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STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

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

**DARREAN J. DOWREY, a minor child;
REBECCA SMITH, et ux,**

Plaintiffs,

vs.

**CKE RESTAURANTS, dba CARL'S JR
RESTAURANTS.**

Defendants.

Case No. **CV 2006 3664**

**ORDER GRANTING PLAINTIFFS'
"MOTION FOR (PARTIAL)
SUMMARY JUDGMENT THAT ANY
PUNITIVE DAMAGES AWARDED
ARE NOT REDUCED BY
PLAINTIFF'S COMPARATIVE
NEGLIGENCE"**

I. PROCEDURAL HISTORY AND BACKGROUND.

On March 30, 2002, plaintiff Darrean J. Dowrey was injured on the indoor playground at Carl's Jr. in Coeur d'Alene, Idaho. That fast-food restaurant is owned by defendant CKE Restaurants (d.b.a. Carl's Jr.). In 2006, plaintiffs commenced this action against defendants pursuant to I.C. §5-514 (The Idaho Long-Arm Statute). Plaintiffs sought to amend the Complaint pursuant to I.R.C.P. 15(a)-(c), and this Court ordered that such amendment was allowed on June 16, 2008. Plaintiffs' Amended Complaint includes the causes of action: 1) negligence; 2) negligent design; 3) negligent construction; and 4) failure to inspect and care for equipment.

Defendant CKE filed an Amended Answer on July 22, 2008, and defendants Prime Play of Canada and Delta Play entered Notices of Appearance on July 2, 2008. On June 12, 2008, this Court ordered that the parties shall appoint a Discovery Master.

Plaintiff filed an Answer to Defendant CKE's counter-claim on August 25, 2008. Plaintiff moved this Court for an Order to appoint a Guardian *Ad Litem*; such appointment was ordered on September 24, 2008.

On October 21, 2008, this Court granted plaintiffs' Motion to Amend the Complaint to Add a Claim for Punitive Damages. Plaintiffs now move for partial summary judgment, requesting that this Court determine as a matter of law that any punitive damages not be reduced by plaintiffs' comparative negligence. Defendants CKE move this Court for an Order vacating the trial setting and Scheduling Order. Oral argument on both motions were held on June 24, 2009. This matter was set for a 9-day jury trial to begin on January 11, 2010.

II. STANDARD OF REVIEW.

The standard of review on appeal from an order granting summary judgment is the same standard that is used by the District Court in ruling on the summary judgment motion. *Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). All disputed facts are liberally construed in favor of the non-moving party and all reasonable inferences are drawn in favor of the non-moving party. *AMCO Ins. Co. v. Tri-Spur Inv. Co.*, 140 Idaho 733, 736-737, 101 P.3d 226, 229-230 (2004). Summary judgment is appropriate only where the pleadings, depositions, affidavits, and admissions show that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. I.R.C.P. 56(c).

III. ANALYSIS.

A. Motion to Vacate Trial Setting/Scheduling.

Defendants CKE move this Court for an Order vacating the current trial setting and scheduling dates because plaintiffs' Third Amended Complaint adds five new

defendants and three new causes of action in this matter. Motion to Vacate Trial Setting/Scheduling Dates, p. 2. CKE argues it will take “at least thirty (30) days for service upon and appearance by the new defendants”, causing discovery to halt pending their appearance. *Id.* Additionally, CKE states the newly added defendants will have missed the scheduling deadlines already in place regarding discovery and expert witness disclosure and that new causes of action and new defendants may lead to filing of cross-claims against and between the defendants. *Id.*, pp. 2-3.

