STATE OF IDAHO)
County of KOOTENAI)ss
FILED 12/5/19
AT 5:00 O'Clock P. M
CLERK, DISTRICT COURT
Deputy

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

UNITED FIRE GROUP, INC., a New Jersey Corp. a/s/o ANDY'S HEATING AND COOLING, LLC, an Idaho limited liability company,

Plaintiff,

VS.

AVISTA CORP., a Waxshington corporation dba Avista Utilities, FRONTIER COMMUNICATIONS OF AMERICA, INC., a Delaware corp., ROBINSON BROS. CONSTR., INC., an Oregon corp., ONE CALL LOCATORS, LTD., a Montana corp. d/b/a ELM LOCATING AND UTILITY SERVICE,

Defendants.

Case No. **CV28-18-9083**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT ROBINSON BROS. CONSTR.'S MOTION TO STRIKE AND DENYING DEFENDANTS ONE CALL'S AND AVISTA'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on a Motion for Summary Judgement filed on September 19, 2019, by defendants One Call Locators, Ltd., d/b/a ELM Locating & Utility Services (ELM) and Avista Corporation (Avista) against United Fire Group, Inc., and Andy's Heating & Cooling, L.L.C. (United Fire).

Also before the Court is defendants' Motion to Strike, filed on November 20, 2019, by defendants Robinson Brothers Construction, Inc. (Robinson Brothers) and

Frontier Communications of America, Inc. (Frontier), and was joined by the plaintiff, United Fire. Oral argument on these motions were held on December 4, 2019. At the conclusion of the hearing, the Court stated the motion to strike was denied, as was the motion for summary judgment, but that due to the length of the hearing and the time of day, the Court would place its reasoning in a written decision.

On November 26, 2018, United Fire filed this lawsuit as subrogor of Andy's Heating & Cooling, LLC (Andy's) against ELM, Avista, Robinson Brothers, and Frontier, for monies paid to Andy's in accordance with an insurance contract between United Fire and Andy's. Compl. 1-2. The Complaint does not set forth the amount of those monies paid, nor does the Complaint even allege the jurisdictional amount for the case to be assigned to a District Judge. The Case Information Sheet required by the Idaho Supreme Court is not filled out completely. The Court assumes that jurisdictional amount exists.

Frontier had hired Robinson Brothers for the construction project which allegedly damaged Andy's property. *Id.* at ¶ 14. The construction entailed excavation near Avista utility lines. *Id.* at ¶ 10. On contract by Avista, ELM placed paint and flags marking the utility line's location prior to Robinson Brothers excavation. *Id.* at ¶¶ 12-14. During the course of their excavation, Robinson Brothers struck the utility line that allegedly caused damage to Andy's property. *Id.* at ¶¶ 13-14.

Idaho law states that an excavator shall: "Determine by hand digging, in the area twenty-four (24) inches or less from the facilities, the precise actual location of underground facilities which have been marked" I.C. §55-2207(2)(a). Avista argues that:

> [i]f the auger was used within the 24-inch buffer zone, without first hand digging to locate Avista's utility line, Robinson is in violation of Idaho State law and is at fault for this damage and Summary Judgment should be

> granted. Robinson, a remaining defendant, would then be deemed responsible for any damage being claimed by United Fire in this lawsuit.

Mem. of Law in Supp. of Mot. for Summ. J. 4. This negligence per se theory forms the basis for Avista's and ELM's argument for summary judgment against Robinson Brothers and Frontier. *Id.*

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to Rule 56, summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." I.R.C.P. 56(c).

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
>
> (1) give an opportunity to properly support or address the fact;
>
> (2) consider the fact undisputed for purposes of the motion;
>
> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
>
> (4) issue any other appropriate order.

I.R.C.P. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168

(1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence." *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

The moving party may also meet "the 'genuine issue of material fact' burden. . . by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). "Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is

lacking." *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick* at 311, 882 P.2d at 478).

> Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under [I.R.C.P. 56(d)]. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994) (alteration added).

Dunnick at 311, 882 P.2d at 478; *see also Heath* at 712, 8 P.3d at 1255.

III. ANALYSIS

First, the Court must decide if it will grant Robinson Brothers' and Frontier's Motion to Strike Paragraphs 7 through 14 of Richard P. Doyle's (Doyle) Declaration. Next, the court must decide if it will grant Avista and ELM's Motion for Summary Judgment.

