STATE OF IDAHO)
County of BONNER)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 BONNER

MICHAEL D. RICHARDSON, and MIKE RICHARDSON and JOAN RICHARDSON, husband and wife, *Plaintiffs*, vs. **LAKE PEND OREILLE SCHOOL DISTRICT # 84; SANDPOINT SENIOR HIGH SCHOOL, and MATTHEW BRASS and ANGIE BRASS, husband and wife, in their individual and official capacities,** *Defendants*.	Case No. **CV 2011 1618** **MEMORANDUM DECISION AND ORDER ON MOTIONS TO EXCLUDE AND STRIKE; MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

The defendants in this case are Lake Pend Oreille School District (the District), Sandpoint Senior High School (SSHS), Matthew Brass (Matthew) and Angie Brass (Angie)(collectively "the Brasses"). On September 18, 2009, plaintiff Michael Richardson (Richardson) attended cross-country practice, supervised by coaches Matthew and Angie. Memorandum in Support of Defendants' Motion for Summary Judgment, p. 2. On that date, Richardson was suffering from a calf injury and so was instructed by his coaches to ride a bicycle, in lieu of running, to maintain conditioning. *Id.,* p. 3. It was the team policy for injured team members who were unable to run to ride a bicycle during practice. *Id*. On that date, the team members who were riding bicycles were being supervised by Rebecca Johnson (Johnson), a volunteer assistant coach. The intended course for the cyclists on that day was Pinecrest Loop. *Id.*

Though the team policy was for each athlete to provide his own bicycle, Richardson failed to bring his bicycle to practice on September 18, 2009, so he was provided a bicycle and helmet, both personally owned by Matthew and Angie. *Id*. During the ride on Pinecrest Loop Road, Richardson hit a vehicle at the intersection of Pinecrest Road and Pinecrest Loop Road, resulting in injuries to him. *Id*. The vehicle had the right of way, as Richardson entered the intersection through a "Yield" sign. *Id*.

Richardson and his parents Mike and Joan Richardson (collectively "plaintiffs") claim the accident was a result of "complete brake failure" of the bike's brakes, while defendants deny any brake issue. *Id*., citing Complaint and Demand for Jury Trial, p. 4, ¶ 13; Answer and Demand for Jury Trial, p. 5, ¶ 13.

This matter is before the Court on defendants' Motion for Summary Judgment filed on May 23, 2013, along with a "Memorandum in Support of Defendants' Motion for Summary Judgment", "Affidavit of Counsel in Support of Defendants' Motion for Summary Judgment" (Walther Affidavit), "Affidavit of Matthew Brass in Support of Defendants' Motion for Summary Judgment" (First Matthew Brass Affidavit), "Affidavit of Richard Gill, Ph.D., CHFP, CXLT in Support of Defendants' Motion for Summary Judgment" (First Gill Affidavit), and "Affidavit of Angie Brass in Support of Defendants' Motion for Summary Judgment" (Angie Brass Affidavit). On July 9, 2013, defendants filed a different "Affidavit of Matthew Brass in Support of Defendants' Motion for Summary Judgment" (Second Matthew Brass Affidavit). On September 24, 2013, plaintiffs filed "Plaintiffs Response to Defendants Motion for Summary Judgment", an "Affidavit of Lawrence R. Beck Regarding Plaintiffs' Response to Defendants' Motion for Summary Judgment", and "Plaintiffs' Statement of Material Facts as to Which There are no Genuine Disputes". On October 24, 2013, defendants filed "Defendants' Motion to Exclude Portions of the Affidavit and Report of Ronald S. Sutphin", "Memorandum in

Support of Defendants' Motion to Exclude Portions of the Affidavit and Report of Ronald S. Sutphin", "Defendants' Motion to Exclude Portions of the Affidavit and David C. Thornburg", "Memorandum in Support of Defendants' Motion to Exclude Portions of the Affidavit and Report of David C. Thornburg", "Reply Affidavit of Counsel in Support of Defendants' Motion for Summary Judgment", and another "Affidavit of Richard T. Gill, Ph.D., CHFP, CXLT in Support of Defendants' Motion for Summary Judgment" (Second Gill Affidavit). On October 31, 2013, plaintiffs filed "Reply Memorandum in Support of Defendants' Motion for Summary Judgment". On November 20, 2013, plaintiffs filed "Plaintiffs' Motion to Strike Portions of the Affidavit, Report and Video Demonstration of Defendants' Expert Witness, Richard T. Gill." On November 21, 2013, plaintiffs filed an "Affidavit of Lawrence R. Beck Regarding Video Clip (Exhibit 1-v) from Ronald S. Sutphin" and the "Second Affidavit of Ronald S. Sutphin". On November 22, 2013, plaintiffs filed "Plaintiffs' Memorandum in Support of Motion to Exclude Portions of the Affidavit, Report and Video Demonstration of Defendants' Expert Witness, Richard T. Gill." On November 27, 2013, defendants filed "Defendants' Memorandum in Opposition to Plaintiffs' Motion to Strike Portions of the Affidavit, Report and Video Demonstration of Defendants' Expert Witness, Richard T. Gill." On November 29, 2013, plaintiffs filed "Plaintiffs Response Memorandum to Defendants' Motion to Exclude Portions of the Affidavit and Report of Ronald S. Sutphin". On November 29, 2013, plaintiffs filed an "Affidavit of Lawrence R. Beck Regarding Newly Discovered Evidence in Opposition to Defendants' Motion for Summary Judgment, and in Support of Plaintiffs' Response to Defendants' Motion to Strike Portions of Ronald S. Sutphin's Affidavits and Report."

Oral argument on defendants' Motion for Summary Judgment was held on December 4, 2013, and that matter was taken under advisement at that time.

II. RULINGS ON MOTIONS TO STRIKE OR EXCLUDE.

Before hearing arguments on defendants' Motion for Summary Judgment, the Court heard argument on plaintiffs' Motion to Exclude Portions of the Affidavit, Report and Video Demonstration of Defendants' Expert Witness, Richard T. Gill, as well as defendants' Motion to Exclude Portions of the Affidavit and Report of Ronald S. Sutphin, and Motion to Exclude Portions of the Affidavit and Report of David C. Thornburg. At the conclusion of such argument, the Court made its rulings on the record.

As to plaintiffs' Motion to Exclude Portions of the Affidavit, Report and Video Demonstration of Defendants' Expert Witness, Richard T. Gill, the Court: 1) denied the motion to strike Gill's video and test results, finding the video misleading as it does not depict a bike trying to stop while moving down a hill at speed, but was relevant to the defendants' defense that there was not a complete brake failure as claimed by plaintiffs, finding the video was not a "reconstruction", and reserving ruling on whether such would be shown to the jury at trial; 2) granted plaintiffs' motion to strike as to Gill's opinion that Sutphin did not do a dynamic test; and 3) granted plaintiffs' motion to strike as to Gill's opinion that there are no other tests or results of tests which dispute Gill's opinion, denied plaintiffs' motion to strike as to Gill's opinion that Thornberg agreed with Gill's opinion that Richardson intended to go straight down hill and straight through the intersection without attempting to brake (but finding such opinion negatively effects Gill's credibility), and denied plaintiffs' motion to strike as to Gill's opinion that Thornberg admitted that the rear brakes alone were enough to stop the bike (but finding such opinion negatively effects Gill's credibility).