In response, plaintiffs have provided the Court with the Affidavit of Scott Gingras, which sets forth the efforts made by plaintiffs to locate the new defendants for service of process. Affidavit of Scott Gingras in Response to Defendants’ Motion for Continuance, pp. 2-9. While setting forth that service has been completed upon Defendants Sun Season Products, Inc.; Koala Corp., Inc.; and possibly Mr. Steve DeMarco (the Complaint, Summons, and First Set of Discovery Requests were left with his son-in-law at his last known address), the Affidavit does not address the remainder of CKE’s grounds for seeking a continuance, or appear to explicitly object to the motion. The decision to grant or deny a continuance is vested in the sound discretion of the trial court. *State v. Ward*, 98 Idaho 571, 574, 569 P.2d 916, 919 (1977). “Trial Judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons.” *State v. Carman*, 114 Idaho 791, 793, 760 P.2d 1207, 1209 (Ct.App. 1988), quoting *Morris v. Slappy*, 461 U.S. 1, 11, 103 S.Ct. 1610, 1616, 75 L.Ed.2d 610 (1983). This Court’s Scheduling Order states:

14. REQUEST TO VACATE TRIAL SETTING: Any party moving or stipulating to vacate a trial setting shall set forth the reasons for the request and include

a representation by counsel that these reasons have been discussed with the client and that the client has no objection to vacating the trial date. For a continuance to be granted, the parties shall have already engaged in mediation, or should expect to engage in mediation at the time originally set for the trial or shortly thereafter.

Any vacation or continuance of the trial day shall not change or alter the time frames for the deadlines set forth herein, but the dates for such deadlines will change to the new dates as are established by the date of the new trial setting. Any party may, upon motion and for good cause shown, request different discovery and disclosure dates upon vacation or continuance of the trial date.

Scheduling Order, Notice of Trial Setting and Initial Pretrial Order, ¶ 14. There is no indication that the parties have engaged in mediation already, and the new defendants have not yet appeared in this matter. However, given that the Third Amended Complaint, filed April 29, 2009, lists new causes of action and new defendants, it is proper for this Court to exercise its discretion and grant defendants' Motion to Vacate the Trial Setting. This was done at the conclusion of oral argument on June 24, 2009, and a status conference was set for September 15, 2009, at 4:00 p.m..

B. Motion for Partial Summary Judgment on Punitive Damages and Comparative Negligence.

Plaintiffs move this Court for summary judgment, determining as a matter of law that any punitive damages awarded against CKE not be reduced any comparative negligence of plaintiff. Motion for Summary Judgment, p. 2. Plaintiffs argue the majority of jurisdictions hold that punitive damages are intended to punish and, therefore, should not be reduced by a plaintiff's comparative negligence. *Id.* In support of this argument, plaintiffs cite Annot., *Effect of Plaintiff's Comparative Negligence in reducing Punitive Damages Recoverable*, 27 A.L.R. 4th 318 (updated 2008) [although plaintiff's briefing states the ALR is attached as Exhibit "1", it was not provided for the Court or CKE.] *Id.* Plaintiffs argue Idaho case law, though limited on this precise issue,

disallows the defense of comparative negligence in cases involving intentional bad faith by an insurance company, intentional torts, and reckless conduct by the defendant. *Id.*, pp. 2-3.

CKE responds: (1) plaintiffs' motion was untimely under I.R.C.P. 56(c) because the attachments referenced in plaintiffs' briefing were not received within twenty-eight days before hearing on the matter; (2) the motion is premature because no evidence has been presented in support of plaintiff's claim for punitive damages and although new defendants have been added, no determination of comparative negligence has been reached; and (3) plaintiffs have not provided the Court with support for their argument that Idaho would follow the majority trend regarding the issue of punitive damages and comparative negligence; the Idaho cases plaintiffs cited where the defense of comparative negligence is not allowed under a claim of reckless conduct are not on point as they deal with Idaho's Automobile Guest Statute (*Sharp v. Smith*, 85 Idaho 17, 33, 375 P.2d 174, 194 (1962) and *Loomis v. Church*, 76 Idaho 87, 92, 277 P.2d 561, 564 (1954)). Response to Plaintiff's Motion for Summary Judgment, pp. 2-4.

In plaintiffs' reply, plaintiffs argue the timeliness issue is "not even technically meritorious" because copies of authorities are provided as a courtesy only to the trial judge. Reply RE: Punitive Damages and Comparative Negligence, p. 2. Plaintiffs also reply that the motion is not premature, and CKE cites no authority for the argument that there can be no motion for partial summary judgment on this issue where there has been no finding of comparative negligence or entitlement to punitive damages. *Id.* Finally, plaintiffs reply that the overwhelming majority of jurisdictions hold punitive damages are not to be reduced by a plaintiff's comparative negligence, and plaintiffs summarize this case law. *Id.*; Appendix 1 to Plaintiff's Reply to Defendant's Response

to Motion for Summary Judgment.

