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Stem v. Prouty Clerk's Record v. 3 Dckt. 37641

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LAW CLERK

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IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

JOHN STEM,
PLAINTIFF-APPELLANT,

vs.

CITY OF GARDEN CITY, IDAHO,
DEFENDANT,

and

WESLEY C. PROUTY,
DEFENDANT-RESPONDENT.

*Appealed from the District Court of the Fourth Judicial
District of the State of Idaho, in and for ADA County*

Hon MICHAEL R. MCLAUGHLIN, District Judge

EMIL R. BERG

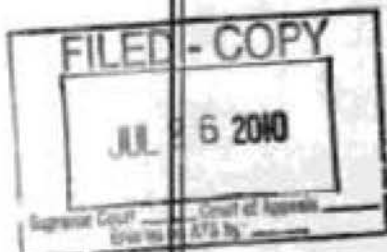
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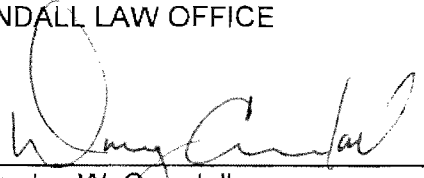
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Summary of Expert's Opinion: Mr. Stem was referred to Dr. Coffman, an infectious disease specialist, upon recommendation of Dr. Schweiger, M.D. Dr. Coffman is expected to testify in conformity with his report dated December 17, 2006, indicating a complex crush injury to the right lower extremity with necrotic muscle and exposed hardware.

DATED this 26th day of January, 2009.

CRANDALL LAW OFFICE

By 

Douglas W. Crandall
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

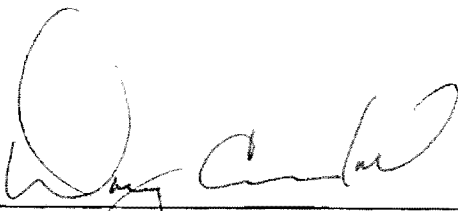
I HEREBY CERTIFY that on the 26th day of January, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

James J. Davis
406 W Franklin
PO Box 1517
Boise, ID 83701
Facsimile No.: (208) 336-3374
Attorney for Defendant City of Garden City, Idaho

- US Mail
- Overnight Mail
- Hand-Delivery
- Facsimile Transmission
- Electronic Transmission

James G. Reid
David P. Claiborne
Ringert Clark, Chartered
455 S Third
PO Box 2773
Boise, ID 83701
Facsimile No.: (208) 342-4657
Attorneys for Defendant Wesley C. Prouty

- US Mail
- Overnight Mail
- Hand-Delivery
- Facsimile Transmission
- Electronic Transmission



Douglas W. Crandall

EXHIBIT 1
REPORT OF RICHARD SLAUGHTER

000402

RSA, Inc.

Richard Slaughter Associates

907 Harrison Blvd
Boise, Idaho 83702

208 850-1223
Fax 208 345-9633
email: richard@rsaboise.com
EIN: 82-0464626

Invoice

Mr. Jeffrey Sheehan
Crandall Law Offices
420 W Main Street, Suite 206
Boise, ID 83702

January 21, 2009

Time billed at \$175 per hour

<u>Date</u>	<u>Item</u>	<u>Time</u>	<u>Fee</u>
1/5/09	Retainer		(500.00)
12/16/08	Initial interview, J. Sheehan	0.5	
12/16/08	Create worksp[ace, file	0.3	
1/12/09	Review medical and industiral commission files	2.3	
1/14/09	Start report	0.2	
1/20/09	Report	0.1	
1/21/09	Complete report, deliver	1.8	
	Total	5.15	<u>\$901.25</u>
	Please remit		\$401.25

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VALUATION OF ECONOMIC LOSS

Mr. John Stem

Submitted to:

Mr. Jeffrey T. Sheehan, Esq.
Crandall Law Offices
420 W Main Street, Suite 206
Boise, ID 83702
January 22, 2009

Richard Slaughter Associates
907 Harrison Blvd
Boise, Idaho 83702

RSA
208 850-1223
Fax: 208 345-9633
Internet: richard@rsaboise.com

000404

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	C. Listing of recent cases	

Introduction

This report was prepared to estimate the present value of economic losses stemming from injuries suffered by Mr. John Stem on November 29, 2006. Mr. Jeffrey Sheehan's office contacted Dr. Richard Slaughter on or about December 16, 2008, for the purpose of present valuing Mr. Stem's economic loss. The loss in this case consists of the present value of John Stem's lost income during his expected lifetime. This report does not include any estimate of general damages.

Assumptions and methodology

Method of analysis

The analysis calculates the present value of Mr. Stem's lost income, resulting from his injuries.

Mr. Stem's physicians have reported a 38% of whole person impairment. Reports from the Idaho Industrial Commission do not indicate success with regard to replacement employment and income (Lijewski, Jan. 30, 2008 and following). Ms. Lijewski finds that Mr. Stem might be able to complete a training course in heavy equipment operation, but does not provide a probability of his being able to complete the course. The history she provides indicates that two years after the fact Mr. Stem has not been able to either enter on a suitable training course nor to find employment.

On the basis of available information, it is not clear that Mr. Stem will ever be able to hold gainful employment, and if so when that employment might begin or what position he might hold. For that reason, this analysis assumes that Mr. Stem will not have mitigating income.

Mr. Stem's base loss is calculated on the basis of reported \$10 per hour income from his prior employment. There is no documentation of those wages, as Mr. Stem was apparently paid in cash. The analysis does assume 6.2% employer social security contributions on Mr. Stem's behalf, but no other benefits. Because of his varied work

history, the analysis assumes that in the absence of injury Mr. Stem would have been out of the labor force about 25% of the time during his worklife. The analysis does not incorporate an estimate of lost household work.

Inflation and discount rates

Inflation rates are derived from data published by the U.S. Department of Commerce, Bureau of the Census for the past thirty years. Increases in earnings levels are estimated from published changes in the Average Non-farm wage of production workers. These data are collected and published monthly by the Bureau of Labor Statistics of the U.S. Department of Commerce. Over time they will be representative of earnings changes for most occupations.

The discount rate is based on the average yield of taxable long-term Treasury securities (maturities 10 years and greater), also for thirty years, to match the period used for inflation rates.

This method, by matching inflation and discount for a long time period, focuses on the stable relationship between inflation and the real time value of money, and avoids temporary distortions caused by short-term monetary or fiscal policy or aberrations in the market. Discounts apply to 2010 and beyond; wage data for 2006 is inflated for 2007 and 2008 for nominal increases in the average business wage.

Assumptions

Birthdate	§ [REDACTED]
Date of injury	November 29, 2006
Age at retirement	67 years
Life expectancy	76 years
Earning level	\$10/hour
Fringe benefits	Social Security match only

Documents examined

In preparing this report the following documents have been examined:

Documents provided by Plaintiff and Plaintiff's attorney:

Letter dated January 6, 2009, to Richard Slaughter, from Mr. Jeffrey Sheehan.

Transcripts and progress reports, Boise Independent School District.

Industrial Commission reports, written by Cindy Lijewski, ICRD Consultant, for months of June 2007 through November 2008; Employment history and evaluation dated January 30, 2008.

Other Documents and Interviews

Interest rates on long-term Treasury bonds:

<http://www.federalreserve.gov/releases/h15/> : historical data

Wage cost indices and CPI indices: Bureau of Labor Statistics, available at

<http://www.bls.gov/data/home.htm>.

“Expectation of Life and Expected Deaths by Race, Sex, and Age: 2001,” *Statistical Abstract of the United States*, 2005 edition, Table # 94.

Present value of lost income


Mr. Stem's economic loss, including the life care plan, is presented in the table below. The detail of Mr. Stem's economic loss is presented in Appendix A.

Calculation of Economic Loss

	Present Value
PV of total loss	\$525,419
PV of replacement income	<u>\$0</u>
PV of Net Loss	<u>\$525,419</u>
Loss to February 1, 2009	<u>\$52,126</u>

This report is subject to correction and/or amendment for errors that may be discovered and new data that may be provided prior to trial. This opinion does not include the value of damages for mental anguish, medical expenses, or other claims that may be made by the plaintiff.

My fee for analysis and report preparation, and trial is \$175 per hour.


Richard A. Slaughter, Ph.D.

21 January 2009
Date

Appendix A

Present value calculation, Economic Loss

Base Lost Income for John Stem

Date of Birth:	[REDACTED]	Net discount rate:	2.60%
Date of Injury:	29-Nov-06	CPI-U:	0.00%
Date of Analysis:	14-Jan-09		
Base Year for Analysis	2006		
Income (2006):	\$20,800	Beginning Income (2006):	\$20,800
Fringe Benefits:	6.20%	Remaining Worklife:	44.77
Out of workforce:	25.00%		
Age at Injury:	22.2		
Normal Retirement	67.00		
NormalLife Expectancy	76	Total PV:	\$525,419
Sex	M	PV Actua/Replacement:	0
		Net PV of Loss:	<u>\$525,419</u>
		Loss to 2/1/2009	\$52,126

Fringe benefits: None

Year	Age	Factor	Inflator	Base Loss	Projected Net Income	Fringe benefits	Out of workforce	Total Income Loss	Total Present Value	Cumulative PV
2006	22	0.08		\$20,800	1,733	107		1,841	1,988	1,988
2007	23	1.00	3.9%	21,620	21,620	1,340		22,960	24,169	26,158
2008	24	1.00	3.6%	22,402	22,402	1,389		23,791	24,410	50,567
2009	25	1.00	2.0%	22,850	22,850	1,417	(5,561)	18,706	18,706	69,273
2010	26	1.00		22,850	22,850	1,417	(6,067)	18,200	17,739	87,012
2011	27	1.00		22,850	22,850	1,417	(6,067)	18,200	17,289	104,301
2012	28	1.00		22,850	22,850	1,417	(6,067)	18,200	16,851	121,153
2013	29	1.00		22,850	22,850	1,417	(6,067)	18,200	16,424	137,577
2014	30	1.00		22,850	22,850	1,417	(6,067)	18,200	16,008	153,585
2015	31	1.00		22,850	22,850	1,417	(6,067)	18,200	15,602	169,187
2016	32	1.00		22,850	22,850	1,417	(6,067)	18,200	15,207	184,394
2017	33	1.00		22,850	22,850	1,417	(6,067)	18,200	14,822	199,216
2018	34	1.00		22,850	22,850	1,417	(6,067)	18,200	14,446	213,662
2019	35	1.00		22,850	22,850	1,417	(6,067)	18,200	14,080	227,742
2020	36	1.00		22,850	22,850	1,417	(6,067)	18,200	13,723	241,465
2021	37	1.00		22,850	22,850	1,417	(6,067)	18,200	13,375	254,841
2022	38	1.00		22,850	22,850	1,417	(6,067)	18,200	13,036	267,877
2023	39	1.00		22,850	22,850	1,417	(6,067)	18,200	12,706	280,583
2024	40	1.00		22,850	22,850	1,417	(6,067)	18,200	12,384	292,967
2025	41	1.00		22,850	22,850	1,417	(6,067)	18,200	12,070	305,038
2026	42	1.00		22,850	22,850	1,417	(6,067)	18,200	11,764	316,802
2027	43	1.00		22,850	22,850	1,417	(6,067)	18,200	11,466	328,268
2028	44	1.00		22,850	22,850	1,417	(6,067)	18,200	11,176	339,444
2029	45	1.00		22,850	22,850	1,417	(6,067)	18,200	10,893	350,337
2030	46	1.00		22,850	22,850	1,417	(6,067)	18,200	10,616	360,953
2031	47	1.00		22,850	22,850	1,417	(6,067)	18,200	10,347	371,301
2032	48	1.00		22,850	22,850	1,417	(6,067)	18,200	10,085	381,386
2033	49	1.00		22,850	22,850	1,417	(6,067)	18,200	9,830	391,215
2034	50	1.00		22,850	22,850	1,417	(6,067)	18,200	9,581	400,796
2035	51	1.00		22,850	22,850	1,417	(6,067)	18,200	9,338	410,134
2036	52	1.00		22,850	22,850	1,417	(6,067)	18,200	9,101	419,235

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Stem - 1

Base Lost Income for John Stem

Year	Age	Factor	Inflator	Base Loss	Projected Net Income	Fringe benefits	Out of workforce	Total Income Loss	Total Present Value	Cumulative PV
2037	53	1.00		22,850	22,850	1,417	(6,067)	18,200	8,871	428,106
2038	54	1.00		22,850	22,850	1,417	(6,067)	18,200	8,646	436,751
2039	55	1.00		22,850	22,850	1,417	(6,067)	18,200	8,427	445,178
2040	56	1.00		22,850	22,850	1,417	(6,067)	18,200	8,213	453,391
2041	57	1.00		22,850	22,850	1,417	(6,067)	18,200	8,005	461,396
2042	58	1.00		22,850	22,850	1,417	(6,067)	18,200	7,802	469,198
2043	59	1.00		22,850	22,850	1,417	(6,067)	18,200	7,604	476,802
2044	60	1.00		22,850	22,850	1,417	(6,067)	18,200	7,412	484,214
2045	61	1.00		22,850	22,850	1,417	(6,067)	18,200	7,224	491,438
2046	62	1.00		22,850	22,850	1,417	(6,067)	18,200	7,041	498,479
2047	63	1.00		22,850	22,850	1,417	(6,067)	18,200	6,862	505,341
2048	64	1.00		22,850	22,850	1,417	(6,067)	18,200	6,688	512,030
2049	65	1.00		22,850	22,850	1,417	(6,067)	18,200	6,519	518,549
2050	66	1.00		22,850	22,850	1,417	(6,067)	18,200	6,354	524,903
2051	67	0.08		22,850	1,904	118	(506)	1,517	516	525,419

Data

John Stem income

	2005 and earlier	2006	2007	2008
Custom Rock Tops		Worked for 2 weeks prior to injury		
Stone Systems (family)	3 years, ended at \$10/ hour			
Dillabaugh's Flooring America	7 mo.			
Inland N.W. Dist.	8 mo.			
Floors by Design	2 years			
G & G Floors	9 mo.			

Impairment, per Idaho Ind. Commission Jan. 30, 2008

Right below-knee amputation	32%
Phantom pain disorder, chronic	5%
DRE lumbar category II	5%
Total whole person impairment	38%

Background:	GED, Borah. Dyslexic, IQ 72; special ed throughout school	
History		
Accident:	Nov. 29, 2006	
Amputation:	26-Apr-07	Disability per Martin: total, lifelong
Retraining recommendation:	12/28/07	Ind. Comm. Analyst recommended heavy equipment training
Impairment	1/30/08	38%, per report from Dr. McMartin
Training options:	1/30/08	Heavy Equipment School of Idaho: \$15,500 course for heavy equipment. Provides national Fork lift; heavy equipment. NO to customer service, welder, auto body painting
Medical voc. Opinion (McMartini	12/7/07	
Impairment rating:	1/15/08	38%
Work planning	3/6/08	Efforts by Ind. Comm. To assist retraining.
Vocational	6/13/08	Potential for working as a marketing rep for Snake River Truck
Vocational	7/14/08	Details of work potential; Workmen's comp response, and costs
Vocational/medical	10/31/08	Work Comp. denials end Snake River Truck potential; heavy equip. school denied entrance
Ind. Comm. Case closed	12/9/08	

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Appendix B

Resume of Richard A. Slaughter

Richard A. Slaughter

Current Position

President, RSA, Inc., dba Richard Slaughter Associates, 1984 - present. RSA engages in international and domestic economic consulting involving strategic planning support, utility regulation, public finance, economic valuation, and tax structure. Clients have included Idaho cities and counties, the Treasurer of the State of Idaho, Fortune 500 companies, universities, international consulting firms, and attorneys.

Richard Slaughter Associates
907 Harrison Blvd.
Boise, ID 83702-4052

208 850-1223
Fax 208 345-9633
email: richard@rsaboise.com

Education

- B. A. Political Science, University of Idaho, 1966.
- M. A. International Relations, University of Denver, 1968.
- Ph. D. International Politics, Graduate School of International Studies, University of Denver, 1974.

Academic Fields: International Law, Organization, and Economics; dissertation written on economic conditions of political integration in Europe.

Prior Experience

Director, Martin Institute for Peace Studies and Conflict Resolution, University of Idaho, 1996 - 2000. The Martin Institute is an inter-disciplinary center focused on research into sources of international and sub-national conflict, education on conflict resolution, and expanded utilization of alternative dispute resolution techniques.

Chief Economist, Division of Financial Management (DFM), State of Idaho, 1980 - 1984. Directed staff of M.A. and Ph.D. economists in economic and revenue forecasting; population estimates and projections; tax policy development.

- Director, Governor's Economic Research Council, 1983-84. Chaired by Cecil D. Andrus.
- Served on committees of the National Governor's Association and Council of State Planning Agencies relating to tax policy, statistical policy, and automation of information delivery.

Economist, Executive Office of the Governor, 1976-79.

- Developed the Idaho Economic Model and associated models for economic forecasting, revenue projections, income distribution, Medicaid costs, welfare caseload, etc.
- Edited and published the *Idaho Economic Forecast* and the *Idaho Outlook*.
- Chairman, Federal-State Cooperative Program for Population Projections, 1979-80.
- Prepared zero-based budgeting procedures for DFM and provided training to staff.

Adjunct Professor, Business, Albertson College of Idaho, 2004

Adjunct Associate Professor, Political Science and Economics, Boise State University, 1976-78, 1984

Assistant Professor of Political Science, West Georgia College, Carrollton, Georgia, 1972-76

Instructor, Colorado Woman's College, Denver, Colorado, 1972

Classroom teacher, Boise High School, Boise, Idaho, 1968-70

Selected Consulting Activity

International Consulting: Richard Slaughter recently served as interim Chief of Project and international economist for an Asian Development Bank project in Kyrgyzstan dealing with tax structure and social service delivery. In 1998 he consulted on revenue and economic forecasting models as part of a budgetary reform project for the Agency for Strategic Planning of the Republic of Kazakhstan.

Climate Change: Richard Slaughter is currently undertaking an analysis of the impact of climate change on energy and water related law and institutions in the Pacific Northwest as part of a larger project on

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climate change impacts. The study is organized by the Climate Impacts Group at the University of Washington, under sponsorship of the National Oceanic and Atmospheric Administration (NOAA).

Economic Valuation and feasibility: Richard Slaughter has performed economic loss analyses for clients in cases ranging from lost earnings and lifetime care costs to disparate impact, in employment, personal injury, and wrongful death cases. He has also performed feasibility studies on several projects, including a proposed siting of a regional shopping mall.

Utility Regulation: RSA has served as economic consultant to small power producers in numerous Idaho Public Utilities Commission cases, in the areas of cost of capital, avoided cost methodology, and ratepayer security.

Public Finance: Richard Slaughter served as internal financial consultant to the Idaho State Treasurer in 1982 and 1983; as financial consultant to Bankers Trust Company in 1985; and to the Idaho State Treasurer in 1986 with regard to issuance of tax anticipation notes. In 1982 and 1983, as Chief Economist of the State, Richard Slaughter designed and lobbied significant changes in tax law to facilitate solution of difficulties resulting from state revenue shortfalls.

Revenue Forecasting/Estimation: RSA has helped clients investigate the relationship of their businesses to their respective markets, and prepared a model for the City of Boise to estimate retail sales within the city limits from a variety of other data.

Resource Valuation: RSA has completed studies and provided testimony to the Idaho Land Board on resource values relative to leasing of public lands.

Public Policy Research/Education: RSA has completed studies on education and economic development, and provided input to statewide study groups on education reform. Richard Slaughter played an active role in education reform in Idaho from 1988 through 1994, coordinating efforts to improve the use and availability of technology and discussion of non-traditional education structures, including charter schools.

Resource Modeling and valuation: RSA has prepared complex commodity price and optimization models for a local multinational corporate client, and has analyzed the economic impact and value of natural resources in the economy.

Publications and Papers (does not include RSA research reports or op-eds)

"A Transactions Cost Approach to the Theoretical Foundations of Water Markets," *Journal of the American Water Resources Association* (JAWRA), 2009 (in press).

"Mandates vs. Markets: Addressing Over-Allocation of Pacific Northwest River Basins," *Water Policy*, 2009 (in press).

"The Climate Policy Dilemma: Which Way Forward," University of Washington Climate Impacts Group. In review, *Foreign Policy*, 2008.

"Water, Adaptation, and Property Rights on the Snake and Klamath Rivers," *Journal of the American Water Resources Association* (JAWRA), April 2007.

"Institutional History of the Snake River, 1850-2000." (University of Washington, Climate Impacts Group, 2004)

"Poor Kyrgyzstan: A Critique of Economic Development Policy," *The National Interest*, Summer 2002.

"Preparing for Climatic Change: the Water, Salmon, and Forests of the Pacific Northwest", Joint author with Philip Mote, et al., University of Washington Climate Impacts Group. *Climatic Change*, November 2003.

Revolution and Technology in Education. Unpublished paper, 1990. Portions published in *The IEA Tech Reporter*, Journal of the Idaho Education Association College of Education Technology, 1994.

"Dynamics of Education and Economic Growth, with Special Reference to Idaho." *Proceedings* of the Pacific Northwest Regional Economic Conference, Corvallis, OR, April 27-29, 1989.

Education and the Idaho Economy: The Dynamics of Education and Economic Growth in Idaho. Report of the Idaho Business Council subcommittee on education, 1989.

Ed., *Report of the Governor's Economic Research Council on the Idaho Economy.* Boise: Division of Financial Management, 1984.

“Idaho in Transition, 1970 - 2000.” Featured address to the *Idaho 2000 Symposium*, University of Idaho, Moscow, Idaho, October 20, 1983. *Idaho Economic Forecast*, Vol. V, No. 3, Autumn 1983.

“Statistical Quality Impacts of Federal Budget Reductions.” Invited testimony delivered to the House Subcommittee on Census and Population, March 16, 1982.

Publisher, the *Idaho Outlook*, 1981 - 84. Published monthly as an economic and General Account revenue update.

Editor and publisher, the *Idaho Economic Forecast*, 1979 - 84. Published three to four times a year since 1979. Incorporates detail and summary economic forecasts, alternative scenarios, forecast narrative, and invited articles.

“Idaho State Sales Tax Forecasting.” Invited paper for the *Proceedings* of the 1979 National Association of Tax Administrators Conference on Revenue Estimating, Washington, D. C.: Federation of Tax Administrators, 1980.

Public and Professional Service, Memberships, and Honors

Member, *Council on Foreign Relations*, New York, NY

Member, *American Water Resources Association*

Co-Founder, *American Committees on Foreign Relations (ACFR)*, Washington, DC, 1995

Vice-President, *ACFR*, Washington, DC, 2005 - present

Treasurer, *ACFR*, 1995 - 2001

Director, *Boise Committee on Foreign Relations*, in affiliation with the *Council on Foreign Relations*, New York, N. Y. 1989 - 1995, and *American Committees on Foreign Relations*, Washington, D.C., 1995 - present

Board of Directors, *The Frank Church Institute*, 2000 - present

Board of Directors, *Idaho Center for International Visitors*, 2006 - present

Advisory Board, *Martin Institute for Peace Studies and Conflict Resolution*, University of Idaho, 1992 - 1996, 2005 - present. Chairman, Executive Committee, 1995 - 1996

President, *Treasure Valley Economics Association*, 1993 - 1996

Board of Directors, *Boise Kiwanis Club*, 1991 - 1995

Board of Directors, *Capitol Youth Soccer Association*, 1980 - 89; Commissioner of Soccer, 1983-86

August 2008

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Appendix C

Listing of Recent Cases, Richard A. Slaughter

Listing of civil cases, not including regulatory commission proceedings, in which Richard A. Slaughter has testified, since January 2002:

Year	Attorney	Party	Case/Plaintiff	Trial	Deposition
2002	W. Dryden	Defendant	Gold v. City of Boise	No	No
2002	W. Dryden	Defendant	Thum v. Les Schwab	No	No
2002	J. Lynch	Defendant	Villegas-Corona v. Unipress	Scheduled	Yes
2002	D. Lojek	Plaintiff	Shauna Chapman	Settled	No
2002	G. Gilman	Plaintiff	Loya v. Ada Co. Paramedics	Scheduled	No
2002	D. Lojek	Plaintiff	Waters et al. V. Pinkerton's, Inc.	No	No
2003	L. Schroeder	Plaintiff	Ure v. Fannon	Yes	No
2003	G. Shockey	Plaintiff	Smith v. West Valley	Yes	Yes
2004	D. Lojek	Plaintiff	Drew v. Western Construction		Yes
2004	K. Lynch	Defendant	Brown v. Bates Rents	Yes	No
2005	R. Owen	Plaintiff	Schneider v. _____	Yes	No
2006	W. Thomas	Plaintiff	Cox/Falconberg v. Flying J	No	Yes
2006	J. Lynch	Defendant	Jones v. B&B McConkie v. Univ. of Utah Health Center	Yes	No
2007	G. Ferguson	Plaintiff	Grover v. Baird	Settled	Yes
2007	G. Ferguson	Plaintiff		Yes (no testimony)	Yes
2007	R. Powers	Defendant	Cramer v. Swanson	No	No
2007	B. Seiniger	Plaintiff	Bentley v. Lewis et al.	Yes	Yes
2007	D. Crandall	Plaintiff	Matthews v	(arbitration)	No
2008	C. Peterson	Plaintiff	Ferguson v. Williams & Hunt	Yes	No
2008	G. Ferguson	Plaintiff	Lee v. Joseph et al. Hassebrock v. Ogden Reg. Med. Center		Yes
2008	G. Ferguson	Plaintiff	Center		Yes
2008	S. Shah	Plaintiff	Staker v. Heiner		Yes

EXHIBIT 2
REPORT OF WILLIAM KARCHER

000420

JOHN STEM - LIFETIME COST FOR RIGHT BELOW KNEE PROSTHESIS

Usual and Customary Charges for Right Below Knee Prosthesis

RIGHT BELOW KNEE PROSTHETIC LEG w/ProPrio Foot		
L5301	1	\$2,843.00
L5637	1	\$303.00
L5910	1	\$368.00
L5940	1	\$633.00
L5620	2	\$604.00
L5645	1	\$810.00
L5629	1	\$323.00
L5673	2	\$1,456.00
L5671	1	\$674.00
L5981	1	\$3,324.00
L5968	1	\$3,619.00
L5999	1	\$12,500.00
L7368	1	\$503.00
L8420	12	\$252.00
L8470	6	\$66.00
*** TOTAL FOR EVERY 3 YEARS		\$28,278.00
RIGHT BELOW KNEE - BACK UP LEG		
L5301	1	\$2,843.00
L5637	1	\$303.00
L5910	1	\$368.00
L5940	1	\$633.00
L5620	2	\$604.00
L5645	1	\$810.00
L5629	1	\$322.00
L5671	2	\$1,348.00
L5673	1	\$1,456.00
L5980	1	\$4,113.00
L8420	12	\$252.00
L8470	6	\$66.00
***TOTAL FOR EVERY 3 YEARS		\$13,118.00

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RIGHT BELOW KNEE - EXERCISE/SWIM LEG		
L5301	1	\$2,843.00
L5637	1	\$303.00
L5910	1	\$368.00
L5940	1	\$633.00
L5620	2	\$604.00
L5645	1	\$810.00
L5629	1	\$322.00
L5671	2	\$1,348.00
L5673	1	\$1,456.00
L5980	1	\$4,113.00
L8420	12	\$252.00
L8470	6	\$66.00
***TOTAL FOR EVERY 3 YEARS		\$13,118.00
***EVERY YEAR		
4 SILICONE LINERS (1 to we	2	\$1,456.00
2 Dozen Prosthetic Socks - M	12	\$132.00
2 Dozen Prosthetic Socks - Si	24	\$504.00
Anti-perspirant, powder	4	\$88.00
Repairs and Adjustments 2 times per year		\$2,600.00
***TOTAL FOR YEARLY ITEMS		\$4,780.00
TOTAL FOR EVERY 3.5 YEARS FOR THE NEXT 60 YEARS		\$926,738.00
TOTAL FOR EVERY YEAR FOR THE NEXT 60 YEARS		\$286,800.00
** NOT ADJUSTED FOR INFLATION		

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**EXHIBIT 3
REPORT OF BETH CUNNINGHAM
AND JUNE FONTES**

000423

June L. Fontes
4335 S. Tinker Avenue
Boise, ID 83709
(208) 362-4891 or 871-1116
june83709@yahoo.com

Employment History:

Community Partnerships of Idaho, Inc.
3076 N. Five Mile Road
Boise, ID 83713
(208) 376-4999

May 1998 to Present

Vocational Evaluator/Employment Specialist

- Facilitated academic, aptitude, and vocational interest testing for people with disabilities and provided a summary of results and recommendations for vocational rehabilitation counselors.
- Met with client to complete intake interviews regarding their work history, disability implications, educational history, and vocational goals.
- Provided information on colleges and community courses for clients to consider.
- Met with employers and assisted clients in the application process when looking for work or on-the-job training.
- Provided work adjustment services once the client begins their employment.
- Completed vocational reports and progress notes. Updated counselors by telephone or e-mail.
- Input data on Quickbooks for employment department billing. Solve billing problems as needed.

Northview Hospital
(company is now called SunHealth Behavioral Health System)
8050 Northview Street
Boise, ID 83704
(208) 327-0504

March 1994 to January 1998

Recreation Therapist

- Completed individual assessments and recommended step by step objectives for individuals to take to reach their goals.
- Provided therapeutic recreational services for mental health patients, eighteen and older.
- Coordinated recreational activities for geriatric population such as exercise class, music, and current events.
- Worked with a team of professionals

Boise Samaritan Village

May 1990 to March 1994

3115 Sycamore Dr.
Boise, ID 83703
(208) 343-7726

Activity Coordinator

- Coordinated and directed recreational programs for residents of a long-term care facility.
- Completed activity assessments for each resident and completed daily and monthly progress notes.
- Encouraged and assisted residents in participation in recreational activities. Listened to residents needs.
- Member of an Inter-disciplinary team and the Employee Relations Committee.

Education:

Oklahoma State University, Stillwater, OK
Bachelor's of Science Degree

University of Idaho, Moscow, ID
Graduate level courses in

- Assessment and Evaluation in Therapeutic Recreation
- Recreation Therapy in Psychiatric Settings

Professional Affiliation:

Community Services Professional III –
National Registry of Certified Community Service Personnel

Beth Cunningham M.A., CRC, CVE
2414 N. Highwood Ave. Boise, Idaho 83713
(208) 376-4999 ext. 212/ 208 376-4999
(208) 484-1180

Objective

To serve individuals with disabilities by providing vocational counseling, exploration, assessment, and the identification of needs which will help with obtaining employment and achieving independence.

Education

1993- Graduated with a M.A. in Rehabilitation Counseling with an emphasis in Vocational Evaluation from the University of Northern Colorado.

1991- Graduated with a B.A. in Psychology from the University of Tennessee in Knoxville, Tennessee.

2001- Obtained a Certification in Rehabilitation Administration from Western Washington University.

Credentials

- Certified Rehabilitation Counselor since October of 1993. CRC # 00011818 through September 2008.
- Certified Vocational Evaluator since April of 1994. CVE # V3304 through April 2009.

Rehabilitation Counseling Experience

2005- Present- Work on a contract basis for the Social Security Administration as a Vocational Expert providing Vocational Expert Testimony in OHA Hearings.

