STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

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

DAVID K. MARKS, *Plaintiff*,

vs.

DIRECTV, INC., *Defendant*.

Case No. **CV 2010 11133**

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL, OR IN THE ALTERNATIVE FOR AN ADDITUR, and ORDER ON COSTS

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff David Marks' (Marks) Motion for a New Trial, or, Alternatively, Motion for an Additur.

Marks is an employee for Cheap Cars & Trucks. Complaint, p. 1. In his December 29, 2010, Complaint, Marks alleged that on July 5, 2010, a technician for defendant DirecTV (DirecTV) was at Cheap Cars & Trucks installing DirecTV at that location. Complaint, p. 2. In order to perform the installation, the technician opened a trap door in the floor of a storage room at Cheap Cars & Trucks. *Id*. Marks walked into the room and fell into the opening in the floor, resulting in severe injuries. *Id*. Marks pursued a negligence claim against DirecTV, claiming that DirecTV's technician owed a duty to notify persons at Cheap Cars & Trucks that the trap door had been opened. Complaint, p. 3.

DirecTV filed an answer on November 17, 2011, and denied the allegations in Marks' Complaint and set forth six affirmative defenses. Answer, p. 1. These six affirmative defenses were: 1) Marks' contributory negligence, 2) Marks' contributory negligence exceeds any fault on the part of DirecTV, 3) Marks' injuries were caused by Cheap Cars & Trucks, 4) Marks' claims are barred by Idaho Worker's Compensation laws, 5) the hazard, if any, was open and obvious and 6) Marks' failure to mitigate damages. Answer, pp. 2-3.

Both parties demanded a jury trial. Following the jury trial, on October 2, 2012, the jury rendered a verdict in Marks' favor. In its verdict, entered October 18, 2012, the jury attributed 51% negligence to DirecTV and 49% to Marks. The jury awarded damages totaling $57,028.17, in plaintiff's favor, comprised of $32,028.17 in economic damages, and $25,000.00 in non-economic damages. Applying the 49% reduction in fault to Marks for his contributory negligence, to the $57,028.17 total damages, Marks' received a Judgment filed on October 18, 2012, for $29,084.37.

On October 29, 2012, Marks filed a Motion for a New Trial, or in the Alternative for an Additur with a supporting memorandum. Motion for New Trial, p. 1. In his Memorandum, Marks states that he is entitled to a new trial, as there was an irregularity in the proceedings under I.R.C.P. 59(a)(1), or an error of law under I.R.C.P. 59(a)(7) because the jury did not properly understand the law of comparative negligence "as it related to the manner in which the jury was to determine the appropriate amount of damages to award" to Marks. Memorandum in Support of Motion for New Trial, p. 3. In the alternative, Marks requests that the Court direct an additur under I.R.C.P. 59 to make up the alleged discrepancy between what the jury thought that the Plaintiff's award would be and what the actual award was. Memorandum in Support of Motion for New Trial, pp. 4-5.

On November 13, 2012, DirecTV filed an Opposition to Plaintiff's Motion for New Trial and Additur. Opposition to Plaintiff's Motion, p. 1. In its Memorandum, DirecTV opposes Marks' motion for a new trial on the grounds that I.R.C.P. 59(a)(1) does not apply because Marks has not identified an off the record communication creating an irregularity in the trial proceeding, and I.R.C.P. 59(a)(7) does not apply because the jury's alleged misunderstanding of the jury instructions and verdict form are not errors of law. Opposition to Plaintiff's Motion, pp. 2-4. Furthermore, DirecTV objects to the affidavits of jurors Michelle L. Smidt, Ruth Yeiser, and Tina Rogers, on the grounds that I.R.E. 606 prohibits a juror from testifying as to "any matter occurring during the course of deliberation or the effects on a juror's thinking." Opposition to Plaintiff's Motion, p. 4. Finally, DirecTV states that Marks is not entitled to an additur because the verdict handed down by the jury in the case is consistent with the clear weight of the evidence in the trial. Opposition to Plaintiff's Motion, p. 6.