At oral argument, of concern to the Court was the prospect of issuing an advisory opinion on this issue at summary judgment, because this case has not been to trial. Accordingly, there has been no punitive damage award at the present time. However, this Court on November 3, 2008, after briefing and oral argument on plaintiffs' motion to amend the complaint to add a claim for punitive damages, decided the issue under Idaho Code § 6-1604 and made the determination that plaintiffs had established "a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." This Court allowed plaintiffs to amend their complaint to add a prayer for relief for punitive damages.

An advisory opinion appears to be one which would not resolve any dispute between the parties (*Koch v. Canyon County*, 145 Idaho 158, 163, 177 P. 3d 372, 377 (2008)), and that would not be the case here. Obviously, the parties disagree over what the legal interpretation of this issue should be. If there is an award of punitive damages the issue will have to be decided at that time. Because the parties disagree as to the legal interpretation of this issue, and because the issue is one of first impression in the State of Idaho, resolution of this issue could guide the parties in settlement and in preparation for trial. An advisory opinion would deal with hypothetical facts and would not deal with a real and substantial controversy (*Boundary Backpackers v. Boundary County*, 128 Idaho 371, 376, 913 P.2d 1141, 1146 (1996)), and that is not the case here. The parties disagree over the legal interpretation of this issue and they are headed into a trial where the Court has already decided the issue of punitive damages will go to the jury. Indeed, it may be that the Court will need to instruct the jury as to its ruling on this issue. For all of these reasons this Court concludes deciding plaintiffs'

motion for partial summary judgment does not constitute an advisory opinion.

Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000), analyzes the issue of whether punitive damages awarded in a negligence action should be reduced by the proportion of the plaintiff's comparative negligence as a matter of first impression in South Carolina. *Clark* is a unanimous decision by the South Carolina Supreme Court, which upheld a similar previous decision in *Clark* by the South Carolina Court of Appeals. In *Clark*, the South Carolina Supreme Court provided four compelling reasons for its decision. First, it reasoned that the purpose of actual or compensatory damages is to compensate for injuries or losses, but the purpose of punitive damages is to punish the wrongdoer and deter others from engaging in reckless, willful, wanton, or malicious conduct. 339 S.C. 369, 378, 529 S.E.2d 528, 533. As such:

[A]llowing the defendant to shift a portion of the cost of a punitive award back to the plaintiff through comparative negligence would reduce the punishment and deterrent effect of the award.

339 S.C. 369, 380, 529 S.E.2d 528, 534. Second, that Court further reasoned that reducing a defendant's punishment would inflict a corresponding amount of punishment on the plaintiff; it would be inappropriate to reduce punitive damages by comparing a plaintiff's negligence with a defendant's reckless and willful conduct; and punitive damages focus on the defendant. 339 S.C. 369, 380-81, 529 S.E.2d 528, 534. Third, the South Carolina Supreme Court held: "...it would be inappropriate to reduce the plaintiff's damage by comparing the plaintiff's *negligence* with the defendant's *reckless* or *willful* conduct." *Id.* (italics in original). In a comparative fault jurisdiction, with punitive damages one would not be comparing the same *type* of conduct. The Superior Court of Pennsylvania put it this way: "To involve a comparison of unequal forms of conduct would not fit within this scheme." *Krinijanski v. Union R. Co.*, 515 A.2d 933,

938, 357 Pa.Super. 196, 206 (Pa.Super. 1986).

Finally, the South Carolina Supreme Court in *Clark* reasoned:

Fourth, when considering the negligence attributable to each party, the focus is on the actions of both plaintiff and defendant. What did each do, or not do, that contributed to the cause of an injury? With punitive damages, however, the focus is on only the defendant. The central inquiry is whether the defendant's conduct was so reckless, willful, wanton, or malicious that the defendant should be punished and deterred by requiring him or her to pay money to the plaintiff.