February 2000- Currently- Director of the Employment Department of Community Partnerships of Idaho. I oversee all employment services provided to individuals with disabilities. I supervise the employment coordinators, vocational evaluator, employment specialists and the job coaches. I ensure that standards are met to adhere to our certifying body, RSAS, and ensure contract requirements with the VA Vocational Rehabilitation, the Idaho Division of Vocational Rehabilitation and Health and Welfare.

1997- 2000- Evaluation Coordinator for Community Partnerships of Idaho. I Developed the evaluation program serving individuals with disabilities referred by the Idaho Division of Vocational Rehabilitation, the State Insurance Fund, the Industrial Commission and some private consumers. In 1999, we began serving Veterans with disabilities by providing initial evaluation services for the VA Vocational Rehabilitation office. I also trained and supervised staff in providing community based work evaluations in Ada, Canyon, and Owyhee counties.

1994-1997- Worked as a Rehabilitation Counselor for the Idaho Division of Vocational Rehabilitation. Started the School to Work Transition caseload in the Caldwell office, Region VII. In this position, I was the rehabilitation counselor for High School students with disabilities for nine different schools in seven different towns in the rural communities of Canyon, Owyhee, and Gem counties.

1993-1994- Worked as a Vocational Evaluator, managing the Evaluation Unit of the Regional Assessment and Training Center in Denver Colorado. Evaluations were contracted by Colorado Rehabilitation Services and Ft. Logan Mental Health Department.

Professional Memberships

- I have been a member of the National Rehabilitation Association since 1992. I served as the Idaho Membership Chairperson from 1994-1996 and Chapter President in 2001.
- I have been a member of the American Rehabilitation Counseling Association (ARCA) since 1999.

000426



3076 N Five Mile Rd * Boise, ID 83713 * Ph: (208) 376-4999 * Fax:(208) 376-4988

FAX

Confidential Urgent

TO:

Date: 1/26/09

Number of pages including cover sheet: _____

FROM: Beth

Cunningham

Community Partnerships of Idaho
3076 N Five Mile Rd
Boise, ID 83713

Phone: (208) 376-4999 ext _____

Fax: (208) 376-4988

e-mail: _____@cp-of-idaho.com

PHONE: _____

FAX: _____

REMARKS:

Re: John Stem

Confidential Notice:

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* Urgent * FYI * Reply ASAP * Please comment * Process * Per your request *



Community Partnerships
of Idaho, Inc.

Vocational Evaluation Report

Evaluation Dates:	October 30, 2008
Client:	John Stem
Referral Source:	Cindy Lijewski, M.S. Idaho Industrial Commission Rehabilitation Division 4355 W. Emerald, Suite 105 Boise, ID 83706

Referral instructions/questions:

1. Is formal education a good choice at this time?
2. Observations of effort at evaluation
3. Provide recommendations for a vocational goal

Background Information/ Work History

John is a twenty-four year old male. His primary disability is right below the knee amputation pre workers comp claim. Secondary disabilities as reported by his mother are dyslexia and IQ-72; attended Special Education courses at Borah High School and graduated in 2003.

He is to lift no greater than twenty pounds, no frequent lifting, bending, or twisting. No prolonged standing or walking. Light duty is okay but needs to change positions frequently. No squatting or lifting from chair to floor level or kneeling.

John has worked as a granite polisher but due to permanent restrictions is not able to return to this vocation. He has also installed tile, carpet and vinyl. He has worked as a warehouse person and his job duties were to pull orders, inventory control, provide customer services and maintain safe operations of a forklift. John has completed welding classes also.

Tests Administered (please see test descriptions in the appendix)

- COPS
- COPS Cards
- CAPS aptitude test
- ABLE-Reading Comprehension

Results

Interests

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COPS- the client's performance indicated that his job preferences are in the following areas; these are rated from his highest interest to his lowest interest area.

Science Professional 76% Skilled 83%

Technology Professional 80% Skilled 55%

Consumer Economics 60%

Outdoor 80%

Business Professional 90% Skilled 93%

Clerical 59%

Communication 98%

Arts Professional 85% Skilled 85%

Service Professional 98% Skilled 86%

John researched his top categories and read through the job descriptions and training requirements. He then chose the following jobs as most interesting to him.

1. Buyer
2. Claim Adjuster
3. Sales Representative, Wholesale
4. Editor, Magazine
5. Historian
6. District Attorney
7. Lawyer, Criminal
8. Investigator
9. Tile Decorator
10. Web Designer
11. Detective
12. Preschool, Teacher

Aptitudes

The Career Ability Placement Survey CAPS was administered to the client to assess his career abilities. This test identifies aptitudes, which relate to the same occupational fields as the COPS interest inventory. These aptitudes can be compared with the client's interests as identified on the COPS. The aptitudes assessed are defined below:

Mechanical reasoning: measures how well you understand mechanical principles and

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the laws of physics. This ability is important especially in courses in industry, arts, and occupations in technology as well as jobs in science.

Spatial relations: measures how well you can visualize or think in three dimensions and mentally picture the positions of objects from a diagram or picture. The ability is important in courses in art and industrial arts and jobs in science technology and arts.

Verbal reasoning: measures how well you can reason with words and your facility for understanding and using concepts expressed in words. The ability is more important in general academic success and in jobs requiring written or oral communication, especially professional level occupations in communication, science, and service involving high levels of responsibility and decision making.

Numerical ability: measures how well you can reason with and use numbers and work with quantitative materials and ideas. This ability is important in school courses and jobs in fields of science and technology involving mathematics, chemistry, physics, or engineering and in business and clerical fields.

Language usage: measures how well you can recognize and use Standard English grammar, punctuation, and capitalization. The ability is especially important in jobs requiring written or oral communication and in clerical jobs as well as professional level occupations in science, and in all levels of business and service.

Word knowledge: measures how well you can understand the meaning and precise use of words. This is important in communication and all professional level occupations involving high levels of responsibility and decision making.

Perceptual speed & accuracy: measures how well you can perceive small detail rapidly and accurately within a mass of letters, numbers, and symbols. This ability is important in office work and other jobs requiring fine visual discrimination.

Manual speed & dexterity: measure how well you can make rapid and accurate movements with your hands. This ability is important in arts, skilled and technology, skilled occupations, and other jobs requiring use of the hands.

The client's performance yielded the following results:

Subtest	Percentile	Rating
Mechanical Reasoning	17%	Below average
Spatial Relations	8%	Low
Verbal Reasoning	2%	Very low
Numerical Ability	2%	Very low
Language Usage	17%	Below average
Word Knowledge	8%	Low
Perceptual Speed and Accuracy	17%	Below average
Manual Speed and Dexterity	17%	Below average

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The client demonstrated aptitudes consistent with many fields of interest. With the proper training, he has the aptitude to be successful in the following fields:

- Technology Skilled (score is on the cut off line)
- Outdoor
- Service Skilled

Therefore, the client demonstrated aptitude to pursue a career in the areas of security guard (more sedentary), taxi driver, bus driver, watch repairer or jeweler, locksmith, benchwork (assembler/electronics), parking lot attendant, service station attendant, courier or ticket taker.

Academic Achievement

The **Adult Basic Learning Examination (ABLE)** has been used to assess the client's academic skills in the following subtests:

Subtest	No. of items	Raw Score	Grade Equivalent	Stanine	%ile	Rating
Reading Comprehension	48	30	7.2	3	22	Low

The Norms used for this test are ABE/GED.

John's reading comprehension score is at 7.2 grade equivalency. He may want to receive tutorial assistance to improve his academic skills.

Observations

John was punctual for his evaluation. He was pleasant and polite. This evaluator observed John expressing his sense of humor about things during the evaluation. He spoke openly about who he was going to vote for and said that if the other guy won he was moving to Canada. His saying this made me think that he is opinionated about certain things and is not shy about saying what he thinks.

When completing the grammar section of the CAPS test he said he couldn't do it but the evaluator encouraged him to do what he could and he said "I will try". Evaluator explained directions on several of the CAPS tests to assist John in understanding how to complete the test. He found the Word Knowledge section on the CAPS to be challenging for him.

John spoke of working with his dad and the business that they had (still maintain the name) together. He said that he was making very good money at this job. It may be that he is looking for an occupation where he can make the same amount of money and he may find this difficult to do at this time. John volunteers at Snake River Truck presently. John said that he helps out when people need assistance such as with rebuilding a carburetor. He works helping customize vehicles. John said that he scoots around on a

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small chair when working at the shop. He also answers the telephone at the shop.

John shared his interest in car shows and really enjoys going to them. He said he is skilled in fabricating and design but not in mechanics or wiring on automotive vehicles. He told this evaluator about his vehicle (that was parked in the CPI parking lot) and how proud he was of the work he completed on it. This evaluator went out to see it and was impressed with his customizing work.

Summary and Recommendations

John has interest in several vocational categories. His highest interest is in Communication and Service Professional. Occupations he selected as his top choices are:

- Buyer
- Claim Adjuster
- Editor, Magazine
- Historian
- District Attorney
- Lawyer, Criminal
- Investigator
- Detective
- Preschool, Teacher
- Sales Representative, Wholesale
- Tile Decorator (would need to be small and light weight)
- Web Designer

Although John has interest in these areas they would require further education such as a bachelors or masters degree in college. His reading comprehension is at 7.2 grade equivalency. It would seem that short term or on-the-job training for John would be more suitable and beneficial to John in seeing success in a vocational pursuit.

Occupations that match John's aptitude and interest and are within his physical capabilities are:

- security guard (more sedentary would be best but some security jobs require standing as well and he will need to take this into consideration)
- taxi driver (John uses a left side accelerator (injury on right side) and can use a right side accelerator also) –vehicle may need to be accommodated for John
- bus driver (refer to information above under taxi driver)
- watch repairer - benchwork
- sign shop
- locksmith
- benchwork (assembler/electronics)
- parking lot attendant –cashier in booth at parking garages
- service station attendant
- courier

- ticket taker- theatres
- Idaho Auto Auction-picking up/delivering cars
- Soldering- benchwork
- Telephone Research (Northwest Research, All American Sports Publishing,)
- Screen-printing (OJT)
- Framing, Art – with physical accommodations

Service Recommendations

1. To receive On-the-Job Training.

Rationale: John could receive on-the-job training while working and be provided the accommodations necessary for him to be successful. He has interest in designing/arts. It would be beneficial to him to find an occupation that provided him the opportunity to utilize his artistic talents.

2. To participate in some Job Seeking Skills training

Rationale: To further develop interviewing skills, complete a resume and practice completing applications. This will help to establish job readiness skills, assess motivation and teach job retention skills. Recommendations are for 2-3 hours of Job Seeking Skills training.

3. Site development; work adjustment and placement services

Rationale: To assist John in finding employment, that meets his interests and aptitudes, as well as location and other job preferences (approx. 10-15 hours). Work adjustment will help him to adjust to a new routine and establish a working relationship with the employer and co-workers. Placement and follow along services will be utilized to maintain good working relationships and ensure job satisfaction and long term retention.

Thank you for this referral,

Beth Cunningham

Beth Cunningham, M.A., CRC, CVE
Employment Director
Community Partnerships of Idaho

June Fontes

June Fontes
Vocational Evaluator

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Appendix

The Career Occupational Preference System (COPS) is designed to identify the ranking interests of a client in nine traditional areas of vocational activity. The areas addressed in this test are Science, Technology, Consumer Economics, Outdoor, Business, Clerical, Communication, Arts and Service.

The Career Ability Placement Survey was designed to accompany the COPS. It measures aptitude and reveals strong and weak areas to assess an individual's likeliness to be successful in particular occupational fields. The following subtests were administered.

Verbal Reasoning
Numerical Reasoning
Language Usage
Word Knowledge
Perceptual Speed and accuracy
Manual Speed and Dexterity
Mechanical Reasoning
Spatial Relations

The Wide Range Achievement Test (WRAT-3) is a standardized test of school achievement in reading (word recognition and pronunciation), spelling, and arithmetic computation.

**EXHIBIT 4
RESUME OF MARK HEDGE**

000435



LOCHSA ENGINEERING

MARK L. HEDGE, P.E.
PRINCIPAL

JESS S. HALDEMAN, S.E.
MARK L. HEDGE, P.E.
KENNETH W. (BILL) KAPREN, JR., S.E.
DAVID S. PETERSON, S.E.
TED T. EGERTON, P.E.
KENDARD F. MIZE, P.E.
JOHN R. ZIELINSKI, S.E.

EDUCATION

University of Idaho, B.S.C.E. - 1985

PROFESSIONAL ORGANIZATIONS

NSPE, ACEC

PROFESSIONAL LICENSES

Professional Engineer - Nevada # 8445
Professional Engineer - Idaho #9533
Professional Engineer - Arizona #34668
Professional Engineer - Michigan #6201049667
Professional Engineer - Utah #5610148-2202
Professional Engineer - Colorado #42596

GENERAL EXPERIENCE

Mr. Hedge has practiced Civil Engineering since 1985. He has worked on public and private site development projects throughout all of Nevada and in parts of Idaho, Arizona, Utah and Colorado. This work included management and design of various aspects of projects including geometry calculations, grading and street design, as well as water, sewer and drainage design and analysis. He is familiar with the many aspects of surveying and master planning. Multiple educational, commercial and resort projects have been developed with his assistance. He is currently the managing principal of a multi-company organization.

RELATED EXPERIENCE

Mr. Hedge has served as a Principal in charge or Project Manager of civil engineering on the following site development projects:

- Arroyo Market Center and Business Park, Las Vegas, Nevada
- Beltway Business Park, Las Vegas, Nevada
- Mandalay Mile, Las Vegas, Nevada
- Majestic Runway Commercial and Industrial Parks, Las Vegas, Nevada
- Cannery Casinos - All projects.
- Panorama Towers - All Phases, Las Vegas, Nevada.
- One Las Vegas Condominiums, Las Vegas, Nevada.
- The Palms Hotel & Casino all phases, Las Vegas, Nevada
- Trendwest Timeshare, Las Vegas, Nevada
- Fiesta Hotel & Casino Expansion, Las Vegas, Nevada
- Tuolumne Indian Casino, Sonora, California
- Pala Band Indian Casino, Pala, California
- CityCenter Resort, Las Vegas, Nevada
- Mandalay Bay Hotel/Casino, Las Vegas, Nevada
- 100± Clark County Elementary, Middle and High Schools, Clark County, Nevada
- Metro Northwest Substation & Academy, Las Vegas, Nevada

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CIVIL AND STRUCTURAL ENGINEERING

- UNLV Campus – Various Projects, Las Vegas, Nevada
- RTC Building, Las Vegas, Nevada
- Hollywood / Sahara Park, Clark County, Nevada
- Wynn Golf Course, Las Vegas, Nevada
- Faith Lutheran High School – All phases, Las Vegas, Nevada
- Green Valley Ranch Library, Henderson, Nevada: New library.
- Community College of Southern Nevada – (Now CSN), Clark County, Nevada
- Opportunity Village, Las Vegas, Nevada
- Residential Projects throughout Clark County, Nevada.
- Desert Breeze Park, Las Vegas, Nevada: 40-acre soccer park

Mr. Hedge has also assisted as an expert witness on the following Nevada legal cases:

- The Falls at Hidden Canyon for Sage Construction – 2001
- Resort Villas vs. L.R. Nelson for Wiczorek & Associates – 2002
- Steel Residence for Rowling, Olsen, et al – 2002
- Siena Village, LLC. vs. Vpoint Engineers for Weil & Drage – 2003
- Saxton vs. Sunrise Ridge H.O.A in Defense of Southwest Engineers for Collins, Collins, Muir & Stewart – 2003
- American Asphalt – Allure H.O.A vs. Glen View for Thorndal Associates – 2004
- American Asphalt – Belle Espirit H.O.A. vs. Bonanza Holdings for Thorndal Associates – 2004
- Fairway Villas vs. Bramble Development in Defense of Western Pipeline for Thorndal Associates - 2004
- Fiesta Apartments vs. Falcon Development in Defense of Southwest Engineers for Drage & Olson - 2004
- Bullock Brothers Septic Defense for Drage & Olson – 2004
- Valley Electric Associates vs. National Horizon in Defense of Orion Engineering for Collins, Collins, Muir & Stewart – 2004
- Perlman Architect Defense Assistance for Drage & Olsen – 2004
- Westgate Properties vs. Vpoint Engineers for Weil & Drage – 2006.

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LOGHSA ENGINEERING

JESS S. HALDEMAN, S.E.
 MARK L. HEDGE, P.E.
 KENNETH W. (BILL) KARREN, JR., S.E.
 DAVID S. PETERSON, S.E.
 TED T. EGERTON, P.E.
 KENDARD F. MIZE, P.E.
 JOHN R. ZIELINSKI, S.E.

LEGAL HOURLY RATE SCHEDULE

<u>Billing Discipline</u>	<u>Preparation Work/Research</u>	<u>*Depositions/ Court Appearance</u>
Principal Civil Engineer	\$220.00	\$440.00
Civil Engineer	\$140.00	\$280.00
Civil Draftsman.....	\$120.00	N/A
Principal Traffic Engineer.....	\$220.00	\$440.00
Principal Structural Engineer	\$220.00	\$440.00
Associate Traffic Engineer	\$180.00	\$320.00
Structural Engineer	\$140.00	\$280.00
Structural Draftsman	\$120.00	N/A
Designer/Sr. Designer	\$130.00	\$225.00

**Four Hour Minimum*

Rates listed are effective February 2008 and include all wages, salaries and insurance.

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CIVIL AND STRUCTURAL ENGINEERING

EXHIBIT 5
RESUME OF GREG SCHWEIGER

000439

7045 Carriage Hill Dr.
Suite. 103
Brecksville, OH 44141
Phone (440) 717-1672

Gregory Paul Schweiger, M.D.

Education

Orthopaedic Trauma Fellowship
MetroHealth Medical Center
Case Western Reserve University
Cleveland, OH
Aug, 1998 – July, 1999

Orthopaedic Surgery Residency
The Ohio State University Hospitals
Columbus, OH
July 1994 – June 1998

General Surgery Internship
The Ohio State University Hospitals
Columbus, OH
July 1993 – June 1994

University of Southern California School of Medicine
Los Angeles, CA
M.D. May 1993

California State University Sacramento
Sacramento, CA
B.A. Chemistry with Honors, May 1989

Board

Board Eligible, July 1998

Certification

July 2002

License

State Medical Board of Ohio, June 1997

000440

Research

Torburn, L. Schweiger, G.P. Perry, J. Below-Knee Amputee Gait in Stair Ambulation, A Comparison of Stride Characteristics Using Five Different Prosthetic Feet. C.O.R.R. 303, 185-192, 1994

Schweiger, G.P. Cook, P. Evaluation of the Distal Radioulnar Joint: A Comparison of Axial Radiographs and CT Imaging.

Interests

Downhill skiing, water skiing, fly-fishing, hunting

References

Carl R. Coleman, M.D.
3600-B Olentangy River Rd. Columbus, OH 43214. (614) 451-3231

John B. Roberts, M.D.
410 W. 10th Ave. N-1050 Doan Hall, Columbus, OH 43210.
(614) 293-8578

Richard Fischer, M.D.
4219 W. San Louis St. Tampa, FL 33629. (813) 837-9870

Brendan Patterson, M.D.
Department of Orthopaedics, MetroHealth Medical Center,
Cleveland, OH 44109. (216) 778-3896

EXHIBIT 6
MEDICAL BILLS WITH MICHAEL McMARTIN

000442



ANDERSON, JULIAN & HULL LLP

ATTORNEYS AND COUNSELORS AT LAW

Robert A. Anderson
Brian K. Julian
Alan K. Hull
Chris H. Hansen
Phillip J. Collaer
Michael P. Stefanic
Amy G. White

Justin P. Aylsworth
Mark D. Sebastian
Matthew O. Pappas
Rachael M. O'Bar
Davis F. VanderVelde
Stephen L. Adams
Robert A. Mills

C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208)344-5800
Facsimile: (208)344-5510

Kenneth D. Nyman
(of Counsel)

e-mail: ajh@ajhlaw.com
Web Site: www.ajhlaw.com
With Attorneys Licensed to Practice in
Idaho, AZ, CO, MD, NV, OR, PA and WA

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DATE: July 1, 2008

SENT TO: Douglas Crandall 336-2088

FROM: Alan K. Hull / Matthew O. Pappas
ANDERSON, JULIAN & HULL, LLP

This message consists of 8 page(s), including this cover page. Please check to see if you received the correct number of pages; if not, kindly contact us immediately either by return facsimile or by telephone.

Original to Be Sent Via Regular Mail: Yes ___ No X

Re: Case Name: John Stem

Client No.: 638 Matter No.: 251

Note or special instructions: Updated benefits history

BREAKDOWN OF BENEFITS

CLAIMANT: John Stem
 CLAIM: 200622371
 CLMT ATTY: Douglas Crandall, Esq
 DATE: 5/14/2007

EXAMINER: Donna Young
 SIF ATTY: Alan Hull, Esq

Medical Breakdown

Vendor	Date of Service	Amount Paid	Date Paid
Gem State Radiology ✓	11/29/06	\$127.50	12/17/06
Orthopaedic Associates	11/29/06	\$8,416.16	12/31/06
Ada County Emergency Services ✓	11/29/06	\$1,223.13	12/17/06
Boise Orthopedic Clinic	12/05/06	\$169.65	12/25/06
Gem State Radiology ✓	12/01/06	\$283.90	12/25/06
St Alphonsus RMC ✓	11/29/06	\$43,113.85	12/25/06
Gem State Radiology ✓	11/29/06	\$101.15	12/25/06
Gem State Radiology ✓	02/01/06	\$20.40	12/25/06
Idaho Emergency Physicians	11/29/06	\$377.65	12/25/06
St Alphonsus RMC ✓	12/06/06	\$10,773.86	12/25/06
St Alphonsus RMC ↓	12/7/06-12/11/06	\$194.92	12/25/06
Boise Anesthesia	11/29/06	\$1,849.51	12/31/06
St Alphonsus RMC ✓	12/15/06	\$270.31	12/31/06
St Alphonsus RMC ↓	12/14/06	\$422.61	01/07/07
Working Rx	12/11/06	\$1,169.22	01/07/07
Working Rx	12/11/06	\$129.73	01/07/07
Boise Physical Medicine ✓	12/5/06-12/19/06	\$1,174.55	Multiple
Boise Anesthesia	12/15/06	\$581.90	01/07/07
Gem State Radiology ✓	12/17/06	\$305.20	01/07/07
Orthopaedic Associates	12/15/06	\$66.30	01/07/07
Orthopaedic Associates	01/02/07	\$491.05	01/15/07
Orthopaedic Associates	12/29/06	\$553.13	01/15/07
Orthopaedic Associates	12/26/06	\$428.51	01/15/07
Orthopaedic Associates	12/18/06	\$428.51	01/15/07
Orthopaedic Associates	12/15/06	\$428.51	01/15/07
Boise Anesthesia	12/18/06	\$465.52	01/15/07
Gem State Radiology ✓	12/29/06	\$209.20	01/15/07
Idaho Emergency Physicians	12/14/06	\$47.45	01/21/07
St Alphonsus Trauma Physicians ✓	12/01/06	\$48.13	01/21/07
Orthopaedic Associates	12/22/06-1/5/07	\$919.56	01/15/07
Boise Anesthesia	12/26/06	\$523.71	Multiple
Thomas Coffman, MD	12/17/06-12/26/06	\$360.75	02/11/07
Boise Physical Medicine ✓	1/4/07-1/7/07	\$518.05	02/25/07
Boise Anesthesia	12/29/06	\$581.90	01/28/07
Boise Anesthesia	12/22/06	\$523.71	01/28/07
St Alphonsus Trauma Physicians ✓	11/29/6-12/3/06	\$240.42	01/28/07
Working Rx	01/16/07	\$278.30	01/28/07
Working Rx	01/16/07	\$12.66	01/28/07
Boise Anesthesia	01/05/07	\$581.90	02/04/07
Working Rx	1/16/07-1/17/07	\$3,779.43	01/28/07
Mednow Home Infusion ✓	01/17/07	\$2,350.00	02/04/07

BREAKDOWN OF BENEFITS

CLAIMANT: John Stem
 CLAIM: 200622371
 CLMT ATTY: Douglas Crandall, Esq
 DATE: 5/14/2007

EXAMINER: Donna Young
 SIF ATTY: Alan Hull, Esq

Gem State Radiology ✓	1/12/07-1/13/07	\$510.70	02/04/07
Norco Inc ✓	12/11/07-1/11/07	\$286.94	02/11/07
Boise Anesthesia	01/02/07	\$523.71	02/11/07
St Alphonsus RMC ✓	01/23/07	\$211.27	04/08/07
Gem State Radiology ✓	11/29/06	\$90.00	02/11/07
Boise Anesthesia	01/11/07	\$581.90	02/11/07
Claimant Travel Reimbursement	02/06/07	\$388.21	02/06/07
St Alphonsus RMC ✓	12/15/06	\$158,261.90	03/11/07
St Alphonsus RMC ✓	12/19/06-1/16/07	\$1,119.10	02/11/07
Emergency Medicine of Idaho	01/17/07	\$73.78	02/19/07
Mednow Home Infusion ✓	01/23/07	\$4,189.95	02/19/07
Emergency Medicine of Idaho	01/26/07	\$73.78	02/19/07
Emergency Medicine of Idaho	01/29/07	\$52.84	02/19/07
Norco Inc ✓	01/11/07	\$200.99	02/19/07
Orthopaedic Associates	01/31/07	\$60.35	02/19/07
Working Rx	02/01/07	\$202.46	02/19/07
Mtn States Counseling ✓	02/08/07	\$142.78	02/19/07
Emergency Medicine of Idaho	01/15/07	\$136.50	02/19/07
Working Rx	02/06/07	\$309.85	02/19/07
Bruno Granwehr, MD	12/18/06-12/29/06	\$366.60	02/25/07
Harmon Travel Services Inc.	02/05/07	\$136.80	02/19/07
Boise Anesthesia	01/08/07	\$640.09	02/25/07
Norco Inc	1/16/07-2/11/07	\$239.39	02/25/07
Harmon Travel Services Inc.	02/05/07	\$136.80	02/25/07
Emergency Medicine of Idaho	02/02/07	\$548.17	03/04/07
Mtn States Counseling	01/31/07	\$250.00	03/04/07
Sky Blue, Md	12/16/06-1/12/07	\$469.95	03/04/07
Mednow Home Infusion	02/02/07	\$5,906.40	03/04/07
Boise Physical Medicine	12/11/06	\$320.75	03/04/07
Working Rx	02/21/07	\$824.20	03/04/07
St Alphonsus Home Health	1/17/07-1/23/07	\$210.60	03/04/07
Nootka Hotels Inc	02/12/07	\$321.36	03/04/07
Assoc of University Physicians	02/13/07	\$432.10	03/11/07
KCI USA Inc.	1/16/07-1/25/07	\$735.00	03/11/07
KCI USA Inc.	02/13/07	\$125.00	03/11/07
St Alphonsus Home Health	12/12/06-12/14/06	\$876.20	03/18/07
Boise Physical Medicine	1/12/07-1/16/07	\$277.55	03/11/07
Medical Services Company	01/16/07	\$4,935.00	03/25/07
Orthopaedic Associates	02/09/07	\$71.40	03/11/07
Assoc of University Physicians	02/12/07	\$311.30	03/11/07
Mednow Home Infusion	2/16/07-2/28/07	\$7,884.34	03/25/07
Working Rx	03/01/07	\$469.30	03/18/07
Orthopaedic Associates	02/23/07	\$1,402.31	03/25/07
Orthopaedic Associates	02/23/07	\$60.35	03/18/07
Boise Physical Medicine	2/6/07-3/1/07	\$335.40	03/18/07
Mtn States Counseling	03/05/07	\$142.78	03/18/07
Orthopedic Surgery Center	02/23/07	\$1,402.31	03/25/07
Idaho Elks Rehab Hospital	1/17/07-2/28/07	\$6,665.20	Multiple

BREAKDOWN OF BENEFITS

CLAIMANT: John Stern
 CLAIM: 200622371
 CLMT ATTY: Douglas Crandall, Esq
 DATE: 5/14/2007

EXAMINER: Donna Young
 SIF ATTY: Alan Hull, Esq

St Alphonsus RMC	02/22/07	\$130.95	03/25/07
Mednow Home Infusion	03/06/07	\$4,403.30	03/25/07
Medical Services Company	1/25/07-2/15/07	\$2,800.00	03/25/07
Emergency Medicine of Idaho	2/21/07-2/28/07	\$147.56	03/25/07
Idaho Emergency Physicians	02/22/07	\$109.20	03/25/07
Norco Inc	03/11/07	\$55.00	03/25/07
Brownfields	03/09/07	\$148.76	03/25/07
Emergency Medicine of Idaho	03/07/07	\$73.70	03/31/07
Orthopaedic Associates	03/07/07	\$60.35	03/31/07
Orthopaedic Associates	1/8/07-1/11/07	\$1,315.76	04/08/07
Boise Physical Medicine	03/20/07	\$218.61	03/31/07
Medical Services Company	02/24/07	\$1,500.00	03/31/07
Emergency Medicine of Idaho	03/14/07	\$73.78	04/08/07
Orthopedic Ambulatory	02/23/07	\$756.47	03/31/07
Norco Inc	02/12/07	\$200.75	04/15/07
Working Rx	03/28/07	\$407.53	04/08/07
Idaho Emergency Physicians	03/19/07	\$105.84	04/15/07
Mednow Home Infusion	03/16/07	\$5,702.80	04/15/07
St Alphonsus RMC	03/28/07	\$1,118.40	04/15/07
Mtn States Counseling	03/20/07	\$142.78	04/15/07
Mtn States Counseling	03/27/07	\$142.78	04/15/07
Gem State Radiology	03/28/07	\$123.25	04/15/07
St Alphonsus RMC	03/19/07	\$445.52	04/15/07
Working Rx	04/04/07	\$125.33	04/22/07
Orthopaedic Associates	03/28/07	\$85.00	04/22/07
Emergency Medicine of Idaho	03/28/07	\$127.84	04/22/07
Working Rx	04/13/07	\$407.53	04/29/07
St Alphonsus RMC	04/03/07	\$88.80	04/29/07
Emergency Medicine of Idaho	04/11/07	\$73.78	04/29/07
Working Rx	04/20/07	\$163.40	05/06/07
Emergency Medicine of Idaho	04/12/07	\$182.05	05/06/07
Idaho Emergency Physicians	04/03/07	\$68.67	05/06/07
St Alphonsus RMC	05/03/07	-\$3,892.93	05/03/07
Boise Physical Medicine	05/01/07	\$109.00	05/13/07
Floto Pharmacy	04/02/07	\$265.00	05/13/07
Emergency Medicine of Idaho	04/25/07	\$148.78	05/13/07
Idaho Elks Rehab Hospital	2/28/07-3/14/07	\$969.22	05/13/07
Orthopaedic Associates	04/26/07	\$4,734.93	05/20/07
St Alphonsus RMC	04/26/07	\$12,917.33	05/28/07
Working Rx	05/04/07	\$336.30	05/20/07
Working Rx	05/04/07	\$1,238.30	05/20/07
Idaho Elks Rehab Hospital	03/28/07	\$1,037.88	05/20/07
Working Rx	05/09/07	\$487.31	05/20/07
ATS Wheelchair & Medical	5/1-5/4/07	\$128.95	05/20/07
Norco Inc	2/24-3/24/07	\$18.00	05/20/07
Boise Physical Medicine	05/11/07	\$218.61	05/28/07
Orthopaedic Associates	05/09/07	\$64.60	05/28/07
St Alphonsus Pathology	04/26/07	\$219.06	05/28/07