A. The Motion to Strike is denied for the reasons discussed below.

Robinson Brothers and Frontier first argue that Doyle's Declaration does not satisfy I.R.C.P. 56(c)(4) requirements of personal knowledge. Mem. In Supp. of Mot. to Strike 3-4. Doyle's Declaration analyzes photographs of the hole dug by Robinson Brothers' auger, and overlays measurements of the location of the hole relative to ELM's marks designating Avista's utility line.[1] Robinson Brothers and Frontier argue that "[p]aragraphs 7 through 14 are based on photographs that Doyle did not take, and a mathematical equation based upon presumptions for which he has no personal knowledge." *Id.* at 5. They go on to argue that Doyle was not present at the scene when the photographs were taken and did not measure the traffic cone that he relies on to extrapolate his measurements from. *Id.* at 6. Robinson Brothers and Frontier argue

[1] Robinson Brothers and ELM took the photos later used in Doyle's Declaration. Doyle's Decl. ¶¶ 4-5.

that Doyle and Robinson Brothers have never represented or presented evidence that the photographs are to scale with uniform distances throughout the photograph without distortions. *Id.* at 7. (see footnote 1, Robinson Brothers took the photographs but never attested to their validity in scaling for measurement.) They go on to argue that since:

> Mr. Doyle does not have any personal knowledge as to the photographs or actual distances, but rather places his testimony in the speculation of distances, photoshop, and reliance on third-party hearsay. This evidence should not be allowed and Paragraphs 7 through 14 of Mr. Doyle's Declaration should be struck.

Id. at 8.

Second, Robinson Brothers and Frontier argue that the measurement of the traffic cone shown in some of the pictures, which was used by Doyle as the reference point for measurement of distance and is used by Doyle in his application of his mathematical equation is inadmissible under Rule 507 because it came from a communication made in the course of mediation. *Id.*

Third, Robinson Brothers and Frontier argue that the testimony offered by Doyle is inadmissible lay opinion under I.R. E. 701 and 702. *Id.* at 9. They go on to argue that since Doyle did not measure the traffic cone, or measure anything on the actual scene, his Declaration instead relies "...on technical application of a mathematical calculation and requires an expert to testify to these equations and technical applications." *Id.* at 9-12.

Fourth, Robinson Brothers and Frontier argue that under Idaho Rules of Professional Conduct 3.7(a), Doyle "...cannot serve as both an advocate and a necessary witness in this case." *Id.* at 12. Following Doyle's filing of his Declaration, he was subsequently admitted to the case Pro Hac Vice. *Id.* at 13. Robinson Brothers

and Frontier argue that Doyle's Declaration likely makes Doyle a necessary witness in this case, with no applicable exception under Rule 3.7. For these reasons, they argue that "...if this Court finds Mr. Doyle's Declaration admissible, it should also find that he cannot continue to serve as an advocate in this case." *Id.*

Finally, Robinson Brothers and Frontier argue that:

> ... allowing the defense attorney to testify as a witness would create the same cumulative evidence and confusion issues that the court determined to exist in *Cannon Builders.* 126 Idaho at 621, 888 P.2d at 795. Second, like the Facebook postings in *State v. Hall,* the information contained in the Declaration is highly speculative and very prejudicial. 161 Idaho 413, 387 P.3d 81. Thus, the probative value of the Photoshopped images of the site are is substantially outweighed by the danger of unfair prejudice, confusing the issue, presenting cumulative evidence, and wasting time. As such, this Court should strike Paragraphs 7 through 14 of the Declaration.

Id. at 14.

Avista and ELM argue that "Robinson has not presented evidence that its photographs are not to 'scale[.]'" Opp. to Defs'. Mot. to Strike 2. Additionally, "...relying on the actual photographs, and applying high school geometry to extrapolate distances, is appropriate comment on the undisputed facts." *Id.* Finally, Avista and ELM argue that, "[t]he actual photographs taken by Robinson, part of their damage report and now an exhibit to this record, are critical and not cumulative evidence as suggested by Robinson or which risks confusing the issue and wasting time as also suggested by Robinson." *Id.*

In this Case, this Court finds that Paragraphs 7-14 of Doyle's affidavit does meet the requirements for admissibility under I.R.C.P. 56(c)(4). The Court in *Posey v. Ford Motor Credit Co.* Found that:

> Affidavits supporting or opposing a summary judgment motion must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is

> competent to testify to the matters stated. Idaho Rule of Civil Procedure 56(e). These requirements "are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge." *State v. Shama Res. Ltd. P'ship,* 127 Idaho 267, 271, 899 P.2d 977, 981 (1995). *See also Sprinkler Irrigation Co., Inc. v. John Deere Ins. Co., Inc.,* 139 Idaho 691, 696–97, 85 P.3d 667, 672–73 (2004), and *Oats v. Nissan Motor Corp. in U.S.A.,* 126 Idaho 162, 166, 879 P.2d 1095, 1099 (1994).

Posey v. Ford Motor Credit Co., 141 Idaho 477, 483, 111 P.3d 162, 168 (Ct. App. 2005). In this Case, Doyle has based his metric of calculating the distances found in the photograph on measurements of the traffic cone received during mediation with the other parties. Idaho Rules of Evidence 3(c) states: "Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation." Robinson Brothers' statement regarding the measured length of the traffic cones is therefore not excluded under I.R.E.3(c), and properly comes in as non-hearsay evidence as a Statement by Party-Opponent. I.R.E 801(d)(2).

This Court finds that Doyle has personal knowledge of the photographs which he used for his analysis found in his Declaration. Doyle's measurements are based solely on the photographs and the mediation statements regarding the traffic cone's measurements. No other personal knowledge is required to provide the analysis of the photographs he made.

This Court finds that, under I.R.P.C. 3.7(a), disqualification of Doyle as Counsel is premature. Idaho Rule of Professional Conduct 3.7(a) reads:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

I.R.P.C. 3.7 (emphasis added). The plain language of the rule limits a lawyer's activities "at a trial," and makes no prohibitions on a lawyer's activities during a pre-trial stage. The cases discussed below make clear that Rule 3.7 only prohibits witness attorneys from acting as an advocate *at trial*.

The Court finds the following cases to be persuasive. In *In re Elias*, the United States Bankruptcy Court, District of Idaho, briefly discussed I.R.P.C. 3.7(a) after counsel for one party anticipated calling opposing counsel as a necessary witness. No. 02-41640, 2005 WL 4705220, at 2, 6 (Bankr. D. Idaho, June 10, 2005) ("[Opposing] Counsel is a creditor in Debtor's bankruptcy case because he is owed $70,000 for prepetition legal fees."). The Court stated, "[u]nder the Rule, Counsel would likely not be prohibited from representing the bankruptcy estate during pre-trial matters even if he is called as a witness at trial." *Id.* at 6. The Court further stated, "[s]hould the issue arise prior to trial, Counsel could assume a dual role under the circumstances set forth in the Rule," but noted that the commentary to the Rule makes clear that "the relevant inquiry is fact specific, and depends upon the nature of the case and the tenor of the lawyer's testimony." *Id.*

The State of Washington's Rule of Professional Conduct 3.7(a) is identical to that of Idaho's rule, with the addition of a fourth exception. In *American Safety Casualty Insurance Company v. Happy Acres Enterprises Co., Inc.*, the defendants moved to disqualify the plaintiff's counsel because the defendants asserted he was a material witness and intended to call him at trial. No. C16-0044 RSM, 2017 WL 279616, at 3 (W.D. Wash. Jan. 20, 2017). The defendants' motion to disqualify the plaintiff's counsel and his firm from the litigation process was found by the Court to be premature. *Id.* at 3. The Court explained that "RPC 3.7 does not authorize such a broad

disqualification." *Id.* "As this Court has previously stated, 'the plain language of Washington RPC 3.7(a) is unequivocally clear in only prohibiting attorneys from acting as an advocate *at trial*.'" *Id.* (quoting *Microsoft Corp. v. Immersion Corp.*, 2008 U.S. Dist. LEXIS 27442, 8, 2008 WL 682246 87 U.S.P.Q.2d (BNA) 1701, 1703-1704 (W.D. Wash. Mar. 7, 2008)) (emphasis in original). Therefore, the Court declined to disqualify Plaintiff's counsel or his firm from representing the client in this matter.[2] *Id.*