339 S.C. 369, 380-81, 529 S.E.2d 528, 534. Essentially, with punitive damages in a state such as South Carolina (and Idaho), since the focus is entirely on the defendant as to the issue of punitive damages, there is no other party to which defendant's conduct should be compared in the first place.

The South Carolina Supreme Court then discussed the outlier:

In the only case which has allowed a reduction in punitive damages under comparative negligence, the court did so in part because it concluded Michigan law allows punitive damages only to compensate the plaintiff for injured feelings, not to punish and deter the wrongdoers. *Parr v. Central Soya Co.*, 732 F.Supp. 738, 742-44 (E.D.Mich.1990).

339 S.C. 369, 380, 529 S.E.2d 528, 534. The South Carolina Supreme Court went on to hold "punitive damages are not reduced by the proportion of the plaintiff's negligence under comparative negligence." 339 S.C. 369, 381, 529 S.E.2d 528, 535.

Similarly, Colorado courts have examined whether comparative negligence principles should be directly applied to punitive damages and concluded they should not. "[T]he purpose of punitive damages is to punish the wrongdoer as an example to others, and not to compensate the plaintiff, [and therefore] an award of punitive damages is unrelated to the plaintiff's conduct." *Bodah v. Montgomery Ward & Co., Inc.*, 724 P.2d 102, 104 (Colo.App. 1986); *Jacobs v. Commonwealth Highland Theaters, Inc.*, 738 P.2d 6, 13 (Colo.App. 1986); see also *Lira v. Davis*, 832 P.2d 240 (Colo. 1992).

Lira was a unanimous (at least on the issue of not reducing punitive damages by a plaintiff's comparative fault) *en banc* decision of the Supreme Court of Colorado. The Colorado Supreme Court held:

In the majority of jurisdictions, direct reduction of a punitive damages award by the plaintiff's percentage of fault is rejected because such reduction is inconsistent with the purposes of punitive damages-punishment and deterrence. See generally *Damages in Tort Actions* § 40.54, 40-247; Francis M. Dougherty, Annotation, *Effect of Plaintiff's Comparative Negligence in Reducing Punitive Damages Recoverable*, 27 A.L.R.4th 318 (1984). See also *Friley v. International Playtex, Inc.*, 604 F.Supp. 126 (W.D.Mo.1984); *Amoco Pipeline Co. v. Montgomery*, 487 F.Supp. 1268, 1273 (W.D.Okla.1980); *Tampa Electric Co. v. Stone & Webster Engineering Corp.*, 367 F.Supp. 27, 38 (M.D.Fla.1973); *Bowman v. Doherty*, 235 Kan. 870, 686 P.2d 112, 122 (1984) (affirming the trial court's refusal to apportion punitive damages based on the percentage of fault attributed to the parties under the comparative negligence standard); *Shahrokhfar v. State Farm Mutual Auto. Ins. Co.*, 194 Mont. 76, 634 P.2d 653, 659 (1981) (“[P]unitive damages cannot be reduced by the percentage of plaintiff's contributory negligence.”); *Comeau v. Lucas*, 90 A.D.2d 674, 455 N.Y.S.2d 871, 873 (1982) (“punitive damages are not subject to apportionment”); *Turner v. Lone Star Industries, Inc.*, 733 S.W.2d 242 (Tex.App.1987) (where award of punitive damages supported by finding of gross negligence, punitive damages will not be reduced by percentage of contributory negligence); *Hondo's Truck Stop Cafe, Inc. v. Clemmons*, 716 S.W.2d 725, 726 (Tex.App.1986); *Danculovich v. Brown*, 593 P.2d 187, 193-94 (Wyo.1979).

832 P.2d 240, 242, 243.

Many of these cases are found in *Effect of Plaintiff's Comparative Negligence in Reducing Punitive Damages Recoverable*, 27 A.L.R.4th 318 (1984). That annotation also contains additional cases in support: *Bell v. Mickelsen*, 710 F.2d 611 (10th Cir. 1983) (interpreting Wyoming law); *Perdernaes Elec. Co-op, Inc. v. Schulz*, 583 S.W.2d 882 (Tex.Civ.App. Waco 1979); *Sears, Roebuck & Co. v. Kunze*, 996 S.W.2d 416 (Tex.App. Beaumont 1999). There are *no* cases to the contrary cited in that annotation.