As to defendants' motion to exclude Thornburg's affidavit and amended report, the Court denied such, except that it granted the motion to strike paragraph 9.c, 9.d.1,

9.d.2, 9.d.5, 9.d.6. As to defendants' motion to exclude Sutphin's affidavit and report, the Court denied such, except that it granted the motion to strike as to that portion of paragraph four which reads: "I have been able to determine the condition that the front and rear brakes were in prior to the collision, and have described that condition in Exhibit A as a bicycle accident waiting to happen"; as to that portion of paragraph one which reads: "It is my opinion that the cause of the bicycle collision on September 18, 2009 was a catastrophic failure of the front and rear brakes on the Giant Iguana bicycle", and as to that portion paragraph eight which reads: "It is not surprising that some might perceive the brakes as adequate on short, flat, low-speed rides" and "But I find it difficult to believe that anyone could ride this bike down any hill of significant grade or distance and be able to control its speed".

III. SUMMARY JUDGMENT STANDARD OF REVIEW.

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." IRCP 56(c). "Once the movant has established a prima facie case that, on the basis of uncontroverted facts, the movant is entitled to judgment, the opposing party must set forth specific facts showing that there is a genuine issue for trial and cannot merely rest on the pleadings." *McVicker v. City of Lewiston*, 134 Idaho 34, 37 (2000), citing IRCP 56(e); *Theriault v. A.H. Robins Co. Inv.,* 108 Idaho 303, 306 (1985).

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

IRCP 56(e).

"In order to survive a motion for summary judgment, the non-moving party must 'make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial.'" *Jones v. Starnes*, 150 Idaho 257, 260, 245 P.3d 1009, 1012 (2011), quoting *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988).

The Court construes the record in the light most favorable to the party opposing the summary judgment motion. *Id.* Generally, "all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Beus v. Beus*, 151 Idaho 235, 238, 254 P.3d 1231, 1234 (2011), quoting *Harrison v. Binnion*, 147 Idaho 645, 650, 214 P.3d 631, 636 (2009).

IV. ANALYSIS OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

A. Introduction.

The Idaho Tort Claims Act (ITCA) I.C. § 6-901 *et seq*., allows state governmental entities that commit torts to be held liable for money damages to the same extent a private person would be held liable under the circumstances. I.C. § 6-901. However, a plaintiff seeking to recover on a tort claim against a governmental entity must meet three stages of analysis. *Sherer v. Pocatello School Dist. No. 25*, 143 Idaho 486, 490, 148 P.3d 1232, 1236 (2006). First, the plaintiff must state a cause of action for which tort recovery would be allowed under the laws of Idaho, that is, "whether there is such a tort under Idaho law." *Id*. (quoting *Carrier v. Lake Pend Oreille Sch. Dist. No. 84*, 142 Idaho 804, 806-07, 134 P.3d 655, 657-58 (2006)). Second, the plaintiff must show that "[no] exception to liability under the ITCA shields the alleged misconduct from liability." *Id*. (quoting *Coonse v. Boise Sch. Dist.*, 132 Idaho 803, 805, 979 P.2d 1161, 1163 (1999)). Third, if no exception applies, the plaintiff must still meet its burden of showing

that it is entitled to recovery based on the merits of its claim. *Id*. On a motion for summary judgment, the court must determine whether the plaintiff has satisfied the first two stages before it can consider "whether the merits of the claim as presented for consideration on the motion for summary judgment entitle the moving party to [judgment]." *Coonse*, 132 Idaho 803, 805, 979 P.2d 1161, 1163.

The first prong is whether plaintiffs have stated a recoverable cause of action under Idaho law. The defendants acknowledge plaintiffs have stated a viable cause of action, specifically "negligence" under tort law in Idaho, and thus have satisfied the first stage of the ITCA analysis. Memorandum in Support of Defendants' Motion for Summary Judgment, p. 7.

The second prong is whether there exists an exception under the ITCA which shields Defendants from liability. It is this second prong upon which defendants rest its motion for summary judgment, specifically, the exceptions stated in I.C. § 6-904B(4), I.C. § 6-904(1) and I.C. § 6-904A(2).

B. A Dispute of Fact Exists as to Defendants' Reckless, Willful or Wanton Conduct.

The exceptions to liability outlined in I.C. §§ 6-904B(4) and 6-904A(2) do not apply where the governmental entity and its employees acted with malice or criminal intent or where the conduct was reckless, willful, and wanton. This Court finds there is a dispute of fact as to whether defendants' conduct was reckless, willful, and wanton. The exception under I.C. § 6-904B(4) also does not apply if the conduct is grossly negligent.

According to I.C. § 6-904C

> 1. "Gross negligence" is the doing or failing to do an act which a reasonable person in a similar situation and of similar responsibility would, with a minimum of contemplation, be inescapably drawn to recognize his

> or her duty to do or not do such act and that failing that duty shows deliberate indifference to the harmful consequences to others.
>
> 2. "Reckless, willful and wanton conduct" is present only when a person intentionally and knowingly does or fails to do an act creating unreasonable risk of harm to another, and which involves a high degree of probability that such harm will result.

I.C. § 6-904C.

To constitute reckless disregard, the actor's conduct must not only create an unreasonable risk of bodily harm, rather the actor must actually perceive the high degree of probability that harm will result and continue in his course of conduct. *Athay v. Stacey*, 146 Idaho 407, 414, 196 P.3d 325, 332 (2008). "Actual knowledge of the high degree of probability that harm will result does not require knowledge of the actual person or persons at risk, or the exact manner in which they would be harmed." *Id.* Actual knowledge simply "requires knowledge of the high degree of probability of the kind of harm that the injured party suffered." *Id*.

The key issue in the definition of reckless, willful, and wanton, is *knowledge*. *Hunter v. State, Dep't of Corr., Div. of Prob. & Parole*, 138 Idaho 44, 49, 57 P.3d 755, 760 (2002). Furthermore, the "element of knowledge implies an element of foreseeability" and the Supreme Court of Idaho has recognized that the issue of foreseeability of the risk of harm is generally a question for the trier of fact. *Hunter v. State, Dep't of Corr., Div. of Prob. & Parole*, 138 Idaho 44, 49, 57 P.3d 755, 760 (2002).