Not all jurisdictions are in agreement on this matter. The best authority on this matter found by this Court is a law review article from the University of New Mexico School of Law. The citation is Douglas R. Richmond, *Lawyers as Witnesses*, 36 N.M.L. Rev. 47 (2006). (Available at: https://digitalrepository.unm.edu/nmlr/vol36/iss1/4). The pertinent portion of that article reads as follows:

> Although the plain language of Rule 3.7(a) clearly limits it to trials, and it is generally true that lawyers who are disqualified from serving as advocates at trial may nonetheless represent their clients in pretrial activities, some courts hold that pretrial disqualification is appropriate where the activity "includes obtaining evidence which, if admitted at trial, would reveal the attorney's dual rule." [footnote omitted] Depositions therefore pose a special problem. Because depositions often are read into evidence at trial--deposition transcripts may be used at trial to impeach witnesses, and videotaped depositions are regularly played for juries-a lawyer may be disqualified from representing clients in depositions if those depositions cannot be used at trial without revealing the lawyer's dual roles. [footnote omitted] This problem is most acute where depositions are videotaped because the jury may see the lawyer or recognize the lawyer's voice when the videotapes are played at trial. [footnote omitted] It is more likely that stenographic deposition transcripts can be read into evidence or used to impeach witnesses without revealing a lawyer's dual roles. [footnote omitted]
>
> Some courts have gone so far as to expand the rule to preclude lawyers' testimony in affidavits at summary judgment.[34] [34. *See, e.g., Int'l*

[2] The Court also found that the defendants failed to provide sufficient evidence supporting the disqualification of the plaintiff's counsel in the matter, and that if the plaintiff's counsel were to testify, his "proposed testimony would go directly to the nature and value of legal services rendered" – the second exception to Rule 3.7(a). *Am. Safety Cas. Ins. Co. v. Happy Acres Enterprises Co.*, No. C16-0044 RSM, 2017 WL 279616, at *3 (W.D. Wash. Jan. 20, 2017).

Res. Ventures, Inc. v. Diamond Mining Co. of Am., Inc., 934 S.W.2d 218, 220 (Ark. 1996) ("We have held that Rule 3.7 is applicable to a lawyer's giving evidence by affidavit as well as by testimony in open court."). In *Aghili v. Banks,* 63 S.W.3d 812 (Tex. App. 2001), the court affirmed a trial court's decision striking defense counsel's affidavit supporting his clients' summary judgment motion. *Id.* at 819. It is important to note, however, that Rule 3.08(a) of the Texas Disciplinary Rules of Professional Conduct, which was at issue in that case, differs significantly from Model Rule 3.7(a), inasmuch as it is not limited to trials. Rather, the Texas rule provides that a lawyer "'shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client,'" subject to five exceptions. *Id.* at 817 (quoting Texas rule).] Other courts decline to do so, [35] [35. *See, e.g., Carroll v. Town of Univ. Park*, 12 F. Supp. 2d 475, 486 (D. Md. 1997); *Zurich Ins. Co. v. Knotts*, 52 S.W.3d 555, 556 (Ky. 2001).] however, and those courts that broadly hold that Rule 3.7(a) does not apply to lawyers' pretrial activities would presumably hold that the rule does not preclude lawyers from offering affidavits at summary judgment. [36] [36. *See Jackson v. Adcock*, No. Civ. A. 03-3369,2004 WL 1661199, at 4 (E.D. La. July 22, 2004); *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 239 F. Supp. 2d 1170, 1174 (D. Colo. 2003) ("[Rule 3.7(a)] does not automatically require that a lawyer be disqualified from pretrial activities, such as...motions practice."); *Caplan v. Braverman*, 876 F. Supp. 710, 711 (E.D. Pa. 1995) (stating that Rule 3.7 "only prevents a lawyer who will be a witness from acting as an 'advocate at trial'); *Columbo v. Puig*, 745 So. 2d 1106, 1107 (Fla. Dist. Ct. App. 1999); *DiMartino v. Eighth Judicial Dist. Court*, 66 P.3d 945,946-47 (Nev. 2003) (adopting the view that a lawyer who is likely to be a necessary witness may still represent a client in pretrial matters).] In addition to its clear language, there is no policy reason commending the rule's application to lawyers' affidavit testimony at summary judgment. Because it is the judge who reads motions, there is no chance that the lawyer's dual roles will be confusing.[37] [37. *See State v. Van Dyck*, 827 A.2d 192, 195 (N.H. 2003) (observing that, "[u]nlike a jury, a judge is unlikely to confuse the roles of advocate and witness or to deem an attorney credible simply because he is an attorney"); *see also Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 282 (2d Cir. 2004) (explaining that the lawyer-witness rule applies "first and foremost" where the lawyer-witness is representing a client "before a jury"); *Roberts v. State*, 840 So. 2d 962, 970 (Fla. 2003) (finding no basis for Rule 3.7 disqualification where prosecutor testified in a post-conviction evidentiary hearing before ajudge); *DiMartino,* 66 P.3d at 947 (noting that pretrial disqualification of lawyer-witness generally is not necessary because there is no danger of the confusion and prejudice that may result from a lawyer appearing as an advocate and a witness before a jury).] It is equally unlikely that a judge, as compared to a jury, will be unfairly influenced by the lawyer's dual roles.[38] [38. *See Van Dyck,* 827 A.2d at 195 (asserting that a judge is