BREAKDOWN OF BENEFITS

CLAIMANT: John Stem
 CLAIM: 200622371
 CLMT ATTY: Douglas Crandall, Esq
 DATE: 5/14/2007

EXAMINER: Donna Young
 SIF ATTY: Alan Hull, Esq

Mtn States Counseling	05/03/07	\$142.78	05/28/07
Boise Physical Medicine	4/27-5/4/07	\$386.21	05/28/07
Norco inc	03/30/07	\$3,236.96	06/10/07
Boise Physical Medicine	05/02/07	\$224.29	06/10/07
Working Rx	05/25/07	\$107.34	06/10/07
Idaho Orthotic & Prosthetic	05/11/07	\$192.64	Multiple
Hands on Physical Therapy	06/01/07	\$154.88	06/17/07
Hands on Physical Therapy	06/04/07	\$160.03	06/17/07
Working Rx	06/01/07	\$493.74	06/17/07
Working Rx	06/05/07	\$620.30	06/17/07
Idaho Elks Rehab Hospital	1/22-3/15/07	\$4,873.90	06/24/07
John Bishop MD	04/26/07	\$566.08	06/17/07
Boise Physical Medicine	06/05/07	\$218.61	06/24/07
Idaho Orthotic & Prosthetic	5/11-5/30/07	\$3,600.43	06/24/07
Orthopaedic Associates	06/13/07	\$60.35	06/24/07
Working Rx	06/19/07	\$290.24	07/15/07
Working Rx	06/22/07	\$238.23	07/08/07
Idaho Elks Rehab Hospital	05/07/07	\$2,093.00	07/15/07
Mednow Inc	06/19/07	\$24.50	07/15/07
Working Rx	06/28/07	\$463.99	07/15/07
Working Rx	07/09/07	\$12.30	07/22/07
Idaho Orthotic & Prosthetic	07/13/07	\$13,907.67	07/29/07
Claimant Travel Reimbursement	07/19/07	\$7,375.00	07/19/07
Idaho Elks Rehab Hospital	06/04/07	\$1,749.20	08/12/07
Working Rx	07/23/07	\$572.04	08/05/07
Working Rx	07/23/07	\$117.74	08/05/07
Mtn States Counseling	07/11/07	\$145.20	08/05/07
Idaho Orthotic & Prosthetic	07/18/07	\$659.05	08/05/07
Idaho Orthotic & Prosthetic	05/03/07	\$1,542.60	08/12/07
Boise Anesthesia	04/26/07	\$1,338.37	08/12/07
Idaho Elks Rehab Hospital	07/24/07	\$240.56	08/19/07
Boise Physical Medicine	06/28/07	\$162.54	08/19/07
Working Rx	08/13/07	\$481.42	08/26/07
St Alphonsus Rehab	04/05/07	\$97.66	08/26/07
Idaho Elks Rehab Hospital	04/04/07	\$2,036.80	08/26/07
Idaho Orthotic & Prosthetic	08/20/07	\$1,936.91	08/31/07
Orthopaedic Associates	08/15/07	\$227.14	09/16/07
Boise Physical Medicine	08/15/07	\$162.54	09/16/07
Idaho Elks Rehab Hospital	07/09/07	\$310.40	09/16/07
Orthopaedic Associates	08/29/07	\$227.14	09/30/07
Center for Wound Healing	07/24/07	\$148.78	09/16/07
Idaho Elks Rehab Hospital	08/14/07	\$102.68	10/08/07
Mtn States Counseling	09/25/07	\$145.20	10/08/07
Working Rx	09/27/07	\$329.09	10/14/07
Working Rx	09/27/07	\$208.36	10/14/07
Mtn States Counseling	09/17/07	\$145.20	10/14/07
Idaho Elks Rehab Hospital	04/27/07	\$7,794.23	10/21/07
Boise Physical Medicine	09/27/07	\$162.54	10/14/07

BREAKDOWN OF BENEFITS

CLAIMANT: John Stern
 CLAIM: 200622371
 CLMT ATTY: Douglas Crandall, Esq
 DATE: 5/14/2007

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Idaho Orthotic & Prosthetic	09/27/07	\$258.46	10/14/07
Idaho Orthotic & Prosthetic	09/28/07	\$62.00	10/21/07
Working Rx	10/12/07	\$87.72	10/28/07
Idaho Elks Rehab Hospital	08/06/07	\$475.20	10/28/07
Mtn States Counseling	10/09/07	\$145.20	10/28/07
Mtn States Counseling	10/18/07	\$145.20	10/28/07
Orthopaedic Associates	10/17/07	\$172.33	11/04/07
Working Rx	11/06/07	\$355.52	11/25/07
Mtn States Counseling	10/23/07	\$145.20	11/25/07
Working Rx	11/08/07	\$517.28	11/30/07
Center for Wound Healing	08/14/07	\$52.84	11/30/07
Idaho Orthotic & Prosthetic	10/5-11/14/07	\$83.00	11/30/07
Working Rx	11/14/07	\$178.80	11/30/07
Boise Physical Medicine	11/06/07	\$218.61	11/30/07
Working Rx	11/21/07	\$111.68	12/09/07
Working Rx	12/05/07	\$296.67	12/16/07
Boise Physical Medicine	12/04/07	\$218.61	12/23/07
St Alphonsus Rehab	11/20/07	\$154.00	12/23/07
Working Rx	12/12/07	\$111.68	12/23/07
Working Rx	12/08/07	\$68.58	12/23/07
St Alphonsus Rehab	11/16/07	\$35.20	12/23/07
Working Rx	12/06/07	\$668.30	12/23/07
Idaho Orthotic & Prosthetic	12/13/07	\$283.63	12/23/07
St Alphonsus RMC	12/12/07	\$132.00	12/30/07
Orthopaedic Associates	12/12/07	\$107.73	12/30/07
Mtn States Counseling	12/18/07	\$145.20	01/13/08
Boise Physical Medicine	01/15/08	\$460.00	02/03/08
Third Party Solutions Inc	1/16-1/18/08	\$1,156.26	02/10/08
Idaho Orthotic & Prosthetic	01/30/08	\$175.00	02/18/08
Mtn States Counseling	01/29/08	\$145.80	02/18/08
Idaho Orthotic & Prosthetic	02/10/08	\$175.00	02/24/08
Idaho Orthotic & Prosthetic	02/10/08	\$6,445.45	02/24/08
Idaho Orthotic & Prosthetic	02/10/08	\$5,174.74	02/24/08
Mtn States Counseling	02/06/08	\$145.80	02/29/08
Third Party Solutions Inc	02/18/08	\$286.11	03/16/08
Third Party Solutions Inc	02/15/08	\$871.09	03/16/08
Center for Wound Healing	02/07/08	\$313.12	03/16/08
Mtn States Counseling	02/14/08	\$150.00	03/09/08
Idaho Emergency Physicians	02/06/08	\$105.84	03/16/08
Center for Wound Healing	02/14/08	\$64.89	03/16/08
St Alphonsus RMC	02/06/08	\$262.40	03/23/08
Floto Pharmacy	2/7-2/18/08	\$207.66	03/30/08
Idaho Elks Rehab Hospital	02/07/08	\$524.20	03/30/08
Third Party Solutions Inc	03/24/08	\$794.69	04/20/08
St Alphonsus RMC	03/22/08	\$363.15	04/20/08
Mtn States Counseling	04/03/08	\$150.00	04/27/08
Idaho Emergency Physicians	03/22/08	\$363.79	04/27/08
Third Party Solutions Inc	04/01/08	\$519.02	04/27/08

BREAKDOWN OF BENEFITS

CLAIMANT: John Stern
 CLAIM: 200822371
 CLMT ATTY: Douglas Crandall, Esq
 DATE: 5/14/2007

EXAMINER: Donna Young
 SIF ATTY: Alan Hull, Esq

1/23/08-2/5/08	2 wks	\$623.40	02/05/08
2/6/08-2/19/08	2 wks	\$623.40	02/19/08
2/20/08-3/4/08	2 wks	\$623.40	03/04/08
3/5/08-3/18/08	2 wks	\$623.40	03/18/08
3/19/08-4/1/08	2 wks	\$623.40	04/01/08
4/2/08-4/15/08	2 wks	\$623.40	04/15/08
4/16/08-4/21/08	6 days	\$267.15	04/21/08

Total \$20,711.12

PFI Breakdown

5/15/07	Advance	\$1,200.00	5/15/07
4/22/08-4/30/08	Monthly	\$399.53	4/28/08
5/1/08-5/31/08	Monthly	\$1,350.28	5/22/08
6/1/08-6/30/08	Monthly	\$1,350.28	6/23/08

Total \$4,300.09

Medicals \$415,309.64
 TTD \$20,711.12
 PFI \$4,300.09
 Total Paid to Date \$441,320.85

Outstanding Denied Billings	Dates of Service	Amount of Bill	Reason for Non-Payment

FEB 18 2009
By J. David Navarro Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN STEM,

Plaintiff,

vs.

CITY OF GARDEN CITY, IDAHO and
WESLEY C. PROUTY,

Defendant.

Case No. CVPI0806177

MEMORANDUM DECISION ON
PLAINTIFF'S MOTION TO ALLOW
SECOND AMENDED COMPLAINT
AND DEFENDANT WESLEY PROUTY'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT

APPEARANCES

For Plaintiff: Douglas W. Crandall and Jeffrey T. Sheehan of Crandall
Law Office and Sheehan Law Office

For Defendant Wesley C. Prouty: James G. Reid and David P. Claiborne
of Ringert Clark, Chtd.

For City of Garden City: James J. Davis, Attorney at Law

PROCEEDINGS

This matter came before the Court on January 27, 2009, upon the Plaintiff's
Motion to Allow Second Amended Complaint and upon Defendant Wesley Prouty's
Motion for Partial Summary Judgment. The Court took the matter under advisement.

BACKGROUND

This is a personal injury case arising out of a forklift accident on November 29,

000451

1 2006. On that date, Plaintiff John Stem was employed by Custom Rock Tops, Inc., a
2 granite sales and installation business. Custom Rock Tops leased a building from
3 Defendant Wesley Prouty to run its operation. The building contained a loading area
4 where forklifts were operated to load and unload slabs of granite. The loading area was
5 contiguous to Defendant Garden City's public sidewalk and roadway. On Mr. Prouty's
6 property was a Garden City manhole or water meter cover protecting a water valve. On
7 the day of the accident, a Custom Rock Tops employee was operating a forklift to
8 unload granite from a delivery truck. The operator backed the forklift over the water
9 meter cover, causing the cover to break and shatter under the weight of the forklift. The
10 forklift tipped over and fell onto the Plaintiff, pinning his leg. As a result, the Plaintiff's
11 leg had to be amputated.
12

13 The Plaintiff alleges the water meter cover that shattered was a "light duty" cover
14 designed to withstand weight of about 2,000 pounds, and that the appropriate water
15 meter cover for the area where the injury occurred is a "heavy duty" cover, capable of
16 withstanding 16,000 pounds. Under a theory of premises liability, the Plaintiff alleges
17 Mr. Prouty was negligent in failing to warn the Plaintiff about the dangerous water meter
18 cover and in failing to maintain a reasonably safe premise for use of forklifts. As
19 Garden City was the owner of the water meter cover, the Plaintiff also alleges
20 negligence on the part of Garden City for failing to replace the cover with one of
21 suitable strength.
22

23 Mr. Prouty filed his Motion for Partial Summary Judgment on December 4, 2008,
24 requesting that the Court dismiss him from this law suit. The Plaintiff subsequently filed
25 a Motion to Amend to add a claim of Negligence Per Se against Mr. Prouty, alleging
26

000452

1 that Mr. Prouty failed to obtain a building permit in violation of Idaho statutory law. For
2 purposes of organization and clarity, the Court will address the Plaintiff's Motion to
3 Amend first.

4 DISCUSSION

5 1. Plaintiff's Motion to Allow Second Amended Complaint

6 a. Legal Standard

7 Leave to amend a pleading "shall be freely given when justice so requires."
8 I.R.C.P. 15(a). The decision to grant or refuse permission to amend is left to the sound
9 discretion of the trial court. *Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co.*, 132
10 Idaho 318, 324, 971 P.2d 1142, 1148 (1998). Although the trial court should liberally
11 grant amendments, it need not do so if the amendment fails to state a valid claim,
12 would be futile, or would cause undue delay or prejudice to the opposing party.
13 *McCann v. McCann*, 138 Idaho 228, 237, 61 P.3d 585, 594 (2002).
14

15 b. Analysis

16 In 1996 or 1997, Mr. Prouty modified his property to incorporate a second
17 overhead door system to facilitate loading and unloading between two businesses using
18 forklifts. The Plaintiff alleges that Mr. Prouty did not obtain a building permit from the
19 City of Garden City as he was required to do under Idaho Code and Garden City
20 ordinances. The Plaintiff asserts that if Mr. Prouty had obtained a permit, an engineer
21 would have had to inspect the property to ensure the property was suitable for the use
22 of forklifts, and the water meter cover would have been replaced or fortified as a result
23 of such an inspection.
24

25 Based on the allegations that Mr. Prouty failed to obtain a building permit and
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000453

1 failed to maintain a reasonably safe water meter cover, the Plaintiff is requesting to file
2 an amended complaint to set forth a separate claim against Mr. Prouty under a
3 Negligence Per Se theory. The Plaintiff submits that Mr. Prouty's failures violated
4 Garden City Code § 6-2-17, Garden City Code § 6-2-9, Idaho Code § 39-4111, Idaho
5 Code § 39-4126, and the 1994 Uniform Building Code, the last of which was adopted
6 by Garden City pursuant to Garden City Ordinance 651.

7 Garden City Code § 6-2-17 requires that construction methods and materials
8 used in the installation of water main lines, water service lines, fire service lines and
9 water system appurtenances conform to all material and construction specifications as
10 provided by the public works director. Garden City Code § 6-2-9 provides that property
11 owners shall be responsible for all damage resulting from leaks or breaks in service
12 pipes and fixtures. Idaho Code § 39-4111, Idaho Code § 39-4126, and the 1994
13 Uniform Building Code make it unlawful for a person to alter a building without first
14 obtaining a permit.

15
16 “[I]n Idaho, it is well established that statutes and administrative regulations may
17 define the applicable standard of care owed, and that violations of such statutes and
18 regulations may constitute negligence per se.” *Steed v. Grand Teton Council of the*
19 *Boy Scouts of America*, 144 Idaho 848, 853, 172 P.3d 1123, 1128 (2007) (citing
20 *Sanchez v. Galey*, 112 Idaho 609, 617, 733 P.2d 1234, 1242 (1986)). Negligence per
21 se lessens the plaintiff's burden only on the issue of the actor's breach of duty, or in
22 other words, “the actor's departure from the standard of conduct required of a
23 reasonable man.” *Steed*, 144 Idaho at 853, 172 P.3d at 1128 (citation omitted). “In
24 such cases, the court adopts as the standard of conduct of a reasonable person the
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000454

1 requirements of the statute or regulation.” *Id.*

2 After review of the statutes cited by the Plaintiff, the Court will grant the Plaintiff’s
3 requested amendment to the complaint. The amendment would not be futile and would
4 not cause undue delay or prejudice to Mr. Prouty. To recover under a negligence per
5 se claim, however, the Plaintiff must still establish the four requirements of a successful
6 negligence per se claim:

7 “First, the statute or regulation must clearly define the required standard of
8 conduct; second, the statute or regulation must have been intended to
9 prevent the type of harm defendant’s act or omission caused; third, the
10 plaintiff must be a member of the class of persons the statute or
regulation was designed to protect; and fourth, the violation must have
been a proximate cause of the injury.

11 *Sanchez*, 112 Idaho at 617, 733 P.2d at 1242 (citations omitted).

12 The Plaintiff shall file the amended pleading within ten (10) days of the signing of
13 this order. Because this pleading was not before the Court at the time of the filing of
14 the summary judgment by the Defendant Prouty, the Court could not consider this new
15 claim as part of the summary judgment motion. The defense may wish to submit
16 further argument regarding these elements in pursuit of another summary judgment
17 motion. Nevertheless, in view of the liberal standard for allowing leave to amend, the
18 Court will grant the Plaintiff’s Motion to Amend.
19

20 **2. Defendant Wesley Prouty’s Motion for Partial Summary Judgment**

21 At the time Mr. Prouty filed his Motion for Summary Judgment, the only cause of
22 action against him was that of negligence under a theory of premises liability.
23 Therefore, the Court will address this summary judgment decision as to that cause of
24 action alone.
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a. Legal Standard

Summary judgment will be granted only “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.” I.R.C.P. 56(c). When considering a summary judgment motion, the trial court must construe the record liberally in favor of the non-moving party and draw all reasonable factual inferences in favor of such party. *Bear Lake West Homeowner's Assoc. v. Bear Lake County*, 118 Idaho 343, 346, 796 P.2d 1016, 1019 (1990). The motion will be denied if conflicting inferences may be drawn from the evidence or if reasonable people might reach different conclusions. *Parker v. Kokot*, 117 Idaho 963, 793 P.2d 195 (1990).

The initial burden of establishing the absence of a genuine issue of material fact rests with the moving party. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994). If the moving party meets that burden, the party who resists summary judgment has the responsibility to place in the record before the court the existence of controverted material facts that require resolution at trial. *Sparks v. St. Luke's Regional Medical Center, Ltd.*, 115 Idaho 505, 508, 768 P.2d 768, 771 (1988). The resisting party may not rely on his pleadings nor merely assert the existence of facts which might support his legal theory. *Id.* He must establish the existence of those facts by deposition, affidavit, or otherwise. *Id.*; I.R.C.P 56(e). A mere scintilla of evidence or a slight doubt as to the facts is not sufficient to withstand summary judgment. *Corbridge v. Clark Equipment Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986). In other words, there must be evidence on which a jury might rely. *Petricevich*

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1 v. *Salmon River Canal Co.*, 92 Idaho 865, 871, 452 P.2d 362, 368 (1969). Moreover,
2 the existence of disputed facts will not defeat summary judgment when the plaintiff fails
3 to make a showing sufficient to establish the existence of an element essential to his
4 case, and on which he will bear the burden of proof at trial. *Pounds v. Denison*, 120
5 Idaho 425, 426, 816 P.2d 982, 983 (1991).

6 **b. Analysis**

7 To recover for negligence, the Plaintiff must prove (1) that Mr. Prouty had a duty
8 to conform to a certain standard of conduct; (2) Mr. Prouty breached that duty; (3) there
9 was a causal connection between Mr. Prouty's conduct and the Plaintiff's injuries; and
10 (4) damages. See *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561,
11 563 (1995). The Plaintiff has the burden of proof as to each of these elements; thus, if
12 the Plaintiff fails to make a showing sufficient to establish the existence of any of these
13 elements, Mr. Prouty is entitled to summary judgment. See *Badell v. Beeks*, 115 Idaho
14 101, 102, 765 P.2d 126, 127 (1988). In such a situation, there can be no genuine issue
15 of material fact because a complete failure of proof concerning an essential element of
16 the nonmoving party's case necessarily renders all other facts immaterial. *Garzee v.*
17 *Barkley*, 121 Idaho 771, 774, 828 P.2d 334, 337 (Ct. App. 1992) (citation omitted). This
18 rule facilitates the dismissal of factually unsupported claims prior to trial. *Id.* "Creating
19 only a slight doubt as to the facts will not defeat a summary judgment motion; a
20 summary judgment will be granted whenever on the basis of the evidence before the
21 court a directed verdict would be warranted or whenever reasonable minds could not
22 disagree as to the facts. *Snake River Equipment Co. v. Christensen*, 107 Idaho 541,
23 549, 691 P.2d 787, 795 (Ct. App. 1984).
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1 The first issue presented by Mr. Prouty's Motion for Summary Judgment is
2 whether Mr. Prouty owed a duty to the Plaintiff. In Idaho, the duty of landowners owed
3 to persons injured on their land is determined by the status of the injured person as an
4 invitee, a licensee, or a trespasser. *Holzheimer v. Johannesen*, 125 Idaho 397, 399-
5 400, 871 P.2d 814, 816-817 (1994).

6 An invitee is one who enters upon the premises of another for a purpose
7 connected with the business conducted on the land, or where it can reasonably be said
8 that the visit may confer a business, commercial, monetary or other tangible benefit to
9 the landowner. *Id.* A licensee is a visitor who goes upon the premises of another with
10 the consent of the landowner in pursuit of the visitor's purpose, for example, a social
11 guest. *Id.*

12 A landowner owes an invitee a duty to keep the premises in a reasonably safe
13 condition and to warn of hidden or concealed dangers which the owner knows of or
14 should have known of by exercise of reasonable care. *Walton v. Potlatch Corp.*, 116
15 Idaho 892, 898, 781 P.2d 229, 235 (1989). The duty owed to a licensee is narrower. A
16 landowner is only required to warn a licensee of dangerous conditions known to the
17 landowner and not reasonably discoverable by the licensee. *Holzheimer*, 125 Idaho at
18 400, 871 P.2d at 817. Thus, the scope of duty of a landowner is measured by the
19 knowledge which the landowner had or should have had concerning the risk. *Keller v.*
20 *Holiday Inns, Inc.*, 105 Idaho 649, 652, 671 P.2d 1112, 1115 (Ct. App. 1983).

21 In this case, the Court will find that the status of the Plaintiff was that of an
22 invitee. The facts of the *Keller* case are similar to the facts of this case. There, the
23 plaintiffs were employees of a gift shop that leased space from Holiday Inn Hotel. In
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1 determining the status of those employees, the Idaho Court of Appeals held:

2 Holiday Inn rented space in its building to the gift shop proprietor for a
3 business purpose. The employment of personnel by the gift shop
4 proprietor clearly was within that purpose. Consequently, we hold that
5 these employees were invitees. Our inquiry is narrowed to the duty owed
6 by the land possessor to an invitee.

7 *Id.* On appeal, the Idaho Supreme Court stated:

8 We need not determine into which category plaintiffs herein should be
9 placed, because all of the parties, in their argument before this Court,
10 have categorized plaintiffs as invitees. Consequently, we will conduct our
11 analysis in light of this categorization.

12 *Keller v. Holiday Inns, Inc.*, 107 Idaho 593, 595, 691 P.2d 1208, 1210 (1984).

13 This case, like *Keller*, involves an employee of a lessee who was injured on the
14 premises of the lessor. Mr. Prouty rented his building to Custom Rock Tops for a
15 business purpose, and the employment of the Plaintiff was directly related to the
16 business conducted on the property. Thus, in accordance with the holding in *Keller*,
17 this Court will find that the Plaintiff was an invitee of Mr. Prouty, and Mr. Prouty had a
18 duty to keep his premises in a reasonably safe condition and to warn the Plaintiff of
19 hidden dangers which Mr. Prouty knew of or should have known of by exercise of
20 reasonable care.

21 Although the Plaintiff has established that Mr. Prouty owed a duty to him, the
22 Court will find that the Plaintiff has not submitted evidence sufficient to establish the
23 second element of his Negligence claim, that Mr. Prouty breached his duty to the
24 Plaintiff as an invitee. This is not a *res ipsa loquitur* case. The only evidence before the
25 Court as to what caused a failure of this water meter cover is testimony from Mr. Ruhl, a
26 civil engineer and superintendant of public works for Garden City, that this water meter
cover was not designed for the weight of the vehicles traveling over the surface area of

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1 the water meter cover. The Court will find that the Plaintiff has not sufficiently
2 established that Mr. Prouty did know or should have known through reasonable care
3 that the water meter cover was defective or that the water meter cover presented a
4 danger in an area where forklifts were being operated.

5 The record is devoid of any evidence that a visual inspection of the cover would
6 have revealed the cover's load bearing capacity. In fact, the evidence indicates the
7 contrary. The deposition Mr. Ruhl establishes that Garden City's meter reader would
8 have visually inspected the integrity of the meter cover about twelve times a year.
9 However, the meter reader did not detect a problem during his inspections. If a trained
10 employee familiar with water meter covers did not detect a problem with this water
11 meter cover, then how would Mr. Prouty have been able to detect a problem? Notably,
12 Mr. Prouty has stated that he relied on Garden City as the owner of the meter covers to
13 maintain them.
14

15 There is also no evidence that had Mr. Prouty inspected the cover on both sides
16 that he would have seen or detected some kind of defect such as crack or rust.
17 Moreover, despite evidence that forklifts had been used on the property for years, there
18 is no evidence that this water meter cover had been broken or exhibited defects prior to
19 the Plaintiff's accident, such that Mr. Prouty would have been alerted as to any danger
20 presented by the cover. In short, the Plaintiff has not presented evidence indicating
21 what Mr. Prouty reasonably could have done that would have apprised him of any
22 defect in the subject water meter cover.
23

24 Furthermore, there is little evidence that the meter cover was even defective.
25 Mr. Ruhl, when asked during his deposition if the water meter cover that broke would
26

1 have been appropriate to use in an area where forklifts in excess of 10,000 pounds
2 were being operated, replied, “[i]n my professional opinion, I don’t believe that’s a
3 correct application.” See Deposition of Robert Ruhl pgs 67-73. Mr. Ruhl later
4 explained that there are traffic-rated meter lids and road traffic-rated meter lids, and that
5 there are different lids of different load bearing capacity depending on the area where
6 they are placed, implying that the subject meter cover may not have been strong
7 enough to support the weight of a forklift. Even though this testimony may present a
8 genuine issue of material fact as to the defective nature of the cover, this does not
9 sufficiently establish that Mr. Prouty knew or should have known this type of information
10 as a lay person. Unlike Mr. Ruhl, Mr. Prouty is not an engineer or familiar with what
11 specific type of water meter cover should be used in this type of activity.
12

13 The Plaintiff has presented evidence that Mr. Prouty did have concerns about
14 the water meter covers. At his deposition on August 8, 2008, Mr. Prouty was asked if
15 he had informed his employees prior to Mr. Stem’s accident that they were not to pull
16 forklifts over the covers. Mr. Prouty responded that he had not told employees at
17 Custom Rock Tops not to drive over the cover involved in Mr. Stem’s accident, but he
18 had told his own employees of Intermountain Interiors not to drive across the water
19 meter cover on that half of the building because there was a “six to nine inch
20 depression” and he was concerned about loading issues. The Plaintiff argues Mr.
21 Prouty’s distrust of the covers sufficiently establishes that Mr. Prouty knew or should
22 have known the covers were improper for an area where forklifts were being operated,
23 and that he breached his duty to the Plaintiff when he did not take further measures to
24 inspect, warn about, or replace the subject cover.
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1 There is no evidence before the Court that the "six to nine inch depression" was
2 the basis for the failure of this cover. To the contrary, the evidence is that based upon
3 the opinion of a civil engineer, educated and experienced in the appropriate type of
4 water meter cover, this was not a proper cover for the weight of the vehicles. There is
5 nothing in the record to establish that this depression was the cause of this accident. A
6 landlord without the level of training or experience, such as Mr. Ruhl, cannot be held to
7 this standard of duty.

8 A mere scintilla of evidence will not withstand summary judgment. Mr. Prouty
9 testified as to the reason he warned his own employees, namely, the depression in the
10 ground next to the cover. The Court will not now speculate as to other reasons for Mr.
11 Prouty's caution. Mr. Prouty's concern about a depression by the cover next to
12 Intermountain Interiors does not present a genuine issue of material fact regarding
13 whether he knew or should have known about a defective cover next to Custom Rock
14 Tops.
15

16 Even viewing all reasonable inferences in favor of the nonmoving party, the
17 Plaintiff has not sufficiently established that Mr. Prouty knew or should have known
18 through reasonable care that the subject water meter cover was defective or presented
19 a risk of injury. With the evidence before the Court, a rational jury could not conclude
20 that the Plaintiff has proven Mr. Prouty breached his duty to the Plaintiff. Therefore, the
21 Plaintiff has failed to make a showing sufficient to establish his Negligence claim. As to
22 the claim of Negligence, the Court will grant summary judgment in favor of Mr. Prouty.
23

24 CONCLUSION

25 The Court will GRANT the Plaintiff's Motion to Allow a Second Amended
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1 Complaint to add a claim of Negligence Per Se; the Court will GRANT Mr. Prouty's
2 Motion for Partial Summary Judgment as to the Plaintiff's claim of Negligence.

3 DATED this 18 day of February 2009.

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5 MICHAEL McLAUGHLIN
6 DISTRICT JUDGE

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CERTIFICATE OF MAILING

I hereby certify that on the 19th day of February 2009, I mailed (served) a true

and correct copy of the within instrument to:

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J. DAVID NAVARRO
Clerk of the District Court

By:  Deputy Clerk

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A.M. _____ FILED P.14 3:45

FEB 26 2009

J. DAVID NAVARRO, Clerk
By A. LYKE
2009.02.24

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN STEM,

Plaintiff,

v.

CITY OF GARDEN CITY, IDAHO and
WESLEY C. PROUTY

Defendants.

Case No. CV PI 08-6177

**SECOND AMENDED COMPLAINT
AND DEMAND FOR JURY TRIAL**

The Plaintiff, JOHN STEM, by and through his counsel of record, and Douglas W. Crandall Jeffrey T. Sheehan, herewith submits his claims against the Defendants captioned above, and states and alleges as follows:

JURISDICTION, PARTIES, AND VENUE

1. At all times material to the Second Amended Complaint filed herein, the Plaintiff, John Stem, is an adult resident and domiciliary of the State of Idaho, County of Ada, presently residing at 2727 W. Janelle Street, Meridian, Idaho 83646.

2. Defendant, City of Garden City, Idaho, is a political subdivision and governmental entity of the State of Idaho.

3. On or about April 2, 2007, Plaintiff, by and through undersigned counsel, gave notice of tort claim against Defendant, City of Garden City, Idaho (hereinafter "Garden City"), pursuant to Idaho Code §6-906. A copy of said Notice of Tort Claim is filed and incorporated herein.

4. Following service of the Notice of Tort Claim upon Defendant, Garden City, more than ninety (90) days passed without the said governmental entity approving or denying the claims presented. Pursuant to Idaho Code §6-910, this suit is brought following the timely notice and subsequent denial of Plaintiff's claims.

5. Pursuant to Idaho Code §6-914, this Court has jurisdiction over any action brought under the Tort Claims Against Governmental Entities Act and is governed by the Idaho Rules of Civil Procedure insofar as being consistent with the Act.

6. Pursuant to Idaho Code §6-915, venue is proper against Defendant, Garden City, in the county in which the cause of action arose. In addition, the Plaintiff is a resident of the State of Idaho, County of Ada, and may bring an action in the county of his residence.

7. Defendant, Wesley C. Prouty, is an adult citizen of the United States and is the owner of the property located at 4686 Chinden Boulevard, Garden City, Idaho 83714.

8. Venue is proper as to Defendant, Wesley C. Prouty, pursuant to Idaho Code §5-404, as said Defendant resides in Ada County, Idaho.

FACTS AND GENERAL ALLEGATIONS

9. At all times material to the Second Amended Complaint filed herein, Defendant, Wesley C. Prouty, was and is the owner of real property located at 4686 Chinden Boulevard, Garden City, Idaho 83714 (hereinafter “the premises”).