On December 7, 2012, Marks filed a Supplemental Memorandum in Support of Motion for New Trial, or in the Alternative for an Additur. Supplemental Memorandum, p. 1. In his Supplemental Memorandum, Marks includes an *additional, new* request that a new trial be granted under I.R.C.P. 59(a)(5), arguing that the jury's verdict was the product of passion or prejudice because the judgment in this case was less than the amount of medical expenses put into evidence by the stipulation of the parties. Supplemental Memorandum, p. 3. This is an "additional, new" request because in Marks' Motion for a New Trial, or in the Alternative for an Additur, Marks obliquely mentions I.R.C.P. 59(a). In Marks' Memorandum in Support of Motion for a New Trial, or in the Alternative for an Additur, Marks mentions I.R.C.P. 59(a)(1) and (7). Now, for the first time, Marks argues he is entitled to relief under I.R.C.P. 59(a)(5).

Finally, on December 12, 2012, DirecTV filed an Objection to Plaintiff's Supplemental Memorandum in Support of Motion for New Trial on the grounds that the Motion for a New Trial under I.R.C.P. 59(a)(5) was untimely. Defendant's Objection to Plaintiff's Supplemental Memorandum, p. 1. Alternatively, DirecTV states that I.R.C.P. 59(a)(5) does not apply as Marks appears to be objecting to the amount of the judgment, rather than the amount of damages, and furthermore that there is no basis to conclude that the jury assessed damages under the influence of passion or prejudice. Defendant's Objection to Plaintiff's Supplemental Memorandum, p. 2.

Oral argument was held December 19, 2012.

II. STANDARD OF REVIEW.

The trial court has the discretion and prerogative to redress what is perceived as a miscarriage of justice, either by ordering a new trial or additur or remitter. *Sanchez v. Galey*, 112 Idaho 609, 614, 733 P.2d 1234, 1239 (1986). A trial court's determination whether or not to grant a motion for a new trial will not be overturned absent manifest abuse of discretion. *Stout v. Westover*, 106 Idaho 533, 534, 681 P.2d 1008, 1009 (1984). Similarly, the offer to modify a verdict by additur or remitter will not be disturbed on appeal unless an abuse of discretion is shown. *Young v. Scott*, 108 Idaho 506, 509, 700 P.2d 128, 131 (Ct.App. 1985). A trial court is vested with wide discretion to grant or deny a new trial where substantial rights of the aggrieved party are not affected and that party is not entitled to a new trial as a matter of right. *Rockefeller v. Grabow*, 136 Idaho 637, 645, 39 P.3d 577, 585 (2001). Under I.R.C.P. 59(a)(7), the trial court has a duty to grant a new trial where prejudicial errors of law have occurred, even though the verdict is supported by substantial and competent evidence. *Id*. The test for evaluating whether a trial court has abused its discretion is: 1) whether the lower court rightly

perceived the issue as one of discretion, 2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices, and 3) whether the court reached its decision by an exercise of reason. *Schmedel v. Dille*, 148 Idaho 176, 180, 219 P.3d 1192, 1196 (2009).

III. ANALYSIS.

A. DirecTV's Objection to Marks' Juror Affidavits Must be Sustained.

Marks has filed affidavits by three jurors, Michelle L. Smidt, Tina L. Rogers, and Ruth T. Yeiser. Each affidavit states:

> 3. After some discussion and deliberation, ten of the jurors agreed to apportion the negligence as indicated in the verdict, i.e. 51% to DirecTV and 49% to David Marks. It was my understanding that by apportioning more negligence to DirecTV, I could then award money damages to Mr. Marks. It was also my understanding that all of the other jurors thought the same way as well.
>
> 4. After apportioning negligence, we then went about determining how much money to pay Mr. Marks. It was my understanding that when we awarded Mr. Marks $57,028.17 ($32,028.17 for medical expenses and $25,000 for pain and suffering), Mr. Marks would be paid that full amount by DirecTV. I had no idea that amount would be reduced. It was also my understanding from our deliberations that all of the other jurors thought the same way.

Affidavit of Michelle L. Smidt, Affidavit of Tina L. Rogers, and Affidavit of Ruth T. Yeiser, p. 2, ¶¶ 3, 4.

Idaho Rule of Evidence addresses the competency of jurors as witnesses. I.R.E. 606. Idaho Rule of Evidence 606(b) states:

> **(b) Inquiry to Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or

> whether any outside influence was improperly brought to bear upon any juror and may be questioned about or may execute an affidavit on the issue of whether or not the jury determined any issue by resort to chance.

I.R.E. 606(b).