> unlikely to deem an attorney credible as a witness simply because he is an attorney); *see also Roberts,* 840 So. 2d at 970 (noting that lawyer's dual role would not prejudice opponent in a hearing before a judge); *DiMartino,* 66 P.3d at 947 (noting that pretrial disqualification generally is not warranted because the lawyer-witness rule is intended to eliminate confusion and prejudice resulting from lawyer's dual roles in front of the jury).] To the extent that the rule focuses on client protection, it is difficult to see how a lawyer's submission of an affidavit could create a conflict of interest. If the lawyer faces a conflict because the lawyer has testimony to offer that is harmful to the client's cause, the lawyer will not offer that testimony in an affidavit; that sort of conflict is a problem where the opposing party seeks to call the lawyer as a witness, not where the lawyer volunteers testimony. In short, it is inappropriate for courts to extend Rule 3.7(a) to lawyers' affidavit testimony at summary judgment.

36 N.M.L. Rev. 47, 50-51.

Based on the above, this Court finds that I.R.P.C. 3.7(a) is only applicable at trial. Therefore, disqualifying Doyle as Counsel on this case is premature. Because the Court found that disqualification of Doyle as Counsel is premature, the Court need not discuss whether Doyle is likely to be a necessary witness at trial at this time.

Finally, this Court finds that the probative value of Doyle's Declaration does not substantially outweigh its prejudicial effect or confusion caused by its admittance in evidence. Robinson Brothers and Frontier correctly point out that there is no evidence that the photographs are to scale, and distortions of scale based on the angle the photographs were taken could certainly make Doyle's distance measurements incorrect. Many of the photographs are taken from various different angles that could distort measurements of distance overlaid on the photographs, but Exhibit 6 of Doyle's Declaration appears to be from a relatively head-on angle, perpendicular to the ground. While Exhibit 6 has the most probative value to prove the distance between the hole dug by the auger relative to locator's marks, when taken as a whole, all the photographs have probative value in this regard. This Court recognizes that even slight changes in the angle a photograph is taken can have the effect of distorting perceptions

of distance to varying degrees. The prejudicial effect of these possible distortions, as well as the disputed size of the hole dug by the auger, can be properly addressed by cross-examination of Doyle at trial. Additionally, further evidence to rebut the merits of Doyle's measurements can be presented by Robinson Brothers and Frontier. For these reasons, the Motion to Strike Paragraphs 7-14 of Doyle's Declaration, and the overlaid marks made by Doyle in his Exhibits, is denied.

B. The Motion for Summary Judgement is denied because genuine issues of material fact exist.

As illustrated above, genuine issues of material fact exist in this case which cannot be ruled on as a matter of law. Avista and ELM present evidence that the photographs, and Doyle's analysis of them, show that Robinson Brothers dug a hole with their auger less than 24 inches from the locator's marks of the electrical lines. Robinson Brothers and Frontier present evidence to contradict this assertion. They argue that the hole was not dug with the auger less than 24 inches from the demarcations. In support of this assertion, they argue that overlaying lines of measurement on a photograph can be distorted by the angle the photographs were taken. Additionally, they argue that Doyle's Exhibits depict a hole that was enlarged by hand digging after the auger had made its initial hole. Decl. of Edward R. Brill in Opp. to Mot. for Summ. J. 2-3. The combined effect of the possible distortions in the photographs, and the enlargement of the hole after the auger's initial digging, indicate that Robinson Brothers could have dug with their auger more than 24 inches away from the locator's marks. While the Court must really stretch to reach that conclusion, the Court appropriate errs on the side of caution, and finds a dispute of fact exists. For these reasons, the Motion for Summary Judgment is denied.