10. At all times material to the Second Amended Complaint filed herein, Custom Rock Tops, Inc. leased the premises from Defendant, Wesley C. Prouty, for operation of a granite sales and installation business.

11. At all times material to the Second Amended Complaint filed herein, with the knowledge and consent of Defendant, Wesley C. Prouty, an area of the premises contiguous to the public sidewalk and roadway was used for loading and unloading goods (including granite) on the premises (hereinafter “loading area”).

12. At all times material to the Second Amended Complaint filed herein, the loading area of the premises is located in, on, and about the public streets, sidewalks or other areas maintained by the Defendant, Garden City.

13. At all times material to the Second Amended Complaint filed herein, the loading area of the premises contained one or more manhole covers (sometimes hereinafter referred to as “water valve covers”) to facilitate Defendant, Garden City’s use, access, and maintenance of the city’s water and sewer systems.

14. On or about November 29, 2006, employees and/or agents of Custom Rock Tops, Inc. were unloading granite from a delivery truck onto a forklift in the loading area of the premises.

15. At all times material to the Second Amended Complaint filed herein, Custom Rock Tops, Inc., employed Plaintiff, John Stem, and Marc Jung.

16. At all times material to the Second Amended Complaint filed herein, Custom Rock Tops, Inc. was owned and operated by Jerry Rhinehart.

17. At all times material to the Second Amended Complaint filed herein, Plaintiff, John Stem, exercised ordinary care for his safety and was not in any way comparatively or contributorily negligent.

18. On or about November 29, 2006, employee, Marc Jung, and/or other employees of Custom Rock Top, Inc. were unloading granite from a delivery truck onto a forklift in the loading area of the premises.

19. At said time and place, the forklift driver, Marc Jung, backed the forklift over a manhole cover in the loading area.

20. At said time and place, the manhole cover broke, shattered and/or imploded under the weight of the forklift's wheels, thereby causing the forklift to tip over onto Plaintiff, John Stem, permanently and severely injuring him.

21. Plaintiff, John Stem's right leg was pinned to the ground under the weight of the forklift and its load for an extended period of time. Employee, Marc Jung, jumped from the forklift as it was tipping over.

22. Upon information and belief, the manhole cover which shattered, broke and/or imploded under the weight of the forklift on the premises, had a maximum load of approximately 2,000 pounds and was designated as a "light duty" manhole cover.

23. Upon information and belief, the appropriate manhole cover for loading areas where vehicles operate would be a "heavy duty" manhole cover, which has an approximate maximum load of 16,000 pounds.

24. Upon information and belief, Defendant, Garden City, placed and/or installed the manhole covers located in the parking lot of the premises, or, alternatively, contracted a private construction company to do the same.

25. Upon information and belief, employee, Marc Jung, was not certified to operate a forklift under applicable law, and no other such persons on the premises were properly certified.

26. Upon information and belief, the manhole covers that were installed on the premises were manufactured by D & L Foundry and Supply, Inc.

27. Upon information and belief, the particular manhole cover which had shattered, broke and/or imploded under the weight of the forklift is cover B-5024 and is a light duty cover commonly placed in sidewalk locations, but not rated for roadway use.

28. Upon information and belief, within each manhole is a water meter which is read by a device referred to as a "pad", which permits water meter readings without removal of the manhole cover. Defendant, Garden City, has the water meters read regularly.

29. Defendant, Wesley C. Prouty, has been owner and operator of the premises since 1994. Upon information and believe, Defendant, Wesley C. Prouty, never inspected, maintained or replaced any of the water manhole covers.

30. Upon information and belief, Defendant, Wesley C. Prouty, stated to his forklift operators never to drive over the manhole covers, because he didn't trust the manhole covers.

31. Upon information and belief, Defendant, Wesley C. Prouty, knew, or had reason to know of the dangerous condition of the manhole covers and had failed to take any action to have appropriate heavy duty manhole covers installed.

- 32. At all times material to the Second Amended Complaint filed herein, Defendant, Wesley C. Prouty, was on notice of the dangerous condition the light duty manhole covers posed to the Plaintiff and other employees of Custom Rock Tops, Inc.

33. On or about January 8 or January 9, 2007, employees of Defendant, Garden City, replaced a casing and manhole cover that broke and placed a metal plate over the new installation.

- 34. At all times material to the Second Amended Complaint filed herein, Defendant, Wesley C. Prouty, had a duty of care toward any occupants upon the premises, including the employees of Custom Rock Tops, Inc. and Plaintiff, John Stem.

- 35. At all times material to the Second Amended Complaint filed herein, Defendant, Wesley C. Prouty, owed a duty of reasonable care to keep the premises in a reasonably safe and suitable condition to protect invitees from the activities of third parties on the premises, and to control the conduct of third persons, as to prevent them from conducting activities which create an unreasonable risk of bodily harm to others.

- 36. At all times material to the Second Amended Complaint filed herein, Defendant, Wesley C. Prouty, knew, or had reason to know, of the dangerous conditions with respect to the manhole covers and knew, or should have known the necessity and opportunity for exercising such control over Custom Rock Tops, Inc. and/or Defendant, Garden City.

- 37. At all times material to the Second Amended Complaint filed herein, Defendant, Wesley C. Prouty, had a duty to protect occupants on the premises from the dangerous conditions, including all foreseeable victims, such as the Plaintiff.

— 38. At all times material to the Second Amended Complaint filed herein, Defendant, Wesley C. Prouty, had a duty to act as a reasonably prudent land owner under similar circumstances.

— 39. At all times material to the Second Amended Complaint filed herein, Defendant, Wesley C. Prouty, had a duty to make the premises reasonably safe and discover concealed defects upon the premises, which said Defendant knew, or should have known, upon reasonable inspection.

— 40. At all times material to the Second Amended Complaint filed herein, Defendant, Wesley C. Prouty, owed Plaintiff a duty to keep the premises in a reasonably safe condition and to warn of hidden or concealed dangers which the Prouty knew, or should have known, by exercise of reasonable care.

— 41. Notwithstanding Defendant, Wesley C. Prouty's duties to Plaintiff, Defendant breached the standard of care owed to Plaintiff by failing to warn Plaintiff of the dangerous and improper manhole covers on the premises, failing to replace the manhole covers with covers of suitable strength and durability, failing to keep the premises in a reasonably safe condition, failing to protect the Plaintiff from dangerous conditions upon the premises, failing to maintain the manhole covers appropriately, failing to make reasonable inspections of the premises, and otherwise failing to make the premises reasonably safe.

— 42. As a direct and proximate result of the Defendant, Prouty's negligent acts and omissions, the Plaintiff has and will continue to suffer extreme and substantial damages as more fully described below.

COUNT I: NEGLIGENCE, DEFENDANT, GARDEN CITY

Plaintiff, John Stem, re-alleges each and every paragraph numbered one (1) through forty-two (42) above and further states as follows:

43. At all times material to the Second Amended Complaint filed herein, Defendant, Garden City, had a duty of care toward any occupants upon the premises in the loading area, including the employees of Custom Rock Tops generally and to the Plaintiff individually.

44. At all times material to the Second Amended Complaint filed herein, Defendant, Garden City, had authority, dominion, control, and use of over the city's public utilities including the loading area of the premises described above.

45. At all times material to the Second Amended Complaint filed herein, the Defendant, Garden City, owed a duty to residents and members of the public to properly and prudently construct, maintain, and inspect the water and sewer systems within the city including the manhole covers on the premises.

46. At all times material to the Second Amended Complaint filed herein, Defendant, Garden City, had the legal right and duty to monitor, access, use, maintain and inspect the manhole covers located on the premises, and to ensure that they were in reasonably safe condition.

47. At all times material to the Second Amended Complaint filed herein, Defendant, Garden City, knew or had reason to know, of the dangerous conditions with respect to the manhole covers described above, and knew or should have known the necessity of replacing the manhole covers with "heavy duty" covers.

48. At all times material to the Second Amended Complaint filed herein, Defendant, Garden City, had actual or constructive knowledge of the inadequacy of the manhole covers upon the premises, as said Defendant made regular water meter readings at the location(s) of said covers.

49. At all times material to the Second Amended Complaint filed herein, Defendant, Garden City, owed a duty of reasonable care to keep the loading area of the premises in a reasonably safe and suitable condition and to protect occupants of the premises from dangerous conditions upon the premises.

50. At all times material to the Second Amended Complaint filed herein, Defendant, Garden City, owed a duty to third parties such as Custom Rock Tops and its employees so as to prevent them from conducting activities which create an unreasonable risk of bodily harm to others.

51. At all times material to the Second Amended Complaint filed herein, Defendant, Garden City, had a duty to act as a reasonably prudent municipality under similar circumstances.

52. At all times material to the Second Amended Complaint filed herein, Defendant, Garden City, had a duty to make the loading area of the premises reasonably safe and discover concealed defects upon the premises, which said Defendant knew, or should have known, upon reasonable inspection.

53. At all times material to the Second Amended Complaint filed herein, Defendant, Garden City, owed Plaintiff a duty to keep the premises in a reasonably safe condition and to warn of hidden or concealed dangers which Garden City knew, or should have known, in exercise of reasonable care.

54. Notwithstanding Defendant, Garden City's, duties to Plaintiff, Defendant, Garden City, breached the standard of care owed to Plaintiff by failing to warn Plaintiff of the dangerous and improper manhole covers in the loading area of the premises, failing to require Defendant Wesley C. Prouty to replace the manhole covers, failing to replace the manhole covers with covers of suitable strength and durability, failing to keep the manhole covers located in the loading area of the premises in a reasonably safe condition, failing to protect the Plaintiff from dangerous conditions upon the premises, failing to maintain the manhole covers appropriately, failing to make reasonable inspections of the manhole covers located in the loading area of the premises, and otherwise failing to make the loading area of the premises reasonably safe.

55. As a direct and proximate result of the Defendant, Garden City's, negligent acts and omissions, the Plaintiff has and will continue to suffer extreme and substantial damages as more fully described below.

COUNT II: DEFENDANT WESLEY C. PROUTY (NEGLIGENCE PER SE)

56. Plaintiff, John Stem, re-alleges each and every numbered paragraph one through fifty-five.

57. That on or about November 29, 2006, that Defendant Wesley C. Prouty was leasing to Custom Rock Tops, Inc., a building located at 4686 Chinden Boulevard with its intended use being that of a granite counter top installation business. As part of that business, it was intended by the parties that they be allowed to load and unload granite slabs, by way of the fork lift at 4686 Chinden Boulevard. This was the intended use of the property as contemplated by the parties.

58. That at all times material to the Second Amended complaint filed herein and at the time of Mr. Stem's accident there existed a commercial lease agreement between Defendant

Wesley C. Prouty and Jerry Rhinehart, d/b/a Custom Rock Tops, Inc.. Inclusive in that agreement was a requirement that the landlord shall comply with all laws, orders, ordinances and other public requirements, now and hereafter affecting the lease premises.

59. That during the years of 1996 and/or 1997 Mr. Prouty modified the building at 4686 Chinden Boulevard to include a door capable of allowing access to the property by way of forklift for the storage of materials including but not limited to granite slabs.

60. That prior to this modification the primary use of that area behind 4686 Chinden Boulevard to the start of Fenton Street which was used primarily as parking spaces. In 1996 or 1997 Defendant Wesley C. Prouty converted the use of that particular area behind 4686 Chinden Boulevard to include the use of that property as a loading and unloading area to which forklifts would be used.

61. That at no time did Mr. Prouty prior to and/or subsequent to the conversion of that property to allow use of a forklift to haul materials to and from 4686 Chinden Boulevard, did he first adequately inspect, or make safe the water valve cover which set between the property at 4686 Chinden boulevard and Fenton Street. This particular water valve cover, of the one which fractured causing the forklift to fall with a load of granite and severing Plaintiff John Stem's leg.

62. That the failure of Defendant Wesley C. Prouty to maintain 4686 Chinden Boulevard in a manner in which it was safe to operate a forklift in the loading area, was a violation of Garden City and Idaho Codes and regulations.

63. At all times material to the Second Amended Complaint filed herein, Garden City Code § 6-2-9 required:

All service pipes and fixtures on private property are the responsibility of the property owner and shall be kept in good repair and protected from freezing at the property owner's expense. The property owner shall be responsible for all damage resulting from leaks or breaks in the service pipes and fixtures. Water

will not be furnished to a water service where there is a leak in the service piping or a fixture and when a leak is discovered the water service may be discontinued immediately. If water service has been discontinued because of a leak, it shall not be turned on until all leaks have been repaired.

Garden City Code § 6-2-9 (1988).

64. At all relevant times, Defendant Prouty had a statutory duty under Garden City Code § 6-2-9 to assure that the water valve cover in question was kept in good repair. The Code further states that Defendant Prouty shall be responsible for all damage resulting from breaks to fixtures. The water valve cover in question was indisputably upon the private property of Defendant Wes Prouty.

65. The water valve cover was never designed to accommodate the weight of a forklift. The cover was not in good repair. Defendant Prouty leased his property to Custom Rock Tops with the full understanding that forklifts would be run to and from the building at 4684 Chinden Boulevard and potentially across the water valve cover in question.

66. Defendant Prouty made no effort to inspect and ensure that the water valve covers were adequate for the property. Defendant, Prouty simply ignored the water valve covers for over 10 years after he modified the use of 4684 Chinden Boulevard to include forklifts. The water cover was his responsibility under Garden City Code § 6-2-9, and he failed to examine the cover in question during his entire ownership of 4684 Chinden Boulevard.

67. Garden City Code § 6-2-17 provides as follows:

Construction methods and materials used in the installation of water main lines, water service lines, fire service lines and water system appurtenances shall conform to all material and construction specifications as may be provided by the public works director. Construction materials and workmanship not in accordance with the material and construction specifications shall be removed and replaced to conform with requirements at the expense of the installer.

Garden City Code § 6-2-17 (1988)(emphasis added).

68. In 1996-97, Defendant Prouty modified the use of 4684 Chinden. He did so without a building permit. No engineering documentation has been produced concerning the 1996-97 modifications to 4684 Chinden Boulevard. Had the property been engineered for loading and unloading by forklift, adequate water valve covers would have been put in place.

69. WM3 Properties, the predecessor in interest to ownership of the premises, had used that particular area in the past and had it engineered for use as a parking lot. The water valve cover in place at the time was adequate for a parking lot, but was not adequate for use with a forklift. Defendant Prouty further failed in his statutory duties to assure that the materials and specifications which would have been required of him had he applied for a building permit at the time of the modification.

70. At all relevant times, Idaho Code § 39-4111 stated as follows:

(1) It shall be unlawful for any person to do, or cause or permit to be done, whether acting as a principal, agent or employee, any construction, improvement, extension or alteration of any building, residence or structure, coming into the purview of this division, in the state of Idaho without first procuring a permit from the division authorizing such work to be done.

(2) It shall be unlawful for any person to do, or cause or permit to be done, whether acting as principal, agent or employee, any construction, improvement, extension or alteration of any building, residence or structure in a local governmental jurisdiction enforcing building codes, without first procuring a permit in accordance with the applicable ordinances of the local government.

Idaho Code § 39-4111.

71. At no time during Defendant Prouty's ownership of the premises did not apply for a building permit to construct the modification in 1996-7.

72. At no time during Defendant Prouty's ownership of the premises did he ensure the premises were in compliance with applicable local, state, and federal statutes nor in compliance with the applicable building codes.

73. The 1994 Uniform Building Code states, in pertinent part, as follows:

106.1 Permits Required. Except as specified in Section 106.2 of this section, no building or structure regulated by this code shall be erected, constructed, enlarged, altered, repaired, moved, improved, removed, converted, or demolished unless a separate permit for each building or structure has first been obtained from the building official.

* * * *

106.3.1 Application. To obtain a permit, the applicant shall first file an application therefore in writing on a form furnished by the code enforcement agency for that purpose. Every such application shall:

1. Identify and describe the work to be covered by the permit for which application is made.
2. Describe the land on which the proposed work is to be done by legal description, street address or similar description that will readily identify and definitely locate the proposed building or work.
3. Indicate the use or occupancy for which the proposed work is intended.
4. Be accompanied by plans, diagrams, computations and specifications and other data as required by section 106.3.2.
5. State the valuation of any new building or structure or any addition, remodeling or alteration to an existing building.
6. Be signed by the applicant, or the applicant's authorized agent.

74. Garden City Ordinance 651 amended section 7-1-1 B, of the Garden City Code, to read, in pertinent part, as follows: “. . . All rules, regulations, ordinances . . . printed and contained in the code form designated and entitled UNIFORM BUILDING CODE, being the 1994 Edition, Volumes 1, 2 and 3, printed under the authority of the International Conference of Building Officials, be and the same is hereby ratified and adopted as the Uniform Building Code of Garden City, . . .”.

Defendant Prouty was in fact the individual responsible for ensuring in 1996-97 that he secure a building permit in accordance with the applicable ordinances of Garden City, Idaho. Had a building permit been applied for, the engineering work-up would have been done, and the discovery of the inadequate water valve covers would most likely have been revealed.

75. Idaho Code § 39-4126 indicates, in part:

(1) Any person who willfully violates any provisions of this chapter or who willfully violates any provisions of the codes enumerated in this chapter or rules promulgated by the administrator or pursuant to this chapter, is guilty of a misdemeanor, and upon conviction, shall be fined not more than three hundred dollars (\$300), or imprisoned for not more than ninety (90) days or by both fine and imprisonment. Violations of this chapter shall be tried in any court of competent jurisdiction within the state of Idaho.

(2) A separate violation is deemed to have occurred with respect to each building not in compliance with this chapter. Each day such violation continues constitutes a separate offense.

Idaho Code § 39-4126.

76. Defendant Prouty was in fact the individual responsible for ensuring in 1996-97 that he secure a building Defendant Prouty's failure to apply for a building permit in 1996-97 for the modification at 4684 Chinden Boulevard is a clear violation of Idaho Code § 39-4111. The violation of Idaho Code § 39-4111 is a continuing misdemeanor violation.

77. At all times material to the Second Amended Complaint, Defendant Prouty violated state, local, and federal statutes, including but not limited to: (i) Garden City Code § 6-2-9 Service Pipes and Fixtures; (ii) Garden City Code § 6-2-17, Construction Methods and Materials; (iii) Idaho Code § 39-4101, *et. seq.*, The Idaho Uniform Building Code Act; (iv) Idaho Code § 39-4111, Permits Required; (v) Idaho Code §39-4126, Violations Misdemeanors; (vi) applicable regulations and standards of the Uniform Building Code and International Building Code in effect at the time of the occurrence and at the time of the 1996-97 modification, including all rules promulgated by the board to provide equivalency with the provisions of the Americans with disabilities act accessibility guidelines and the federal fair housing act accessibility guidelines, the International Residential Code, parts I-IV and IX, and the International Energy Conservation Code.

78. The aforesaid statutes, regulations and standards clearly define the required standard of conduct required of Defendant Prouty.

79. The aforesaid statutes, regulations and standards are intended to prevent the type of harm said Defendant' acts or omissions caused.

80. At all times material to the Second Amended Complaint herein, Plaintiff was a member of the class of persons the statute(s), regulation(s), and standard(s) were designed to protect.

81. At all times material to the Second Amended Complaint herein the violation(s) for which Prouty is guilty were the proximate cause of Plaintiff's injuries.

82. At no time relevant to the Second Amended Complaint filed herein, has Defendant Prouty produced any objectively reasonable explanation for (i) the failure to obtain appropriate building permits; (ii) the failure to comply with applicable local, state and federal statutes, regulations, and standards; nor (iii) the failure to maintain the premises in conformity with applicable building codes.

COUNT III: DAMAGES AS TO ALL COUNTS

83. As a direct and proximate result of the Defendants' negligent acts, the Plaintiff has suffered and will continue to suffer extreme physical pain, discomfort, and permanent disability, including the loss of Plaintiff's right leg.

84. As a direct and proximate result of the said Defendants' negligent acts, Plaintiff has and will continue to spend substantial sums of money for medical care and treatment, as well as subsequent examinations, testing, diagnostic procedures, and various expenses incident thereto, in the amount to be specifically determined at trial.

85. As a direct and proximate result of Defendants' negligent acts, Plaintiff will continue to incur additional future medical bills and future expenses attendant to his injuries, both physical and psychological.

86. As a direct and proximate result of the said Defendants' negligent acts, the Plaintiff has and will continue to incur substantial sums of money for prosthetic devices, appliances, fittings, rehabilitation, physical therapy, medications and prescriptions.

87. As a direct and proximate result of the said Defendant's negligent acts, Plaintiff has and will continue to incur the loss of freedom of movement, severe and permanent pain, suffering, emotional distress, disfigurement, and suffer permanent medical and physical limitations.

88. As a direct and proximate result of the said Defendant's negligent acts, the Plaintiff has and will continue to incur a substantial loss of wages and income, past, present, and future, to be specifically determined at trial.

89. The Defendants' conduct as described herein and above was reckless and willful.

90. The Defendants knew, or should have known that the subject premises posed an unacceptable and high degree of harm to foreseeable victims, including the Plaintiff, but, nevertheless, allowed the unsafe and inadequate manhole covers to remain on the property, knowing of the high potential for harm. Defendants' conduct is therefore willful, wanton, and reckless. As such, Idaho statutory cap on general damages does not apply, pursuant to Idaho Code §6-1603(4).

COUNT IV: DEMAND FOR ATTORNEY'S FEES

91. As a result of each Defendant's conduct complained of herein, the Plaintiff has been required to retain the services of legal counsel to represent his interests in this matter.

Pursuant to Idaho Code §12-120 and 12-121, Rules 54(d)(1) and 54(e)(1) of the Idaho Rules of Civil Procedure and all other applicable laws, Plaintiff is entitled to an award of attorneys' fees and costs incurred herein.

WHEREFORE, the premises considered, the Plaintiff, JOHN STEM, respectfully prays for judgment against each of the Defendants as follows:

(a) That a sum be granted to the Plaintiff adequate to compensate Plaintiff for all allowable general damages suffered by him, including but not limited to past, present and future physical and mental pain and suffering, anguish, disfigurement, impairment, and loss of enjoyment of life, in an amount to be determined at trial;

(b) That a sum be granted to the Plaintiff adequate to compensate Plaintiff for his special damages consisting of past, present, and future medical and related expenses, and incidental expenses, in an amount unknown to the Plaintiff at this time, but which sum shall be more readily ascertained at the trial of this matter;

(c) That a sum be granted to the Plaintiff to compensate Plaintiff for the past and future, permanent loss of income he has suffered and will suffer due to his inability to work during his recovery in an amount unknown to the Plaintiff at this time, but which sum shall be more readily ascertained at the trial of this matter;

(d) That prejudgment interest be granted to the Plaintiff; and

(e) For such other and further relief as this Court deems just and equitable.

Dated this 26th day of February, 2009.

Respectfully submitted,



JEFFREY T. SHEEHAN, ESQUIRE
DOUGLAS W. CRANDALL
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by a jury of at least twelve (12) members on all issues properly tried to a jury in the above-entitled matter.

Dated this 26th day of February, 2009.

Respectfully submitted,



JEFFREY T. SHEEHAN, ESQUIRE
DOUGLAS W. CRANDALL
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

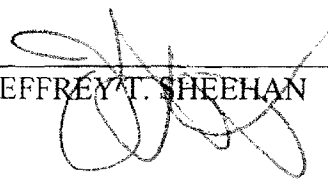
I HEREBY CERTIFY that on this 26th day of February 2009, a copy of the foregoing Second Amended Complaint and Demand for Jury Trial was served on the following by the following method:

James Davis, Esquire
406 W. Franklin Street
P.O. Box 1517
Boise, Idaho 83701
*Attorney for Defendant,
City of Garden City, Idaho*

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

James G. Reid, Esquire
David P. Claiborne, Esquire
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Boise, Idaho 83701-2773
*Attorney for Defendant,
Wesley C. Prouty*

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- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail



JEFFREY T. SHEEHAN

MAR 02 2008

J. DAVID ...
By ...

JAMES G. REID, ISB # 1372
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ORIGINAL

Attorneys for Defendant Wesley C. Prouty

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN STEM,

Plaintiff,

vs.

**CITY OF GARDEN CITY, IDAHO and
WESLEY C. PROUTY,**

Defendants.

Case No. CV-PI-08-06177

**DEFENDANT PROUTY'S OBJECTION
TO PLAINTIFF'S 26(b)(4) STATEMENT**

COMES NOW the Defendant, Wesley C. Prouty, by and through his attorneys of record, Ringert Law Chartered, and hereby submits this *Objection to Plaintiff's 26(b)(4) Statement*, pursuant to the Court's *Scheduling Order* of October 14, 2008.

I. INTRODUCTION.

On May 6, 2008, Defendants served certain interrogatories on Plaintiff seeking the identification by Plaintiff of expected or intended expert witnesses, the subject matter of their expected testimony, whether they have any relation to Plaintiff or Plaintiff's attorneys, whether they

have ever testified for Plaintiff or Plaintiff's attorneys, and the form and manner of their compensation. [Interrogatory No. 3]. Requests for production were also served seeking the production of all correspondence between Plaintiff (or his agents) and others that pertain to issues of liability or damages in this action. [Request for Production No. 10]. In answer to these questions, Plaintiff indicated he had not yet determined his experts, and provided no communications with experts. The answers have not been supplemented.

On October 14, 2008 the Court entered its *Scheduling Order*, which required that Plaintiff disclose his experts by January 26, 2009 in conformance with I.R.C.P. 26(b)(4). Rule 26(b)(4) requires that an expert disclosure include: (a) a complete statement of all opinions to be expressed by the expert; (b) a complete statement of the basis and reasons for the opinions; (c) a description of the data or information considered by the expert in forming the opinions; (d) production of any exhibits to be used to summarize or support the opinions; (e) a detail of the expert's qualifications; (f) a list of all publications authored by the expert in the preceding 10 years; (g) disclosure of the compensation to be paid for the expert's study and testimony; and (h) a list of actions in which the expert has testified at deposition or trial in the preceding 4 years. Plaintiff filed his expert witness disclosures by way of *Plaintiff's 26(b)(4) Statement* on January 26, 2009.

Defendant Prouty **OBJECTS** to *Plaintiff's 26(b)(4) Statement* and the expert witness disclosures provided for the reasons set forth herein. This objection is made pursuant to the Court's *Scheduling Order* in order to prevent the waiver of any objections of Defendant Prouty as to the completeness and/or sufficiency of Plaintiff's expert witness disclosures. Defendant Prouty has not yet had the opportunity to depose Plaintiff's expert witnesses and, therefore, Defendant Prouty does not by the filing waive any further objections as to the foundation, qualification and/or sufficiency

of Plaintiff's expert witnesses or their expected testimony. Moreover, in making this objection Defendant Prouty hereby reserves the right to challenge the admission of the opinion testimony of Plaintiff's experts at trial as permitted by, and pursuant to, the Idaho Rules of Evidence. The objections set forth herein solely relate to the procedural propriety of Plaintiff's expert witness disclosures pursuant to the Idaho Rules of Civil Procedure.

II. RICHARD SLAUGHTER.

Defendant Prouty makes the following objections to the disclosure of Mr. Richard Slaughter -

- a. *Plaintiff's 26(b)(4) Statement* fails to disclose whether Mr. Slaughter has any relation to the Plaintiff or to Plaintiff's attorneys.
- b. *Plaintiff's 26(b)(4) Statement* fails to include the production to this Defendant of any or all correspondence between Mr. Slaughter and the Plaintiff or Plaintiff's attorneys. While the report references such communications, copies of the relevant documents were not produced.
- c. *Plaintiff's 26(b)(4) Statement* fails to include any disclosure of Mr. Slaughter's opinions and methods as it might relate to the present valuation of Plaintiff's claimed lifetime prosthetic care and treatment, even though the disclosure indicates Mr. Slaughter will opine as to such.

III. WILLIAM KARCHER.

Defendant Prouty makes the following objections to the disclosure of Mr. William Karcher -

- a. *Plaintiff's 26(b)(4) Statement* fails to disclose whether Mr. Karcher has any relation to the Plaintiff or to Plaintiff's attorneys.
- b. *Plaintiff's 26(b)(4) Statement* fails to disclose whether Mr. Karcher has ever previously testified for or on behalf of the Plaintiff or Plaintiff's attorneys.
- c. *Plaintiff's 26(b)(4) Statement* fails to disclose the form and manner of Mr. Karcher's

- compensation for providing expert witness services on the Plaintiff's behalf. Disclosure of Mr. Karcher's compensation to be paid for study and testimony is necessary.
- d. *Plaintiff's 26(b)(4) Statement* fails to include the production to this Defendant of any or all correspondence between Mr. Karcher and the Plaintiff or Plaintiff's attorneys.
 - e. *Plaintiff's 26(b)(4) Statement* fails to provide a complete statement of the basis and reasons for the opinions of Mr. Karcher. While a summary statement of Mr. Karcher's opinions is provide, no explanation of the basis and reasoning behind those opinions is provided.
 - f. *Plaintiff's 26(b)(4) Statement* fails to include a description of the data or information considered by Mr. Karcher in forming his/her opinions. A report is tendered setting forth numerous items and costs, but no disclosure is provided as to the data and information relied upon to reach the valuations presented.
 - g. *Plaintiff's 26(b)(4) Statement* fails to include a detail of the expert's qualifications. The disclosure simply indicates a resume has been requested of Mr. Karcher, but not yet provided.
 - h. *Plaintiff's 26(b)(4) Statement* fails to include a list of all publications authored by Mr. Karcher in the preceding 10 years.
 - i. *Plaintiff's 26(b)(4) Statement* fails to include a list of actions in which Mr. Karcher has testified at deposition or trial as an expert in the preceding 4 years.

IV. BETH CUNNINGHAM / JUNE FONTES.

Defendant Prouty makes the following objections to the disclosure of Ms. Beth Cunningham and Ms. June Fontes -

- a. *Plaintiff's 26(b)(4) Statement* fails to indicate whether its testifying expert at trial will be Ms.

- Cunningham, Ms. Fontes, or both women, and if both women will testify, it fails to indicate the specific nature of the testimony that each will provide.
- b. *Plaintiff's 26(b)(4) Statement* fails to disclose whether Ms. Cunningham or Ms. Fontes has any relation to the Plaintiff or to Plaintiff's attorneys.
 - c. *Plaintiff's 26(b)(4) Statement* fails to disclose whether Ms. Cunningham or Ms. Fontes has ever previously testified for or on behalf of the Plaintiff or Plaintiff's attorneys.
 - d. *Plaintiff's 26(b)(4) Statement* fails to disclose the form and manner of Ms. Cunningham's or Ms. Fontes's compensation for providing expert witness services on the Plaintiff's behalf. Disclosure of Ms. Cunningham's or Ms. Fontes's compensation to be paid for study and testimony is necessary.
 - e. *Plaintiff's 26(b)(4) Statement* fails to include the production to this Defendant of any or all correspondence between Ms. Cunningham or Ms. Fontes and the Plaintiff or Plaintiff's attorneys.
 - f. *Plaintiff's 26(b)(4) Statement* fails to include the production of any exhibits to be used to summarize or support the opinions of Ms. Cunningham or Ms. Fontes. In particular, the report of Ms. Cunningham and Ms. Fontes describes testing and identifies test scores, but fails to include production of the actual tests taken or the test results.
 - g. *Plaintiff's 26(b)(4) Statement* fails to include a list of all publications authored by Ms. Cunningham or Ms. Fontes in the preceding 10 years.
 - h. *Plaintiff's 26(b)(4) Statement* fails to include a list of actions in which Ms. Cunningham or Ms. Fontes has testified at deposition or trial as an expert in the preceding 4 years.

