STATE OF IDAHO)
County of KOOTENAI)ss

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AT_____ O'Clock _____M
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

DONNA M. SUER, ET AL,

Plaintiffs,

vs.

JAMES S. VALENTINE, ET AL,

Defendants.

Case No. **CV 2011 2846**

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendants Valentines' motion for summary judgment. This Court has previously set forth the factual and procedural history of this case in its February 15, 2012, Memorandum Decision and Order Denying Plaintiffs' Motions to Strike:

> This matter is presently before the Court on plaintiffs' (Donna Suer, individually and as *guardian ad litem* of Carianne Suer, hereinafter collectively Suers) motion to strike defendants' (James and Savitri Valentine and their daughter Christina Valentine, hereinafter collectively Valentines) motion to strike the Affidavit of Alice Jordan. Jordan's affidavit is part of Valentines' Motion for Summary Judgment, to be heard at a later time. Suers also move to strike the entire motion for summary judgment because oral argument on that motion will be heard eight days beyond the deadline imposed by this Court's Scheduling Order.
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> Suers filed their Complaint on April 4, 2011, alleging Valentines were negligent in not recognizing their horse (named "Dusty") was dangerous, and that such negligence caused damages to Carianne Suer in excess of $10,000.00. Complaint for Damages, pp. 2-3. Valentines filed their Answer and Demand for Jury Trial on May 25, 2011. On July 11, 2011, this Court filed its Scheduling Order, Notice of Trial Setting and Initial Pretrial Order (Scheduling Order), scheduling this case for a

> five day jury trial to begin on May 21, 2012. That Scheduling Order established that "Motions for summary judgment shall be timely filed so as to be heard not later than **ninety-one (91) (thirteen weeks) before Trial.**" Scheduling Order, p. 2, ¶ 1. d. (bold in original).
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> On February 3, 2012, Valentines filed a motion for summary judgment and supporting brief and affidavits, arguing that no evidence exists regarding Valentines' knowledge of the dangerous propensities of the horse at issue and Suers therefore cannot meet their burden of showing any breach of a special duty owed by virtue of that knowledge. Defendants' Memorandum of Authorities in Support of Motion for Summary Judgment, p. 2. In support of that motion for summary judgment, Valentines submitted the affidavit of Alice Jordan. Jordan was the prior owner of the horse in question ("Dusty"), and sold Dusty to Christina Valentine in 2006 or 2007. Affidavit of Alice Jordan, pp. 2-3, ¶¶ 5-17. Valentines filed a Notice of Hearing scheduling the hearing on their motion for summary judgment for March 5, 2012. Notice of Hearing, p.1.
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> On February 7, 2012, Suers filed their motion to strike the motion for summary judgment as untimely and their motion to strike the Affidavit of Alice Jordan. Also on February 7, 2012, Suers filed a motion to shorten time on the hearing of their motion to strike. On February 10, 2012, Valentines filed their opposition to the motion to strike and the motion to shorten time. At the beginning of the February 15, 2012, hearing on Suers' motions to strike, the Court granted Suers' motion to shorten time. The Court also rescheduled the hearing on Valentines' motion for summary judgment a day later, on March 6, 2012, due to Suers' counsel not being available on the March 5, 2012, date originally scheduled.

Memorandum Decision and Order Denying Plaintiffs' Motions to Strike, pp. 1-2. At the conclusion of the February 15, 2012, hearing, the Court took the matter under advisement and issued its written opinion denying Suers' motion to strike the Affidavit of Alice Jordan and denying Suers' motion to strike Valentines' motion for summary judgment. *Id.,* p. 12.

On February 21, 2012, Suers filed their brief in opposition to the motion for summary judgment and the Affidavit of Carianne Suer. Valentines filed their reply brief in support of the motion for summary judgment on February 27, 2012. This matter remains scheduled for a five-day jury trial commencing May 21, 2012.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.,* 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

III. ANALYSIS.

In their Memorandum of Authorities in Support of Motion for Summary Judgment, Valentines argue that Idaho case law dictates the owner of a domestic animal may only be held liable for injuries to persons or property if the owner knew of or should have known of the animal's dangerous propensities. Defendants' Memorandum of Authorities in Support of Motion for Summary Judgment, pp. 9, *et seq.* Valentines cite Idaho and foreign case law regarding the presumed non-violent and non-vicious nature of domestic animals and the failure by Suers in the instant matter to have produced any evidence Valentines knew or should have known of Dusty's alleged violent propensities. *Id.,* pp. 9-12. Valentines claim Suers are arguing that the mere fact that Dusty was a