Under I.R.E. 606, a jury's verdict may not be impeached by a juror's affidavit or otherwise, except on the grounds that: (1) extraneous prejudicial information was improperly brought to the jury's attention, (2) outside influence was improperly brought to bear on a juror, or (3) the verdict was determined by resort to chance. I.R.E. 606(b); *State v. Webster*, 123 Idaho 233, 238, 846 P.2d 235, 236 (Ct.App. 1993). Statements regarding any other aspect of the jury's deliberations are inadmissible to impeach the jury's verdict. *State v. Burnside*, 115 Idaho 882, 886, 771 P.2d 546, 550 (Ct.App. 1989). If the appellant fails to present evidence regarding one of the three above-mentioned exceptions, jury affidavits may not be considered to impeach a jury's verdict. *Webster*, 123 Idaho 233, 238-39, 846 P.2d 235, 236-37.

In this case, Marks has not provided any evidence to the Court regarding prejudicial information improperly brought to the jury's attention, that outside influence was improperly brought to bear on a juror, or that the verdict was determined by resort to chance. In fact, Marks does not even allege any of these situations. Marks simply states that the affidavits show that the jury "did not properly understand the law of comparative negligence as it related to the manner in which that jury was to determine the appropriate amount of damages to award to the Plaintiff." Memorandum in Support of Motion for New Trial, p. 3. As such, under *Webster*, the juror affidavits provided by Marks relating to the misunderstanding of the jury instructions by the jurors must be disregarded and not considered by this Court because they do not fall under any of the three exceptions set forth by *Webster*.

B. DirecTV's Objection to Marks' Supplemental Memorandum in Support of Motion for New Trial Must be Sustained.

Idaho Rule of Civil Procedure 59 addresses the grounds for which a new trial may be granted, as well as sets forth the procedural timelines which must be followed in requesting such relief. I.R.C.P. 59. Specifically, I.R.C.P. 59(b) states that a "motion for a new trial shall be served not later than fourteen (14) days after the entry of judgment." I.R.C.P. 59(b).

In this case, the Plaintiff's Supplemental Memorandum in Support of Motion for New Trial was filed on December 7, 2012. Judgment was rendered in this case in the form of a jury verdict on October 18, 2012. Judgment, p. 1. While Marks' original Memorandum in Support of Motion for New Trial was filed on October 29, 2012, well within the fourteen-day deadline of November 1, 2012, his Supplemental Memorandum in Support of Motion for New Trial was filed on December 7, 2012, well outside of the fourteen-day deadline. As such, Marks' Supplemental Memorandum is untimely and will not be considered by this Court.

As mentioned above, in Marks' Supplemental Memorandum, Marks includes an *additional, new* request that a new trial be granted under I.R.C.P. 59(a)(5), arguing that the jury's verdict was the product of passion or prejudice because the judgment in this case was less than the amount of medical expenses put into evidence by the stipulation of the parties. Supplemental Memorandum, p. 3. This is an "additional, new" request because in Marks' Motion for a New Trial, or in the Alternative for an Additur, Marks only obliquely mentioned I.R.C.P. 59(a). In Marks' Memorandum in Support of Motion for a New Trial, or in the Alternative for an Additur, Marks only mentions I.R.C.P. 59(a)(1) and (7). Now, for the first time, Marks argues he is entitled to relief under I.R.C.P. 59(a)(5). Because that is a new request for relief, it is untimely.

Even if the Court were to consider Marks' Supplemental Memorandum and his request for relief under I.R.C.P. 59(1)(5) as being timely, the Court must still deny the motion for new trial. Idaho Rule of Civil Procedure 59(a)(5) states that a new trial may be granted for "excessive damages or inadequate damages, appearing to have been given under the influence of passion or prejudice." I.R.C.P. 59(a)(5). The Idaho Supreme Court in *Dinneen v. Finch*, 100 Idaho 620, 625-26, 603 P.2d 575, 580-81 (1979) addressed the proper focus for motion for new trials under I.R.C.P. 59(a)(5):

> Where a motion for a new trial is premised on inadequate or excessive damages, the trial court must weigh the evidence and then compare the jury's award to what he would have given had there been no jury. If the disparity is so great that it appears to the trial court that the award was given under the influence of passion or prejudice, the verdict ought not stand. It need not be proven that there was in fact passion or prejudice nor is it necessary to point to such in the record. The appearance of such is sufficient.

Dineen v. Finch, 100 Idaho 620, 625-26, 603 P.2d 575, 580-81.