V. MARK L. HEDGE.

Defendant Prouty makes the following objections to the disclosure of Mr. Mark L. Hedge -

- a. *Plaintiff's 26(b)(4) Statement* fails to disclose whether Mr. Hedge has any relation to the Plaintiff or to Plaintiff's attorneys.
- b. *Plaintiff's 26(b)(4) Statement* fails to disclose whether Mr. Hedge has ever previously testified for or on behalf of the Plaintiff or Plaintiff's attorneys.
- c. *Plaintiff's 26(b)(4) Statement* fails to include the production to this Defendant of any or all correspondence between Mr. Hedge and the Plaintiff or Plaintiff's attorneys.
- d. *Plaintiff's 26(b)(4) Statement* fails to include the production of any exhibits to be used to summarize or support the opinions of Mr. Hedge.
- e. *Plaintiff's 26(b)(4) Statement* fails to include a list of all publications authored by Mr. Hedge in the preceding 10 years.

VI. TREATING PHYSICIANS.

With respect to the disclosure of Plaintiff's treating physicians, Defendant Prouty makes the following general objections -

- a. *Plaintiff's 26(b)(4) Statement* fails to disclose whether the disclosed treating physicians have any relation to the Plaintiff or to Plaintiff's attorneys.
- b. *Plaintiff's 26(b)(4) Statement* fails to disclose whether the disclosed treating physicians have ever previously testified for or on behalf of the Plaintiff or Plaintiff's attorneys.
- c. *Plaintiff's 26(b)(4) Statement* fails to disclose the form and manner of the disclosed treating physicians's compensation for providing expert witness services on the Plaintiff's behalf. Disclosure of the disclosed treating physicians's compensation to be paid for study and

testimony is necessary.


- d. *Plaintiff's 26(b)(4) Statement* fails to include the production to this Defendant of any or all correspondence between the disclosed treating physicians and the Plaintiff or Plaintiff's attorneys.
- e. *Plaintiff's 26(b)(4) Statement* fails to include a detail of the disclosed treating physicians' expert qualifications, except with regard to Drs. Schweiger and McMartin.
- f. *Plaintiff's 26(b)(4) Statement* fails to include a list of all publications authored by the disclosed treating physicians in the preceding 10 years.
- g. *Plaintiff's 26(b)(4) Statement* fails to include a list of actions in which the disclosed treating physicians have testified at deposition or trial as an expert in the preceding 4 years.

VII. CONCLUSION.

By reason of the foregoing, Defendant Prouty respectfully requests and **MOVES THE COURT**, pursuant to Rules 16(i) and 37(e) of the IDAHO RULES OF CIVIL PROCEDURE, and pursuant to the Court's *Scheduling Order*, for the issuing of appropriate sanctions for the above and foregoing failures, including, but not limited to, exclusion of the witnesses and their testimony, an order compelling that the deficient disclosures be corrected, and/or an assessment of Defendant Prouty's costs and attorney fees incurred in making this *Objection* and proceedings related thereto.

DATED this 2nd day of March, 2009.

RINGERT LAW CHARTERED

by: 
James G. Reid
David P. Claiborne

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 2nd day of March, 2009 by the following method:

DOUGLAS W. CRANDALL
ATTORNEY AT LAW
420 W. Main St., Ste. 206
Boise, Idaho 83702
Attorney for Plaintiff

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Attorney for Plaintiff

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Attorneys for Defendant City of Garden City

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- Federal Express
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- Facsimile
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James G. Reid
David P. Claiborne

RECEIVED

MAR 05 2009

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ISB #2185

NO. 059
A.M. 059

MAR 05 2009

J. DAVID
By L. AMES
deputy

Attorney for Defendant City of Garden City, Idaho

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN STEM,

Plaintiff,

vs.

CITY OF GARDEN CITY, IDAHO
and WESLEY C. PROUTY,

Defendants.

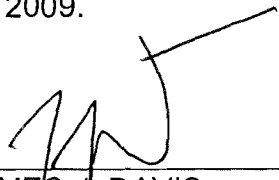
Case No. CV PI 0806177

DEFENDANT CITY OF GARDEN CITY,
IDAHO'S JOINDER IN DEFENDANT
PROUTY'S OBJECTION TO PLAINTIFF'S
26(b)(4) STATEMENT

COMES NOW Defendant City of Garden City, Idaho, and joins in Defendant Prouty's Objection to Plaintiff's 26(b)(4) Statement, signed March 2, 2009, except to the extent of any information concerning the relationship, if any, between the designated expert and Plaintiff or Plaintiff's attorneys and correspondence provided by Plaintiff's attorneys to the expert that was not relied upon by the expert. Defendant City of Garden City, Idaho, also joins in the reservation of right to challenge admission of

opinion testimony pursuant to the Idaho Rules of Evidence since the experts have not yet had their depositions taken.

DATED this 4th day of March, 2009.



JAMES J. DAVIS


CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 4th day of March, 2009, I served a true and correct copy of the foregoing DEFENDANT CITY OF GARDEN CITY, IDAHO'S JOINDER IN DEFENDANT PROUTY'S OBJECTION TO PLAINTIFF'S 26(b)(4) STATEMENT upon the following attorneys by depositing copies thereof in the United States Mail, postage prepaid, in envelopes addressed to said attorneys at the following addresses:

Jeffrey Sheehan
Sheehan Law Office
420 W. Main St., Ste. 206
Boise, ID 83702

Douglas W. Crandall
Crandall Law Office
420 W. Main St., Ste. 206
Boise, ID 83702

James G. Reid
David P. Claiborne
Ringert Law Chtd.
455 S. Third
P. O. Box 2773
Boise, ID 83701-2773



JAMES J. DAVIS

MAR 09 2009

J. DAVID NAVARRO, Clerk
By BRAD BURGESS
ORIGINAL

JAMES G. REID, ISB #1372
DAVID P. CLAIBORNE, ISB #6579
RINGERT LAW CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

Attorneys for Defendant Wesley C. Prouty

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

		*
		*
		*
JOHN STEM,	)	Case No. CV PI 0806177
)	
Plaintiff,)	
)	
vs.	)	MOTION TO STRIKE
)	
CITY OF GARDEN CITY, IDAHO, and)	
WESLEY C. PROUTY,)	
)	
Defendants.)	
		*
		*
		*

COMES NOW, Defendant Wesley C. Prouty, pursuant to I.R.C.P. 12(f) and moves to strike the following paragraphs from Plaintiff's Second Amended Complaint on the grounds and for the reason that the allegations as set forth in paragraphs 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 61, 62 and 72 of Plaintiff's Second Amended Complaint have been previously eliminated by way of Summary Judgment.

Defendant Wesley C. Prouty requests oral argument upon this Motion.

Dated this 9th day of March, 2009.

RINGERT CLARK CHARTERED

BY:  for
James G. Reid

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 2009, a true and correct copy of the foregoing was served upon all parties listed below by:

- | | | | |
|-------------------------------------|----------------------------|--------------------------|--------------|
| <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid | <input type="checkbox"/> | express Mail |
| <input type="checkbox"/> | hand delivery | <input type="checkbox"/> | facsimile |

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James G. Reid

MAR 09 2009

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J. DAVID NAVARRO, Clerk
BY BRANDI BURGESS
DEPUTY

Attorneys for Defendant Wesley C. Prouty

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

	*	
	*	
	*	
JOHN STEM,	)	Case No. CV PI 0806177
)	
Plaintiff,)	
	)	MEMORANDUM IN SUPPORT
vs.	)	OF MOTION TO STRIKE
)	
CITY OF GARDEN CITY, IDAHO, and)	
WESLEY C. PROUTY,)	
)	
Defendants.)	
	*	
	*	
	*	

On February 26, 2009, counsel for Defendant Wesley C. Prouty received, via facsimile, a copy of Plaintiff's Second Amended Complaint. The Court, on February 18, 2009, granted Plaintiff's Motion to allow a Second Amended Complaint setting forth claims against Defendant Prouty under a "negligence per se" theory. In the Court's Memorandum Decision of February 18, 2009, the Court also granted Defendant Wesley

C. Prouty's Motion for Partial Summary Judgment as to the claims against Mr. Prouty in Plaintiff's First Amended Complaint which completely disposed of Plaintiff's claims against Mr. Prouty based on negligence under a theory of premises liability.

The Second Amended Complaint contains a number of allegations, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 61, 62 and 72, which are not allegations relating to Plaintiff's newly authorized cause of action against Defendant Prouty based upon negligence per se, but instead are a rehash of Plaintiff's allegations of negligence as set forth in their initial Complaint that have been dismissed by this Court.

The Idaho Supreme Court, in *Stewart v. Arrington Construction Company*, 92 Idaho 526, 466 P.2d 895 (1968) stated at 92 Idaho 530:

A motion to strike can be used, with respect to a complaint, only to eliminate unnecessary or objectionable verbage. A complaint or defense will stand after a 12(f) attack, stripped only of redundant, immaterial, impertinent, or scandalous matter. . . .


Immaterial matters include "Matter having no essential or important relationship to the averments or unnecessary particulars, history and description, **or allegations which have previously been eliminated by way of summary judgment.**" (citations omitted)

Clearly, the allegations as set forth in paragraphs 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 61, 62 and 72 of Plaintiff's Second Amended Complaint are allegations that have been previously disposed of by way of summary judgment and, as such, should be stricken from Plaintiff's Second Amended Complaint and Defendant Prouty should not be required to respond to the same.

Respectfully submitted this 9 day of March, 2009.

RINGERT LAW CHARTERED

by:


James G. Reid

CERTIFICATE OF SERVICE

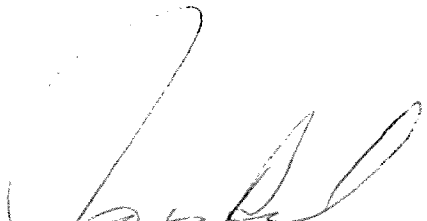
I hereby certify that on this 9 day of March, 2009, a true and correct copy of the foregoing was served upon all parties listed below by:

- | | | | |
|-------------------------------------|----------------------------|--------------------------|--------------|
| <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid | <input type="checkbox"/> | express Mail |
| <input type="checkbox"/> | hand delivery | <input type="checkbox"/> | facsimile |

Douglas W. Crandall
Attorney at Law
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Jeffrey T. Sheehan
Attorney at Law
420 W. Main Street, Suite 206
Boise, ID 83702

James J. Davis
406 W. Franklin Street
P.O. Box 1517
Boise, ID 83701



James G. Reid

RECEIVED

MAR 10 2009

9:28

Ada County Clerk
JAMES J. DAVIS

Attorney at Law
406 W. Franklin St.
P. O. Box 1517
Boise, ID 83701-1517
Telephone: (208) 336-3244
Facsimile: (208) 336-3374
Email: jdavis@davisjd.com
ISB #2185

MAR 10 2009
J. DAVID JONES
Clerk

Attorney for Defendant City of Garden City, Idaho

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN STEM,)	
)	
Plaintiff,	)	Case No. CV PI 0806177
)	
vs.)	
)	
CITY OF GARDEN CITY, IDAHO	)	DEFENDANT CITY OF GARDEN CITY,
and WESLEY C. PROUTY,	)	IDAHO'S ANSWER TO SECOND AMENDED
	)	COMPLAINT AND DEMAND FOR
Defendants.	)	JURY TRIAL
)	

COMES NOW the City of Garden City, Idaho ("Garden City") and for answer to Plaintiff's Second Amended Complaint and Demand for Jury Trial ("Complaint") alleges as follows:

FIRST DEFENSE

Plaintiff's Complaint and each and every count thereof fails to state a claim against this Defendant upon which relief can be granted.

SECOND DEFENSE TO COUNT I

I.

This answering Defendant denies each and every allegation of the Complaint not specifically and expressly admitted herein.

II.

This answering Defendant is without information to form a belief as to the truth of the allegations contained in Paragraph 1, and, therefore, denies the same.

III.

For answer to Paragraph 2, it is admitted that Garden City is a "political subdivision" as that term is defined within the Idaho Tort Claims Act, Idaho Code § 6-901, et seq.

IV.

For answer to Paragraph 3, this answering Defendant admits that it received on April 3, 2007, a "Notice of Tort Claim." It is denied that a copy of the Notice of Tort Claim is attached to the Complaint.

V.

For answer to Paragraph 4, it is admitted that more than 90 days has passed since the Notice of Tort Claim was served and by statute the claim is denied.

VI.

For answer to Paragraph 5, it is admitted that this Court has jurisdiction.

VII.

For answer to Paragraph 6, it is admitted that Ada County is an appropriate venue for this action.

VIII.

This answering Defendant is without information to form a belief as to the truth of the allegations contained in Paragraphs 7, 8, 9, 10, and 11, and, therefore, denies the same.

IX.

For answer to Paragraph 12, it is denied that this answering Defendant owns or maintains the premises referred to as the "loading area" within the Complaint.

X.

For answer to Paragraph 13, it is admitted that manhole covers for this answering Defendant's water and sewer systems are owned and maintained by this answering Defendant. It is further admitted that there are manhole covers in the "loading area" as defined within the Complaint.

XI.

This answering Defendant is without information to form a belief as to the truth of the allegations contained in Paragraphs 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23, and, therefore, denies the same.

XII.

For answer to Paragraph 24, this answering Defendant denies that it originally placed, installed, or contracted with a private construction company to place or install a manhole cover in the "loading area" as defined by the Complaint. To the extent that the allegations in Paragraph 24 are alleging that, at some time after the manhole covers were originally installed, this answering Defendant placed or installed manhole covers within the "loading area" as defined by the Complaint, this answering Defendant

is without information to form a belief as to the truth of said allegations, and, therefore, denies the same. Further, to the extent that Paragraph 24 alleges that this answering Defendant contracted with a private construction company to place or install the manhole covers after original installation, the allegation is denied.

XIII.

This answering Defendant is without information to form a belief as to the truth of the allegations contained in Paragraph 25, and, therefore, denies the same.

XIV.

For answer to Paragraph 26, it is admitted that a manhole cover located at the "loading area" as defined by the Complaint was manufactured by D & L Foundry and Supply, Inc.; but this answering Defendant is without information to form a belief as to the truth of the allegations that the manhole cover involved in this accident was manufactured by D & L Foundry and Supply, Inc., and, therefore, denies the same.

XV.

This answering Defendant is without information to form a belief as to the truth of allegations contained in Paragraph 27, and, therefore, denies the same.

XVI.

For answer to Paragraph 28, it is admitted that this answering Defendant regularly makes meter readings and when doing so the manhole covers need not be removed.

XVII.

This answering Defendant is without information to form a belief as to the truth of the allegations contained in Paragraphs 29, 30, 31, 32, and 33, and, therefore, denies the same.

XVIII.

For answer to the unnumbered paragraph in which the allegations of Paragraphs 1 through 33 are reasserted, this answering Defendant realleges its answers to Paragraphs 1 through 33 as if the same were set out herein in full.

XIX.

For answer to Paragraphs 34 through 42, this answering Defendant denies the allegations on alternative bases. First, the allegations are denied because they are made against a party other than this answering Defendant and require no response. Second, and in the alternative, to the extent a response is required, this answering Defendant is without information to form a belief as to the truth of the allegations concerning ownership of the property, but it is generally admitted that a property owner has certain duties.

SECOND DEFENSE TO COUNT II

XX.

For answer to the unnumbered paragraph in which the allegations of Paragraphs 1 through 42 are reasserted, this answering Defendant realleges its answers to Paragraphs 1 through 42 as if the same were set out herein in full.

XXI.

For answer to Paragraph 43, it is admitted that this answering Defendant had, as respects the manhole cover, a general duty to use due or ordinary care.

XXII.

For answer to Paragraph 44, this answering Defendant denies the allegations regarding its "... authority, dominion, control, and use ..." of the manhole cover on the basis that the allegations are vague and ambiguous.

XXIII.

For answer to Paragraph 45, this answering Defendant admits that it has a general duty to use due or ordinary care.

XXIV.

For answer to Paragraph 46, this answering Defendant denies that it had a "... legal right and duty to monitor, access, use, maintain and inspect" the manhole cover on the basis that the allegation is vague and ambiguous, but it is admitted that this answering Defendant had a duty of due care.

XXV.

This answering Defendant denies the allegations in Paragraphs 47 and 48.

XXVI.

For answer to Paragraphs 49, 50, 51, 52, and 53, this answering Defendant admits that it had a general duty to use due or ordinary care with respect to the manhole cover, but this answering Defendant denies that it had any duties with respect to the premises.

XXVII.

This answering Defendant denies the allegations in Paragraphs 54 and 55.

SECOND DEFENSE TO COUNT III

XXVIII.

For answer to the unnumbered paragraph in which the allegations of Paragraphs 1 through 55 are reasserted, this answering Defendant realleges its answers to Paragraphs 1 through 55 as if the same were set out herein in full.

XXIX.

This answering Defendant is without information to form a belief as to the truth of the allegations contained in Paragraphs 57, 58, 59, 60, 61, and 62, and, therefore, denies the same.

XXX.

This answering Defendant admits the allegations in Paragraph 63.

XXXI.

For answer to Paragraph 64, the ordinance cited speaks for itself.

XXXII.

This answering Defendant is without information to form a belief as to the truth of the allegations contained in Paragraph 65, and, therefore, denies the same.

XXXIII.

For answer to Paragraph 66, this answering Defendant is without information to form a belief as to the truth of the allegations contained in the first and

second sentences thereof, and, therefore, denies the same. As to the third sentence, the ordinance cited therein speaks for itself.

XXXIV.

The allegations in Paragraph 67 are admitted.

XXXV.

For answer to Paragraph 68, this answering Defendant is without information to form a belief as to the truth of the allegations contained in the first sentence thereof, and, therefore, denies the same. For answer to the second sentence thereof, it is admitted that there is no building permit on file with this Defendant. As to the third sentence, it is admitted that no engineering documentation has been produced regarding any modification to the subject premises. As to the fourth sentence, this answering Defendant is without information to form a belief as to the truth of the allegations thereof, and, therefore, denies the same.

XXXVI.

This answering Defendant is without information to form a belief as to the truth of the allegations contained in Paragraph 69, and, therefore, denies the same.

XXXVII.

The allegations in Paragraph 70 are admitted.

XXXVIII.

For answer to Paragraph 71, it is admitted that no building permit is on file with this answering Defendant.

XXXIX.

This answering Defendant is without information to form a belief as to the truth of the allegations contained in Paragraph 72, and, therefore, denies the same.

XL.

The allegations in Paragraphs 73 and 74 are admitted.

XLI.

For answer to Paragraph 75, it is admitted that if a modification was made to the subject building, a building permit should have been applied for with this answering Defendant. This answering Defendant is without information to form a belief as to the truth of the allegations contained in the second sentence of Paragraph 75, and, therefore, denies the same.

XLII.

This answering Defendant admits the allegations in Paragraph 76.

XLIII.

For answer to Paragraph 77, it is admitted that if a modification was made to the subject building, a building permit should have been applied for with this answering Defendant. With respect to the allegations that the failure to obtain a building permit is a clear violation of Idaho law and a continuing misdemeanor violation, this answering Defendant is without information to form a belief as to the truth of the allegations thereof, and, therefore, denies the same.

XLIV.

This answering Defendant is without information to form a belief as to the truth of the allegations contained in Paragraphs 78, 79, 80, 81, 82, and 83, and, therefore, denies the same.

XLV.

This answering Defendant denies the allegations in Paragraphs 84, 85, 86, 87, 88, 89, 90, and 91 on the basis that this answering Defendant was not negligent and it is without information to form a belief as to the truth of the allegations concerning Plaintiff's claimed injuries and damages, and, therefore, denies the same. Further, this answering Defendant specifically denies the allegation in Paragraph 90 that it was reckless and willful and the allegation in Paragraph 91 that it acted willfully, wantonly, and recklessly.

XLVI.

The allegations in Paragraph 92 are denied.

FIRST AFFIRMATIVE DEFENSE

The damages sustained by Plaintiff, if any there were, were directly and proximately caused by Plaintiff's own negligence.

SECOND AFFIRMATIVE DEFENSE

The damages sustained by Plaintiff, if any there were, were directly and proximately caused by the negligence of others.

THIRD AFFIRMATIVE DEFENSE

Plaintiff is not the real party in interest with respect to all or a part of his claims.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff has failed to mitigate his damages, if any. (This Affirmative Defense is asserted to prevent its waiver. To the extent that there are not facts supporting the Affirmative Defense at the conclusion of discovery in this case, this answering Defendant will voluntarily waive the defense.)

FIFTH AFFIRMATIVE DEFENSE

This answering Defendant is immune from Plaintiff's claims under the Idaho Tort Claims Act, Idaho Code § 6-901, et seq.

SIXTH AFFIRMATIVE DEFENSE

This answering Defendant's liability exposure is capped by the Idaho Tort Claims Act, Idaho Code § 6-901, et seq., regardless of the exceptions to the limitation on non-economic damages provided in Idaho Code § 6-1603(4).

WHEREFORE, Garden City, having fully answered Plaintiff's Complaint, prays as follows:

1. Plaintiff's Complaint be dismissed with prejudice as to Garden City.
2. This answering Defendant be awarded its costs of suit herein incurred.
3. For such other and further relief as to the Court seems just and equitable in the premises.

DATED this 9th day of March, 2009.



JAMES J. DAVIS

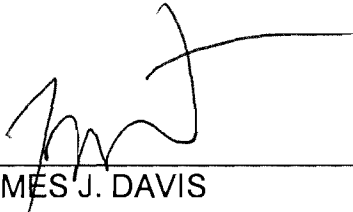
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 9th day of March, 2009, I served a true and correct copy of the foregoing DEFENDANT CITY OF GARDEN CITY, IDAHO'S ANSWER TO SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL upon the following attorneys by depositing copies thereof in the United States Mail, postage prepaid, in envelopes addressed to said attorneys at the following addresses:

Jeffrey Sheehan
Sheehan Law Office
420 W. Main St., Ste. 206
Boise, ID 83702

Douglas W. Crandall
Crandall Law Office
420 W. Main St., Ste. 206
Boise, ID 83702

James G. Reid
David P. Claiborne
Ringert Law Chtd.
455 S. Third
P. O. Box 2773
Boise, ID 83701-2773



JAMES J. DAVIS

RECEIVED
MAR 13 2009
Ada County Clerk

NO. _____ FILED _____
ADA *D*

JAMES J. DAVIS
Attorney at Law
406 W. Franklin St.
P. O. Box 1517
Boise, ID 83701-1517
Telephone: (208) 336-3244
Facsimile: (208) 336-3374
Email: jdavis@davisjd.com
ISB #2185

MAR 13 2009
J. Davis
By _____
DEPT.

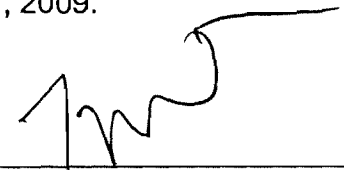
Attorney for Defendant City of Garden City, Idaho

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN STEM,)	
)	
Plaintiff,	)	Case No. CV PI 0806177
)	
vs.)	
)	
CITY OF GARDEN CITY, IDAHO	)	DEFENDANT CITY OF GARDEN CITY,
and WESLEY C. PROUTY,	)	IDAHO'S JOINDER IN MOTION TO
	)	VACATE AND RESET TRIAL
Defendants.)	
_____)	

COMES NOW Defendant City of Garden City, Idaho, by and through its attorney of record, James J. Davis, and joins in the Motion to Vacate and Reset Trial, filed by Defendant Wesley C. Prouty.

DATED this 12th day of March, 2009.



JAMES J. DAVIS


CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 12th day of March, 2009, I served a true and correct copy of the foregoing DEFENDANT CITY OF GARDEN CITY, IDAHO'S JOINDER IN MOTION TO VACATE AND RESET TRIAL upon the following attorneys by depositing copies thereof in the United States Mail, postage prepaid, in envelopes addressed to said attorneys at the following addresses:

Jeffrey Sheehan
Sheehan Law Office
420 W. Main St., Ste. 206
Boise, ID 83702

Douglas W. Crandall
Crandall Law Office
420 W. Main St., Ste. 206
Boise, ID 83702

James G. Reid
David P. Claiborne
Ringert Law Chtd.
455 S. Third
P. O. Box 2773
Boise, ID 83701-2773



JAMES J. DAVIS

JAMES G. REID, ISB #1372
 DAVID P. CLAIBORNE, ISB #6579
 RINGERT LAW CHARTERED
 455 S. Third, P. O. Box 2773
 Boise, Idaho 83701-2773
 Telephone: (208) 342-4591
 Facsimile: (208) 342-4657

NO. _____
 A.M. _____ FILED PM 4:20

APR 29 2009
ORIGINAL
 J. DAVID NAVAREG, Clerk
 By KATHY J. BIEHL
 DEPUTY

Attorneys for Defendant Wesley C. Prouty

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

		*
		*
		*
JOHN STEM,	)	Case No. CV PI 0806177
)	
Plaintiff,)	
)	
vs.	)	MOTION TO AMEND
	)	SCHEDULING ORDER RE:
CITY OF GARDEN CITY, IDAHO, and	)	DISCOVERY
WESLEY C. PROUTY,)	
)	
Defendants.)	
)	*
)	*
)	*

COMES NOW, the Defendant, Wesley Prouty, by and through his attorneys of record, Ringert Law Chartered, and hereby moves the Court to amend its Scheduling Order entered October 14, 2008. Specifically, this Defendant requests that the Court amend paragraph 6 of the discovery order to provide that the deadline for completion of discovery be December 31, 2009, rather than the presently set May 4, 2009 deadline.

Good and proper grounds exist of entry for the relief requested by this Motion for the reason that trial in this matter has been rescheduled to take place in April of 2010, and the disclosure of expert witnesses has been extended to the August and September, 2009 time frames. Likewise extending the deadline for completion of discovery through the end of the 2009 calendar year will allow the parties proper opportunity to engage in discovery after the deadline for disclosure of expert witnesses.

Counsel for Defendant Garden City has indicated to the undersigned that he does not oppose this Motion. Counsel for the Plaintiff has not responded to inquiry from the undersigned relevant to Plaintiff's agreement with this Motion.

Oral argument on this Motion is respectfully requested.

Dated this 29 day of April, 2009.

RINGERT LAW CHARTERED

BY: 
David P. Claiborne

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2009, a true and correct copy of the foregoing was served upon all parties listed below by:

U.S. Mail, postage prepaid express Mail
 hand delivery facsimile

Douglas W. Crandall
Attorney at Law
420 W. Main Street, Suite 206
Boise, ID 83702

Jeffrey T. Sheehan
Attorney at Law
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Boise, ID 83702

James J. Davis
406 W. Franklin Street
P.O. Box 1517
Boise, ID 83701



David P. Claiborne

JAMES G. REID, ISB #1372
 DAVID P. CLAIBORNE, ISB #6579
 RINGERT LAW CHARTERED
 455 S. Third, P. O. Box 2773
 Boise, Idaho 83701-2773
 Telephone: (208) 342-4591
 Facsimile: (208) 342-4657

NO. _____ FILED
 A.M. 11:27 P.M. _____
JUN - 1 2009
 J. DAVID NAVARRO, Clerk
 By [Signature] DEPUTY

Attorneys for Defendant Wesley C. Prouty

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

	*	
	*	
	*	
JOHN STEM,	)	Case No. CV PI 0806177
)	
Plaintiff,)	
)	
vs.	)	ORDER AMENDING
	)	SCHEDULING ORDER RE:
CITY OF GARDEN CITY, IDAHO, and	)	DISCOVERY
WESLEY C. PROUTY,)	
)	
Defendants.)	
	*	
	*	
	*	

Upon consideration of Defendant Wesley C. Prouty's Motion to Amend Scheduling Order re: Discovery, filed April 29, 2009, and all parties stipulating to the entry of the relief requested thereby in open court on May 19, 2009, and good cause otherwise appearing for entry of the relief requested thereby,

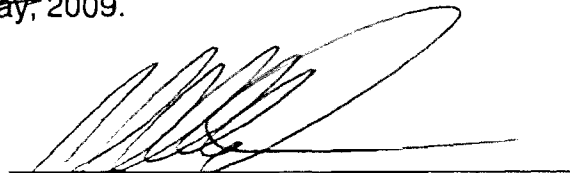
NOW, THEREFORE, it is hereby Ordered that paragraph 6 of the Scheduling

ORDER AMENDING SCHEDULING ORDER RE: DISCOVERY- 1

000519

Order entered October 14, 2008 be and is hereby amended to provide that the deadline for completion of discovery in this action be December 31, 2009.

IT IS SO ORDERED this 1 day of ^{June}~~May~~, 2009.



Honorable Michael McLaughlin

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of ~~May~~ ^{June}, 2009, a true and correct copy of the foregoing was served upon all parties listed below by:


- | | | | |
|-------------------------------------|----------------------------|--------------------------|--------------|
| <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid | <input type="checkbox"/> | express Mail |
| <input type="checkbox"/> | hand delivery | <input type="checkbox"/> | facsimile |

Douglas W. Crandall
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James J. Davis
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P.O. Box 1517
Boise, ID 83701

J. DAVID NAVARRO


Deputy Clerk

JAMES G. REID, ISB #1372
 DAVID P. CLAIBORNE, ISB #6579
 RINGERT LAW CHARTERED
 455 S. Third, P. O. Box 2773
 Boise, Idaho 83701-2773
 Telephone: (208) 342-4591
 Facsimile: (208) 342-4657

NO. _____
 FILED _____
 A.M. _____ P.M. 1:35
 JUN - 1 2009
 J. DAVID NAVARRO, Clerk
 By _____ DEPUTY

Attorneys for Defendant Wesley C. Prouty

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

	*	
	*	
	*	
JOHN STEM,	)	Case No. CV PI 0806177
)	
Plaintiff,)	
)	
vs.	)	ORDER GRANTING MOTION
	)	TO STRIKE
CITY OF GARDEN CITY, IDAHO, and)	
WESLEY C. PROUTY,)	
)	
Defendants.)	
	*	
	*	
	*	

Upon consideration of Defendant Wesley C. Prouty's Motion to Strike, filed March 9, 2009, and all of the parties having stipulated to entry of the relief requested thereby in open court on May 19, 2009, and good cause otherwise appearing for entry of the relief requested thereby,

NOW, THEREFORE, it is hereby Ordered as follows:

ORDER GRANTING MOTION TO STRIKE- 1

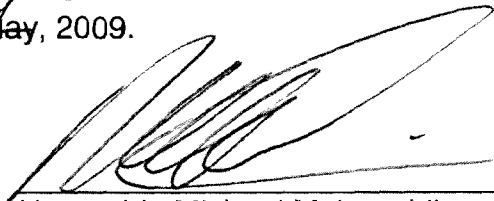
000522

1) That paragraphs 29 through 42, with the exception of paragraph 33, of the Second Amended Complaint and Demand for Jury Trial on file in this action, be and are hereby stricken, and that Defendant Wesley C. Prouty shall not be required to plead an answer to said paragraphs; and

2) That no part or remaining paragraphs of the Second Amended Complaint on file herein, with respect to Defendant Wesley C. Prouty only, shall be construed to state any claim against said Defendant other than claims for violation of statutes or ordinances; and

3) That the Defendant Wesley C. Prouty shall file with the Court within ten (10) days of entry of this Order an Answer to the remaining paragraphs of the Second Amended Complaint on file herein.

