 in economic damages. The Court will address each of these contentions consistent with the standard of review for motions for J.N.O.V.

A. Evidence of Reckless Disregard

At the conclusion of Athay's case in chief, Rich County moved this Court for a directed verdict pursuant to Rule 50(a) of the Idaho Rules of Civil Procedure. This motion was denied. The Court now having reviewed the evidence presented at trial, in light of the standard announced above, does find that there was substantial evidence in the record to support the jury's verdict finding that Stacey's conduct on the night in question did rise to the level of reckless disregard as that term has been defined by the Idaho Supreme Court.

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[2] The Court does feel compelled to note that in Athay's briefing on this issue Athay has stated an incorrect standard of review for this Court. Athay cites to the case of *Litchfield v. Nelson*, 122 Idaho 416, 835 P.2d 651 (Ct.App.1992) for the proposition that the Court must apply a two part analysis. First, whether the verdict was against the weight of the evidence and second, if the ends of justice would be served by vacating the verdict. *See* Plaintiff's Reply Brief in Opposition to Motion for a New Trial, pp. 8-9, § III. Athay further suggests that the Court is free to weigh the conflicting evidence. *Id.* at p. 9, § III. This standard of review enunciated by Athay is a correct standard of review for a motion for a new trial brought under I.R.C.P. 59(a)(6) (insufficiency of evidence to justify the verdict) but is not the correct standard for a motion for J.N.O.V. The Court has previously ruled that it is without jurisdiction to consider Rich County's motion for new trial under this rule of civil procedure due to procedural defects.

In *Athay I* and *Athay II* the Supreme Court set forth the standard for reckless disregard as that phrase is used in Idaho Code § 49-623(4).[3] The Supreme Court enunciated the standard as follows:

> To constitute reckless disregard, the actor's conduct must not only create an unreasonable risk of bodily harm, *Smith v. Sharp,* 85 Idaho 17, 27, 375 P.2d 184, 190 (1962), but, as we held in *Athay I,* the actor must actually perceive the high degree of probability that harm will result and continue in his course of conduct. 142 Idaho at 365, 128 P.3d at 902.

146 Idaho at 414.

As stated above, the function of the Court on a motion for J.N.O.V is not to act as a thirteenth juror. The Court is not to weigh the evidence or substitute its opinion concerning the evidence for that of the jurors. The sole function is to ascertain whether there is substantial evidence upon which the jury's verdict could rest. In this particular case, the Court concludes that there was substantial evidence upon which a reasonable jury could have arrived at the conclusion it did with respect to Stacey's conduct.

The facts introduced at trial establish the following facts which the jury could have relied upon to reach its conclusion that Stacey's conduct reached the level of reckless disregard:

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

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

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

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[3] This particular case has previously been to the Idaho Supreme Court on two separate occasions. The first, *Athay v. Stacey*, 142 Idaho 360, 128 P.3d 897 (2005) is referred to as *Athay I* and the second, *Athay v. Stacey*, 146 Idaho 407, 196 P.3d 325 (2008) is referred to as *Athay II*.

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

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

(6) The pursuit involved speeds in excess of 96 miles per hour;[4]

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

(8) The evidence established that this high speed pursuit was ongoing while there was other traffic on the road. In fact it was established that the utility of the spike strips was impaired because of other vehicles in close proximity to the strips when Ervin came through that area;

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

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

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

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

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

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

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[4] Testimony at trial indicated that Stacey's patrol vehicle had a governor which capped his speed at 96 miles per hour. It was also testified to that the Ervin vehicle would pull away from Stacey's vehicle when Stacey's vehicle caught up to it. Examples of this testimony were in Cokeville, Wyoming when Stacey testified Ervin slowed to approximately 45 miles per hour and after getting his tire spiked Stacey again testified that Ervin slowed momentarily. As such the inference to be drawn from this testimony is that while Stacey did not exceed 96 miles per hour, Ervin did when he was pulling away from Stacey.