Plaintiffs contend the exceptions to the ITCA do not apply to defendants because defendants' conduct was reckless, willful, and wanton. Plaintiffs assert that defendants intentionally acted through the Brass' intentional act of not properly maintaining or tuning the subject bicycle for at least seventeen years. According to plaintiffs' Accident Reconstructionist Expert, David C. Thornburg, the defendants'

actions were reckless, willful, and wanton because: (1) defendant District failed to supervise the defendant cross country coaches Matthew and Angie concerning what equipment they could or could not provide for injured students to use at practices; (2) defendant District failed to supervise the defendant cross country coaches by requiring that sports equipment provided to injured students be regularly inspected, maintained, and free of serious defects; (3) defendants provided Richardson with a bicycle that was not properly maintained and which was defective; (4) defendants failed to properly warn the injured students of the hazards on Pinecrest Loop and of safety procedures in the event of a hazard; and (5) defendants allowed the injured students to ride down steep terrain where the yield sign was obscured and where oncoming traffic would have difficulty seeing riders before the intersection due to the obstructions, and in doing so, defendants did not use warnings, course monitors, or pre-ride safety meetings. Additionally, plaintiffs' Bicycle Expert, Ronald S. Sutphin, stated in his Affidavit that the bike was in poor operating condition and as a result of "a complete lack of reasonable maintenance and repair of the brakes" the front and rear brakes failed. Affidavit of Beck, Exhibit 1, p. 4.

Defendants contend that there is no evidence that defendants acted recklessly, willfully, and wantonly in causing plaintiffs' injuries. Defendants argue that in order for plaintiffs to show that defendants' conduct was reckless, willful, and wanton "Plaintiffs must prove that **at the time** Mr. Brass loaned his bike to [Richardson], Mr. Brass possessed knowledge that there was a high degree of probability that [Richardson] would be injured as a result of loaning him his bicycle." Reply Memorandum in Support of Defendants' Motion for Summary Judgment, p. 13. (emphasis in original).

The incident in the case at bar can be compared to *Smith v. Bd. of Corr.*, 133 Idaho 519, 988 P.2d 1193 (1999). In that case, the plaintiffs were inmates at the Idaho

State Correctional Institute. 133 Idaho 519, 520, 988 P.2d 1193, 1194. The plaintiff inmates were participants in a prison work program that entailed working in a wood shop with a civilian shop supervisor who was a state employee in the Correctional Industries work program. The plaintiffs were injured doing assigned shop work, and safety guards had been removed from the saws. 133 Idaho 519, 524, 988 P.2d 1193, 1198. The Idaho Supreme Court inferred that the shop supervisor knew that the safety guards had been removed and allowed or approved operation of the shop in that manner. *Id.* The Idaho Supreme Court further inferred that operating wood work within inches of an unshielded power saw is very hazardous. *Id.* Based upon its inferences, the Idaho Supreme Court vacated the district court's grant of summary judgment and found that there was sufficient admissible evidence that a jury could find that the State's conduct was reckless, willful and wanton because the State employee supervising the worker-inmates who instructed the plaintiffs to perform the work knew the safety guards had been removed from the saws. *Id.*

Though the facts in the case at bar take place in a different context, a school versus a correctional institution, there are similarities. First, Richardson in the present case was a participant in a state-run program and was being supervised by a government employee. Second, Richardson was injured performing "assigned work," i.e. the bicycle workout. Third, although the bicycle was not altered in the same way as a saw with safety guards removed, the bicycle was not in its "original" condition; rather the bike was 17 years old and, according to plaintiffs' bicycle expert, had been "very poorly maintained." Beck Affidavit, Exhibit 1 (Affidavit of Ronald S. Sutphin), p. 3, ¶ 9. The relatively recent discovery that the front brake pads on the Brasses' bicycle might have been replaced in 2005 (Affidavit of Lawrence R. Beck Re: Newly Discovered Evidence, pp. 1-2, Exhibit A and B) does not change the Court's analysis. If the

Brasses knew the bicycle had little or poor brakes (and there is certainly an issue of fact as to this knowledge), since the route the Brasses established had a long steep downhill run into a controlled intersection, a jury could find "deliberate indifference to the harmful consequences to others" under I.C. § 6-904C(1) or conduct that is "reckless, willful and wanton conduct" because such conduct "involves a high degree of probability that such harm will result" under I.C. § 6-904C(2).

Like the inference drawn by the Idaho Supreme Court in *Smith* (that the civilian supervisor had knowledge that the safety guards had been removed and allowed the saw to operate in that manner), in the present case it could be inferred and in fact is admitted that the Brasses had knowledge that the bicycle had not received much, if any, maintenance over the course of the 17 years during which they owned it. Matthew Brass deposition, p. 47, Ll. 3-10; Angela Brass Deposition, p. 6, Ll. 2-19. Additionally, similar to the Idaho Supreme Court's inference in *Smith* that it is dangerous to operate a saw without safety guards, it is also reasonable for this Court to infer that it is dangerous to provide a student athlete with aged equipment, which has likely never been maintained, specifically, where the brakes are not properly functioning. It is also reasonable to infer that directing students to ride such a bicycle on a course open to crossing traffic with a long downhill stretch may lead to an accident. There is an issue of fact as to whether a reasonable juror could determine such conduct to be "grossly negligent" as defined by I.C. § 6-904C(1) as "deliberate indifference to the harmful consequences to others." There is an issue of fact as to whether a reasonable juror could determine such conduct to be "reckless, willful and wanton conduct" as defined by I.C. § 6-904C(2) as conduct which "involves a high degree of probability that such harm will result."

This Court finds there is a dispute of fact as to whether defendants' conduct was reckless, willful, and wanton. Accordingly, defendants' motion for summary judgment on this issue must be denied.

The remaining defenses under the ITCA are thus analyzed with ordinary "negligent" conduct of the defendants in mind.

C. Idaho Code § 6-904B(4) Provides Immunity for Claims of Failure to Inspect.

Defendants point out plaintiffs have alleged the defendants had a duty to "properly inspect any equipment" owned by a coach and provided to a student for his use. Memorandum in Support of Defendants' Motion for Summary Judgment, p. 8, citing Complaint, ¶¶ 17, 25, 34. Idaho Code § 6-904B(4) states:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without gross negligence or reckless, willful and wanton conduct … shall not be liable for any claim which:
> …
> (4) Arises out of the failure to make an inspection, or the making of an inadequate inspection of any property, real or personal, other than the property of the governmental entity performing the inspection.

I.C. § 6-904B(4). Plaintiffs argue I.C. § 6-904B(4) does not apply because, through the doctrine of respondeat superior, the property of the Brasses had become the property of the District. Plaintiffs claim:

> As here, when an employee provides faulty equipment to students within the course of his/her employment, any liability flowing from said tortious conduct is imputed to the employer (the School District). *See Finholt* [*v. Cresto,* 143 Idaho 894, 897, 155 P.3d 695, 698 (2007)]*, supra; see also Richard J. and Esther E. Wooley Trust* [*v. DeBest Plubming, Inc.,* 133 Idaho 180, 183-84, 983 P.2d 834, 837-38 (1999)]*, supra.*

Plaintiffs' Response to Defendants' Motion for Summary Judgment, pp. 2-4. The Court is not persuaded because the cases cited by plaintiffs simply do not stand for the proposition claimed by plaintiffs ("when an employee provides faulty equipment to

students within the course of his/her employment, any liability flowing from said tortious conduct is imputed to the employer [the District]").