gelding provides evidence Dusty was vicious and dangerous. *Id.,* p. 13. Valentines base this argument on Suers' discovery response that Dusty was an eight year old stallion and "…was just recently gelded prior to becoming the property of Christina Valentine." *Id.* That was Suers' response to Valentines' interrogatory to have Suers identify what facts show Dusty had any prior dangerous tendencies. *Id.* Valentines argue no evidence has been provided to the Court in support of Suers' contention that a breeding stallion becomes aggressive upon being gelded. *Id.* Additionally, Valentines argue there are no *facts* to support Suers' claim that gelding is evidence of dangerousness because Dusty was not just recently gelded before becoming the property of Christina Valentine. The facts show Dusty was gelded more than a year before Alice Jordan came into ownership of Dusty, and Jordan owned Dusty for approximately two years before selling Dusty to Christina Valentine in 2006 or 2007. *Id.,* Affidavit of Alice Jordan, pp. 2-3, ¶¶ 7, 14, 17. Additionally, there is no competent evidence before the Court that a recently gelded (even though Dusty was not recently gelded) mare is dangerous, has violent propensities or is vicious. Plaintiffs filed their expert disclosure on November 21, 2011. The experts disclosed are medical experts. Plaintiffs have listed no expert on the propensities of a gelded mare. Finally, Suers point out a Pennsylvania case where the fact that a horse was a stallion was not enough to impart on the owner knowledge that the horse was vicious or might bite. *Id.,* pp. 13-14, citing *Kinley v. Bierley,* 876 A.2d 419, 420 (Pa. 2005).

In response, Suers in their Brief in Opposition to Defendants' Motion for Summary Judgment, argue they brought a general negligence claim which raises an issue of fact an requires no proof of Dusty's alleged dangerous propensities. Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, pp. 3-4. Suers argue

that under a *premises liability theory*, "in regards to a charge of negligent keeping or control, it is no defense that the party in control of the premises and the animal did not know of the animal's dangerous propensities." *Id.,* p. 4, citing RESTATEMENT (FIRST) OF TORTS, § 518. That section reads:

> One who possesses or harbors a domestic animal, which he does not have reason to know to be abnormally dangerous but which is likely to do harm unless controlled, is subject to liability for harm done by such animal, but only if,
> (a) he fails to exercise reasonable care to confine or otherwise control it, and
> (b) the harm is of a sort which is normal for animals of its class to do.

Suers also cite to foreign case law which stands for the proposition that whether reasonable control of a domestic animal was exercised is a question of fact for the jury. *Id.,* p. 5. Finally, Suers argue Valentines can be charged with the knowledge that even an ordinarily gentle horse would likely have resorted to dangerous behavior given its being driven through a narrow channel and into a small enclosure while it was already in an excited state. *Id.*, pp. 6-7.

Valentines reply the law in Idaho is set forth in *McClain v. Lewiston Interstate Fair & Racing Ass'n,* 17 Idaho 63, 104 P. 1015 (1909), and not in the foreign case law or the unadopted RESTATEMENTS sections to which Suers cite. Defendants' Reply in Support of Motion for Summary Judgment, p. 5. Valentines note *McClain* involved the animal injuring plaintiff having trespassed, but argue that the *McClain* Court specifically upheld the requirement of prior knowledge of dangerous propensities of non-trespassing animals. *Id.,* p. 6. Valentines distinguish the premises liability line of cases cited by Suers by arguing the plaintiff here "voluntarily crawled through the split rail fencing and entered the horse pasture" as opposed to the cases cited by Suers which all involve an injury occurring in a public area. *Id.,* p. 8. Valentines state Suer was a

social guest, i.e. licensee, at the time of the accident, and therefore is owed only a duty to be warned of dangerous hazards known to an owner and not reasonably discoverable by the licensee. *Id.,* p. 9. As such, Valentines conclude that Suer's having seen the horses running in an excited state within the enclosed pasture negates her ability to argue the excited state of the horses was unknown and undiscoverable by Suer. *Id.* Additionally, Valentines again argue Suers are unable to demonstrate that Valentines had knowledge of any dangerous propensity of Dusty. *Id.,* p. 10.