(15) Finally, Sheriff Stacey testified that he knew that there were risks to the traveling public involved in this high speed pursuit.[5]

Based upon these facts which were introduced at the time of trial, this Court must conclude that there was substantial evidence introduced by Athay at trial with respect to Stacey's conduct. The Court further finds that by accepting this evidence as true and allowing for all reasonable inferences to be drawn from this evidence, which the Court must allow on a motion for J.N.O.V., a reasonable jury could and did find that Stacey's conduct on the night in question amounted to reckless disregard. Therefore, the Court will not disregard the verdict of the jury and will not conclude, as a mater of law, that the evidence at trial did not rise to the level where the Court should have prevented it from being considered by the jury. As such, Rich County's Motion for J.N.O.V. as it relates to liability and the reckless disregard standard is **DENIED.**

B. Evidence of Economic Damages

Rich County also challenges the jury's award to Athay of economic damages in the sum of $2,720,126.00. Rich County argues that "even taking the Plaintiff's projections of economic loss, projections of the present value of Plaintiff's life care plan, and the plaintiff's medical bills, it is unclear how the jury awarded $2,720.126.00." Memorandum in Support of Defendant's Motion for New Trial or Alternatively for Judgment Notwithstanding the Verdict, p. 20. However, one never knows precisely how the jury reached its verdict. It is within the province of the jury to decide what evidence it accepts and what evidence it disregards. Upon completion of this task, the jury is not

[5] In fairness to Stacey, he testified that in his professional judgment, the risks to the public were greater if he discontinued the pursuit and did not persist in the pursuit and remove this driver from the public highways.

required to provide an accounting concerning what evidence it felt to be compelling and therefore awarded damages and what evidence it found to be lacking and therefore did not award damages.

What the Court must do on a motion for J.N.O.V. is evaluate the evidence submitted at trial and determine if there is substantial evidence sufficient to support the award of the jury. In this instance the Court concludes that there has been substantial evidence introduced by the Plaintiff sufficient to justify the award by the jury in the amount of $2,720.126.00.

At trial the parties stipulated to Athay's past medical bills in the sum of $111,763.34. *See* Plaintiff's Exhibit 124 which was admitted into evidence without objection.

In support of his claim for damages, Athay called Helen M. Woodard to testify concerning a life care plan she had developed for Athay. She testified that she was a Rehabilitation Counselor and Life Care Planner. This life care plan was admitted into evidence as Plaintiff's Exhibit 137. In this life care plan, Ms. Woodard evaluated and gave her opinion on the future needs of Athay resulting from his paraplegia. These future needs were categorized into the following areas: (1) Medical Evaluations; (2) Lab Testing and Bladder Supplies; (3) Medications; (4) Penile Implant Replacement; (5) Daily Assistance; (6) Psychological Services; (7) Case Management; (8) Rehabilitation Services; (9) Transportation; (10) Vocational Rehabilitation; (11) Equipment; and (12) Replacement Services. In combination with Athay's economist, there was testimony that the present value of these future needs and services was between $2,122,820.00 and $1,951.266.00. *See* Plaintiff's Exhibit 124.

Athay also put on evidence of his claim regarding past lost earnings and loss of earning capacity. In support of this claim he called Jerome F. Sherman. Mr. Sherman testified concerning these issues. Plaintiff's Exhibit 144 was admitted into evidence and Mr. Sherman testified consistent with said exhibit. He opined that Athay's loss of earnings from the date of the accident through December 9, 2009 had been $207,977. He further opined that Athay's lost earning capacity amounted to $867,674 and that his lost fringe benefits amounted to $267,588. Finally, he testified that the present value these lost wages and fringe benefits were between $842,259 and $762,054.

As a result of the foregoing, the evidence introduced by Athay at trial presented a claim for special damages in the amount of $3,076,342.00. The Court recognizes that many aspects of Athay's economic damages were vigorously challenged. In fact all aspects of it were aggressively challenged with the exception of Athay's past medical expenses which were stipulated to by the parties. However, the Court's function is not to act as a third juror and substitute its opinion for that of the jury. Nor is the Court to weigh the conflicting evidence. Rather, the Court must determine whether there is substantial evidence to support the jury's verdict. Although the Court does not know how the jury reached its award of economic damages, the Court does conclude that an award of $2,720,126.00 is less than that total amount claimed and was supported by substantial evidence. Therefore, the Court must **DENY** Rich County's Motion for J.N.O.V. as it relates to Athay's claim for economic damages in the sum of $2,720,126.00.

CONCLUSION

Based upon the foregoing, the Court will **GRANT** Athay's Motion to Strike Motion for New Trial based upon the procedural defects to said motion. Therefore, the Court **STRIKES** Rich County's Motion for a New Trial or Alternatively for Judgment Notwithstanding the Verdict and the memorandum in support of said motion. However, to the extent that the motion and memorandum deal with the alternative Motion for J.N.O.V. the same are not stricken. However, Rich County's Motion for J.N.O.V is **DENIED** on the merits.

IT IS SO ORDERED.