Again, as stated below, Marks is not stating that the amount of *damages* awarded was not in line with the evidence, but that the *judgment* awarded to him was insufficient. Supplemental Memorandum, p. 3. Essentially, Marks takes no quarrel with the amount of damages rendered by the jury, but instead takes issue with the amount of contributory fault the jury assessed to Marks, and the concomitant reduction in the amount of damages recovered by way of a judgment. Marks fails to show how the jury's verdict was a product of passion or prejudice, therefore it is unlikely that simply stating the judgment is less than the amount of medical expenses stipulated to by the parties (even though the damages found were sufficient) is enough. Therefore, the Court must deny the motion for a new trial under I.R.C.P. 59(a)(5) on the merits.

It is worth noting that the *Kafader v. Baumann*, 2012 Opinion No. 62 (Court of Appeals, November 28, 2012) case cited by Marks is not relevant to this case at all, as

Kafader was addressing the issue of a district judge deferring to the jury on credibility of witnesses when deciding a motion for new trial under I.R.C.P. 59(a)(5).

C. Marks' Original Motion for New Trial under I.R.C.P. 59(a)(1) and I.R.C.P. 59(a)(7) Must be Denied.

Idaho Rule of Civil Procedure 59(a) states in part:

> 1. Irregularity in the proceedings of the court, jury or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial . . .
> 7. Error in law, occurring at the trial.

I.R.C.P. 59(a).

With regard to I.R.C.P. 59(a)(1), it should be noted that under I.R.C.P. 59(a)(7), any motion for a new trial upon the grounds set forth in subdivision 1 must be accompanied by an affidavit stating in detail the facts relied upon in support of such a motion for a new trial. I.R.C.P. 59(a)(7). In this case, the only affidavits provided by Marks are those of the three jurors. As discussed above, these affidavits will not be considered by this Court under I.R.E. 606(b). Because these juror affidavits must be disregarded pursuant to I.R.E. 606, Marks is left with no affidavits to support his motion for a new trial under I.R.C.P. 59(a)(1), as required under I.R.C.P. 59(a)(7). On that ground alone, the motion for a new trial pursuant to I.R.C.P. 59(a)(1) must be denied.

Idaho Rule of Civil Procedure 59(a)(7) also states that any motion for a new trial based on subsection 7 must set forth the factual grounds therefor with particularity. I.R.C.P. 59(a)(7). In this case, Marks states in his Memorandum in Support of Motion for New Trial that the jury did not "properly understand the law of comparative negligence as it related to the manner in which that jury was to determine the appropriate amount of damages to award to the Plaintiff." Memorandum in Support of Motion for New Trial, p. 3.

An instruction which incorrectly states the law provides grounds for ordering a new trial. *Walton v. Potlatch Corp*., 116 Idaho 892, 898, 781 P.2d 229, 235 (1989). However, a party is not entitled to have instructions given in the form submitted, but only to have them given in a form which fully and correctly states the issues and the law. *Davis . Bushnell*, 93 Idaho 528, 532, 465 P.2d 652, 656 (1970). All instructions given to the jury should be read and considered as a whole, and where they are not inconsistent but can be reasonably and fairly read together, the Supreme Court will assume that the jury gave due consideration to the instructions as a whole rather than to isolated portions thereof. *Roll v. Roll*, 115 Idaho 797, 799, 770 P.2d 806, 808 (1989). Where it appears that the giving of the instruction did not result in any substantial injury, though not founded on the issues, the case will not be reversed. *Patino v. Grigg & Anderson Farms* 97 Idaho 251, 256, 542 P.2d 1170, 1175 (1975).

In this case, Marks does not contend that the instructions given by this Court to the jury were incorrect statements of law, but rather that the jury was simply confused by those instructions. Memorandum in Support of Motion for New Trial, pp. 3-4. In fact, Marks acknowledges that the verdict form and jury instructions were in a form approved by the Idaho Supreme Court. *Id*. As such, under *Davis*, Marks does not have a right to have a particular form of an instruction given, only a right to have a form that correctly states the law. As Marks has not shown that the jury instruction was an incorrect statement of law, the motion for a new trial pursuant to I.R.C.P. 59(a)(7) must be denied.