This Court notes that summary judgment is proper only where no genuine issues of material fact exists *and* the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). All controverted facts are liberally construed in the favor of the non-moving party and reasonable inferences are drawn in favor of the non-moving party. *G&M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). The parties have presented the Court with differing facts in regard to Carianne Suer's presence within the fenced enclosure prior to the injury. Valentines argue: "Carianne crawled through the pasture's split rail fence and followed Christina into the pasture without invitation." Defendants' Memorandum of Authorities in Support of Motion for Summary Judgment, p. 6, ¶ 29, citing Deposition of Christina Valentine at p. 52, Ll. 1-22. And, "Christina did not ask Carianne for help." *Id.,* citing Deposition of Christina Valentine at p. 54, L. 25, p. 55, Ll. 1-2. Suers, on the other hand, state, "Christina handed Carianne a lead rope and told her that they were going to separate [Dusty] from the herd and move him into a circular pen that is located within the enclosed pasture." Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, p. 2, citing Deposition of Carianne Suer at p. 47, Ll. 22-24. In her affidavit, Suer testified that "Christina told me we were going to separate Junior/Dusty…handed me a lead rope

and instructed me to stand by the gate to the circular pen…[s]he then instructed me to try to direct Junior/Dusty into the circular pen." Affidavit of Carianne Suer, pp. 2-3, ¶¶ 8-10. At this summary judgment juncture, this factual discrepancy must be resolved in favor of Suers. That is, at this point the Court must find that Carianne did follow Christina into the pen upon Christina's invitation to do so.

Carianne Suer's testimony is properly before the Court, although she was approximately twelve years old at the time of the incident and remains under the age of eighteen today. Idaho Code § 9-201 permits any individual who has organs of sense, can perceive, and can make their perceptions known to others to be a witness. Idaho Code § 9-201 further clarifies that the Court is required to conduct a hearing as to whether a child can be a witness only where the child is under ten years of age. Thus, Carianne Suer is able to testify as a witness, and the Court must construe the disputed facts of how she ended up in the fenced enclosure in her favor.

Suers did not respond to Valentines' argument that Dusty cannot be found aggressive simply because he is a gelding. Defendants' Memorandum of Authorities in Support of Motion for Summary Judgment, p. 13. In their discovery response, Suers stated Dusty had previously been used as a breeding stallion and was gelded shortly before being sold to Christina Valentine. However, the Affidavit of Alice Jordan sets forth that Dusty never, "exhibited signs that he had been used as a breeding stallion prior to him being gelded." Affidavit of Alice Jordan, p. 2, ¶ 15. This testimony is uncontradicted by Suers.

But, even construing these facts (Carianne's having been invited into the pen and Dusty not having exhibited signs that he had been used as a breeding stallion) in Suers' favor, the Court's analysis does not end. Foreign case law, and Suers exclusively cite foreign case law, is not binding on this Court. In *Oneida County Fair*

Board v. Smylie, 86 Idaho 341, 386 P.2d 374 (1963), the Idaho Supreme Court held foreign case law is not controlling, even in cases of first impression, but:

> This Court, however, may consider not only the decisions from the sister states, but also the statutory and constitutional authority governing such decisions; and then, if and when there are two lines of authority, it is eminently proper for this Court, as an aid in arriving at its decision, to select and apply to the case under consideration that line of decisions which reflects the soundest reasoning in the premises, consonant with our statutory and constitutional provisions, regardless of any numerical weight of authority. (citations omitted)

86 Idaho 341, 367, 386 P.2d 374, 391. Further, in *Christensen v. City of Pocatello,* 142 Idaho 132, 124 P.3d 1008 (2005), the Idaho Supreme Court wrote:

> When urged to adopt a provision of the Restatement, we will decline to do so if it is inconsistent with Idaho law, the case can be resolved by another formulation, or if it can be resolved by current law. *See Estate of Skvorak v. Security Union,* 140 Idaho 16, 22, 89 P.3d 856, 862 (2004). As is evident from the above discussion, none of the reasons not to adopt it are present. No Idaho decision is contrary to it, the issue cannot be resolved by another formulation, and current law does not answer the direct question.

142 Idaho 132, 137 fn. 3, 124 P.3d 1008, 1013 fn. 3. As argued by Valentines, Idaho law is set forth in *McClain.* In *McClain,* the plaintiff McClain was a licensee when he was racing a horse on the Fair Association's track, when a dog belonging to nonsuited defendants John and Genevieve Vollmer, and under the control of Norman Vollmer, trespassed upon the track and collided with the horse, resulting in injury to McClain. 17 Idaho 63, ___. 104 P. 1015, 1018. The jury awarded McClain $3,500 against Norman Vollmer and another $3,500 against the owner of the track. McClain appealed from the district court's denial of a motion for a new trial. 104 P. 1015, 1017. Apparently canine breed "profiling" was allowed back in 1909, as the Idaho Supreme Court noted:

> That said dog was by the members of said family permitted to and accustomed to accompany any of the members of the family to various and sundry places. That is was the natural propensity, trait, and tendency of all dogs of the class or kind known as the "greyhound," of the class to

> which the dog belongs, and was the trait of such dog, to chase after, run after, bark at, harass, annoy, vex, tantalize, frighten, and interfere with running animals, and especially running horses.