DATED this 14th day of February, 2011.

MITCHELL W. BROWN
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date below, I served a true and correct copy of the foregoing document on the attorney(s) or person(s) listed below in the manner indicated.

Attorney(s)/Persons(s):	Method of Service:
Craig R. Jorgensen Attorney at Law 1246 Yellowstone Avenue, Suite A4 Post Office Box 4904 Pocatello, Idaho 83205-4904 Telephone: (208) 237-4100 Facsimile: (208) 237-1706	[X] U.S. Mail/Postage Prepaid [ ] Overnight Mail [ ] Facsimile [ ] Hand Delivered
Peter Stirba R. Blake Hamilton STIRBA & ASSOCIATES 215 South State Street, Suite 750 Post Office Box 810 Salt Lake City, Utah 84110-8300 Telephone: (801) 364-8300 Facsimile: (801) 364-8355	[X] U.S. Mail/Postage Prepaid [ ] Overnight Mail [ ] Facsimile [ ] Hand Delivered
Alan Johnston E.W. PIKE & ASSOCIATES, P.A. 151 North Ridge Ave., Suite 210 PO Box 2949 Idaho Falls, ID 83403-2949 Telephone: (208) 528-6444 Facsimile: (208) 528-6447	[X] U.S. Mail/Postage Prepaid [ ] Overnight Mail [ ] Facsimile [ ] Hand Delivered

DATED this 14th day of February, 2011.

KERRY HADDOCK
Clerk of the District Court

By: Jeanette Meadowcroft
Deputy Clerk

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

IN THE SIXTH JUDICIAL DISTRICT COURT

STATE OF IDAHO, COUNTY OF BEAR LAKE

KYLE ATHAY, Plaintiff, v. RICH COUNTY, UTAH, Defendant.	Case No. CV-2002-0000072 **NOTICE OF APPEAL**

TO: THE ABOVE NAMED RESPONDENT, KYLE ATHAY, AND THE PARTY'S ATTORNEY, CRAIG R. JORGENSEN, 920 EAST CLARK, POCATELLO, IDAHO 83205-4904, AND THE CLERK OF THE ABOVE TITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, Rich County, Utah, appeals against the above named respondent to the Idaho Supreme Court from the Judgment entered in this matter on October 8, 2010 and the Orders denying: 1) Rich County's Motion to Strike Plaintiff's Further Brief in Opposition the Defendant's Motion for a New Trial; 2) Rich County's Motion for a New Trial and 3) Rich County's Motion for New Trial or Alternatively for Judgment Notwithstanding the Verdict entered in the above entitled action, Honorable Judge Mitchell W. Brown presiding. The last Order of the District Court was entered on February 14, 2011.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1), (5) and (6) of the Idaho Appellate Rules.

3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal:

a. Did the District Court commit error in granting the Respondent's Motion for Entry of Judgment in ruling that Appellant's liability is not capped at $500,000.00 under I.C. § 6-926.

b. Did the District Court commit error in granting the Respondent certain costs as a matter of right despite finding that Respondent did not fully comply with I.R.C.P 54(d)(5) and without reducing the amount of the costs awarded by the proportion of fault assigned to Rich County.

c. Did the District Court commit error in failing to reduce Respondent's award by the amount Respondent had previously collected from collateral sources.

d. Did the District Court commit error in denying Appellant's Motion for Limited Disqualification of Judge in ruling that the Court could fairly and impartially make a determination concerning the Appellant's Motion for a New Trial.

e. Did the District Court commit error in denying Appellant's Motion to Strike Respondent's Further Brief in Opposition to Defendant's Motion for Disqualification of Judge and Further Brief in Opposition to Motion for New Trial despite Respondent's failure to comply with the Idaho Rules of Civil Procedure and in ruling that Appellant was not prejudiced by Respondent's untimely filing.

f. Did the District Court commit error in denying Appellant's Motion for a New Trial in ruling that Appellant's Motion did not comply with the affidavit requirement of I.R.C.P. 59 as interpreted by an Idaho Supreme Court decision that was issued on December 23, 2010, after Appellant had filed and argued its Motion.

g. Did the District Court commit error in denying Defendant's Motion for a New Trial by determining that despite finding that an irregularity in the trial proceedings occurred, that neither party was prevented from having a fair trial because all four prongs of the *Rueth* standard had been met.

h. Did the District Court commit error in granting Respondent's Motion to Strike Appellant's Motion for New Trial in ruling that Appellant's Motion was untimely under

Idaho law as set forth in an Idaho Supreme Court decision that was issued on December 23, 2010, after Appellant had filed and argued its Motion.

i. Did the District Court commit error in denying Appellant's Motion for Judgment Notwithstanding the Verdict in ruling that there was sufficient evidence introduced at trial that a reasonable jury could conclude that Sheriff Stacey's conduct in question amounted to reckless disregard.

j. Did the District Court commit error in denying Appellant's Motion for Judgment Notwithstanding the Verdict in ruling that there was substantial evidence introduced at trial to support the jury's economic damages award.