Finholt was not an Idaho Tort Claim Act case, and it did not deal with any claim of failure to maintain equipment. *Finholt* discussed whether the driver of a vehicle at the time of a wreck was an employee of his employer, and in so doing discussed respondeat superior and more specifically concepts under that such as "special errand" and "travelling employee" theories and the "coming and going" rule under Idaho's Worker's Compensation statutes. 143 Idaho 894, 897, 155 P.3d 695, 698. At no time was the maintenance of any vehicle an issue in that case. At no time did the concept of respondeat superior ever transmute into ownership and responsibility for the vehicle, let alone maintenance of the vehicle. *Id.*

Wooley Trust is likewise not at all on point. *Wooley Trust* was not an Idaho Tort Claim Act case, and it did not deal with any claim of failure to maintain equipment. *Wooley Trust* concerned whether a plumber who negligently repaired an apartment complex owned by plaintiff Wooley Trust was an employee of defendant DeBest Plumbing at the time he made the repairs. 133 Idaho 180, 183-84, 983 P.2d 834, 837-38. At no time was the maintenance of any equipment an issue in that cease. *Id.* At no time did the concept of respondeat superior ever transmute into ownership and responsibility for maintenance of any equipment. *Id.* Plaintiffs' reliance on *Finholt* and *Wooley Trust* is misplaced.

The only pertinent case for this statute section is *Sherer v. Pocatello School Dist. No. 25*, 143 Idaho 486, 148 P.3d 1232 (2006). In that case, a junior high student participated in a "bungee run" and was injured. 143 Idaho 486, 489, 148 P.3d 1232, 1235. The bungee run was an activity provided by Cliffhanger Recreation, a local

business hired by the school to provide activities for the students' end of year carnival. *Id*. The student and her mother filed suit against the school district on a theory of negligence. *Id*. The school district, among other defenses, asserted I.C. § 6-904B(4) provided an immunity. *Sherer*, 143 Idaho 486, 493, 148 P.3d 1232, 1239. The Idaho Supreme Court held the student's claims were barred by I.C. § 6-904B(4) to the extent the claims "rely on the school district's failure to examine the bungee run equipment." *Id*. However, the Idaho Supreme Court also noted this bar was not so broad as to require dismissal of other claims the school district claimed were "part and parcel" of the "failure to make an inspection", such as failure to provide safe equipment, failure to provide adequate supervision and failure to post warnings. *Id*. The Idaho Supreme Court stated "[a]lthough these claims are factually related to the claim that the school failed to adequately inspect the bungee run, a grant of immunity from negligent inspection claims does not apply to a claim of negligent supervision." *Id*.

In this case, there is no dispute that the bicycle and helmet used by Richardson on September 18, 2009, were the personal property of the Brasses. Under I.C. § 6-904B(4) and the holding in *Sherer*, this Court finds plaintiffs' claims that the District and its employees failed to inspect the bicycle and/or helmet, are barred as the district and its employees are immune for such claims.

C. Idaho Code § 6-904B(4) Provides No Immunity for Failure to Maintain.

At each juncture in their Complaint where plaintiffs have alleged the defendants had a duty to "properly inspect any equipment" owned by a coach and provided to a student for his use, plaintiffs also allege a duty to provide "any necessary maintenance to said equipment" (Complaint, pp. 4-5, ¶ 17), to "properly maintain the bicycle and other equipment" (*Id.,* p. 6, ¶ 25), and to "prevent students from being injured from the

use of unmaintained, unchecked, old and broken equipment." (*Id.,* p. 7, ¶ 34). Defendants only in passing mentioned the duty-to- maintain issue in their opening brief on summary judgment. Memorandum in Support of Defendants' Motion for Summary Judgment, p. 10. Idaho Code § 6-904B(4) provides immunity for claims which:

> (4) Arises out of the failure to make an inspection, or the making of an inadequate inspection of any property, real or personal, other than the property of the governmental entity performing the inspection.

The immunity provided by I.C. § 6-904B(4) for failure to inspect does not include immunity for a failure to properly maintain.

D. Idaho Code § 6-904(1), Discretionary Function, Provides No Immunity to the District for not Having a Policy to Inspect.

Idaho Code § 6-904(1), the "discretionary function" immunity, states:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:
>
> 1. Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

I.C. § 6-904(1).

The ITCA makes a governmental entity liable for damages arising out of its own negligent operational acts or omissions. *Czaplicki v. Gooding Joint Sch. Dist. No. 231*, 116 Idaho 326, 330-31, 775 P.2d 640, 644-45 (1989). *"*The Act is to be *liberally construed* with a view toward accomplishing its aims and purposes and attaining substantial justice." *Id.* (emphasis supplied). The test for determining whether the discretionary function immunity applies turns on the nature of the conduct. *Brooks v. Logan*, 127 Idaho 484, 488, 903 P.2d 73, 77 (1995) (*Brooks I*). Routine matters which

do not require evaluation of broad policy factors are likely "operational", whereas decisions involving a consideration of the financial, political, economic and social effects of a particular plan are likely "discretionary" and will be granted immunity. *Ransom v. City of Garden City*, 113 Idaho 202, 205, 743 P.2d 70, 73 (1987). The discretionary function exception does not apply to negligent operational decision-making nor does it shield the negligent implementation of a statute or policy. *Roberts v. Transportation Dept.*, 121 Idaho 727, 733, 827 P.2d 1179, 1184 (Ct.App. 1991). The fact that a government function involves an element of choice or judgment, or requires the ability to make responsible decisions, does not bring that activity within the discretionary function exception. *Id*. In fact, the discretionary function exception "does not include functions which involve *any* element of choice, judgment or ability to make responsible decisions; otherwise every function would fall within the exception." *Sterling v. Bloom*, 111 Idaho 211, 227, 723 P.2d 755, 774 (1986) (emphasis in original). The challenged conduct is then evaluated in light of the dual policies of the discretionary function immunity: 1) to permit those who govern to do so without being unduly inhibited by the threat of liability; and 2) to limit judicial second-guessing of basic policy decisions entrusted to other branches of government. *Brooks I*, 127 Idaho 484, 488, 903 P.2d 73, 77.

In *Brooks I*, a student committed suicide and the parents sued to the school district arguing the school district should have implemented a suicide prevention program. *Brooks I*, 127 Idaho 484, 486-87, 903 P.2d 73, 75-76. The Idaho Supreme Court held the decision to implement a suicide prevention program, including training teachers, is a discretionary function, which should be left to the decision-making body, the school district or legislature, through public input or discussion. *Brooks I*, 127 Idaho

484, 488, 903 P.2d 73, 77. The Court stated that "the courts do not have the fact-finding ability of the legislature or executive departments and should not attempt to balance the detailed and competing elements of legislative or executive decisions." *Id*. As such, the determination that schools should be at the forefront of the suicide prevention effort is "unquestionably an important public policy issue which must be left to the sound discretion of the District." *Id*. The Idaho Supreme Court held the district was immune from liability based on the discretionary function exception for "any failure to implement a suicide prevention program or train its staff in such prevention." *Id*.