104 P. 1015, 1018. After maligning the breed, the Idaho Supreme Court then added: "That the members of said family had knowledge of the trait and tendency of such dogs, and the particular dog in question." *Id.* The dog in question is never referred to by name, perhaps indicating the disdain of the breed. The Idaho Supreme Court quoted the applicable legal principle, writing:

> The argument of counsel for appellant is based upon the principle of law announced in the case of *Ward v. Danzeizen,* 111 Ill.App. 163, and cases in line with that principle, as follows: "The owner of domesticated animals is not liable for injuries done by them, unless he is proved to have had notice of the inclination of the particular animal complained of to commit such injuries; there being no presumption that animals of that species are vicious or dangerous."
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> * * *
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> One of the early cases in this country considering the legal principles involved in the case at bar, under the facts as alleged in the complaint, is that of *Decker v. Gammon,* 44 Me. 322, 69 A.Dec. 99, and in our opinion states the rule correctly, as follows: "If domestic animals, such as oxen and horses, injure any one, in person or property, if they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury, unless he knew that they were accustomed to do mischief; and, in suits for such injuries, such knowledge must be alleged and proved, for, unless the owner knew that the beast was vicious, he is not liable. If the owner had such knowledge, he is liable."

17 Idaho 63, ___, 104 P. 1015, 1020. The Idaho Supreme Court went on to note that they were deciding *McClain* based not on the owner's knowledge (the owner was non-suited), but rather on the uncontroverted fact that the dog was a trespasser to the rights of the plaintiff at the time of the accident. *Id.* The dog was not rightfully where he was supposed to be at the time of the accident. No allegation has been made in the case before the Court that Dusty was not rightfully in the fenced enclosure.

McClain remains good law in Idaho. There is no support for Suers' contention that foreign case law governs. This Court finds the foreign case law and RESTATEMENT section cited by Suers are both inconsistent with *McClain.*

Although *McClain* was raised by Valentines in their opening brief, counsel for Suers did not address McClain in Suers' brief. While not a violation of Rule of Professional Conduct 3.3 (where the commentary makes clear that counsel "must recognize the existence of pertinent legal authorities"), only because Valentines cited the Court to *McClain* (the comment states the duty arises only where the authority has not been disclosed by the opposing party), Suers' failure to discuss *McClain* in briefing placed this Court at a disadvantage in preparation for oral argument.

At oral argument, counsel for Suers stated that the key distinguishing portion of *McClain* is as follows:

> It is common knowledge that a speed contest between horses is for the entertainment and edification of the human family, and not the dog family, and that as a rule large numbers of people gather near the race track, and at which place there is excitement, jostle, and push in the struggle for an advantageous position where the spectator may best observe the contest. At such place we think a dog should not be permitted to go, and especially should not be taken, and that a person, who takes or suffers a dog to be taken to such place, where an injury results front the acts of the dog, is guilty of negligence. Persons who are keepers and custodians of dogs are required to exercise proper judgment as to the place where the dog is taken and the position in which the dog may be placed, and are responsible for the acts of such dog, and when dogs are taken to a place not suitable or proper, or placed or suffered to be placed in a position where they become a dangerous agency, and an injury results therefrom, we think a jury is warranted in concluding that the owner, harborer, or person in control of such dog is guilty of negligence. In this case the conclusion of the jury in respect to such matter we do not believe should be disturbed. In a former part of this opinion we have discussed the question as to the knowledge of the appellants as to the traits or habits of the dog.

17 Idaho 63, ___, 104 P. 1015, 1026-27. This Court is at a loss to see how such passage is relevant. Apparently counsel for Suers is asking this Court to apply the

above specific passage of *McClain* to the obviously distinguishable facts in the present case. Unlike the unnamed greyhound allowed to run at will into a racehorse's legs in *McClain*, there is no allegation that the horse Dusty was "…taken to a place not suitable or proper, or placed or suffered to be placed in a position where they become a dangerous agency…" If counsel for Suers is using this portion of McClain to argue the Idaho Supreme Court would embrace the RESTATEMENT (FIRST) ON TORTS § 518, such argument is misplaced given the facts of this case. In the present case, Dusty was where he was supposed to be. RESTATEMENT (FIRST) ON TORTS, § 518 provides:

> One who possesses or harbors a domestic animal, which he does not have reason to know to be abnormally dangerous but which is likely to do harm unless controlled, is subject to liability for harm done by such animal, but only if,
> (a) he fails to exercise reasonable care to confine or otherwise control it, and
> (b) the harm is of a sort which is normal for animals of its class to do.