4. No portion of the record has been sealed.

5. On August 18, 2010, Appellant requested a hard copy of the entire reporter's standard transcript including opening statements and closing arguments of counsel, the conference on requested instructions and special verdict form and objections to the same, and the court's ruling thereon. Appellant received the Transcript as requested on or about January 12, 2011.

Pursuant to I.A.R. 26.1, Appellant requests the preparation of the above mentioned portions of the reporter's transcript in electronic format on a computer-searchable disk only.

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

a. *Athay v. Stacey, et al.*, 128 P.3d 897 (Idaho 2005) [Athay I].

b. *Athay v. Stacey, et al.*, 196 P.3d 325 (Idaho 2008) [Athay II].

c. All requested and given jury instructions.

d. The Trial Transcript, including opening statements and closing arguments of counsel, the conference on requested instructions and special verdict form, the parties' objections to the same and the court's ruling thereon.

e. Transcripts of the following proceedings:

i. September 16, 2010 Telephonic Status Conference.

ii. November 4, 2010 Hearing on Motion for Limited Disqualification of Judge.

iii. November 18, 2010 Hearing on Motions.

f. Pleadings on Plaintiff's Motion for Entry of Judgment:

i. Motion for Entry of Judgment and Memorandum in Support Thereof and Exhibits A, B, C and D – Dated August 3, 2010.

ii. Memorandum of Costs – Dated August 3, 2010.

iii. Defendant Rich County's Memorandum in Response to Plaintiff's Memorandum Motion for Entry of Judgment and Memorandum in Support Thereof and Objections to Plaintiff's Memorandum of Costs – Dated August 17, 2010.

iv. Plaintiff's Reply Brief Re Entry of Judgment and Memorandum of Costs – Dated August 18, 2010.

v. Plaintiff's Further Brief in Support of Entry of Judgment -- Dated August 26, 2010.

g. Pleadings on Defendant Rich County's Motion for a New Trial:

i. Defendant Rich County's Motion for a New Trial - Dated October 1, 2010.

ii. Memorandum in Support of Defendant Rich County's Motion for a New Trial - Dated October 1, 2010.

iii. Plaintiff's Reply Brief to Defendant's Motion for a New Trial - Dated October 13, 2010.

iv. Affidavit of Kyle Athay - Dated October 13, 2010.

v. Defendant Rich County's Reply Memorandum in Support of Motion for a New Trial - Dated November 2, 2010.

vi. Affidavit of Blake Hamilton in Support of Motion for a New Trial - Dated November 2, 2010.

h. Pleadings on Defendant Rich County's Motion for Limited Disqualification of Judge:

i. Defendant Rich County's Motion for Limited Disqualification of Judge - Dated October 22, 2010.

ii. Memorandum in Support of Defendant Rich County's Motion for Limited Disqualification of Judge - Dated October 22, 2010.

iii. Affidavit of Blake Hamilton - Dated October 22, 2010.

iv. [Plaintiff's] Brief in Opposition to Defendant's Motion for Limited Disqualification of Judge and Further Brief in Opposition to Motion for a New Trial - Dated November 3, 2010.

v. Defendant's Motion to Strike Plaintiff's Brief in Opposition to Defendant's Motion for Limited Disqualification of Judge and Further Brief in Opposition to Motion for a New Trial – Dated November 3, 2010.

vi. Defendant's Memorandum in Support of Defendant's Motion to Strike Plaintiff's Brief in Opposition to Defendant's Motion for Limited Disqualification of Judge and Further Brief in Opposition to Motion for a New Trial – Dated November 3, 2010.

i. Pleadings on Defendant Rich County's Motion for New Trial or Alternatively for Judgment Notwithstanding the Verdict:

i. Defendant Rich County's Motion for New Trial or Alternatively for Judgment Notwithstanding the Verdict - Dated October 22, 2010.

ii. Memorandum in Support of Defendant Rich County's Motion for New Trial or Alternatively for Judgment Notwithstanding the Verdict - Dated November 4, 2010.