However, the Idaho Supreme Court in *Brooks I* held the teacher's alleged failure to warn the school district or parents about suicidal journal entries was a decision made solely by the teacher and did not require evaluation of financial, political, economic and social effects. *Id*. Further, such a decision involved an exercise of practical judgment and not planning or policy formation; thus, the failure to warn was "operational." *Id*.

The Idaho Supreme Court then went on to determine whether school districts or teachers would be unduly inhibited in carrying out their jobs whether there is a threat of liability for using less than ordinary care. *Brooks I*, 127 Idaho 484, 488-89, 903 P.2d 73, 77-78. The Idaho Supreme Court held the statutory provisions of I.C. § 6-903(c) (providing for the defense of public employees by governmental entities if the challenged act or omissions of the employee is within the scope of employment and does not involve malice or criminal intent) and I.C. § 6-903(e) (creating a rebuttable presumption that any act or omission of an employee within the time and place of his employment is within the scope of his employment and without malice or criminal intent) alleviate any fears by teachers that they may be held personally liable for failing to seek help for a potentially suicidal student. *Brooks I*, 127 Idaho 484, 489, 903 P.2d 73, 78.

As the decision to seek help for a potentially suicidal student does not involve a basic policy decision, but a personal decision made as a result of a teacher's knowledge and in the course of the teacher's employment, the Idaho Supreme Court held the duty to warn does not fall within the discretionary function exception. *Id*. As such, the Court then went on to determine whether there existed a legal duty under an ordinary negligence claim. *Id*.

This holding was later abrogated by I.C. § 33-412B (specifically stating a school district does not have a duty to warn of a student's suicidal tendencies absent a teacher's knowledge of direct evidence of such). *Stoddard v. Pocatello School Dist. # 25*, 149 Idaho 679, 684-85, 239 P.3d 784, 789-90 (2010). However, the Court in *Stoddard*, stated it did not interpret the statute as abrogating all duties of I.C. § 33-512(4) or limiting liability to injury on school grounds and during school hours. *Id*.

The Court in *Brooks I* went on to find the duty between a student and a school district or teacher is "simply a duty to exercise reasonable care in supervising students while they are attending school." *Brooks I*, 127 Idaho 484, 490, 903 P.2d 73, 79.

Defendants argue that plaintiffs' claim that the District lacked an adequate policy requiring inspections is precluded by I.C. § 6-904(1). Memorandum in Support of Motion for Summary Judgment, pp. 11-13. Defendants argue that the District's decision not to have an inspection policy is similar to the School District's decision in *Brooks I* to implement a suicide prevention program. *Id.,* pp. 12-13. Plaintiffs argue defendants used the wrong "test" to determine planning versus operational conduct. Plaintiffs' Response to Defendants' Motion for Summary Judgment, p. 10. Plaintiffs cite *Jones v. City of St. Maries,* 111 Idaho 733, 727 P.2d 1161 (1986), for the holding that "the planning/operational test provides immunity for planning activities—activities which

involve the establishment of plans, specifications and schedules where there is room for policy judgment and decisions", where operational activities involve "the implementation of statutory and regulatory policy." *Id.,* p. 10, citing *Jones*, 111 Idaho 733, 735-36, 727 P.2d 1161 1163-64. Plaintiffs then quote from Jones:

> If, for example, the evidence on remand indicates that the city, due to budgetary constraints or other factors, made a policy decision not to inspect its water mains and fire hydrants, such a decision would be discretionary, as it would involve planning rather than operational activity, and the city would be immune from liability even if the decision was negligently made. If, on the other hand, the evidence indicates that the city had, in fact, assumed the responsibility for inspecting and maintaining the fire hydrants and water mains at issue, then it would be obligated to perform those activities with due care and would be correspondingly liable for any failure to do so.

Id., pp. 10-11, citing *Jones*, 111 Idaho 733, 736-37, 727 P.2d 1161 1164-65. Defendants respond by arguing: "The discretionary function immunity immunizes a school district's decision to implement a policy, *or to not implement a policy*." Reply Memorandum in Support of Defendant's Motion for Summary Judgment, p. 8, citing *Brooks I*. This Court finds the italicized portion of defendants' argument to be without merit as applied to the facts of this case. The Court would agree the District's decision might be immunized if the District had evidence that it considered a policy on inspection of equipment, and made the decision not to implement that policy. However, there is no evidence before this Court that the District made a decision not to implement various policies that might have applied to this case. The evidence at this point is the District simply never considered many of these policy issues, thus, never decided not to implement such policies. The Idaho Supreme Court in *Brooks I* did not hold "the discretionary function immunity immunized a school district's failure even consider implementation or non-implementation of a policy." This Court has not been cited to any such authority nor can it find such on its own.

This Court finds *Jones* to be helpful. Had the District in the present case considered whether or not to implement a policy requiring inspections, and then the District decided not to implement such a policy, then that decision not to implement a policy would likely be a planning decision which is immunized. But in the present case there is no indication that the District ever thought about such a policy, let alone made a decision on such policy. Deposition of Tom Albertson, pp. 14, Ll. 8-13; p. 23, Ll. 9-20. *Jones* makes it clear that a conscious decision not to act is immunized. The inference then is where there is simple inaction (never considering the policy), inaction is not immunized. *The ITCA simply does not immunize decisions that were never made.* This holding is consistent with the purposes of discretion function immunity, discussed above, from *Brooks I*: 1) to permit those who govern to do so without being unduly inhibited by the threat of liability; and 2) to limit judicial second-guessing of basic policy decisions entrusted to other branches of government. *Brooks I*, 127 Idaho 484, 488, 903 P.2d 73, 77. As to the first purpose, immunity for "governing" implies decision-making, not non-action. As to the second purpose, the language used in *Brooks I* is "basic policy *decisions*" made by another branch are protected from judicial second-guessing; it does not say "basic policy non-decisions."

If not having such a policy is ever determined to be negligent by the District, the fact that the District does not have such a policy only because it has never given it any thought is not an act that will be immunized under I.C. § 6-904(1).

E. Idaho Code § 6-904A(2) Provides No Immunity to the District for Negligent Acts by its Employees.

Idaho Code § 6-904A(2) states:

> Exceptions to governmental liability –
> A governmental entity and its employees while acting in the course and scope of their employment and without malice or criminal intent and

> without reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:
> …
>
> > 2. Arises out of injury to a person or property by a person under supervision, custody or care of a governmental entity or by or to a person who is on probation, or parole, or who is being supervised as part of a court imposed drug court program, or any work-release program, or by or to a person receiving services from a mental health center, hospital or similar facility.

I.C. § 6-904A(2).