Plaintiffs have cited some additional cases not discussed in *Lira* or in 27 A.L.R.4th 318. *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460, 465 (9th Cir. 1977)

(discusses Oregon law, and finds that since punitive damages are based on gross negligence or worse conduct, punitive damages are not reduced by plaintiff's comparative negligence); *Campbell v. Van Roekel*, 347 N.W. 2d 406, 410-11 (Iowa 1994) (because punitive damages are awarded for gross negligence, recklessness and wantonness, comparative negligence is not a defense to punitive damages); *Blazovic v. Andrich*, 590 A.2d 222, 231-32 (N.J. 1991) (since punitive damages are based on wanton or intentional acts, no reduction of punitive damages based on plaintiff's comparative negligence); *Burke v. 12 Rothschild's Liquor Mart, Inc.*, 593 N.E.2d 522, 532 (Ill. 1992) (no reduction of punitive damages due to comparative fault of plaintiff as they are based on defendant's willful and wanton conduct); *Tucker v. Marcus*, 418 N.W.2d 818, 822, n. 5 (Wis. 1988) (adopts the majority rule not to reduce punitive damages because of plaintiff's comparative negligence, *citing* C. Heft & C. Heft, Comparative Negligence Manual, § 1.310 at 63 (Rev. ed. 1986). *See also* H. Woods, Comparative Fault, § 7:5 at 174 (2d ed. 1987); 1 M. Bender, Comparative Negligence, § 4.30[5] at 62-63 (2d ed. 1987)); *Davies v. Butler*, 602 P.2d 605, 610 (Nev. 1979) (comparative negligence provides no offset to willful and wanton behavior); *Reichert v. Atler*, 875 P.2d 384, 392 (N.M.App. 1992)(no reduction of punitive damages based on comparative negligence where defendant's actions are willful, wanton, malicious, reckless or grossly negligent); *Robbins v. McCarthy*, 581 N.E.2d 929, 932 (Ind.App. 1991)(comparative negligence of plaintiff does not reduce punitive damages); *Demerest v. Progressive American Insurance Co.*, 552 So.2d 1329, 1334 (La.App. 1989)(no reduction in punitive damages because of plaintiff's comparative negligence); *Krinijanski v. Union R. Co.*, 515 A.2d 933, 936-38, 357 Pa.Super. 196, 203-07 (Pa.Super. 1986)(no reduction in plaintiff's claim because of comparative negligence

when defendant committed willful or wanton misconduct); *Lane v. Meserve*, 482 N.E. 2d 530, 533 (Mass.App. 1985) (punitive damages not reduced by plaintiff's comparative negligence); *Comeau v. Lucas*, 455 N.Y.S.2d 871, 873 (N.Y.Sup.Ct.App.Div. 1982) (no apportionment of damages based on plaintiff's fault).

The Nevada Supreme Court in *Davies v. Butler*, 602 P.2d 605, 610-11 (Nev. 1979), discussed the minority view:

As respondents have pointed out, courts in several other jurisdictions have reached a different conclusion. We are not persuaded that the results reached apply to the interpretation of the statute before us. In *Li v. Yellow Cab Company*, 13 Cal.3d 804, 119 Cal.Rptr. 858, 873, 532 P.2d 1226, 1241 (1975), the Supreme Court of California announced, by way of dictum, that henceforth both gross negligence and willful or wanton misconduct would be subject to comparative negligence. The California court, however, having adopted comparative negligence by judicial decision, was not faced, as we are, with the problem of determining legislative intent.

In *Billingsley v. Westrac Company*, 365 F.2d 619 (8th Cir. 1966), the court, applying Arkansas law, concluded that "willful and wanton negligence", as used by the Arkansas courts, amounted in fact to gross negligence and should therefore be subjected to comparative negligence analysis in order to avoid thwarting the purpose of the statute. In *Bielski v. Schulze*, 16 Wis.2d 1, 114 N.W.2d 105 (1962), also cited by respondents, the court explicitly dealt only with the concept of gross negligence. As noted in *Bielski, id.* 16 Wis.2d 1, 114 N.W.2d at 113, "(m)uch of what constituted gross negligence will be found to constitute a high percentage of ordinary negligence causing the harm." The conclusion we reach today is consistent with the approach taken by these courts. It is clear that the legislature, by specifically including gross negligence in the terms of the comparative negligence statute, intended to subject such conduct to comparison with a plaintiff's contributory negligence. We agree that conduct amounting to gross negligence should be subject to such comparison in order to be consistent with the legislative purpose. In light of our prior decisions defining willful and wanton misconduct, however, we find it equally clear that such conduct is Not equivalent to gross negligence.