iii. Plaintiff's Reply Brief In Opposition to Motion For A New Trial – Dated November 12, 2010.

iv. Reply Memorandum in Support of Defendant Rich County's Motion for New Trial or Alternatively for Judgment Notwithstanding the Verdict – Dated November 16, 2010.

j. Copies of the following Subpoenas concerning Defendant Rich County's Motion for a New Trial:

i. Subpoena (Kyle Athay) – Served November 9, 2010.

ii. Subpoena (Brandy Mann Peck) – Served November 12, 2010.

iii. Subpoena Duces Tecum (T-Mobile) – Served November 5, 2010.

iv. Subpoena Duces Tecum (Verizon Wireless) – Served November 16, 2010.

k. Notice of Hearing Set for Thursday, September 16, 2010 at 9:00 a.m. - Dated September 13, 2010.

l. The following Minute Entries, Memorandum Decisions and Orders:

i. Minute Entry and Order – Dated August 19, 2010 (delivered to parties on August 31, 2010.)

ii. Order – Dated August 31, 2010.

iii. Minute Entry and Order - Dated September 16, 2010.

iv. Memorandum Decision and Order on Plaintiff's Motion for Entry of Judgment – Dated October 7, 2010.

v. Minute Entry and Order - Dated November 4, 2010.

vi. Minute Entry and Order - Dated November 18, 2010.

vii. Memorandum Decision and Order on Defendant Rich County's Motion for a New Trial – Dated February 1, 2011.

viii. Memorandum Decision and Order on Defendant Rich County's Motion for a New Trial – Dated February 14, 2011.

m. Defense Exhibit "A" [Subpoenaed phone records of Kyle Athay from Verizon Wireless]; Introduced during November 18, 2010 Hearing on Motions.

n. Summary of Defense Exhibit "A" [Subpoenaed phone records of Kyle Athay from Verizon Wireless]; Provided to the Court and all counsel in support of Defendant's Motion for a New Trial on November 23, 2010.

7. The appellant requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court:

a. All exhibits offered by either party and admitted at trial.

8. I certify:

a. That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

i. Dorothy Snarr (retired), P.O. Box 306, 112 South Main Street, Grace, Idaho, 83241.

b. That the above-named court reporter has been paid for the preparation of the Trial Transcript and all other hearing transcripts requested by Appellant and set forth in Section 6(e)(i) – (iii), above.

c. That the estimated fee for preparation of the clerk's record has been paid.

d. That the appellate filing fee has been paid.

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

DATED this 28 day of March, 2011.

STIRBA & ASSOCIATES

By: _____

PETER STIRBA
R. BLAKE HAMILTON
Attorneys for Defendant-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28 day of March, 2011, I caused to be served a true copy of the foregoing **NOTICE OF APPEAL** by the method indicated below, to the following:

Craig R. Jorgensen, Esq. Attorney at Law 920 East Clark Street Pocatello, ID 83205-4904	(✓) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
Alan Johnston PIKE HERNDON STOSICH & JOHNSTON 151 North Ridge Ave., Suite 210 P.O. Box 2949 Idaho Falls, ID 83403-2949	(✓) 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
Dorothy Snarr P.O. Box 306 112 South Main Street Grace, Idaho, 83241	(✓) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile

Stacie Hamilton

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

I, KERRY HADDOCK, Clerk of the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bear Lake, do hereby certify that the following is a list of the exhibits, offered or admitted and which have been lodged with the Supreme Court or retained as indicated:

PLAINTIFF'S EXHIBITS:

NO:	DESCRIPTION:	SENT/RETAINED
101	Incident Report, Rich County	sent
102	Incident Report, Dale Stacey	sent
117	Pursuit Policy, Rich County	sent
124	Summary of Medical Bills	sent
125	Medical Bills, LDS Hospital	sent
126	Medical Bills, Mountain West Anesthesia	sent
128	Medical Bills, Equipment Expenses	sent
129	Medical Bills, Utah Radiology	sent
130	Medical Bills, Ambulance	sent
132	Medical Bills, Logan Urology	sent
133	Medical Bills, Bear Lake Memorial	sent
134	Medical Bills, Dr. Rees	sent
135	Medical Bills, University of Utah Hospital	sent
137	Life Care Plan, Helen Woodard	sent
138	Curriculum Vitae, Helen Woodard	sent
141	Accident Diagram and Report, Idaho State Police	sent
144	Report, Jerome Sherman	sent
154	Radio Log, Bear Lake County	sent