D. Motion for Additur Must be Denied.

The trial court should grant an additur only, if after assessing the credibility of the witnesses and weighing the evidence, it determines that "the verdict is not in accord with the clear weight of the evidence." *Puckett v. Verska*, 144 Idaho 161, 168, 158 P.3d 937,

944 (2007). When the trial court believes that substantial and competent evidence supports the verdict but its assessment of damages substantially diverges from the jury's award of damages such that only passion or prejudice could explain it, then it should grant a new trial or additur. *Id*. It is important to note that *Puckett* dealt with a motion for additur pursuant to I.R.C.P. 59(a)(5), not I.R.C.P. 59(a)(1) or I.R.C.P. 59(a)(7).

The appearance that passion or prejudice affected the jury's verdict alone is sufficient to justify an additur. *Dinneen v. Finch*, 100 Idaho 620, 625-36, 603 P.2d 575, 580-81 (1979). No one factor is appropriate to award an additur because "how substantial the disparity must be differs with each factual context and with the trial judge's sense of fairness and justice." *Collins v. Jones*, 131 Idaho 556, 558, 961 P.2d 647, 649 (1998).

Even though *Puckett* does not deal directly with motions for additur under I.R.C.P. 59(a)(1) and I.R.C.P. 59(a)(7), it does provide a framework to work from. The question for additur is whether the verdict is in accord with the clear weight of the evidence. *Puckett*, 144 Idaho 161, 168, 158 P.3d 937, 944. It appears from the memorandums and arguments in this case that Marks' issue with the verdict is not the amount of damages itself that the jury awarded, but the amount of the *judgment* that Marks received, after the negligence liability had been allocated accordingly to each party. On that argument, particularly since the affidavits of the jurors cannot be considered under I.R.E. 606(b), it appears that there is really no argument that the damages are inadequate, just that Marks' award was less than his agreed-upon medical expenses. Memorandum in Support of Motion for New Trial, p. 4.

While it is within this Court's discretion to grant an additur, to do so in this case would be an abuse of that discretion. The percentage of fault apportioned to Marks on one hand and DirecTV on the other hand is within the realm of reason. The amount of damages are within the realm of reason. This Court simply cannot find that "the verdict is not in accord with the clear weight of the evidence." *Puckett v. Verska*, 144 Idaho 161, 168, 158 P.3d 937, 944 (2007).

E. *Seppi v. Betty.*

Though neither party has cited the Court to *Seppi v. Betty,* 99 Idaho 186, 579 P.2d 683 (1978), and neither party has brought up this issue, nor had either party requested an instruction consistent with that case, the *Seppi* instruction is pertinent here. As a general rule in Idaho, "it is reversible error for the trial court to instruct the jury as to what effect their answers will have on the final outcome of the case." *Holland v. Peterson*, 95 Idaho 728, 732, 518 P.2d 1190, 1194 (1974). However, the Idaho Supreme Court has carved out an exception in *Seppi v. Betty*, 99 Idaho 186, 579 P.2d 683 (1978). In *Seppi*, the Idaho Supreme Court held that it is not reversible error for a trial court to inform the jury of the effect of apportioning 50% or more of the negligence to the plaintiff. 99 Idaho 186, 195, 579 P.2d 683, 692. However, the Supreme Court also stated that such an instruction is not required, that a trial court has discretion not to give such an instruction where the issues are so complex or the legal issues are so uncertain that such instruction will confuse or mislead the jury. *Id*. Furthermore, the Supreme Court held that a trial court should "carefully instruct the jury that they are to determine the total damages and that they are not to reduce the sum to reflect their findings on the percentage of negligence." *Id*. No one asked for a *Seppi* instruction. Essentially, the *Seppi* instruction is *implicit* in the IDJI jury verdict form (IDJI 1.43.1)

approved by the Idaho Supreme Court, the same verdict form that was used by the Court in this jury trial. The effect of assessing 50% or more fault to a plaintiff is implicit in the sentence: "If the percentage of fault you assigned to the plaintiff is equal to or greater than the percentage of fault you assigned to the defendant, you are done." Whe the jury is told "you are done", that means the jury does not answer the question regarding the amount of damages.

The Idaho Supreme Court finished by stating that a trial court has broad discretion to order a new trial when it believes that the verdict, whether general or special, is a "product of the jury's misunderstanding, prejudice or bias, or that the jury has failed to properly follow its instructions." *Id*.