IT IS SO ORDERED this 1 day of ^{June}~~May~~, 2009.



Honorable Michael McLaughlin

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of ~~May~~^{June}, 2009, a true and correct copy of the foregoing was served upon all parties listed below by:


- | | | | |
|-------------------------------------|----------------------------|--------------------------|--------------|
| <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid | <input type="checkbox"/> | express Mail |
| <input type="checkbox"/> | hand delivery | <input type="checkbox"/> | facsimile |

Douglas W. Crandall
Attorney at Law
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Boise, ID 83702

Jeffrey T. Sheehan
Attorney at Law
420 W. Main Street, Suite 206
Boise, ID 83702

James J. Davis
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P.O. Box 1517
Boise, ID 83701

J. DAVID NAVARRO


Deputy Clerk

JAMES G. REID, ISB #1372
 DAVID P. CLAIBORNE, ISB #6579
 RINGERT LAW CHARTERED
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 Boise, Idaho 83701-2773
 Telephone: (208) 342-4591
 Facsimile: (208) 342-4657

NO. _____ FILED _____
 A.M. _____ P.M. 4:10

JUN 10 2009

J. DAVID HAVANICK, Clerk
 BY BRANDA DEPUTY
ORIGINAL

Attorneys for Defendant Wesley C. Prouty

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

	* * *	
JOHN STEM,	)	Case No. CV PI 0806177
)	
Plaintiff,)	
	)	DEFENDANT WESLEY C. PROUTY'S
vs.	)	ANSWER TO SECOND AMENDED
	)	COMPLAINT AND DEMAND FOR
CITY OF GARDEN CITY, IDAHO, and	)	JURY TRIAL
WESLEY C. PROUTY,)	
)	
Defendants.)	
	* * *	

COMES NOW, Defendant Wesley C. Prouty (hereinafter referred to as "Prouty"),
 by and through his attorney of record, Ringert Law Chartered, and answers Plaintiff's
 Second Amended Complaint and Demand for Jury Trial (herein "Complaint") as follows:

DEFENDANT WESLEY C. PROUTY'S ANSWER TO SECOND AMENDED
 COMPLAINT AND DEMAND FOR JURY TRIAL - 1

000525

✓

FIRST DEFENSE

I.

This answering Defendant denies each and every allegation of the Complaint not herein expressly and specifically admitted.

II.

With respect to the allegations contained in paragraphs 1, 2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 33 and 57 of the Complaint, this answering Defendant admits the same.

III.

With respect to the allegations contained in paragraphs 3, 4, 20, 21, 22, 23, 24, 25, 26, 27, 28, 83, 84, 85, 86, 87 and 88 of the Complaint, this answering Defendant is without sufficient knowledge so as to form a belief as to the truth of the allegations contained therein and, therefore, denies the same.

IV.

With respect to the allegations contained in paragraphs 5, 6, 67, 70, 73, 74 and 75 of the Complaint, the allegations thereat contain legal conclusions and statements to which a response is not required, but to the extent a response is required the allegations contained within said paragraphs are denied.

V.

With respect to the allegations contained in paragraphs 29 through 32, and paragraphs 34 through 42, of the Complaint, the allegations contained thereat do not require a response from this answering Defendant pursuant to the Court's *Order*

Granting Motion to Strike entered June 1, 2009.

VI.

With respect to the allegations contained in paragraphs 43 through 55 of the Complaint, the allegations contained thereat are directed at a party other than this answering Defendant and do not require a response from this answering Defendant, but to the extent a response is required of this answering Defendant, then the allegations contained at said paragraphs are denied.

VII.

With respect to the allegations contained in paragraph 58 of the Complaint, this answering Defendant admits a commercial lease agreement existed between Prouty and Custom Rock Tops, which said lease is in writing and speaks for itself, but the remainder of said paragraph is denied.

VIII.

With respect to the remaining allegations of the Complaint not referenced hereinabove, the allegations contained at said paragraphs are denied.

FIRST AFFIRMATIVE DEFENSE

IX.

Plaintiff's Complaint fails to state a claim against this answering Defendant upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

X.

Plaintiff is not the real party in interest with respect to all or a part of his claims

contrary to IRCP 17(a).

THIRD AFFIRMATIVE DEFENSE

XI.

Persons or entities, other than this answering Defendant and for whom or which this answering Defendant is not responsible may have proximately caused or did proximately cause, in whole or in part, Plaintiff's alleged injuries and damages, if any.

FOURTH AFFIRMATIVE DEFENSE

XII.

The Plaintiffs alleged damages were legally caused by Plaintiff's own negligence or fault, or the negligence or fault of his employer and/or agents.

FIFTH AFFIRMATIVE DEFENSE

XIII.

Plaintiff's alleged injuries and damages, if any, were or may have been proximately caused, in whole or in part, by the superceding intervening acts or omissions of Plaintiffs or other persons or entities other than this answering Defendant.

SIXTH AFFIRMATIVE DEFENSE

XIV.

The Plaintiffs alleged injuries and damages, if any, were not proximately caused by the acts or omissions of this answering Defendant.

SEVENTH AFFIRMATIVE DEFENSE

XV.

This answering Defendant alleges that, if there is any negligence or liability of

any of the parties named herein, which is denied, it is the sole and exclusive negligence and liability of such other parties and not of this answering Defendant.

EIGHTH AFFIRMATIVE DEFENSE

XVI.

Plaintiff may have failed to mitigate the damages, if any, that Plaintiff allegedly sustained.

NINTH AFFIRMATIVE DEFENSE

XVII.

Plaintiffs are required to set off against his damages, if any, amounts Plaintiff may have been or may come to be compensated for by any other means or entities as a result of the matters alleged in the Complaint.

TENTH AFFIRMATIVE DEFENSE

XVIII.

This answering Defendant reserves the right to amend this Answer to plead additional affirmative defenses and matters in avoidance that may be disclosed in the course of additional investigation and discovery.

REQUEST FOR ATTORNEY'S FEES

XIX.

This answering Defendant has retained the services of Ringert Law Chartered to represent him in this matter and, pursuant to Idaho Code §12-120 and 121 and any other applicable statute or rule, is entitled to his reasonable attorney's fees incurred in this action.

WHEREFORE, Wesley C. Prouty prays for judgment as follows:

1. That Plaintiff's Complaint be dismissed with prejudice and that Plaintiff take nothing thereunder.
2. That he be awarded his costs and disbursements necessarily incurred in defending this action pursuant to applicable rules and/or statute.
3. That he be awarded his reasonable attorneys' fees incurred herein.
4. For such other and further relief as the Court may deem just and equitable in the premises.

DEMAND FOR JURY TRIAL

Defendant Wesley C. Prouty demands a trial by jury as to all issues so triable before a jury consisting of no less than twelve (12) persons.

Dated this 10th day of June, 2009.

RINGERT LAW CHARTERED

BY:



James G. Reid
David P. Claiborne

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2009, a true and correct copy of the foregoing was served upon all parties listed below by:

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ORIGINAL

Attorneys for Defendant Wesley C. Prouty

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN STEM,

Plaintiff,

vs.

**CITY OF GARDEN CITY, IDAHO and
WESLEY C. PROUTY,**

Defendants.

Case No. CV-PI-08-06177

**DEFENDANT PROUTY'S SECOND
MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Defendant, Wesley C. Prouty, by and through his attorneys of record, Ringert Law Chartered, and, **PURSUANT TO** Rule 56 of the Idaho Rules of Civil Procedure, **HEREBY MOVES THE COURT** for entry of Summary Judgment in favor of Defendant Wesley C. Prouty as to any and all claims alleged in this action by Plaintiff John Stem against said Defendant.

This Motion is supported by the Statement of Facts Re: Defendant Prouty's Second Motion for Summary Judgment, the Affidavit of Counsel Re: Defendant Prouty's Second Motion for

ay


Summary Judgment, and the Memorandum in Support of Defendant Prouty's Second Motion for Summary Judgment, each of which is filed herewith.

Good cause and proper grounds exist for entry of the relief requested herein for the reason that this moving Defendant is entitled to judgment as a matter of law based upon the undisputed and material facts at issue in this action.

Oral argument is respectfully requested.

DATED this 9th day of October, 2009.

RINGERT LAW CHARTERED

by: 
James G. Reid
David P. Claiborne

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 9th day of October, 2009 by the following method:

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James G. Reid
David P. Claiborne

- correct to the best of my knowledge and belief.
2. That I am an attorney licensed to practice law in the State of Idaho and represent the interests of Defendant Wesley C. Prouty in the above-titled action.
 3. That attached here to as **Exhibit A** is a true and correct copy of relevant excerpts and exhibits from the Deposition of Wesley C. Prouty taken in the above-titled action on August 5, 2008.
 4. That attached here to as **Exhibit B** is a true and correct copy of relevant excerpts and exhibits from the Deposition of Robert E. Ruhl taken in the above-titled action on October 28, 2008.
 5. That attached here to as **Exhibit C** is a true and correct copy of relevant excerpts and exhibits from the Deposition of Gerald Gene Rhinehart taken in the above-titled action on March 11, 2009.
 6. That attached here to as **Exhibit D** is a true and correct copy of relevant excerpts and exhibits from the Deposition of Max Stith taken in the above-titled action on March 31, 2009.
 7. That attached here to as **Exhibit E** is a true and correct copy of relevant excerpts and exhibits from the Deposition of Mark L. Hedge taken in the above-titled action on April 2, 2009.
 8. That attached here to as **Exhibit F** is a true and correct copy of relevant excerpts from the Deposition of Jerrie Wolfe taken in the above-titled action on April 3, 2009.
 9. That attached here to as **Exhibit G** is a true and correct copy of relevant excerpts and exhibits from the Deposition of Larry Charles O'Leary taken in the above-titled action on April 14, 2009.
 10. That attached here to as **Exhibit H** is a true and correct copy of relevant excerpts and exhibits from the Deposition of Marc Jung taken in the above-titled action on April 14, 2009.

11. That attached hereto as **Exhibit I** is a true and correct copy of the Affidavit of Vince Kouba given in the above-titled action on May 11, 2009.

12. That attached hereto as **Exhibit J** is a true and correct copy of Defendant City of Garden City's Answers and Responses to Defendant Wesley C. Prouty's Second Set of Discovery Requests upon Defendant City of Garden City, Idaho served upon the undersigned in the above-titled action on May 18, 2009.


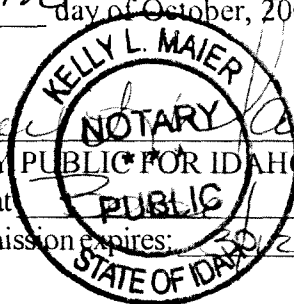
Your affiant says nothing further.

DATED this 9th day of October, 2009.

RINGERT LAW CHARTERED

by: 
David P. Claiborne

SUBSCRIBED AND SWORN TO before me this 9th day of October, 2009.


NOTARY PUBLIC FOR IDAHO
Residing at _____
My commission expires: 30/2/14


CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 9th day of October, 2009 by the following method:

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Presiding Judge

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James G. Reid
David P. Claiborne

EXHIBIT A

AFFIDAVIT OF COUNSEL RE: DEFENDANT PROUTY'S SECOND MOTION FOR
SUMMARY JUDGMENT - 5

000539

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

COPY

JOHN STEM,)
)
 Plaintiff,)
)
 vs.) Case No. CV-PI-08-06177
)
 CITY OF GARDEN CITY, IDAHO)
)
 and WESLEY C. PROUTY,)
)
 Defendants.)
)
 _____)

DEPOSITION OF WESLEY C. PROUTY

AUGUST 5, 2008

REPORTED BY:

BARBARA BURKE, CSR No. 463

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN STEM,)
Plaintiff,)
vs.) Case No. CV-PI-03-06177
CITY OF GARDEN CITY, IDAHO)
and WESLEY C. PROUTY,)
Defendants.)

DEPOSITION OF WESLEY C. PROUTY
AUGUST 5, 2008

REPORTED BY:
BARBARA BURKE, CSR No. 463
Notary Public

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1 THE DEPOSITION OF WESLEY C. PROUTY was taken
2 on behalf of the Plaintiff at the offices of
3 Ringert Clark Chartered, 455 South Third Street,
4 Boise, Idaho, commencing at 9:00 a.m. on August 5,
5 2008, before Barbara Burke, Certified Shorthand
6 Reporter and Notary Public with and for the State
7 of Idaho in the above-entitled matter.

8 APPEARANCES

9 For the Plaintiff:
10 DOUGLAS W. CRANDALL
11 420 West Main Street, Suite 206
12 Boise, ID 83702
13 For the Defendant City of Garden City, Idaho:
14 JAMES DAVIS, ESQUIRE
15 406 West Franklin Street
16 P.O. Box 1517
17 Boise, ID 83701
18 For the Defendant Wesley C. Prouty:
19 Ringert Clark Chartered
20 By JAMES G. REID, ESQUIRE
21 455 Third Street
22 P.O. Box 2773
23 Boise, ID 83701-2773

24 Also Present:
25 Danielle Stem

1 WESLEY C. PROUTY,
2 first duly sworn to tell the truth relating to
3 said cause, deposes and says:
4 EXAMINATION
5 QUESTIONS BY MR. CRANDALL:
6 Q. Mr. Prouty, do you mind if I call you
7 "Wes" for today's purposes?
8 A. No. No, not at all.
9 Q. Okay. Wes, for the record, would you
10 please state and spell your name for me, please?
11 A. Spell my name?
12 Q. Yes.
13 A. It's Wesley, W-e-s-l-e-y; initial C;
14 Prouty, P-r-o-u-t-y.
15 Q. Wes, how old are you?
16 A. I'm 67.
17 Q. And your date of birth?
19 Q. And your current address?
20 A. Let's see. 3467 West Muirfield Drive,
21 Meridian, Idaho, 83646.
22 Q. Okay. And do you have a profession?
23 A. I own a floor covering business.
24 Q. Okay. How long have you owned that
25 particular profession?

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1 A. Since 1989.
 2 Q. Okay. Are you still active in that
 3 today?
 4 A. Um-hmm (nodding head). Yes, I am.
 5 Q. And the name of that floor covering
 6 business?
 7 A. Intermountain Interiors.
 8 Q. What is the location of Intermountain
 9 Interiors?
 10 A. 4688 Chinden Boulevard.
 11 Q. Is that the same address that you share
 12 with Custom Rock Toppers?
 13 A. Yes. They have got a separate address,
 14 but -- yes, it is, the same building.
 15 Q. The same building?
 16 A. Yes.
 17 Q. Are you the owner of that premises?
 18 A. Yes, I am.
 19 Q. Are you married?
 20 A. No, I'm not.
 21 Q. So you are, in the true sense of the
 22 word, the only owner of that particular premises?
 23 A. Yes, I am.
 24 Q. Who did you purchase that premises
 25 from?

1 A. From Max Stith's company, I think.
 2 I don't know the name of it. Do you remember?
 3 (Speaking to Mr. Reid).
 4 It's 3CM or something -- I don't know.
 5 It's Max Stith and his partners.
 6 Q. When was that purchased?
 7 A. In 1994.
 8 Q. Did you occupy that premises prior to
 9 purchasing it?
 10 A. Two years prior to that.
 11 Q. Did you lease that from Max?
 12 A. Yes, I did.
 13 Q. And at the time that you leased the
 14 premises from Max until today's date, have there
 15 been any modifications to the premises?
 16 A. Modifications to the outside, inside?
 17 Q. Well, let me rephrase that.
 18 Let's start with the outside. Any
 19 modifications to the premises since the date of
 20 the lease to the outside?
 21 A. We had an overcoat on the driveways is
 22 all, but that's all.
 23 Q. Do you know when that was done?
 24 A. Probably three years ago, maybe four
 25 years ago. I don't know the exact date.

1 Q. Now, when you say, "overcoat" --
 2 A. Yes. We put an inch-and-a-half of
 3 blacktop on top of the existing one.
 4 Q. Okay.
 5 MR. DAVIS: I'm sorry?
 6 THE WITNESS: That was just in the
 7 front of the building, though.
 8 MR. DAVIS: I'm sorry. An inch and a
 9 half of what?
 10 THE WITNESS: Blacktop, new blacktop.
 11 MR. DAVIS: Thank you.
 12 Q. (BY MR. CRANDALL) Since you leased the
 13 property, have you done any significant modifications
 14 to the internal portion of the property?
 15 MR. DAVIS: Object to the form, the use
 16 of the word "significant." I'm afraid it may
 17 exclude other modifications, and I'd like to know
 18 about all of them.
 19 Q. (BY MR. CRANDALL) Okay. Let's rephrase
 20 that question.
 21 A. Modifications inside --
 22 Q. Any and all modifications inside of the
 23 property that you are aware of since the date
 24 that you leased it?
 25 A. Well, Custom Rock Top did some

1 remodeling in their building, inside theirs, they
 2 changed some walls and stuff, but as far as my
 3 half, I haven't done anything to it.
 4 Q. Anything since you originally leased
 5 that in 1992?
 6 A. Right.
 7 Q. Do you know what type of changes -- you
 8 indicated movement of some walls and so forth
 9 that Custom Rock Tops did to their portion of the
 10 building?
 11 A. Well, there was two separate locations
 12 in there. They took one of the walls out between
 13 the two locations.
 14 Q. Okay.
 15 A. They tore the ceiling out. They tore
 16 all the equipment out. There was a laundromat in
 17 there before, and that was all tore out.
 18 Q. Since 1992 when you originally leased
 19 the property, are you familiar with all of the
 20 tenants that have occupied that particular
 21 building since 1992?
 22 MR. REID: Object to the form. Which
 23 building, Counsel?
 24 Q. (BY MR. CRANDALL) The building where
 25 the incident took place, which was -- give me

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1 that address one more time of that location.
 2 I'll just refer to it at that address.
 3 A. 4688 Chinden.
 4 Q. 4688 Chinden. I'll rephrase the question.
 5 Since 1992 and your lease of 4688 Chinden,
 6 are you familiar with all the tenants that have
 7 occupied that particular building?
 8 A. I'm trying to think. I'm sort of
 9 familiar with them. They changed hands quite a
 10 bit. That laundromat was in there, and then it
 11 changed hands three times.
 12 Q. So just tell me the tenants you do
 13 remember occupying that particular location.
 14 A. Well, Max Stith had the laundromat.
 15 Q. Okay.
 16 A. Then Max Stith sold that, the business
 17 itself -- this was before I bought the building --
 18 to Vince Kouba.
 19 Then Vince sold it to a guy named Rich --
 20 and I can't think of Rich's last name.
 21 Then Rich sold it to Mike that had --
 22 I don't know his last name.
 23 Q. Okay. What is the address of Custom
 24 Rock Toppers?
 25 MR. DAVIS: 4684.

1 Q. Okay. To your knowledge, since 1992,
 2 has anyone ever modified the parking lot/loading
 3 area of 4684 since 1992?
 4 A. No.
 5 MR. DAVIS: Object to the form of the
 6 question. Go ahead.
 7 THE WITNESS: No, they haven't.
 8 Q. (BY MR. CRANDALL) There are some water
 9 covers that exist outside of 4684 and my
 10 understanding is 4688 addresses?
 11 A. Yes, there is.
 12 Q. Can you take a piece of paper and
 13 diagram those locations of those water covers for
 14 me. I will give you a pencil if you need one.
 15 A. I've got one, but I don't know if can I
 16 do this. This is the building. There's Custom
 17 Rock Top --
 18 MR. DAVIS: Can we go off the record
 19 while he's doing this?
 20 MR. CRANDALL: Sure.
 21 (Discussion held off the record).
 22 (Exhibit I marked).
 23 MR. CRANDALL: Let's go back on the
 24 record.
 25 Q. (BY MR. CRANDALL) Wes, we have had

1 MR. CRANDALL: 4684.
 2 THE WITNESS: Is it? Thank you.
 3 Q. (BY MR. CRANDALL) As it pertains to
 4 4684, do you know since 1992 the tenants that
 5 have occupied that particular building?
 6 A. The ones I just told you.
 7 Q. Okay. When did Custom Rock Toppers
 8 lease 4684 from you?
 9 A. Let's see. I think it was April of
 10 2006, I believe.
 11 Q. 2006. At the time that they leased
 12 4684 from you, what was the previous business
 13 that had occupied that particular address?
 14 A. That was the laundromat.
 15 Q. Okay. And you indicate they did some
 16 modifications to the property. Was that done
 17 prior to their occupying the building, or were
 18 the modifications done after they had occupied
 19 the building?
 20 A. No, prior to it.
 21 Q. Okay. As it pertains to the modifications
 22 to 4684 done by Custom Rock Toppers, were those
 23 modifications limited to the interior portion of
 24 that building?
 25 A. Yes, they were.

1 this marked as Exhibit No. 1 to your deposition.
 2 You have drawn freehand a sketch here of what you
 3 believe the property -- a rough outline of the
 4 property and the manhole and water hole covers
 5 that exist there.
 6 It looks like there's one that has a
 7 circle with a line drawn through and a little
 8 question mark there, and we have put that
 9 question mark there because that's an area you
 10 believe may contain a water valve cover, but
 11 you're not sure as of the date of this
 12 deposition. Is that fair?
 13 A. Yes.
 14 Q. And in this area that you have marked
 15 the other two water covers, is this property
 16 where those water covers sit a part of your
 17 property at 4688 and 4684 Chinden Boulevard?
 18 A. Yes, they are.
 19 Q. And what is this area designated for
 20 use?
 21 MR. DAVIS: Object to the form of the
 22 question. Go ahead.
 23 Q. (BY MR. CRANDALL) Go ahead.
 24 A. For unloading and loading.
 25 Q. Is there parking that's available in

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1 this area, too, or is it all just loading?
 2 A. There is some parking right here.
 3 There was some parking but not -- there used to
 4 be a couple -- some lines there for parking right
 5 here at the laundromat (indicating).

6 MR. REID: You might want to have him
 7 identify what area you're talking about because
 8 when we say, "this area," in the deposition --

9 MR. CRANDALL: Yes. True. Thank you
 10 Jim.

11 MR. REID: I won't know what that is
 12 three months from now.

13 Q. (BY MR. CRANDALL) Designate the area
 14 that you're indicating is the loading area you're
 15 referring to.

16 A. Right directly behind Custom Rock Tops
 17 on the -- where the laundromat was located.

18 Q. And does that area stretch out to the
 19 street at Fenton?

20 A. No.

21 Q. Is there a curb and some sidewalks
 22 prior to that?

23 A. No, there's not.

24 Q. Okay.

25 MR. DAVIS: I don't think he answered

1 the question. I don't think you guys are talking --

2 MR. REID: He's asking if the loading
 3 area goes out to the street.

4 THE WITNESS: Well, yes. I thought he
 5 was talking about the parking area.

6 MR. DAVIS: That's what I thought he
 7 was talking about, too.

8 THE WITNESS: I'm sorry.

9 MR. CRANDALL: Let's go back and get
 10 square.

11 Q. (BY MR. CRANDALL) Does the loading
 12 area stretch --

13 MR. REID: Just listen to his question.

14 Q. (BY MR. CRANDALL) The loading area
 15 that you have indicated on your map here, does it
 16 stretch from the buildings at 4688 and 4684
 17 Chinden all the way to Fenton Street?

18 A. Yes.

19 MR. DAVIS: Object to the form of the
 20 question; it mischaracterizes his testimony. He
 21 has drawn those lines to indicate that that is
 22 parking, Counsel. You were talking over each
 23 other.

24 MR. CRANDALL: No. I just indicated
 25 from the building to the Fenton Street, whether

1 that's the area that he designated as the loading
 2 area.

3 MR. DAVIS: Object to the form of the
 4 question. I still don't think you guys are
 5 talking.

6 THE WITNESS: You asked me a question
 7 about, was there parking there --

8 Q. (BY MR. CRANDALL) Right.

9 A. -- and at one time they had some
 10 parking spots there.

11 Q. Right. I'm off the parking question.

12 A. Okay.

13 Q. I'm talking about the loading and
 14 unloading area. I think you indicated to me
 15 there was a loading area out in this area where
 16 these manhole covers exist. Is that accurate?

17 A. Yes, that's accurate.

18 Q. Tell me where that loading area begins
 19 and ends.

20 A. Well, for my purposes, it comes right
 21 over here -- right about here where the Custom
 22 Rock Top building is.

23 Q. Would you mark that with an "X"?

24 A. (Complied).

25 Q. Okay. And tell me where it ends as it

1 pertains to Fenton Street.

2 A. Well, as it pertains to Fenton?

3 Q. Yes.

4 A. Right at Fenton.

5 Q. Okay. So where you've marked with "Xs"
 6 on this diagram marks the beginning and ending of
 7 the loading area that exists at 4688 and 4684
 8 Chinden?

9 A. Well, that pertains to my area.

10 Q. Okay.

11 A. That pertains to what my area is.
 12 4684 does some stuff back here.

13 Q. Explain to me what 4684 does.

14 A. Well, they have granite come in, and
 15 they unload their granite and drive it around and
 16 bring it in the back of this building here
 17 (indicating).

18 Q. All right. What I'm interested in in
 19 your diagram is to identify the loading/unloading
 20 area that is available to Custom Rock Toppers.

21 MR. DAVIS: Object to the form of the
 22 question. Go ahead.

23 THE WITNESS: Right there and right
 24 there, Custom Rock Top.

25 Q. (BY MR. CRANDALL) And does that area

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1 extend out to Fenton Street?
 2 A. Yes, it does.
 3 Q. Now, for purposes of your diagram, are
 4 you aware of where this incident involving
 5 Mr. Stem takes place?
 6 A. Yes, I am.
 7 Q. As to your diagram, will you write on
 8 the appropriate water valve cover where Mr. Stem's
 9 accident took place. You can just mark it --
 10 just write "Stem" on it.
 11 A. (Complied).
 12 Q. Okay. So is it a fair characterization
 13 of your diagram that this accident occurred on
 14 property owned by you and used by Custom Rock
 15 Toppers?
 16 A. Yes.
 17 Q. And was this property that the incident
 18 took place on a part of the loading and unloading
 19 area designated for use by Custom Rock Toppers?
 20 A. Yes.
 21 MR. DAVIS: Object to the form of the
 22 question. Go ahead.
 23 THE WITNESS: Yes.
 24 Q. (BY MR. CRANDALL) Okay. Are you familiar
 25 with who designed and built the manhole covers

1 that exist at 4688 and 4684 Chinden?
 2 A. I have no idea.
 3 Q. Okay. When you purchased the property
 4 at 4684 and 4688, did the manhole -- excuse me --
 5 the water hole covers exist on that day as they
 6 did on the date of Mr. Stem's accident?
 7 A. Yes, they did.
 8 Q. Had you done any type of modification
 9 to the water hole covers between 1992 and the
 10 date of the accident?
 11 A. No, I did not.
 12 Q. Did you do any type of inspections on
 13 your property?
 14 A. As inspections on what?
 15 Q. Inspect any type of -- for wear, tear,
 16 safety issues, anything like that?
 17 MR. REID: Object to the form.
 18 THE WITNESS: I just was renting the
 19 building, I rented it, and I bought it. I'd been
 20 in it for two years, and I bought it.
 21 Q. (BY MR. CRANDALL) But the question was
 22 on any type of routine basis, did you conduct any
 23 type of investigations or inspections of the
 24 property?
 25 A. No, I did not.

1 Q. Had you ever inspected the water hole
 2 covers on 4688 and 4684 Chinden between the dates
 3 of 1992 and the date of this accident?
 4 A. No, I did not.
 5 Q. Had you ever lifted the water hole covers
 6 up between 1992 and the date of this accident?
 7 A. No, I had not.
 8 Q. Okay. Have you any background in
 9 construction?
 10 A. Just as a subcontractor.
 11 Q. And is that limited to floor coverings?
 12 A. That's limited to floor coverings, yes.
 13 Q. Do you have any experience in building
 14 or constructing manhole covers or water valve
 15 covers?
 16 A. No, I have not, none at all.
 17 Q. On the day of the accident with
 18 Mr. Stem, were you present at either 4688 or 4684
 19 Chinden?
 20 A. I was present later on that afternoon.
 21 Q. Okay. At the time of the accident, you
 22 were not on-site?
 23 A. I was in Mountain Home.
 24 Q. Okay. When did you arrive at the
 25 scene, an approximate time?

1 A. Approximately around -- I would guess
 2 around 1:30, as close as I can remember.
 3 Q. When you arrived at the accident scene
 4 at approximately 1:30, tell me what you observed.
 5 A. Well, some of my guys took me out there
 6 and showed me what went on and what was going on
 7 out there.
 8 Q. Okay. And what did you understand had
 9 occurred?
 10 A. Well, that he had backed over the
 11 manhole cover with a hyster, and that the hyster
 12 broke the cover, and it flipped over and pinned
 13 Dave -- not Dave Stem, but the Stem boy -- to
 14 the pavement.
 15 Q. And when you say he was backing the
 16 hyster, you're not referring to Mr. Stem, are you?
 17 A. No. I don't know who was on the hyster.
 18 Q. Some other individual was?
 19 A. Yes.
 20 Q. Anything else that you observed at that
 21 time regarding the accident scene?
 22 A. Oh, let's see. I don't know if they
 23 come and put that cover over there at that time
 24 or not.
 25 Q. Okay.

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- 1 Q. Okay. Have you served in the military?
 2 A. No.
 3 Q. What's the last degree that you
 4 received from an educational institution?
 5 A. High school.
 6 Q. What high school and what year?
 7 A. Nampa High School, 1959.
 8 Q. Do you have any college education?
 9 A. No.
 10 Q. Do you have any experience, education,
 11 or training with regard to municipal water
 12 systems?
 13 A. No.
 14 Q. Metallurgy?
 15 A. No.
 16 Q. Have you had any employment outside of
 17 the floor covering area, say, from 40 years old
 18 on?
 19 A. Yes.
 20 Q. Just generally what was the nature of
 21 that employment?
 22 A. I was in the poultry business.
 23 Q. Okay. As I understand it, you were not
 24 present on the day of the accident, but when you
 25 came back from Mountain Home to your business,

- 1 you talked to Todd Tuttle and Donna Sovereign?
 2 A. Yes.
 3 Q. And you talked to Jerry Rhinehart
 4 sometime that same day?
 5 A. Yes.
 6 Q. Did you talk to any of Custom Rock Tops
 7 employees who were present at the time of the
 8 accident?
 9 A. No.
 10 Q. Okay. I'm trying to read my notes.
 11 (Discussion held off the record).
 12 Q. (BY MR. DAVIS) As I understood your
 13 testimony, prior to Custom Rock Tops moving into
 14 the building, they did some remodeling?
 15 A. Yes.
 16 Q. Did they do it themselves or did they
 17 hire a contractor?
 18 A. They did it themselves.
 19 Q. Do you know whether they obtained any
 20 permits or licenses to do that?
 21 A. I do not know.
 22 Q. And I believe you testified that there
 23 were no modifications made to the exterior of the
 24 building since you moved into it in 1992; is that
 25 correct?