The District initially argued I.C. § 6-904A(2) provided the District with immunity not only for Richardson's actions, but also for the actions of the District's employees for any negligent supervision of its coaches. Memorandum in Support of Defendants' Motion for Summary Judgment, pp. 13-17. The District claims:

> Thus, to the extent that Plaintiffs argue that the District's supervision of him was inadequate; Plaintiffs' claims are barred as a matter of law by the Idaho Tort Claims Act. ***I.C. § 6-904A(2).***

Id., p. 17. The District seemed to abandon this argument, as no mention of I.C. § 6-904A(2) was made in defendants' Reply Memorandum in Support of Motion for Summary Judgment. However, at oral argument, counsel for the District argued I.C. § 6-904A provided a "supervisory immunity", and "negligent supervision would be immunized" under I.C. § 6-904A, specifically citing *Brooks v. Logan II*. The analysis below shows that as to any injuries caused to Richardson by the District's failure to supervise Richardson, the District is immune. However, the District is simply wrong that the District is immune under I.C. § 6-904A(2) for the District's supervision of Richardson by its employees.

Idaho courts have applied I.C. § 6-904A(2) to school districts in a number of ways. In *Mickelsen v. School Dist. No. 25*, 127 Idaho 401, 901 P.2d 508 (1995), a high school student sustained head injuries in a fight involving two other students, which took place in the school hallway during the school day. 127 Idaho 401, 402, 901 P.2d

508, 509. The student and her parents filed suit against the school district on a negligence theory. *Id*. The Idaho Supreme Court affirmed the district court's ruling that I.C. § 6-904A(2) barred recovery and expressly held an extensive supervisory relationship exists between schools and students, though it did not directly address the conduct of the students. *Mickelsen*, 127 Idaho 401, 403, 901 P.2d 508, 510.

In *Brooks v. Logan*, 130 Idaho 574, 944 P.2d 709 (1997) (*Brooks II)*, a student committed suicide, and his parents alleged his teacher had read passages in an assigned journal which they claimed should have alerted the teacher something was wrong. 130 Idaho 574, 575, 944 P.2d 709, 710. The Idaho Supreme Court affirmed the district court's ruling that I.C. § 6-904A(2) barred recovery and adopted the district court's reasoning: "If, under *Mickelsen*, the school is immune from a claim for failure to supervise and prevent two students from injuring a third, then under the same rationale, the school in this case should be immune for its failure to supervise and prevent one student from harming himself." 130 Idaho 574, 577, 944 P.2d 709, 712.

In *Coonse v. Boise School Dist.*, 132 Idaho 803, 979 P.2d 1161 (1999), a third grade student was assaulted by a group of older boys while at recess on the playground. 132 Idaho 803, 804, 979 P.2d 1161, 1162. The student and her parents sued the school district on a claim of negligent supervision. *Id*. The Idaho Supreme Court addressed the issue of "whether a school district is immune from suit under I.C. § 6-904A when the complaint alleges negligent supervision of a student who was consequently harmed as opposed to negligent supervision of third parties who harmed the student." *Id*. The Idaho Supreme Court held a school district has "simply a duty to exercise reasonable care in supervising students while they are attending school." *Coonse*, 132 Idaho 803, 805, 979 P.2d 1161, 1163 (quoting *Brooks v. Logan*, 127

Idaho 484, 490, 803 P.2d 73, 79 (1995) (*Brooks I*). The Court went on to hold the immunity of I.C. § 6-904A arises from the status of the person(s) causing the injury, not the status of the person injured. *Coonse*, 132 Idaho 803, 806, 979 P.2d 1161, 1164. In comparing the case of *Coonse* to *Mickelsen*, the Idaho Supreme Court noted the injuries in both cases were *inflicted by other students while at school*. *Id*. (emphasis added). As such, the Idaho Supreme Court in *Coonse* held because the students who assaulted the girl were also students at the school, *Mickelsen* controlled and recovery was barred by I.C. § 6-904A(2). *Coonse*, 132 Idaho 803, 807, 979 P.2d 1161, 1165.

In *Sherer v. Pocatello School Dist. #25*, 143 Idaho 486, 148 P.3d 1232 (2006), a junior high student participated in a "bungee run" and was injured. 143 Idaho 486, 489, 148 P.3d 1232, 1235. The bungee run was an activity provided by Cliffhanger Recreation, a local business hired by the school to provide activities for the students' end of year carnival. *Id*. The student and her mother filed suit against the school district on a theory of negligence. *Id*. In rendering its decision, the Idaho Supreme Court discussed at length the duty owed to students by the school district and stated the duty "is not an absolute mandate to prevent all harm; rather schools are obligated to exercise due care and take reasonable precautions to protect their students." *Sherer*, 143 Idaho 486, 491, 148 P.3d 1232, 1237. The Idaho Supreme Court added "the fact that [a plaintiff's] injuries were caused by a third party does not absolve [a] school district from liability for its negligence" if the third party's actions were the foreseeable result of the school's negligence. *Id*. (quoting *Doe v. Durtschi*, 110 Idaho 466, 472-73, 716 P.2d 1238, 1244-45 (1989)). In analyzing I.C. § 6-904A, the Idaho Supreme Court held that the effect of the statute is to require a "heightened showing or recklessness, as opposed to mere negligence, for such claims." *Sherer*, 143 Idaho 486, 491, 148

P.3d 1232, 1237. The Idaho Supreme Court stated "the legislative history and the language of the statute make it clear that the intent of the statute was to prevent recovery for negligence based upon a particular theory of recovery, i.e. that the government negligently failed to prevent *third persons under its care* from causing injury to members of the public." 143 Idaho 486, 492, 148 P.3d 1232, 1238. (emphasis added). The Idaho Supreme Court went on to explain that "I.C. § 6-904A(2) limits from negligence liability the causal pathway upon which a valid claim for relief might otherwise proceed, i.e., that the school failed to exercise reasonable care in preventing a person under its supervision from causing injury", but then added "such limitation does not extend to *other negligence claims*." *Id*. (emphasis added). The Idaho Supreme Court noted the child's status as a student would limit her claims that the school failed to prevent her from harming herself, but *would not limit claims she injured herself as a consequence of the school's negligence in conducting a dangerous activity and failing to provide or ensure adequate supervision*. *Id.*

In *Mareci v. Coeur d'Alene School Dist. No. 271*, 150 Idaho 740, 250 P.3d 791 (2011), a sixth-grade student was injured when he was pushed by a student and hit his head on the ground, and then subsequently when he was hit by the same student with a backpack on the bus ride home. 150 Idaho 740, 742, 250 P.3d 791, 793. The Idaho Supreme Court held the other child was a student in the custody of the school district at the time and so I.C. § 6-904A applies; thus the plaintiffs were required to show the school district employees acted with malice or criminal intent or that their conduct was reckless, willful and wanton. *Mareci*, 150 Idaho 740, 743, 250 P.3d 791, 794. The Court defined "reckless, willful and wanton conduct", for purposes of the ITCA, as being present only when a person intentionally and knowingly does or fails to do an act

creating unreasonable risk of harm to another, and which involves a high degree of probability that such harm will result. *Id*. The plaintiffs argued they could still proceed on a theory of ordinary negligence under *Sherer;* however, the Court held *Sherer* was distinguishable because in *Sherer*, it held the school district was not entitled to immunity on a claim it failed to properly supervise a contractor because an independent contractor was not under the "supervision" of the school as required by I.C. § 6-904A, whereas in *Mareci*, the other child was a student, under the clear supervision of the school. *Mareci*, 150 Idaho 740, 744, 250 P.3d 791, 795. The Idaho Supreme Court held I.C. § 6-904A(2) applied "if a person who caused the injury was under the supervision, custody, or care of the School District, regardless of how the Plaintiffs seek to characterize their cause of action." *Mareci*, 150 Idaho 740, 744-45, 250 P.3d 791, 795-96.