First of all, there is no evidence that Dusty was in fact "abnormally dangerous" and the Valentines simply were ignorant of that fact. By its language, that is the situation to which RESTATEMENT (FIRST) ON TORTS, § 518, pertains. Second, there is no evidence that Dusty is "…likely to do harm unless controlled." Third, there is no evidence that Christina Valentine failed to exercise reasonable care to confine or otherwise control Dusty. Fourth, there is no evidence that the harm (knocking over and injuring Carianne) is the type of harm of the sort which is normal for horses to do. For Restatement (First) on Torts, § 518, to apply, Suers need to prove all predicate conditions and the two elements. Arguably, none of those predicate conditions and two elements apply to the facts of this case.

Valentines correctly set forth the duty of care owed by landowners to others is based upon the status of the person injured on the land. *Holzheimer v. Johannesen,* 125 Idaho 397, 399, 871 P.2d 814, 816 (1994), citing *Rehwalt v. American Falls*

Reservoir, Dist. No. 2, I97 Idaho 634, 636, 550 P.2d 137,139 91976). Invitees enter for a purpose connected with business and confer a business, commercial, monetary, or other tangible benefit upon the landowner. *Wilson v. Bogert,* 81 Idaho 535, 545, 347 P.2d 341, 347 (1959). Invitees are owed a duty to have the property maintained in reasonably safe condition and to be warned of hidden or concealed dangers. *Bates v. Eastern Idaho Regional Medical Center,* 114 Idaho 252, 253, 755 P.2d 1290, 1291 (1988). A social guest, or licensee, enters property for their own purpose and is only owed warnings of dangers known to the landowner. *Wilson,* 81 Idaho 535, 545, 347 P.2d 341, 347. Ultimately, although the Court has found that Carianne Suer was present in the fenced enclosure upon invitation of Christina Valentine, it cannot be said that Suer entered the Valentines' premises for commercial or business reasons. In her affidavit, Carriane Suer states she was dropped off at Valentines' property "so I could ride horses and spend the day there." Affidavit of Carianne Suer, p. 2, ¶ 3. It is clear Suer entered the premises for her own purpose. And, no evidence has been presented to the Court to demonstrate that Carianne Suer's entering the enclosure to aid Christina Valentine in separating Dusty from the herd conferred a business, commercial, monetary, or other tangible benefit to Valentines, even if the reason for her visit to Valentine's property as a whole was merely for her own benefit. Therefore, as argued by Valentines, Suer was owed only a duty to be warned of dangers of which Valentines had knowledge. *McClain* makes clear that: "… such knowledge must be alleged and proved, for, unless the owner knew that the beast was vicious, he is not liable." 17 Idaho 63, ___, 104 P. 1015, 1020.

The Court, having resolved an issue of fact (whether Carianne crawled through the pasture split rail fence as Valentines contend, or was invited by Christina into the

pasture to help as Suers contend) in favor of the non-moving party (the presumption on summary judgment is in favor of Suers' or Carianne's version, so it is the latter of those two scenarios upon which the Court makes its analysis at the present time), the Court now concludes that Valentines, the moving party, are entitled to judgment as a matter of law. There has been no evidence set forth by Suers that Valentines had any knowledge of Dusty's alleged propensity for violence. In fact, given the Affidavit of Alice Jordan (which this Court earlier refused Suers' motion to strike), the Court only has evidence of Dusty having never previously presented aggressive behavior.

At oral argument, counsel for Suers mentioned that Christina Valentine was responsible for driving the horses right at Carianne Suers. But any specific action of Christina Valentine is not what is alleged in the Suers' Complaint. Suers Complaint is focused on the Valentines owning a dangerous horse, as that Complaint alleges: "At the time and place of this event, the Defendants either knew or should have known that their gelding had dangerous propensities and was a danger to the Plaintiff and others." Complaint for Damages, p. 2. As a result of what has been pled in the Complaint, the Court cannot graft on to that Complaint new causes of action based on Christina Valentin's driving Dusty into the direction of Carianne Suers.

IV. CONCLUSION AND ORDER.

For the reasons stated above, defendants Valentines' Motion for Summary Judgment must be granted.

IT IS HEREBY ORDERED defendants Valentines' Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED the trial scheduled for May 21, 2012, is VACATED.

Entered this 12th day of March, 2012.

_____

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 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 #**
Jeffrey R. Owens	667-1939	Todd R. Startzel/Patrick Harwood	509-624-2081

_____
Jeanne Clausen, Deputy Clerk