- 1 A. That's correct.
 2 Q. When you moved into the building in
 3 1992, using what's been marked as Deposition
 4 Exhibit 1, were there any loading doors on that
 5 building?
 6 A. Yes.
 7 Q. Okay. And can you indicate, using my
 8 red pen, and "Xs" -- I've got you, and I'm getting
 9 there -- okay.
 10 Show me with the red pen where the
 11 loading doors were when you moved in in 1992.
 12 A. Right there and right there.
 13 Q. Okay. So you have drawn four little
 14 lines at the Intermountain Interior space --
 15 A. Yes.
 16 Q. Let me finish. Is that correct?
 17 A. Yes.
 18 Q. Okay. And the shorter distance between
 19 those two lines would indicate where the exterior
 20 doors were; correct?
 21 A. Yes.
 22 Q. Okay. And that was the extent of the
 23 loading and unloading doors on the Fenton side of
 24 the property when you moved in in 1992?
 25 A. Yes.

- 1 Q. Okay. Was there ever another exterior
 2 door added to that building?
 3 A. Yes, there was.
 4 Q. And when was that done?
 5 A. Oh, let's see. About 1996 or '97,
 6 I believe.
 7 Q. Who did that?
 8 A. Budd Landon Masonry.
 9 Q. Say it again.
 10 A. Budd Landon Masonry.
 11 Q. Now, who was Budd Landon Masonry?
 12 A. He's a brick mason.
 13 Q. Was he a tenant in the building?
 14 A. No. He was a contractor.
 15 Q. Okay. So did you hire him?
 16 A. Yes, I did.
 17 Q. What was the purpose of adding that
 18 door in 1996 or 1997?
 19 A. For another loading purpose for -- to
 20 get into that other building.
 21 Q. Okay. When it was a laundromat?
 22 A. No. That section was not rented out.
 23 Q. Okay. As I understand the configuration
 24 of the building -- and we'll get to drawing in a
 25 minute -- Intermountain Interiors would have

1 occupied the west end of the property?
 2 A. Yes.
 3 Q. Then there was a center section, and
 4 then there was the laundromat that was on the
 5 east section?
 6 A. Yes.
 7 Q. Okay. Did anybody ever occupy that
 8 center section?
 9 A. Yes.
 10 Q. Who was that?
 11 A. Vince Kouba had a little business in
 12 there, and I had a little business that was
 13 called Custom Vents. We made some vents in
 14 there, and that's why we put the door in there.
 15 Q. Did you obtain a permit or a license to
 16 add that exterior door to the building?
 17 A. I don't know. We must have because we
 18 had it engineered.
 19 Q. Who engineered it?
 20 A. I don't remember.
 21 Q. Do you have the paperwork still for
 22 that -- what I'll call the "exterior remodel"?
 23 A. I don't know.
 24 Q. Did anyone besides you and Vince Kouba
 25 occupy that center section of the building?

1 it, water meter lid "A" -- "A" as it appears on
 2 Exhibit 1.
 3 A. Yes.
 4 Q. And some two to four weeks later
 5 somebody from Garden City came out and did some
 6 work there?
 7 A. Yes.
 8 Q. Did you observe what they did?
 9 A. Yes.
 10 Q. What did they do?
 11 A. They came and replaced the top, put on
 12 a new top. They built it up, and then they
 13 re-paved around it.
 14 Q. So did they put a new ring in or did
 15 they just put a new lid?
 16 A. There's a new ring in it, but they came
 17 and did it a second time. So I don't know if
 18 they put the new ring in the first time or the
 19 second time.
 20 Q. Okay. So to date, there is a new ring
 21 and a new lid?
 22 A. Yes.
 23 Q. And that depressed area that you
 24 testified earlier that you had told your employees
 25 not the drive the hyster over, that was raised?

1 A. No.
 2 Q. As you sit here, you don't recall
 3 specifically whether you obtained any permitting
 4 or licensing to add the exterior door; you're
 5 just assuming. Is that correct?
 6 A. Yes. I'm assuming Budd got the permit,
 7 the contractor.
 8 Q. Mr. Crandall asked you a number of
 9 questions about designated loading and designated
 10 unloading areas.
 11 Did you ever submit anything to the
 12 City of Garden City in which you said a particular
 13 area was designated as a loading or an unloading
 14 area?
 15 A. No, I did not.
 16 Q. Mr. Crandall asked you a question about
 17 whether you ever lifted the water meter lids, and
 18 I think your answer was "No," you never did?
 19 A. No.
 20 Q. Are you aware of whether anyone else
 21 did from the time you bought the building in 1994
 22 up through the date of the accident?
 23 A. I'm not aware of it.
 24 Q. You testified that you wrote a letter
 25 to Garden City with respect to, as I understand

1 A. Yes.
 2 Q. Has anyone done anything to the middle
 3 of the three circles that you've drawn on
 4 Exhibit 1 that I think you referred to as the
 5 storm drain? Has anyone done anything to the
 6 storm drain after the Stem accident?
 7 A. Not that I know of.
 8 Q. And by that, I mean, do you know
 9 whether the lid has been replaced or not?
 10 A. I do not know.
 11 Q. I'm a little concerned about the quality
 12 of the record with regard to the rerouting of the
 13 water in 2004, the rerouting of the water line.
 14 As I understand it, was the source of
 15 the water for the -- someplace over on your
 16 Exhibit 1 down where you have the "C," was the
 17 original source of the water from the water
 18 meters in the back of your property?
 19 A. Yes. The original source.
 20 Q. Okay. So, to your knowledge, were
 21 there two lines running off of this meter?
 22 A. I believe there were two lines.
 23 Q. And that's meter "A"?
 24 A. Um-hmm (nodding head).
 25 Q. "Yes"?

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1 It was a bad question. Let me start over.
 2 Q. (BY MR. DAVIS) As you understand the
 3 lease that you have with Custom Rock Top, are
 4 they leasing anything other than the building,
 5 the portion of the building they occupy?
 6 A. No.
 7 Q. Okay.
 8 MR. DAVIS: Are you okay?
 9 MR. CRANDALL: Yes.
 10 (Discussion held off the record).
 11 Q. (BY MR. DAVIS) Mr. Prouty, after the
 12 new exterior door was added in approximately '96
 13 or '97, were hysters used in that area?
 14 A. Yes.
 15 Q. What kind of product would have been
 16 taken in and out of that door?
 17 A. Lumber.
 18 Q. What dimension of lumber are we talking
 19 about? Well, let me ask -- was it pallets of
 20 lumber?
 21 A. Pallets, pallets of lumber.
 22 Q. Would the deliveries have been made
 23 over in the area of the laundromat parking spots
 24 or would the deliveries have been made more on
 25 the Intermountain Interior side of the building?

1 lease that you had with Kouba for the laundromat
 2 portion of the building?
 3 A. Yes.
 4 Q. And would it have been a separate lease
 5 for the center portion of the building that he
 6 occupied, or was it the same lease?
 7 A. He ended up buying the laundromat, so
 8 it -- probably two separate leases, I recall.
 9 Q. And you think you would still have that
 10 lease, as well?
 11 A. Yes, I would.
 12 Q. You don't remember having a conversation
 13 with any Garden City police officer regarding
 14 this accident at all?
 15 A. I do not recall that.
 16 Q. Do you know Heath Compton?
 17 A. Who?
 18 Q. You don't know Officer Heath Compton?
 19 A. No.
 20 Q. Do you remember having a conversation
 21 with some individual, whether you knew they were
 22 a Garden City police officer or not, that knew
 23 your son or that you were a big supporter of
 24 Boise State football?
 25 A. I don't recall that.

1 A. It could have been either one.
 2 Q. Do you recall specifically as you sit
 3 here having seen trucks pull up and the hysters
 4 load and unload in the area of the parking places
 5 at the laundromat area?
 6 A. Yes.
 7 Q. Okay. I think you testified for
 8 Mr. Crandall that from the time that you began
 9 occupying the subject premises, you didn't change
 10 the lids on the meters, the water meters?
 11 A. No.
 12 Q. Do you know whether anyone did in the
 13 interim period prior to the accident?
 14 A. I don't know.
 15 Q. Mr. Crandall asked you some questions
 16 with the assumption that the lid was limited,
 17 in his words, to 2,000 pounds. You don't have
 18 any personal knowledge of the capacity of the
 19 subject lid, do you?
 20 A. No, I do not.
 21 Q. Do you have a copy still of the last
 22 lease you had with one of the laundromat owners
 23 that you have identified as "Mike"?
 24 A. Yes.
 25 Q. Okay. Would you have a copy of the

1 Q. And that's an okay thing.
 2 MR. CRANDALL: Yes, that's a good thing.
 3 MR. REID: Boy, have we got a bad
 4 record now. (Laughter).
 5 MR. DAVIS: I hope you've got that --
 6 (Discussion held off the record).
 7 MR. DAVIS: Back on the record.
 8 Q. (BY MR. DAVIS) I have a copy of the
 9 lease that's been produced as part of your
 10 discovery responses, and the lease refers to in
 11 paragraph 12 -- let's have it marked as Exhibit 2.
 12 (Exhibit 2 marked).
 13 Q. (BY MR. DAVIS) You have been handed
 14 what's been marked as Deposition Exhibit No. 2.
 15 Is this a copy of the commercial lease that you
 16 have with Gerald Rhinehart dba Custom Rock Tops
 17 for the east end of the building that we're
 18 talking about?
 19 A. It appears to be.
 20 Q. Up at the top there is some handwriting
 21 that says, "Custom Rock Tops." Do you know whose
 22 handwriting it is?
 23 A. It looks like mine.
 24 Q. The copy that's been produced 000548
 25 isn't signed, but I assume you have a signed copy

1 an "X" with a red circle around it.
 2 Q. Is that the door that Custom Rock
 3 Toppers used in loading and unloading granite?
 4 A. Yes.
 5 Q. Describe that door for me, if you
 6 would.
 7 A. It's 16-foot high and I believe 10-foot
 8 wide, I believe.
 9 Q. Is it akin to, like, a garage door?
 10 A. It's a roll-up door.
 11 Q. A roll-up door. I think I saw a
 12 photograph of that. Let's see if I can find it
 13 real quick.
 14 Let me show you a photograph and --
 15 I guess I might as well pull this and have it
 16 marked as part of the deposition, as well, to
 17 make it clean. I will have this photograph
 18 marked Exhibit 4.
 19 (Exhibit 4 marked).
 20 Q. (BY MR. CRANDALL) Wes, let me have you
 21 take a look at this photograph. Do you recognize
 22 what's depicted in that photograph?
 23 A. Yes.
 24 Q. I believe that's the photograph I took
 25 from the original appraisal report that was done

1 when you purchased this property. Is that
 2 accurate?
 3 A. Yes.
 4 Q. Does that photograph -- I'm sorry.
 5 Go ahead.
 6 A. I can't tell you from that picture if
 7 that's one of the -- there was two doors and now
 8 there's three, and I can't tell by that picture.
 9 If that is an original appraisal, then the door
 10 is here (indicating).
 11 MR. REID: You can't say, "here."
 12 THE WITNESS: "Here" is to the left of
 13 that door.
 14 MR. REID: To the left of which door,
 15 the door in the picture?
 16 THE WITNESS: In the picture.
 17 MR. REID: There's another door now.
 18 That's to the left of the door that's depicted in
 19 Exhibit 4?
 20 THE WITNESS: I believe so.
 21 Q. (BY MR. CRANDALL) When you say there's
 22 another door that's depicted and when we use the
 23 word "door," are we always referring to one of
 24 these wide garage style doors, as opposed to a
 25 regular entry and exit door that people use?

1 A. Yes.
 2 Q. Okay. And the door that is depicted in
 3 this photograph marked as Exhibit 4 to the
 4 deposition, did this door exist on that building
 5 on the date of your purchase of that property?
 6 MR. DAVIS: Objection, Counsel. I
 7 think you're confused again. Let's just take a
 8 second off the record.
 9 (Discussion off the record).
 10 Q. (BY MR. CRANDALL) This door that's
 11 depicted in this photograph existed prior to your
 12 purchase of the property?
 13 A. Yes.
 14 Q. And you later added an additional door?
 15 A. Yes.
 16 Q. Okay. And that was the door that
 17 Custom Rock Toppers used to load and unload
 18 granite?
 19 A. Yes.
 20 Q. Okay. And on the diagram that you have
 21 drawn, you have put an "X" with a circle to
 22 depict the approximate area to which the new door
 23 was added to allow Custom Rock Toppers to both
 24 load and unload granite?
 25 A. Yes.

1 Q. Okay. Prior to your purchase of this
 2 property -- scratch that.
 3 Prior to your lease of this property in
 4 1992, had anyone, to your knowledge, ever used
 5 the area that we have depicted in your drawing as
 6 the loading and unloading area, had they ever
 7 used a hyster in that particular area prior to
 8 your lease?
 9 MR. DAVIS: Object to the form the
 10 question' vague and ambiguous. Go ahead.
 11 Q. (BY MR. CRANDALL) Do you understand
 12 what I'm asking?
 13 A. The original lease?
 14 Q. I'm asking whether or not prior to you
 15 leasing the property, if you had any knowledge
 16 that any prior tenants had used the area, between
 17 the building and Fenton Street, had ever used a
 18 hyster in that particular area?
 19 MR. DAVIS: Object to the form.
 20 Go ahead.
 21 THE WITNESS: I don't know.
 22 Q. (BY MR. CRANDALL) When you leased this
 23 building in 1992, did you begin using a hyster at
 24 that location?
 25 A. Yes, we did.

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1 Q. Okay. And the purpose of the use of
2 that hyster was for --

3 A. Loading and unloading carpet and
4 pallets.

5 Q. Okay. And the door that you used to
6 load and unload your hyster with, was that the
7 one that was depicted in Exhibit No. 4?

8 A. Yes.

9 Q. Okay. To your knowledge, were you the
10 first and only tenants prior to Custom Rock Toppers
11 to use a hyster at this building?

12 A. I don't know.

13 Q. Okay. Do you know of any other
14 businesses, besides yourself or Custom Rock
15 Toppers, who have ever used a hyster at that
16 location?

17 A. Yes. A bowling alley was in there --
18 not a bowling alley, but the trophy maker, and
19 they did bowling balls. So they could have used
20 hysters. I don't know how big of loads they got
21 in there.

22 Q. Okay. Prior to putting the --
23 engineering the door and putting the door in,
24 which was used by Custom Rock Toppers, was the
25 area between the building and Fenton Street used

1 Q. Prior to adding this door -- and by
2 "this door," I mean the one with the red circle
3 around it marked "X" that was engineered - had
4 anyone tenant-wise, other than Custom Rock
5 Toppers, used a hyster in the section of the
6 building in which Custom Rock Toppers leased?

7 MR. DAVIS: Object to the form.
8 Go ahead.

9 THE WITNESS: Repeat that again.

10 Q. (BY MR. CRANDALL) Let me ask a simpler
11 version.

12 Prior to Custom Rock Toppers using a
13 hyster at that location, "the location" being the
14 area in which they leased inside your building,
15 had anyone prior to Custom Rock Toppers ever used
16 a hyster at that particular location in the
17 building?

18 A. Yes.

19 Q. And who was that?

20 A. Us, Intermountain Interiors.

21 Q. Okay. Other than Intermountain
22 Interiors -- and I think you indicated that on
23 occasion you would unload lumber in that
24 particular area -- have you ever witnessed any
25 other party -- either tenant or otherwise -- that

1 exclusively as parking spaces?

2 A. Not exclusively.

3 Q. What other uses were made of that
4 particular area?

5 A. If nobody else was there when I had a
6 big long 40-foot or 60-foot truck show up, they
7 would pull up here --

8 Q. Okay.

9 A. -- and we would unloaded our trucks.

10 Q. Okay. So you used it for loading and
11 unloading --

12 A. Yes.

13 Q. -- areas?

14 A. Yes.

15 MR. DAVIS: Objection. The record
16 should reflect that the witness answered it
17 before I had an opportunity to assert the
18 objection.

19 MR. CRANDALL: Did you get it
20 clarified? Do you need to ask a question?

21 MR. DAVIS: No, I don't. Thank you.

22 Q. (BY MR. CRANDALL) Was it your intent
23 when having this door added to allow the tenants
24 to use a hyster at that location?

25 A. Yes, if needed.

1 used that particular area -- and the area I'm
2 talking about is the area that is between the
3 address of the lease -- on the lease with Custom
4 Rock Toppers and Fenton Street as -- have you
5 ever seen anyone other than yourself use a hyster
6 in that location?

7 MR. DAVIS: Object to the form, but
8 go ahead.

9 THE WITNESS: No.

10 Q. (BY MR. CRANDALL) The depressed area
11 that you spoke about that had water accumulation
12 issues, did that area include the cover for the
13 water valve as depicted in your drawing as "A"?

14 A. Yes.

15 Q. Okay. So I'm picturing a depressed
16 area in which the water covering depicted in "A"
17 set somewhere in the middle, and that being the
18 area in which you had the water accumulation
19 issues?

20 A. Yes.

21 MR. DAVIS: Object to form.

22 MR. CRANDALL: No other questions.
23 Thank you.

24 MR. REID: I've got a couple now, in
25 light of Counsel's questions.

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1 EXAMINATION
2 QUESTIONS BY MR. REID:

3 Q. Prior to Custom Rock Top leasing the
4 east end of the building, in the conduct of your
5 business did you operate hysters in the area that
6 has been designated on Exhibit 1 as being the
7 Stem water meter cover?

8 A. Prior to Custom Rock Top?

9 Q. Yes.

10 A. We did.

11 Q. Okay. Did you have any concerns about
12 driving hysters over that water meter cover?

13 A. No.

14 Q. Did you also operate hysters in the
15 area of the water meter cover that we've
16 designated as "A"?

17 A. Yes.

18 Q. What was your concern about that area?

19 A. Well, it was about six to nine inches
20 deep there overall, and our hyster has a five-inch
21 clearance.

22 When you drop down like this and you've
23 got to pull out 12-foot, it's hard to stick a
24 roll of carpet and pick up.

25 Q. Did your concern about the water meter

1 cover area on Exhibit A have anything to do with
2 the capability of the water meter cover to
3 withstand the load of a hyster?

4 A. No.

5 Q. Did anybody ever tell you that either
6 of the water cover meters, either "A" or "B,"
7 could not withstand a hyster?

8 A. No.

9 Q. Did anybody tell you that the water
10 meter covers either "A" or "B" could not withstand
11 a load of more than 2,000 pounds?

12 A. No.

13 MR. REID: I have no more questions.
14

15 FURTHER EXAMINATION
16 QUESTIONS BY MR. CRANDALL:

17 Q. Had you known that the water valve
18 covers in both the Location B or where the Stem
19 accident was located was rated only up to
20 2,000 pounds, would you have had a concern about
21 pulling your hyster across that valve cover?

22 MR. DAVIS: Object to the form of the
23 question; hypothetical.

24 THE WITNESS: I have no knowledge of
25 weight loads and stuff.

1 Q. (BY MR. CRANDALL) I understand that,
2 but if you had known -- assume you know that
3 the lid was rated up to 2,000 pounds -- and by
4 "the lid," I mean the cover that existed over the
5 water valve that broke in Mr. Stem's accident,
6 had you known that that was rated up to 2,000 pounds,
7 would you have had concerns about driving your
8 hyster over that cover?

9 MR. DAVIS: Same objection. Go ahead.

10 THE WITNESS: No, because I don't know
11 really -- I assumed they were safe enough to
12 drive over.

13 Q. (BY MR. CRANDALL) Okay. So if,
14 in fact, this cover is rated only to 2,000 pounds,
15 would you feel comfortable driving your hyster
16 across it?

17 A. I did.

18 MR. DAVIS: Same objection.

19 THE WITNESS: I did personally.

20 Q. (BY MR. CRANDALL) But when you did so,
21 you didn't know it was rated up to 2,000 pounds;
22 is that correct?

23 A. No.

24 Q. You did not know that it was?

25 A. I did not know that, no.

1 Q. So I'm asking you now -- if you knew
2 that today, would you feel comfortable in driving
3 your hyster across it?

4 A. Well, now that I know that --

5 MR. DAVIS: Objection. Give me one
6 second. Same objection. Go ahead.

7 Q. (BY MR. CRANDALL) Do you want me to
8 repeat the question?

9 A. Well, I understand the question, but
10 now that I know they break at that, of course I'd
11 have concerns.

12 MR. CRANDALL: No other questions.

13 MR. DAVIS: Well, I've just got a
14 couple of things.

15 Can we all agree, Counsel, that
16 Deposition Exhibit 1 will be copied in color so
17 that when we're referring to it in reds and
18 blues, that it will make sense?

19 MR. CRANDALL: Right.

20 MR. REID: Good idea.

21 (Discussion off the record).
22

23 FURTHER EXAMINATION

24 QUESTIONS BY MR. DAVIS:

25 Q. I just want to clarify -- because I've

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EXHIBIT B

AFFIDAVIT OF COUNSEL RE: DEFENDANT PROUTY'S SECOND MOTION FOR
SUMMARY JUDGMENT - 6

000552

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN STEM,)
)
 Plaintiff,)
)
 vs.)
)
 CITY OF GARDEN CITY, IDAHO;)
 and WESLEY C. PROUTY,)
)
 Defendants.)
)
)

Case No. CV-PI-08-06177

DEPOSITION OF ROBERT E. RUHL

OCTOBER 28, 2008

BOISE, IDAHO

BURNHAM, HABEL & ASSOCIATES, INC.
Certified Shorthand Reporters

COPY
Prepared for

Reported By

Mr. Reid

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Maryann Matthews,

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000553
GSE

1 Whereupon the deposition proceeded as follows:
2
3 (Exhibit 1 was marked for identification
4 and a copy is attached hereto.)
5

6 ROBERT E. RUHL,
7 a witness having been first duly sworn to tell the
8 truth, the whole truth, and nothing but the truth,
9 testified as follows:
10

11 EXAMINATION

12 BY MR. REID:

13 Q. Could you state your full name, please?
14 A. My name is Robert E. Ruhl, R-u-h-l.
15 Q. Mr. Ruhl, my name is Jim Reid, and I
16 represent Wes Prouty in a lawsuit that has been filed by
17 Mr. John Stem against Mr. Prouty and Garden City, Idaho;
18 and you have been produced as a witness today pursuant
19 to what we call a Rule 30(b)(6) designation.
20 I won't bore you to death with that, but I
21 have had, prior to the beginning of your deposition, an
22 exhibit marked Exhibit No. 1 that I'll talk to you about
23 in just a minute; but let me ask you a couple
24 preliminary questions, if I could.
25 Have you ever had your deposition taken

1 answer that question, I'm going to assume you under-
2 it.
3 Is that fair?
4 A. Yes, sir.
5 Q. How long have you been -- what is your
6 current position with Garden City?
7 A. I'm the public works director for the City
8 of Garden City.
9 Q. How long have you been the public works
10 director for the City of Garden City?
11 A. Four years, two months.
12 Q. What is the extent of your formal
13 education?
14 A. I have heavy engineering -- a licensed
15 engineer within the state of Arizona, California.
16 Q. Did you attend college?
17 A. Yes, I did.
18 Q. And graduate?
19 A. Yes, I did.
20 Q. With an engineering degree?
21 A. No, sir.
22 Q. What degree --
23 A. I took the legal test to -- (inaudible).
24 (Discussion held off the record.)
25 (The record was read.)

1 before?
2 A. Yes, I have.
3 Q. How many times?
4 A. Probably approximately 30.
5 Q. Okay. So you're very familiar with the
6 process, then?
7 A. (Witness nods head.)
8 Q. Correct?
9 A. Yes, sir.
10 Q. You have to be sure to answer audibly.
11 A. Yes, sir.
12 Q. Okay. I will try real hard not to talk
13 while you're talking, if you'll give me the same
14 courtesy so that she can take down what we're saying
15 without us talking over the top of each other.
16 A. Okay.
17 Q. If I ask you a question that you don't
18 understand, please ask me to restate it. Is that okay?
19 A. Yes, sir.
20 Q. If you want to take a break, just let me
21 know. You can talk to Mr. Davis here. The only thing
22 that I do ask is that if I have a question pending, that
23 you answer my question before you break.
24 A. Yes, sir.
25 Q. Finally, if I ask you a question and you

1 THE WITNESS: -- pass the engineering test.
2 BY MR. REID:
3 Q. What was the degree you received?
4 A. Public administration.
5 Q. And what school was that?
6 A. Cal State Long Beach.
7 Q. Okay. And then I think you said you took a
8 legal test to get an engineering degree. Could you
9 explain that for me?
10 A. To be an engineer you can take a test that
11 requires proof that you can meet all the requirements to
12 be a licensed engineer.
13 Q. Where did you take this test?
14 A. The state of California, state of Arizona.
15 Q. Okay. And are you a licensed engineer in
16 both California and Arizona?
17 A. Not at this time, no.
18 Q. Were you at one time?
19 A. Yes, I was.
20 Q. Were you licensed in a particular branch of
21 engineering?
22 A. Civil.
23 Q. Both states --
24 A. At one time.
25 Q. -- both California and Arizona?

1 A. Yes.
 2 Q. And describe how that works to me.
 3 A. Basically we do not sign off and we do not
 4 turn the water on.
 5 Q. Okay. So you check the system and the lids
 6 before you sign off on the water system?
 7 A. To meet the plans, that's correct.
 8 Q. Okay. The water system supplying water to
 9 4688 Chinden and 4684 Chinden, are you aware of -- prior
 10 to November of 2006 are you aware of any request by
 11 Garden City to the property owner to change anything?
 12 A. No, I'm not aware of that.
 13 Q. But if that had happened, would you have a
 14 record of it?
 15 A. Yes.
 16 Q. And have you searched your files to see if
 17 there are any records of such a thing?
 18 A. Yes, I have.
 19 Q. And I take it they do not exist?
 20 A. No, sir.
 21 Q. Okay. Would I be correct, then, in stating
 22 that at least to your knowledge, the water systems
 23 located at 4688 and 4684 Chinden prior to November 29th,
 24 2006 were not then in violation of any code?
 25 MR. CRANDALL: Object --

1 Q. Okay. To your knowledge has -- have you or
 2 has anyone connected with Garden City informed the
 3 property owners of 4684 and 4688 Chinden Boulevard in
 4 Garden City that their water meter lids were in
 5 violation of any code?
 6 A. Not to my knowledge.
 7 Q. The water meter lid that you circled on
 8 Exhibit No. 2 earlier in your deposition, you pointed
 9 out the darkened area around it.
 10 Do you know what that is?
 11 A. Yes. It's -- I believe that's an asphalt
 12 patch.
 13 Q. Was that done at your direction?
 14 A. Yes.
 15 Q. Why was that done?
 16 A. We had a leak.
 17 Q. A leak in what?
 18 A. I believe at the water line.
 19 Q. Do you know when the leak was?
 20 A. No, I do not.
 21 Q. Okay. Do you have any records evidencing
 22 the patch that was done?
 23 A. Probably.
 24 Q. I would ask you to, if you can, find those
 25 records and produce those to counsel.

1 MR. DAVIS: Object to the form of the
 2 question.
 3 MR. CRANDALL: I join in the objection.
 4 THE WITNESS: I'm caught here. I'm sorry.
 5 MR. REID: I'll have her read you the
 6 question back.
 7 (The record was read.)
 8 THE WITNESS: I couldn't state that.
 9 BY MR. REID:
 10 Q. And why couldn't you?
 11 A. I would have no knowledge of when that went
 12 in.
 13 Q. Well, maybe I'm just confused, but didn't
 14 you tell me that you maintained records that would have
 15 pointed out any deficiencies?
 16 MR. DAVIS: Object to the form of the
 17 question. Mischaracterizes his testimony. He said he
 18 looked for records and didn't find any.
 19 MR. REID: Oh, okay.
 20 BY MR. REID:
 21 Q. To your knowledge do any records exist with
 22 respect to the water system or meter covers at 4684 and
 23 4688 Chinden that disclose a code violation on the part
 24 of that system or those lids?
 25 A. No, sir.

1 MR. DAVIS: Please send me a request for
 2 production of documents and --
 3 MR. REID: We'll do that.
 4 MR. DAVIS: -- we'll respond.
 5 BY MR. REID:
 6 Q. Do you recall when that patch was put in?
 7 A. No, I do not.
 8 Q. Do you believe it would have been after
 9 November of 2006?
 10 A. Yes, sir.
 11 Q. Do you, as you sit here today looking at
 12 this exhibit -- and, again, I'm not trying to trick you
 13 or anything -- do you know whether or not the water
 14 meter that's -- that you've circled here is the water
 15 meter that was -- lid that was broken?
 16 A. No, I do not know that.
 17 Q. Okay. And I take it you can't tell by
 18 looking at the picture whether that's the water meter
 19 lid that's the subject of the invoice?
 20 A. I would not be able to tell you that. I'm
 21 having a hard time even seeing the lid, to tell you the
 22 truth.
 23 Q. Sure. Okay. Have you made an effort to
 24 determine who manufactured the water meter lid that was
 25 broken --

1 Q. A truck backed over it?
 2 A. A loading ramp for -- a truck loading ramp.
 3 Q. Do you know how the water meter broke --
 4 the water meter lid broke?
 5 A. I don't really know. It was just broken
 6 and I replaced it.
 7 Q. How long ago was that?
 8 A. It's been a couple years.
 9 Q. Prior to November of 2006 or after?
 10 A. I'm not -- it's not that familiar in my
 11 head at this moment.
 12 Q. Okay. Are you aware of any other water
 13 meter lids that have broken that you have a specific
 14 recollection of?
 15 A. No, I don't.
 16 Q. But you think there may have been others?
 17 A. A couple others. It might not necessarily
 18 have been this style (indicating) of a meter. It may
 19 have been the smaller meters.
 20 Q. Okay. The one that you are aware of that
 21 broke, was it this style of a meter lid?
 22 A. I believe --
 23 MR. DAVIS: Object to the form of the
 24 question.
 25 But go ahead.

1 EXAMINATION
 2 BY MR. CRANDALL:
 3 Q. Mr. Ruhl, my name is Doug Crandall. I
 4 represent Mr. Stem and his family in this accident.
 5 First off, can you hear me okay?
 6 (The deposition was interrupted.)
 7 MR. DAVIS: I'm sorry. Excuse me for a
 8 minute.
 9 (Recess taken.)
 10 MR. CRANDALL: Back on the record.
 11 BY MR. CRANDALL:
 12 Q. Bob, my first question is that I understood
 13 you to say that there are, on occasions, times when the
 14 property owners will supply the lid for a water meter
 15 that's on their property.
 16 A. That is correct.
 17 Q. Okay. And tell me again the circumstances
 18 under which that would occur.
 19 A. When the developer or property owner, et
 20 cetera, comes in, they'll bring in a written, stamped
 21 drawing. And in that process they'll have their
 22 contractor go out and place in the water service or
 23 water lines, whatever is indicated on the plans, and --
 24 Q. Okay. So when that -- on that occasion
 25 when something like that occurs, does Garden City take

1 THE WITNESS: I believe so.
 2 BY MR. REID:
 3 Q. Do you remember where it was?
 4 A. Yes.
 5 Q. Where was it?
 6 A. Behind the Big Lots on -- I don't remember
 7 the alleyway. Just off -- between State and Glenwood.
 8 Q. Was it in an alleyway?
 9 A. It was in a backup area for the loading
 10 ramp for the Big Lots.
 11 Q. Okay. Do you have any records surrounding
 12 that --
 13 A. Yes.
 14 Q. -- incident?
 15 A. Yes.
 16 MR. REID: I think I'm done. Thank you.
 17 Do you want to take your break now?
 18 MR. DAVIS: Well, what's going to happen is
 19 the judge's clerk is going to call me. So if the call's
 20 not already on here and you want to get started, then we
 21 can do that and wait for the phone to ring and then take
 22 a break. I don't care. I hate wasting minutes.
 23 MR. CRANDALL: I'll just start questioning
 24 and if the phone rings, we can break.
 25 MR. REID: Sure.