Who caused Richardson's injuries? Obviously Richardson played a part. Richardson didn't bring his own bicycle to cross-country practice, contrary to school policy, he was ignorant about bicycles, he knew there were brake problems with the bike at one point, and he took no evasive action once he realized he had no brakes. The suicide cases involving schools make it clear the District is immunized for Richardson's negligence in causing his injuries, for any claim of negligently supervising Richardson.

Richardson alleges the District also caused his injuries by its failure to supervise its coaches. Complaint, p. 4, ¶ 17. Some facts which suggest the District may have been negligent in the supervision of its cross country coaches are that: (1) Tom Albertson, SHS Athletic Director, was not aware that coaches were loaning personal bicycles to students and likely would not have condoned the practice; and (2) Tom

Albertson was aware that students were told to follow the rules of the road but was not clear as to whether and when those rules were reviewed with student athletes. Thus, there are genuine issues of material fact as to those claims.

Contrary to the District's claims, the District is not immunized for any negligent supervision of Richardson by the District's employees, to the extent such caused Richardson's injuries. The following quotations from *Sherer* make it clear that the District's employees are not "third persons", the unpredictable acts of which I.C. § 6-904A was meant to immunize. The Idaho Supreme Court held in *Sherer*:

> The application of section 6–904A to the claim that the school district failed to properly supervise Cliffhanger depends on whether Cliffhanger was "under supervision, custody or care" of the school district within the meaning of the statute. Broadly interpreted, this phrase could be construed to include all employees or other persons acting on behalf of the government. However, if liability is to be the rule and immunity the exception, this language should be given a construction that avoids undoing section 6–903's creation of a right to recover against the state for its negligence. *See Hei,* 139 Idaho at 87, 73 P.3d at 100.
>
> The purpose of section 6–904A was to "render the state immune from the unpredictable acts of *third persons* ...." *Harris,* 123 Idaho at 299, 847 P.2d at 1160 (emphasis omitted, added). In *Hei,* the Court declared that a school employee was not under the "supervision, custody or care" of the school district within the meaning of section 6–904A. *Hei,* 139 Idaho at 87, 73 P.3d at 100. Thus, the school district is not immune from negligence liability for the acts of its employees under section 6–904A, even though it might be said to have negligently failed to supervise the employees under its supervision.
>
> The party responsible for administering the bungee run, Cliffhanger Recreation, was an independent contractor, not an employee of the school district. The question of whether an independent contractor qualifies as a person "under supervision" of the school district for purposes of section 6–904A is one of first impression. However, the language and history of the statute and the holding in *Hei* provide guidance. The cases that have applied the statute make it clear that the supervisory relationship must go beyond a mere contractual arrangement.
>
> In addition to "supervision, custody or care," section 6–904A(2) lists other categories including probation, parole, drug court programs, work-release programs, mental health centers, and hospitals. Each of these categories is a nonconsensual, custodial relationship under which it is primarily the government, rather than the individual, that bears a duty. The legislature was concerned with the unpredictable acts of third parties,

> *Harris,* 123 Idaho at 299, 847 P.2d at 1160, not with the government's ability to control its own agents and contractors. Thus, although an independent contractor may be a third person whose performance is monitored by the government entity that hired it, the existence of a consensual, contractual relationship does not place that person under "supervision, custody or care" within the meaning of the statute.
>
> To the extent the Appellants' claims are premised upon the school's negligent supervision of Cliffhanger, section 6–904A does not limit the school district's liability. The claim that the school negligently failed to supervise Cliffhanger should not have been dismissed on summary judgment.

143 Idaho 486, 492-93, 148 P.3d 1232, 1238-39.

The case law set forth above is clear that injuries caused to themselves or to another person by a student under the supervision of a school are not recoverable under I.C. § 6-904A(2). A school district is immune "to the extent [a plaintiff] premises the negligent supervision claim on the School District's alleged failure to use reasonable care in supervising *her,* as a student, for any alleged harm she inflicted on herself....", *Sherer*, 143 Idaho at 492, 148 P.3d at 1238 (quoting *Hei v. Holzer*, 139 Idaho 81, 87, 73 P.3d 94, 100 (2003)). Additionally, the Idaho Supreme Court has found "no supervisory relationship between a school district and its teachers for purposes of I.C. § 6–904A." *Hei*, 139 Idaho at 87, 73 P.3d at 100. The Idaho Supreme Court has stated that it "[does] not believe 'supervision, custody or care' can be so broadly interpreted as to include the employment relationship between a school district and a teacher." *Id.*

Richardson argues his injuries were not the result of the District's failure to properly supervise Richardson, but rather the failure to supervise the cross country coaches who were employees of the school district. Complaint, p. 4, ¶ 17. Based upon the above case law, a claim based upon the district's failure to supervise its own employees, the cross country coaches, is not barred by I.C. § 6-904A(2). Accordingly, the District's motion for summary judgment under I.C. § 6-904A must be denied.

F. There is Evidence of Negligence.

The District argues: "…there is no evidence to support Plaintiffs' claim (upon which they bear the burden of proof) that the Defendants school district breached their duty of care under the circumstances." Memorandum in Support of Defendants' Motion for Summary Judgment, p. 19. In making this argument the District claims the following testimony of Richardson is "conclusory" and "without foundation", adding:

> Michael's sole "evidence" that the brakes in question were defective is his statement that he vigorously applied both the front and back brakes and they failed to slow the bike at all despite the fat that he had commenced braking at the top of the hill and continued to do so up to the moment of impact, while admitting that he took no other actions to sop the bike or avoid the collision. (***Richardson depo,*** 53:10-54:24.)

Id. Plaintiffs argue nothing about Richardson's testimony runs afoul of I.R.E. 701 and 704. Plaintiffs' Response to Defendants' Motion for Summary Judgment, p. 18. This Court agrees. It is permissible for Richardson to conclude the brakes in question were defective by his observations before impact. Applying both brakes with no discernable effect would lead to the conclusion that something is wrong with the brakes. The District bases much of this argument (that plaintiffs have provided no evidence on negligence) on its own expert, Gill, who examined the bicycle and found a zero percent probability that the bicycle had brake failure. Memorandum in Support of Defendants' Motion for Summary Judgment, p. 22. The District's brief was written on May 21, 2013, well before plaintiffs' experts rendered their opinions. Not surprisingly, plaintiffs' experts have different opinions than do defendants' expert. Plaintiffs note that their bicycle expert Sutphin tested the bicycle and found "the front brakes of the bicycle significantly failed, and the rear brakes either failed in part, or even if they worked fully, they were unable by themselves to appreciably decelerate the bicycle Michael Richardson was riding as he descended the steep hill just prior to the collision." Plaintiffs' Response to

Defendants' Motion for Summary Judgment, p. 15, citing Sutphin Affidavit, at ¶ 6. Sutphin opined this was due to a complete lack of reasonable maintenance and repair of the brakes while owned by the Brasses. *Id.* Plaintiffs also note their accident reconstructionist, Thornburg, concluded the front brakes failed at the time of the collision, and that the back brakes either failed, or if they worked either partially or fully, they were insufficient to allow the bike and rider to decelerate in order to avoid the collision. *Id.,* p. 17, citing Thornburg Report, pp. 13-14. The District's argument that plaintiffs have not submitted evidence of the District' negligence ignores the facts that the District's employees, the Brasses, failed to maintain the bicycle for 17 years before the accident. *Id.,* p. 14.