As a basis for its decision the Supreme Court stated:

> Irrespective of whether one considers it a virtue or a vice, the tendency of juries to adjust their verdicts to accord with their notions of the justice of the cause is an inherent characteristic of juries and will be with us as long as we continue to have juries . . . It would be incredibly naive to believe that jurors, after having listened attentively to testimony of the parties and a parade of witnesses and after having heard the arguments of counsel, will answer questions on a special verdict form without giving any thought to the effect those answers will have on the parties and to whether their answers will effectuate a result in accord with their own lay sense of justice.

Seppi, 99 Idaho 186, 193, 579 P.2d 683, 690. The Idaho Supreme Court went on to state:

> It is this latter problem, juries speculating on the effect of their answers, that creates a unique danger when the issues in a comparative negligence case in Idaho are submitted to a jury in a special verdict form. A jury uninformed about the precise working of the Idaho comparative negligence law, when presented with questions asking them to apportion the negligence between the parties and to fix the total amount of damages, is likely to assume that the plaintiff's recovery will be reduced in proportion to his negligence. In such situation the Idaho comparative negligence rule, which bars recovery if the plaintiff's negligence is 50% or more, poses a trap for the uninformed jury . . . In short, not informing the jury of the effect of a 50% negligence finding in many cases is likely to cause an unjust result and produce a judgment

> which does not reflect the wisdom of the jury or their view of the facts, but only their ignorance of Idaho law.

Seppi, 99 Idaho 186, 193-94, 579 P.2d 683, 690-91.

Since 1978, *Seppi* has been examined many times by the Idaho Supreme Court and Idaho Court of Appeals. An interesting case is *Ross v. Coleman Co.*, 114 Idaho 817, 761 P.1d 1169 (1988). In *Ross*, the trial court gave a *Seppi* instruction, which stated:

> "You are now to compare the negligence of the parties and Idaho Power Company. *If you find the plaintiff's negligence equal to or more than the total amount of negligence of either defendant* or Idaho Power Company, *he will receive nothing from that entity,* regardless of the amount of damages you may find that he sustained. To the extent that you find the plaintiff negligent in an amount less than any of these entities the total amount of damages sustained by him will be reduced by the amount of percentage of negligence you may attribute to him. For example, if you find Michael Ross's negligence was less than Coast Catamaran Corporation, Michael Ross's recovery will be reduced by any percentage of negligence that you may have attached to him. The same analysis applies to Michael Ross and either Coleman Company, Inc., or the Idaho Power Company."

Ross, 114 Idaho 817, 833, 761 P.2d 1169, 1185. (emphasis in original).

As shown above, the trial court in *Ross* expanded the *Seppi* instruction to not only state the effect of a jury allocating 50% or more fault to the plaintiff, but to include the effect of the percentage allocated to the plaintiff's negligence on the total award of damages. *Id*. The Idaho Supreme Court did not directly address the second part of the jury instruction in *Ross*, though it is interesting to note that the instruction was not ruled erroneous on that issue. *Id*. The *Ross* trial court was reversed, but not due to the second part of the instruction being given, but because the trial court failed to further instruct the jury on its intention to impute the negligence of one defendant to another. *Id*.

The Idaho Court of Appeals then analyzed *Seppi* in *Stoddard v. Hubbard*, 119 Idaho 225, 804 P.2d 1356 (1991). In *Stoddard*, the Court noted that though *Seppi*

states that such instructions are warranted in most cases, the Supreme Court only held that it is not reversible error to give such instructions. 119 Idaho 225, 228, 804 P.2d 1356, 1359. The Court also reiterated the fact that *Seppi* states that "where the trial court chooses to inform the jury of the effect of its apportionment of negligence, the court must also instruct the jurors to determine the *total* amount of damages sustained by the plaintiff." *Id*. The Court in *Stoddard* held that "language further instructing the jury to refrain from reducing the sum to reflect its finding on negligence, while emphasizing the jurors' duty to determine total damages, is not essential . . . [a]bsent a showing otherwise, we will presume the jury followed the court's direction and determined the total damages." *Id*. The reasoning set forth by the Court was that brevity and clarity are important for special verdict forms and that the court further instructing the jury not to reduce their total damage award would be redundant. *Id*.