As noted by V. Schwartz, *Comparative Negligence* s 5.3 (1974), to the extent that the concepts of willful and wanton misconduct or gross negligence were instituted merely to ameliorate the hardships of the contributory negligence rule, the rationale no longer applies under comparative negligence, but to the extent that they reflect a judgment that the defendant's culpability "is so close to intentional wrongdoing that he should not have the benefit of contributory negligence," the basis for the

rule is unchanged by a comparative negligence system. We conclude that the legislature, by including the term “gross negligence” in the comparative negligence statute, has made a determination that the concept of gross negligence is comparable to and subject to comparison with ordinary negligence, but has left the law unchanged with regard to conduct in which the defendant's culpability more closely approaches that of one who intentionally inflicts damage.

Because Idaho's punitive damage statute, Idaho Code § 6-1604, does not allow punitive damages for grossly negligent conduct, and lists only “oppressive, fraudulent, malicious or outrageous conduct”, the above concerns of the minority view discussed and rejected in *Davies* are not pertinent given Idaho law.

In Idaho, “the public purpose behind punitive damages is both to punish and to deter.” *Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Ins. Co.*, 95 Idaho 501, 504, 511 P.2d 783, 786 (1973); *Golder v. Golder*, 110 Idaho 57, 63, 714 P.2d 26, 32 (1986); *Shields v. Martin*, 109 Idaho 132, 138, 706 P.2d 21, 27 (1985) (“Punitive damages are not awarded for the purposes of compensating the plaintiff, but to punish the defendant and deter others from following in the defendant's example.”)

This issue is before the Court as a matter of first impression. As shown above, this is hardly a matter of first impression in jurisdictions with comparative negligence statutes and punitive damage statutes similar to Idaho's. Where the purpose of punitive damages in Idaho mirrors that in states which hold punitive damages are not reduced by the proportion of the plaintiff's negligence under comparative negligence, and differs from that in states which hold punitive damages are reduced by the amount of plaintiff's comparative negligence, this Court concludes, as a matter of law, punitive damages are not to be reduced by a plaintiff's comparative negligence to the extent such an award is not for the purpose of compensating the plaintiff. Defendants are correct, the Idaho cases plaintiffs cited where the defense of comparative negligence is not allowed under

a claim of reckless conduct, are not quite on point as they deal specifically with Idaho's Automobile Guest Statute. *Sharp v. Smith*, 85 Idaho 17, 33, 375 P.2d 174, 194 (1962) and *Loomis v. Church*, 76 Idaho 87, 92, 277 P.2d 561, 564 (1954). However, this Court has read those cases and finds they give an indication that the Idaho Supreme Court would likely find, as this Court does with this issue of first impression, that contributory fault does not reduce any award of punitive damages.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court must grant plaintiffs' motion for partial summary judgment. If there is an award for punitive damages against defendants in favor of plaintiffs, and if there is a finding of contributory negligence on the part of plaintiffs, such award of punitive damages will not be reduced by any percentage of comparative fault of plaintiffs.

IT IS HEREBY ORDERED plaintiffs' motion for partial summary judgment is GRANTED. If there is an award for punitive damages against defendants in favor of plaintiffs, and if there is a finding of contributory negligence on the part of plaintiffs, such award of punitive damages will not be reduced by any percentage of comparative fault of plaintiffs.

Entered this 8th day of July, 2009.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 8th day of July, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
Craig Vernon/Scott Gingras	(208) 664-1684	Michael J. Elia/Steven R. Kraft	(208) 336-7031
Richard McKinney	509-327-2504		

Jeanne Clausen, Deputy Clerk