While mentioning foreseeability in passing in one sentence their opening brief (Memorandum in Support of Defendants' Motion for Summary Judgment, p. 22), in their reply brief defendants changed the focus of their lack of evidence argument entirely to foreseeability. Reply Memorandum in support of Defendants' Motion for Summary Judgment, pp. 15-18. Defendants claim, "The undisputed evidence in this case indicates that Mr. Richardson's injury was **not reasonably foreseeable** for the reason that absolutely no one present at that time [Richardson, the Brasses or the District] possessed any knowledge that Mr. Brass's bike would have brake failure (as alleged) and cause this accident." *Id.,* p. 16. (emphasis in original). To support that claim, defendants argue: "To the contrary, Michael Richardson, Matt Brass and Angie Brass have all testified that they knew of no problems with the bike and ***ALL*** believed that it was safe for Michael to ride the bike during practice on the date of the accident." *Id.* (emphasis in original). The district distinguished the present case from *Durtschi* where

the school district had actual knowledge of prior incidents of its teacher abusing students. *Id.,* pp. 17-18. The district then argued:

> ***In contrast***, in the instant case there is absolutely no evidence that anyone with knowledge of the bike believed that it was in any way unsafe, and more specifically, the evidence is undisputed that neither Mr. Richardson, nor Mr. Brass, nor Ms. Brass had any concern about the bike's brakes. (Richardson Depo. 33:19-35:10, 37:25-38:10, 41:19-42:12; Mike Brass Affidavit pp. 2-4; A. Brass Affidavit pp. 2-3.) All believed the bike was safe to ride. (Id.)

Id., p. 18. (emphasis in original). The Court would agree there is no *direct* evidence of a defect admitted to by either of the Brasses. However, there is *circumstantial* evidence of a problem with the brakes of the bicycle. Obviously, there is circumstantial evidence on the day in question through the observations of Richardson. That defect is confirmed by direct evidence through plaintiffs' experts Thorburg and Sutphin. There is direct evidence of a prior problem of the bicycle testified to by Richardson:

> Q. How many times had you ridden the Giant Iguana before September 18th, 2009?
> A. Four to five, I believe.
> Q. And that was all within a couple of weeks of Setpember 18th, 2009?
> A. Approximately.
> Q. During the times that you were riding the Giant Iguana, did you ever notice any problems at all with the bike?
> A. Yes. Once.
> Q. What was that?
> A. I was riding it – I do not remember where. A residential road. And I hit the brakes and they didn't work and I rolled into a ditch. And I thought that is funny.
> I had another member of the team out. His name's Cody Miller. I called him over and said, "Look at this. The brakes didn't work."
> And he hopped on the biken and tried the brakes, and he said the brakes worked fine.
> I said, "Really. Let me see." I hopped on it and the brakes worked fine. I said, "Wow."
> Q. And that was during a practice at cross country?
> A. Correct.
> Q. Was there any coach there with you at the time?
> A. I do not recall. Rebecca may have been riding bike as practice, but she wasn't there, so to speak.
> Q. Not right there with you at the time.

A. Yes. That's what I mean to say.
Q. Yes. But she was also riding with the group of riders?
A. Perhaps. I do not remember all who was riding bikes those days.
Q. Okay. Did you tell Matt or Angie about the incident where you believe the brakes didn't work and you went into the ditch?
A. I did not.
Q. Did you ever at any time prior to September 18th, 2009 tell Matt or Angie that you believed there was any problem at all with the Giant Iguana?
A. Well, I told them it was old and hard to pedal. And they said, "Yes. Well, you'll get a good workout."
And I laughed and said, "Yes, I suppose you're right." But that's not really – its hard to convey that.

Affidavit of Counsel in Support of Defendants' Motion for Summary Judgment, Exhibit A, Michael Richardson, October 30, 2012 deposition transcript, p. 33, L. 10 – p. 35, L. 5. Thus, the Brasses knew they had not maintained the bicycle at the time of the accident. The Brasses knew "it was old and hard to pedal." Richardson knew he had brake problems with the bicycle but admits he didn't tell the Brasses. There is conflicting evidence, direct and circumstantial, as to what the Brasses knew regarding the bike's safety before the accident. It will be up to the jury to make credibility determinations based on that conflicting evidence.

G. "Miscellaneous Parties."

Defendants argue:

> Plaintiffs have named Sandpoint High School, Matthew Brass and Angie Brass as defendants. These parties should be dismissed because: (1) Sandpoint Senior High School is not a legally recognized "person" and cannot be sued in its individual capacity; and (2) Matthew and Angie at all times acted in the course and scope of their employment and cannot be found individually liable.

Memorandum in Support of Defendants' Motion for Summary Judgment, pp. 22-23. Plaintiffs have not responded to this argument by defendants. Because there has been no response by plaintiffs, defendants argue Sandpoint Senior High School, Matthew Brass and Angie Brass in their individual capacities should also be dismissed. Reply

Memorandum in Support of Defendants' Motion for Summary Judgment, pp. 18-19. This Court agrees, SSHS and the Brasses in their individual capacity are dismissed.

V. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED the rulings on the parties' motions to strike and exclude are as set forth on the record at oral argument on December 4, 2013, and as set forth above;

IT IS FURTHER ORDERED defendant's motion for summary judgment is DENIED as to: 1) defendants' claim that there is a lack of evidence on defendants' reckless, willful or wanton conduct; 2) defendants' claim that Idaho Code § 6-904B(4) provides immunity for claims of defendants' failure to maintain equipment; 3) defendants' claim that Idaho Code § 6-904A(2) provides immunity to the District for negligent acts by its employees; and 4) defendants' claim that there is a lack of evidence as to defendants' negligence;

IT IS FURTHER ORDERED defendants' motion for summary judgment is GRANTED as to: 1) defendants' claim that Idaho Code § 6-904B(4) provides Immunity for claims of failure to inspect; 2) defendants' claim that Sandpoint Senior High School must be dismissed as a party, and 3) defendants' claim that Matthew Brass and Angie Brass in their individual capacities must be dismissed.

Entered this 18th day of December, 2013.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of December, 2013, 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 #**
Lawrence R. Beck	208-772-7243	Brian K. Julian	208-344-5510

_____
Jeanne Clausen, Deputy Clerk