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C. Miscellaneous.

At oral argument, the Court urged analysis of this dispute beyond simply Idaho Code § 55-2207. As mentioned above, I.C. § 55-2207(2)(a) reads in part, an excavator shall: "Determine by hand digging, in the area twenty-four (24) inches or less from the facilities, the precise actual location of underground facilities which have been marked." But also, an excavator shall "plan the excavation to avoid damage to or minimize interference with underground facilities in and near the excavation area." I.C. § 55-2207(2)(a). It is undisputed that Robinson Brothers did no hand digging at this site. Under that statute, if any part of their auger is within the 24-inch area of the marking, Robinson Brothers is strictly liable. No question about that. However, it is difficult to understand how Robinson Brothers' actions of immediately using the auger to drill a hole, which best case (from Robinson Brothers' standpoint) lies **immediately adjacent** to this 24-inch area, without hand digging anywhere, can be considered planning "the excavation to avoid damage or to minimize interference with underground facilities *in and near the excavation area*." I.C. § 55-2207(2)(a) (italics added). It seems that a reasonable interpretation of the entire statutory scheme would be that the contractor is required to hand dig within 24 inches either side of the marked line, and that the contractor would then have to dig as deep as needed to actually locate the wire or the pipe that has been marked on the surface of the ground. If the contractor does not find the wire, or the pipe that has been marked within that 48-inch area (24 inches either side of the marking on the ground), then the contractor would know the area has been *mismarked*. If it has been mismarked, then it seems incumbent upon the contractor to know that it must continue to hand dig until the utility has been *actually located*. The statutory scheme seems to contemplate this course of conduct via compensation to the contractor. In other words, the statutory scheme compensates the careful contractor,

the contractor that follows all the involved statutes, not just paying attention to one of those statues. If Robinson had hand dug within the 48-inch zone trying to find the buried line, and having not found it within the 48-inch zone, but then continued hand digging beyond that zone and then found the actual line (which they would have), the actual line being found exactly where they were about to place the auger and begin drilling, Robinson Brothers would have been paid for that extra work. Idaho.Code § 55-2205(2)(a) reads, "Excavators shall have the right to receive compensation from the owner of the underground facility for costs incurred if the owner of the underground facility does not locate its facilities in accordance with this chapter."

Robinson Brothers is convinced it does not need to take this extra step. Robinson Brothers feels it can simply bring out the auger and tear away at the soil if they are confident they are more than 24 inches away from the marked line. Robinson Brothers feels the 24-inch boundary creates a safe haven and that drilling beyond that safe haven relieves them from all liability if they hit an underground utility. Counsel for Robinson Brothers writes, "However, it is also true that the excavator is not required to excavate by hand if the excavator is more than 24 inches from the locator marks." Defs. Robinson Brothers Construction, Inc.'s and Frontier Communications of America, Inc.'s Mem. in Opp'n to Defs One Call Locators, LTD. and Avista Corporation's Mot. for Summ. J. 4. That may or may not be "true", and we may have to wait until the court trial to decide that issue. Robinson Brothers does not get to decide whether that is "true" or not; that will be a legal decision for this Court. However, the language of I.C. § 55-2207(2)(a) and I.C. § 55-2205(2)(a) should not be ignored by the parties because attorney's fees may awarded to the prevailing party under the applicable statutory scheme. I.C. § 55-2211(5). It would seem that prompt analysis of all the applicable statutes would be prudent by all parties.

IV. CONCLUSION AND ORDER

For the reasons set forth above, Robinson Brothers' and Frontier's Motion to Strike is denied, and Avista's and ELM's Motion for Summary Judgment is denied.

IT IS HEREBY ORDRERED that Robinson Brothers' and Frontier's Motion to Strike is **DENIED**.

IT IS FURTHER ORDERED that Avista's and ELM's Motion for Summary Judgment is **DENIED**.

Entered this 5th day of December, 2019.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 6th day of December, 2019, a true copy of the foregoing was emailed, mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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