Other jurisdictions have taken a much more liberal approach to negligence jury instructions. In Nebraska, the legislature has gone so far as to require that a trial court inform the jury that the ultimate outcome of a 50-50 allocation of negligence between a plaintiff and defendant will be a verdict in favor of the defendant, thus the plaintiff would receive nothing. *Russell v. Stricker*, 635 N.W.2d 734, 739 (2001). This is essentially a *Seppi* instruction. The Court in Nebraska went on to say that a jury cannot be "fully and openly informed before making its determination" when it does not receive this proper ultimate outcome charge. *Id*. Finally, the Court stated that a jury "should be openly informed as to the legal principles involved in our comparative negligence doctrine so that they may make a rational decision." *Russell*, 635, N.W.2d 734, 741. Essentially, the status in Idaho is there is no *Seppi* instruction in the instructions approved by the Idaho Supreme Court; however, Idaho case law shows the giving of a *Seppi* instruction

is not error (and no party requested such in the present case). The status in Nebraska is that it is error not to give a *Seppi* type instruction.

Marks requested four jury instructions. None of the four even dealt with the subject of comparative fault, let alone a *Seppi* type instruction.

As Idaho case law above shows, parties are allowed to have the trial court give an instruction informing the jury of the consequence of allocating 50% or more negligence to the plaintiff in a case. However, the trial court is not required to give such an instruction. Under *Ross* it certainly appears permissible for a trial court to give a modification of the *Seppi* instruction to include information on how the percentage allocated to a plaintiff's negligence affects the total amount of damages found by the jury. However, in this case, neither party asked for a *Seppi* instruction, much less any modification thereof. Where neither party asked for instructions on a particular point, failure to give them is not error. I.R.C.P. 51(1)(1); *Goodwin v. Wulfenstein,* 107 Idaho 492, 690 P.2d 947 (Ct.App. 1984); *Joyce Bros. v. Stanfield,* 33 Idaho 68, 189 P. 1104 (1920); *Owen v. Taylor,* 62 Idaho 408, 114 P.2d 258 (1941). When the instructions given by the trial court are correct insofar as they go, one party cannot complain of the failure to give additional instructions if none are requested. *Carpenter v. Double R Cattle Co.,* 108 Idaho 602, 701 P.2d 222 (1985).

IV. CONCLUSION.

By making the following claim, Marks, through three jurors, is asking this Court to be sympathetic to Marks, an action the Court instructs the jury, (in IDJI 1.00 "[Your decision] should not be based on sympathy or prejudice.") *not* to do.

> It was my understanding that when we awarded Mr. Marks $57,028.17 ($32,028.17 for medical expenses and $25,000 for pain and suffering), Mr. Marks would be paid that full amount by DirecTV. I had no idea that amount would be reduced.

Affidavit of Michelle L. Smidt, Affidavit of Tina L. Rogers, and Affidavit of Ruth T. Yeiser, p. 2, ¶ 4.

To grant Marks the relief he requests would require the Court to: 1) come in and graft on extra damages (not determined by the jury) for Marks so as to offset the amount of contributory negligence the jury specifically attributed to Marks, or 2) come in and reduce the amount of contributory negligence the jury specifically attributed to Marks. The Court cannot do either. The Idaho Supreme Court in *Seppi* specifically prohibited such, when it held that a trial court should "carefully instruct the jury that they are to determine the total damages and that they are not to reduce the sum to reflect their findings on the percentage of negligence." 99 Idaho 186, 195, 579 P.2d 683, 692.

To grant Marks the relief he now requests would completely disregard the jury verdict form itself, which is approved by the Idaho Supreme Court, and which asks the jury to first determine the percentage of fault to each of the two parties, and then, determine the amount of the plaintiff's damages. These are two separate, discrete and sequential questions. While the jury *could* have been instructed as to the precise effect of its decisions on these two questions, such an instruction was not requested by Marks. Due to that failure, the Court cannot at this juncture order a new trial or grant an additur.

IV. CONCLUSION AND ORDER.

For the reasons stated above, Marks' Motion for a New Trial must be denied and Marks' alternative Motion for an Additur must be denied.

IT IS HEREBY ORDERED Marks' Motion for a New Trial is DENIED and Marks' alternative Motion for an Additur is DENIED.

IT IS FUTHER ORDERED that Marks' Costs as a matter of right, in the amount of $5,020.33 are GRANTED.

Entered this 26th day of December, 2012.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of December, 2012, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Gary Amendola	765-1046	Marc Lyons	664-5884

_____
Jeanne Clausen, Deputy Clerk