DEFENDANT'S EXHIBITS:

NO:	DESCRIPTION:	SENT/RETAINED
201	Rich County Dispatch Call Log	sent
202	Rich County Dispatch Audio Recording	sent
203	Rich County Dispatch Audio Transcript	sent
204	Lincoln County Dispatch Audio	sent
205	Lincoln County Dispatch Audio Transcript	sent
209	Dash Camera Video	sent
211-1	Photo, Sage Creek Junction	sent
211-2	Photo, Sage Creek Junction	sent
211-3	Photo, Sage Creek Junction	sent
212-1	Accident Scene Diagram(DuVal)	sent
212-2	DuVal Photo, Accident Location	sent
212-3	DuVal Photo, Accident Location, Wheel Rim Gouging on Rd	sent
212-4	DuVal Photo, Accident Location, Oncoming Vehicle Lane	sent
212-5	DuVal Photo, Accident Location, East Shoulder	sent
212-6	DuVal Photo, Athay Vehicle	sent
212-7	DuVal Photo, Ervin Vehicle	sent
213	Spiked Tire	sent picture
214	Wheel Rim	sent picture
216	Stacey's Bear Lake County Deputy Sheriff Card	sent
218-1	Judgment of Conviction (certified copy)	sent
218-2	Affidavit of Probable Cause, W.D. Jones	sent
218-3	Affidavit of Probable Cause, Rex Skinner	sent
218-4	Influence Report	sent
218-5	Intoxilizer Results	sent
218-6	Statement of Miranda Rights and Questioning Form	sent
218-7	Idaho Uniform Citation	sent
219-1	Derk Rasmussen Demonstrative Summaries	sent
219-2	Cirricula Vitae of Derk Rasmussen	sent
220	Bear Lake Mental Health Records for Kyle Athay, 1999	sent
221	Dr. Clay Campbell Medical Records for Kyle Athay, 1999-2006	sent
222	Bear Lake County and Rich County Interlocal Agreement	sent
224-1	Post-Accident In-Patient Rehab Follow Up, 1/30/2002	sent
224-2	Post-Accident In-Patient Rehab Follow Up, 3/30/2004	sent
224-3	Post-Accident In-Patient Rehab Follow Up, 8/02/2006 Possible Pressure Sore Evaluation	sent
224-4	Pressure Sore Evaluation Follow Up, 8/18/2006	sent
224-9	Post-Accident In-Patient Rehab Follow Up, New Wheelchair Evaluation	sent
227	Map	sent
228	Map	sent picture
229	Football Contract	sent
230	Drawing by Chad Ludwig	sent
231	Written Calculations	sent
A	Subpoenaed Phone Records of Kyle Athay from Verizon Wireless and Summary of Exhibit "A"	sent

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 20th day of May, 2011.

(SEAL)

KERRY HADDOCK
Clerk of the District Court

By _____
Deputy Clerk

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

I, KERRY HADDOCK, Clerk of the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bear Lake, do hereby certify that the foregoing Clerk's Record in the above entitled cause was compiled and bound under my direction and contains true and correct copies of all pleadings, documents and papers designated to be included under Rule 28, IAR, the Notice of Appeal, any Notice of Cross-Appeal, and any additional documents requested to be included.

I further certify that all documents, x-rays, charts and pictures offered or admitted as exhibits in the above entitled cause, if any, will be duly lodged with the Clerk of the Supreme Court with any Reporter's Transcript and the Clerk's Record, as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 20th day of May, 2011.

KERRY HADDOCK
Clerk of the District Court

(SEAL)

By _____
Deputy Clerk

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

I, KAREN VOLBRECHT, Deputy Clerk of the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bear Lake, do hereby certify that I have personally served or mailed, by United States Mail, postage prepaid, one copy of the Clerk's Record and any Reporter's Transcript to each of the parties or their Attorney of Record as follows:

CRAIG R. JORGENSEN
Attorney at Law
P.O. Box 4904
Pocatello, ID 83205-4904
Counsel for Plaintiff/Respondent

ALAN JOHNSTON
Attorney at Law
P.O. Box 2949
Idaho Falls, ID 83403-2949
Resident Counsel for Defendant/Appellant

PETER STIRBA
Attorney at Law
P.O. Box 810
Salt Lake City, UT 84110-0810
Non-Resident Counsel for Defendant/Appellant

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 20th day of May, 2011.

(SEAL)

KERRY HADDOCK,
Clerk of the District Court

By _____
Deputy Clerk