1 an active role in the inspection of the property?
 2 MR. DAVIS: Object to the form.
 3 But go ahead.
 4 THE WITNESS: They observe what was placed,
 5 make sure it met the plans.
 6 BY MR. CRANDALL:
 7 Q. Okay. So to simplify it, at the conclusion
 8 of the construction project involving the water meters,
 9 someone from Garden City inspects the work done to make
 10 sure that it meets with the plans?
 11 A. Somebody observes that what was placed on
 12 the plans was placed there. The certification comes
 13 from the engineer that submitted the plans.
 14 Q. Help me out with the certification. Is
 15 that the process in which a person actually visits the
 16 property under construction or do they do that simply
 17 from --
 18 A. They attest that they have done that.
 19 Q. -- let me finish my question --
 20 A. Excuse me.
 21 Q. -- or do they look upon the plans
 22 themselves and base their decision off the plans?
 23 A. The way that I -- the statement reads is
 24 that they attest that this has been placed in the field.
 25 Q. Okay. What does that mean?

1 A. It means that there's a registered engineer
2 within this state say they have observed this and that
3 it has met the standards of what was on the plans.
4 Q. So coming back to my original question,
5 somebody from Garden City, either the engineering
6 department or someone else, visually inspects work done
7 to make sure that it meets with the plans?
8 MR. DAVIS: Object to the form of the
9 question.
10 THE WITNESS: Somebody from Garden City
11 observes. Inspection means that we took
12 responsibility. The responsibility is on the registered
13 engineer that it met the state code.
14 BY MR. CRANDALL:
15 Q. Okay. And the registered engineer would be
16 an independent person hired by a contractor or a
17 building owner to draw up the plans for the --
18 A. That is correct.
19 Q. Okay. But Garden City does inspect the
20 particular job that was done to make sure that it meets
21 with Garden City's requirements?
22 MR. DAVIS: Object to the form.
23 Go ahead.
24 THE WITNESS: They observe that it met
25 those requirements.

1 BY MR. CRANDALL:
2 Q. Maybe we're talking semantics here, but
3 when you say the word "observe," tell me what you mean
4 by that.
5 Did they do an actual visual inspection of
6 the work done?
7 MR. DAVIS: Object to the form of the
8 question.
9 Go ahead.
10 THE WITNESS: A registered engineer in the
11 state answers to a registration board.
12 MR. CRANDALL: Okay.
13 THE WITNESS: They're attesting to what it
14 is. What we do, if we go out and we observe that it
15 does not appear to be what is on the plans, we request
16 back to the engineer to correct it.
17 BY MR. CRANDALL:
18 Q. Okay. So my question is, is that -- let me
19 put it in context of this case here. Originally when
20 this water system was put in at 4688 Chinden, to your
21 knowledge would someone from Garden City have done a
22 visual inspection upon completion of that project to
23 make sure that it complies with the appropriate Garden
24 City ordinances?
25 MR. DAVIS: Object to the form.

1 But go ahead.
2 THE WITNESS: At that time I would have no
3 knowledge of that.
4 BY MR. CRANDALL:
5 Q. Okay. Would that process occur today? If
6 I was to go out today and put in a water meter, would
7 Garden City send an inspector out at the completion
8 of that project to make sure that it complied with the
9 appropriate ordinances?
10 MR. DAVIS: Object to the form of the
11 question. You've asked it now seven or eight different
12 times, and he's given you the same answer every time:
13 Somebody goes out and observes it.
14 They don't have inspectors. You want him
15 to have inspectors, but he's telling you they have
16 observers.
17 MR. CRANDALL: Well, I guess I'm hung up
18 here, Jim, in terms of is it an observer or an
19 inspector, and is there a difference between the two.
20 THE WITNESS: Yes.
21 BY MR. CRANDALL:
22 Q. Explain the difference between what an
23 observer is versus an inspector.
24 A. An inspector is somebody to go out and
25 certify that that's what's placed there.

1 Q. Okay.
2 A. An observer goes out and observes that
3 appears to be what's on the plan.
4 Q. All right.
5 A. The engineer on the site is the one that
6 supplies the inspector that supplies the one [sic].
7 He's the one that certifies -- certifies by his stamp
8 that that's --
9 Q. Okay. I understand. Sorry. And in your
10 search of the records pertaining to 4688 and/or 46 --
11 what's the other -- 84, were you able to determine if
12 this process was completed during the construction of
13 the water meters on that location?
14 A. Clarify that for me.
15 Q. When the original water meters were put in
16 at 4688 and 4684, by search of records were you able to
17 ascertain whether this particular process, i.e.
18 certification by the engineer and observation by Garden
19 City, was done?
20 A. No.
21 Q. Do you currently purchase your water meter
22 lids from the same manufacturer?
23 A. The same manufacturer as what? Let me
24 clarify that.
25 Q. The same manufacturer as the -- HD Supply

1 water meter lid affects its ability to bear weight, that
 2 really is kind of beyond your expertise?
 3 A. That is correct.
 4 Q. Have you done a personal investigation into
 5 the building permit history of 4688 Chinden Boulevard
 6 and 4644 -- or excuse me -- 4684?
 7 A. Personal?
 8 Q. Yes.
 9 A. I have delegated staff to do that.
 10 Q. Okay. And who did you delegate that to?
 11 A. Several people.
 12 Q. Okay. And did they report back to you
 13 their results?
 14 A. Yes.
 15 Q. Okay. And what do you understand as to the
 16 building permit history of 4684 and 4688 Chinden?
 17 A. We have very little documentation on that.
 18 Q. Okay. Do you have the original
 19 documentation, I believe in 1985, when Max Stith
 20 originally placed the water meter covers and water
 21 meters upon the property?
 22 A. No, I do not.
 23 Q. Have you ever seen his -- a building permit
 24 issued to Max Stith?
 25 A. No, I have not.

1 A. They're covered under ordinance.
 2 Q. Is there a monetary threshold that invokes
 3 the need to apply for a building permit?
 4 A. I don't believe so.
 5 Q. Okay. What would -- or are there too many
 6 different instances to tell me that would invoke the
 7 need for one to apply for a building permit?
 8 A. That's based under the International
 9 Building Code. Its -- we've adopted that by ordinance
 10 Q. Okay. Are you familiar with this type of
 11 water meter lid that is portrayed in Exhibit 4?
 12 A. Yes.
 13 Q. Okay. Is there a particular load capacity
 14 that this lid is designed for?
 15 A. I don't remember off the top of my head,
 16 but yes.
 17 Q. It's been suggested that it is
 18 approximately 2,000 -- up to 2,000 pounds. Would y
 19 agree or disagree with that?
 20 A. That's a possibility.
 21 Q. Okay. Are there different types of water
 22 meter lids for different types of uses?
 23 A. Yes, there is.
 24 Q. What are those?
 25 A. There's traffic rated, traffic-rated lid --

1 Q. Did you find any building permits issued to
 2 4684 or 4688 Chinden Boulevard?
 3 A. Not to my recollection.
 4 Q. What involvement, if any, do you have in
 5 your capacity as public works director for Garden City
 6 in the building permits process?
 7 A. I oversee it.
 8 Q. Okay. So if somebody was wanting to change
 9 the structure or the use of a structure, tell me -- take
 10 me through the steps they would have to do to get that
 11 approved by you.
 12 A. They'd have to submit a plan in to the
 13 front desk. The front desk would determine if it needs
 14 to go to the city engineer, what requirements they
 15 have. It has to go before planning and zoning
 16 commission depending on what -- what the project is.
 17 It would have to be reviewed by several
 18 agencies -- ACHD, NACFR, which is North Ada County Fire
 19 District [sic] -- and then at that time it would set in
 20 motion certain activities it would require depending on
 21 what the -- what the change was.
 22 Q. Okay.
 23 A. And --
 24 Q. What are the parameters that require
 25 someone in Garden City to apply for a building permit?

1 I'm sorry, I forgot the others right at this immediate
 2 second.
 3 Q. Okay. Do the variations in the lid
 4 primarily deal with the variations in their structural
 5 integrity in terms of how much weight they'll bear?
 6 A. I would assume that.
 7 Q. Do you know the type of water meter lid one
 8 would need to use in a parking lot?
 9 A. Yes. We have an engineer standard for
 10 that. It's -- again, it's the state engineering
 11 standard, and that defines what we use.
 12 Q. Can you tell me the type of lid that one
 13 would use to cover a water meter in a parking lot?
 14 A. Not specifically off the top of my head, I
 15 cannot.
 16 Q. Do you know whether or not on Exhibit 4 if
 17 that is a water meter lid used -- or capable of use in a
 18 parking lot?
 19 A. It would appear to me that it is.
 20 Q. Do you know whether or not if you change a
 21 parking lot by way of changing your building use from
 22 parking to loading area, whether one would need to ap
 23 for a building permit?
 24 A. It's possible it also would come under
 25 planning and zoning.

1 Q. Explain that to me.
2 A. We have zoning issues within the -- when a
3 building is put in, a -- it was designed for certain
4 things. It was approved by planning and zoning. If you
5 change that designation of the building, sometimes it
6 triggers to have to go before planning and zoning.

7 Q. Okay. I'll represent to you that in
8 approximately 1997 defendant Wes Prouty modified 4688
9 Chinden Boulevard to incorporate a loading/unloading
10 overhead door system which would allow access for a
11 Hyster, and in doing so, changed the structure of the
12 area from a parking lot to an area that Hysters were
13 driven across.

14 Do you know whether or not in performing
15 that function Mr. Prouty would have needed to obtain a
16 building permit?

17 MR. DAVIS: Object to the form.

18 But go ahead.

19 MR. REID: I join in the objection.

20 THE WITNESS: It's possible. All our plans
21 are required to be submitted to -- any change or -- any
22 change in a building is required to be submitted through
23 to the fire department, to ACHD, several other
24 agencies.

25 And then the other issue is CUP, a

1 plan to modify the use of 4688 Chinden Boulevard?

2 A. No, I do not.

3 MR. REID: And I object to the form and
4 move to strike that last answer.

5 BY MR. CRANDALL:

6 Q. Would the lid, water meter lid depicted in
7 Exhibit 4 -- would it have been appropriate to use that
8 lid in an area in which Hysters in excess of 10,000
9 pounds drove across them?

10 MR. DAVIS: Object to the form.

11 Go ahead.

12 THE WITNESS: In my professional opinion?

13 MR. CRANDALL: Yes.

14 THE WITNESS: I don't believe that's a
15 correct application.

16 BY MR. CRANDALL:

17 Q. Assume, if you will, that sometime
18 approximately in 1997 a modification was made to 4688
19 Chinden Boulevard which allowed the use of a Hyster to
20 travel across what once was a parking lot, and that that
21 person did not apply for a building permit.

22 Would there have been any other methodology
23 known to you or place you on notice that they had
24 changed the use of that particular portion of their
25 property to allow a Hyster to be used across a parking

1 conditional use permit, not knowing what the permitted
2 use is of that particular facility.

3 BY MR. CRANDALL:

4 Q. If someone brought to you a plan and in
5 that plan they were going to modify the use of a
6 building by placing a door in the side of this building
7 that would access the use of a Hyster, and in accessing
8 that Hyster, drive it through what was once a parking
9 lot, would Garden City officials have conducted an
10 investigation to determine whether that could be done in
11 a safe manner?

12 MR. DAVIS: Object to the form of the
13 question.

14 MR. REID: Object to the form.

15 MR. DAVIS: Go ahead.

16 THE WITNESS: We would request that a plan
17 be submitted with a registered engineer's stamp stating
18 what the needs are.

19 BY MR. CRANDALL:

20 Q. And if you received that plan in 1997,
21 would you have -- would you still have retained a copy
22 of that plan?

23 A. I have no knowledge at this moment.

24 Q. Okay. So as you sit here today, you do not
25 know whether or not anyone, for that matter, submitted a

1 lot?

2 MR. REID: Object to the form.

3 THE WITNESS: No.

4 BY MR. CRANDALL:

5 Q. Do you rely upon a person applying for a
6 building permit to allow you to determine whether that
7 modified use can be performed safely?

8 A. Yes.

9 Q. In this particular case is it your
10 understanding that the land owner, Mr. Prouty, never
11 placed Garden City on notice that he had modified the
12 use of his property from a parking lot to a loading area
13 in which Hysters were driven across?

14 MR. REID: Object to the form.

15 THE WITNESS: I am not aware of that.

16 BY MR. CRANDALL:

17 Q. Your answer is you're not aware that
18 Mr. Prouty ever placed you or Garden City on notice that
19 he changed the use of his property?

20 A. That is correct.

21 Q. Is that a common occurrence in your
22 experience in which people go out and modify the use of
23 their property, and in doing so, make the water meter
24 covers unsafe?

25 MR. DAVIS: Object to the form.

1 Q. Okay. Is there a difference between a
2 building permit and a plumbing permit?
3 A. Yes.
4 Q. What are the differences?
5 A. One's for the building; one's for the
6 plumbing.
7 Q. Okay. And are those two different permit
8 processes that you have to go through with Garden City
9 to build under their building ordinances?
10 A. Yes.
11 Q. Did you -- I think you may have answered
12 this, but permit me to ask it one more time. Did you do
13 a review of the property at 4688 and 4684 to determine
14 whether any plumbing permits had been applied for for
15 that property?
16 A. I had staff do that.
17 Q. And what were the results?
18 A. Negative.
19 Q. Point of clarification. I think this is my
20 last question. At the time of this accident who owned
21 the water lid pictured in Exhibit No. 4?
22 A. The City of Garden City.
23 Q. What do you base that claim upon?
24 A. City ordinances.
25 Q. Okay.

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1 MR. DAVIS: If you want it, we'll deed it
2 to you.
3 MR. CRANDALL: Thanks.
4 BY MR. CRANDALL:
5 Q. If at the time of this accident this water
6 meter lid was on property owned by Mr. Prouty and either
7 him or the previous owner had installed that particular
8 lid depicted in Exhibit No. 4, would you still assert
9 that at the time of this accident that lid was owned by
10 Garden City?
11 A. Yes.
12 MR. CRANDALL: That's all my questions.
13 MR. DAVIS: How long do you think you're
14 going to be?
15 MR. REID: Not very long. Do you want to
16 take a break or not?
17 MR. DAVIS: I don't know. Are you doing
18 okay, Bob?
19 THE WITNESS: I'm fine.
20 (Discussion held off the record.)
21 MR. DAVIS: Okay. If you're ready, Jim.
22
23 FURTHER EXAMINATION
24 BY MR. REID:
25 Q. Have you got handy with you Exhibit No. 8

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1 there, Bob? It's the invoice (indicating).
2 A. (Indicating.)
3 Q. Yeah. Now, are water meter lids
4 categorized by the amount of load-bearing weight they
5 support?
6 A. Some, yes.
7 Q. Okay. Is there anything on Exhibit No. 8,
8 the invoice for the lid that I believe you testified
9 replaced the broken one of Exhibit No. 4, that can tell
10 me what that lid is rated for by way of load bearing?
11 A. It would come out of the Idaho standards.
12 The Idaho standards.
13 Q. Is there anything on this document, though,
14 that I could look at that would say this particular lid
15 has a load-bearing capacity of X?
16 A. That says on this specific document
17 (indicating)? No.
18 Q. Okay. If you look at -- under the heading
19 there on that document that says "Description" --
20 A. Uh-huh.
21 Q. -- it has the number 24 1055.
22 A. Uh-huh.
23 Q. Does that have any significance to you?
24 A. Yes. It's a 24-inch model No. 1055 manhole
25 lid.

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1 Q. Then it says "Only Water."
2 A. Yes. That's -- what that does is that's
3 the designation because there's similar manhole lids
4 that you use on sewer, and they would have a sewer or
5 wastewater or stormwater designation. On the casting it
6 will have "Water."
7 Q. Okay. And then it says -- right underneath
8 that it says "1 - 2" Touchread Hole." What does that
9 mean?
10 A. That's the 2-inch hole in there to place
11 the touch-read pad.
12 Q. Is that the same as the hole on Exhibit
13 No. 4 --
14 A. That is correct.
15 Q. -- that counsel asked you about?
16 A. That is correct.
17 Q. So that the lid that you purchased to
18 replace the lid that was broken in this incident had a
19 touch-read hole in it also?
20 A. That is correct.
21 Q. Would I be correct that you have no
22 personal knowledge as to how anybody used this property
23 before or after 1997?
24 A. That is correct.
25 Q. And so if this property was used for

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000560

1 Q. Okay. Is there a difference between a
 2 building permit and a plumbing permit?
 3 A. Yes.
 4 Q. What are the differences?
 5 A. One's for the building; one's for the
 6 plumbing.
 7 Q. Okay. And are those two different permit
 8 processes that you have to go through with Garden City
 9 to build under their building ordinances?
 10 A. Yes.
 11 Q. Did you -- I think you may have answered
 12 this, but permit me to ask it one more time. Did you do
 13 a review of the property at 4688 and 4684 to determine
 14 whether any plumbing permits had been applied for for
 15 that property?
 16 A. I had staff do that.
 17 Q. And what were the results?
 18 A. Negative.
 19 Q. Point of clarification. I think this is my
 20 last question. At the time of this accident who owned
 21 the water lid pictured in Exhibit No. 4?
 22 A. The City of Garden City.
 23 Q. What do you base that claim upon?
 24 A. City ordinances.
 25 Q. Okay.

1 there, Bob? It's the invoice (indicating).
 2 A. (Indicating.)
 3 Q. Yeah. Now, are water meter lids
 4 categorized by the amount of load-bearing weight they
 5 support?
 6 A. Some, yes.
 7 Q. Okay. Is there anything on Exhibit No. 8,
 8 the invoice for the lid that I believe you testified
 9 replaced the broken one of Exhibit No. 4, that can tell
 10 me what that lid is rated for by way of load bearing?
 11 A. It would come out of the Idaho standards.
 12 The Idaho standards.
 13 Q. Is there anything on this document, though,
 14 that I could look at that would say this particular lid
 15 has a load-bearing capacity of X?
 16 A. That says on this specific document
 17 (indicating)? No.
 18 Q. Okay. If you look at -- under the heading
 19 there on that document that says "Description" --
 20 A. Uh-huh.
 21 Q. -- it has the number 24 1055.
 22 A. Uh-huh.
 23 Q. Does that have any significance to you?
 24 A. Yes. It's a 24-inch model No. 1055 manhole
 25 lid.

1 MR. DAVIS: If you want it, we'll deed it
 2 to you.
 3 MR. CRANDALL: Thanks.
 4 BY MR. CRANDALL:
 5 Q. If at the time of this accident this water
 6 meter lid was on property owned by Mr. Prouty and either
 7 him or the previous owner had installed that particular
 8 lid depicted in Exhibit No. 4, would you still assert
 9 that at the time of this accident that lid was owned by
 10 Garden City?
 11 A. Yes.
 12 MR. CRANDALL: That's all my questions.
 13 MR. DAVIS: How long do you think you're
 14 going to be?
 15 MR. REID: Not very long. Do you want to
 16 take a break or not?
 17 MR. DAVIS: I don't know. Are you doing
 18 okay, Bob?
 19 THE WITNESS: I'm fine.
 20 (Discussion held off the record.)
 21 MR. DAVIS: Okay. If you're ready, Jim.
 22
 23 FURTHER EXAMINATION
 24 BY MR. REID:
 25 Q. Have you got handy with you Exhibit No. 8

1 Q. Then it says "Only Water."
 2 A. Yes. That's -- what that does is that's
 3 the designation because there's similar manhole lids
 4 that you use on sewer, and they would have a sewer or
 5 wastewater or stormwater designation. On the casting
 6 will have "Water."
 7 Q. Okay. And then it says -- right underneath
 8 that it says "1 - 2" Touchread Hole." What does that
 9 mean?
 10 A. That's the 2-inch hole in there to place
 11 the touch-read pad.
 12 Q. Is that the same as the hole on Exhibit
 13 No. 4 --
 14 A. That is correct.
 15 Q. -- that counsel asked you about?
 16 A. That is correct.
 17 Q. So that the lid that you purchased to
 18 replace the lid that was broken in this incident had a
 19 touch-read hole in it also?
 20 A. That is correct.
 21 Q. Would I be correct that you have no
 22 personal knowledge as to how anybody used this property
 23 before or after 1997?
 24 A. That is correct.
 25 Q. And so if this property was used for

EXHIBIT C

AFFIDAVIT OF COUNSEL RE: DEFENDANT PROUTY'S SECOND MOTION FOR
SUMMARY JUDGMENT - 7

000562

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN STEM,)
)
 Plaintiff,)
)
 vs.)
)
 CITY OF GARDEN CITY, IDAHO;) Case No. CV-PI-08-06177
 and WESLEY C. PROUTY,)
)
 Defendants.)
)
)

DEPOSITION OF GERALD GENE RHINEHART

MARCH 11, 2009

BOISE, IDAHO

BURNHAM, HABEL & ASSOCIATES, INC.

Certified Shorthand Reporters

COPY
Prepared for

Mr. Claiborne

Post Office Box 835
Boise, Idaho 83701

(208) 345-5700 • FAX 345-6374 • 1-800-867-5701

Reported By

Maryann Matthews,
CSR

000563

1 Whereupon the deposition proceeded as follows:
 2
 3 GERALD GENE RHINEHART,
 4 a witness having been first duly sworn to tell the
 5 truth, the whole truth, and nothing but the truth,
 6 testified as follows:
 7
 8 EXAMINATION
 9 BY MR. CLAIBORNE:
 10 Q. Okay. Would you please state your name for
 11 the record, sir?
 12 A. Gerald Gene Rhinehart.
 13 Q. Okay. And, Mr. Rhinehart, we're taking
 14 your deposition today in the case John Stem v. Garden
 15 City and Wes Prouty. It's a case here in Ada County
 16 concerning some injuries to Mr. Stem.
 17 We're taking your deposition in accordance
 18 with the Idaho Rules of Civil Procedure. My name's
 19 David Claiborne. I'm an attorney for Wesley Prouty.
 20 Have you ever had your deposition taken
 21 before?
 22 A. No.
 23 Q. Okay. Have you ever attended a deposition
 24 before?
 25 A. No.

5

1 marked.
 2 (Exhibit 1 was marked for identification
 3 and a copy is attached hereto.)
 4 MR. CLAIBORNE: Off the record.
 5 (Discussion held off the record.)
 6 MR. CLAIBORNE: Back on the record.
 7 BY MR. CLAIBORNE:
 8 Q. Okay. Sir, we've handed you what we've
 9 marked as Exhibit 1. Is this a copy of the notice of
 10 deposition you received to appear here today?
 11 A. Yeah.
 12 Q. Okay. Have you had an opportunity to look
 13 at Exhibit 1?
 14 A. Yeah. I read through this one here
 15 (indicating) that I have.
 16 Q. Okay. Now, are you the person with Custom
 17 Rock Tops that would have knowledge of the issues
 18 described in the notice at paragraphs A through E?
 19 A. Yeah.
 20 Q. Okay. Is there any other person associated
 21 with Custom Rock Tops who would also have knowledge of
 22 these issues we've outlined in Exhibit 1 as -- at
 23 paragraphs A through E?
 24 A. It would have been Lonnie Baxter.
 25 Q. Lonnie?

7

1 Q. Well, the format is pretty much -- is
 2 pretty simple. I'll be asking questions, the other
 3 lawyers in the room will have an opportunity to ask
 4 questions as well; and you're to answer the questions.
 5 Okay?
 6 You are under oath. You were just sworn.
 7 If you need to take a break for any reason, let us know
 8 and we can take a break. If there's a question you
 9 don't understand, we'd ask you to answer the question
 10 before you take a break; is that --
 11 A. Okay.
 12 Q. If you don't understand any question I ask,
 13 please let me know so I can rephrase it in a way you
 14 understand.
 15 A. Okay.
 16 Q. If you answer a question, I'm going to
 17 assume you understood it. Is that acceptable?
 18 A. That's acceptable.
 19 Q. Okay. Are you under the influence of any
 20 medicine or drug that would cloud your memory today?
 21 A. No.
 22 Q. Okay. And were you served with a notice
 23 and subpoena to appear today?
 24 A. Yes.
 25 MR. CLAIBORNE: Okay. I'll have that

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1 A. Yeah.
 2 Q. Can you spell the name, please?
 3 A. L-o-n-n-i-e B-a-x-t-e-r.
 4 Q. And is that a male or female?
 5 A. I'm sorry?
 6 Q. Is that a man or a woman?
 7 A. Man.
 8 Q. Do you know where he is today?
 9 A. He was the shop foreman for the back area.
 10 Q. Okay. And is Mr. Baxter still in the Boise
 11 area?
 12 A. I'm not sure.
 13 Q. Do you know his whereabouts?
 14 A. I do not know.
 15 Q. Okay. If you turn to the second and third
 16 pages of Exhibit 1, we'd asked you to bring certain
 17 records with you today, correct?
 18 A. Yes.
 19 Q. Okay. Do you have any records with you
 20 today?
 21 A. No.
 22 Q. Okay. And why not?
 23 A. I could not get to them. They were locked
 24 in the office, and I just got ahold of Wes this morning.
 25 Q. When you say "Wes," you mean Wes Prouty?

8

1 Q. Yeah.
 2 A. Yes.
 3 Q. Okay. How many -- or a range?
 4 A. Usually right around four or five.
 5 Q. Okay. Now, what types of jobs were the
 6 employees doing?
 7 A. They were doing polishing and cutting stone
 8 and installation.
 9 Q. Okay. And what areas did Custom Rock Tops
 10 do business in?
 11 A. The valley --
 12 Q. Okay.
 13 A. -- Treasure Valley.
 14 Q. Just the Treasure Valley?
 15 A. Yeah, pretty much.
 16 Q. And I think for the record can you just
 17 tell us what was the line of business that Custom Rock
 18 Tops was involved in?
 19 A. I can't hear you.
 20 Q. What was the line of business that Custom
 21 Rock Tops was involved in?
 22 A. Granite countertops.
 23 Q. Okay. So Custom Rock Tops would install
 24 granite countertops --
 25 A. Yeah.

1 marked as Exhibit 2 to your deposition. It's a document
 2 titled "Commercial Lease Agreement."
 3 Do you have that in front of you?
 4 A. Yes.
 5 Q. Okay. Do you recognize this document?
 6 A. Sorry?
 7 Q. Do you recognize this document?
 8 A. Yeah.
 9 Q. And you can feel free to take time to look
 10 through it if you'd like.
 11 Is this a true and correct copy of the
 12 lease agreement between Custom Rock Tops and Wesley
 13 Prouty?
 14 A. As far as I can tell, yeah.
 15 Q. Okay.
 16 A. I don't have a copy of that agreement.
 17 Q. Okay. On the last page, page 6, it does
 18 not contain any signatures. Do you recall signing a
 19 lease agreement with Mr. Prouty?
 20 A. Yes.
 21 Q. Okay.
 22 A. We knew each other for a long time and we
 23 never did sign the papers, I don't believe.
 24 Q. Oh. You don't think you ever signed a
 25 lease?

1 Q. -- like the surface we're here on today
 2 (indicating)?
 3 A. Yes.
 4 Q. Would it also cut the stone?
 5 A. Yes.
 6 Q. I assume it purchased the stone from a
 7 supplier.
 8 A. Yes.
 9 Q. Okay. Now, are you familiar with the
 10 premises at 4684 Chinden Boulevard?
 11 A. Yes.
 12 Q. And was that a premises occupied by Custom
 13 Rock Tops?
 14 A. Yes.
 15 Q. When did Custom Rock Tops enter into
 16 possession of that Chinden premises?
 17 A. I couldn't tell you the exact day.
 18 Q. Okay.
 19 A. It was about a year and a half before then,
 20 before I closed it. So it would have been somewhere
 21 around May 2005, May or June, I would say.
 22 (Exhibit 2 was marked for identification
 23 and a copy is attached hereto.)
 24 BY MR. CLAIBORNE:
 25 Q. Okay. Sir, we've handed you what we've

1 A. Not until right at the very end when I was
 2 leaving, I believe.
 3 Q. Okay. On page 1 of Exhibit 2, the lease,
 4 it says it's effective July 1, 2006. Do you see that in
 5 the first sentence? It's near the very top here
 6 (indicating).
 7 A. Oh, okay. Right here (indicating).
 8 Q. Now, on July 1, 2006 was Custom Rock Tops
 9 already in the premises?
 10 A. Yes.
 11 Q. Okay. So your company had entered into the
 12 premises before a lease agreement was entered into. Is
 13 that true?
 14 A. Well, we were actually setting up for. So
 15 we started on this date (indicating), but I was actually
 16 moving in the saws and, you know, some of the machineries
 17 and stuff, but --
 18 Q. Okay. So July 1 may have been the time
 19 that -- about when you started --
 20 A. Opening time.
 21 Q. -- opening the door for business, correct?
 22 A. Yeah.
 23 Q. Okay.
 24 A. That sounds about right.
 25 Q. Now, did the premises include the area

1 behind the store on Fenton Street, the -- I guess
 2 there's an asphalt area behind the premises; is that
 3 right?
 4 MR. DAVIS: Object to the form of the
 5 question.
 6 THE WITNESS: As far as unloading and
 7 loading, I assume so, yeah.
 8 BY MR. CLAIBORNE:
 9 Q. Okay. Well, why don't you -- can you
 10 describe the premises for us, the 4684 Chinden Boulevard
 11 premises?
 12 What did it include?
 13 A. Describe it?
 14 Q. Yeah.
 15 A. It's -- I don't know. How do you want me
 16 to describe it?
 17 Q. Well, there was a building, right?
 18 A. Yeah, there was a building. And then it
 19 kind of wraps around and it's all glass on one side and
 20 stuff; and then we put kind of protective boards so the
 21 forklifts or nothing could bump into, break, any of the
 22 glass and stuff.
 23 And then the backside has one main door
 24 that opens up for loading and unloading, and that's
 25 where the saw station was.

1 Q. Okay. And did you have forklifts?
 2 A. In the back area.
 3 Q. Okay. How many?
 4 A. Parking was in the front and then the
 5 loading zone was in the back.
 6 Q. Okay. And in the loading zone you would
 7 use forklifts?
 8 A. Loading zone what?
 9 Q. In the loading zone you would use
 10 forklifts?
 11 A. Yes.
 12 Q. Okay. How many forklifts did you have?
 13 A. One.
 14 Q. Did you ever make any improvements to the
 15 premises?
 16 A. Yeah. We did the showroom, put down tile
 17 and stuff on the floor and stuff.
 18 Q. In the interior?
 19 A. Yeah, interior.
 20 Q. Any work on the outside portions of the
 21 premises?
 22 A. No.
 23 Q. Okay. And during your tenancy, did you
 24 have liability insurance?
 25 A. Yes.

1 Q. Okay. So --
 2 A. So we'd bring the Hyster from there around
 3 and then in.
 4 Q. And when you leased the premises from
 5 Mr. Prouty, did that include the right for you to use
 6 that asphalt area behind the store?
 7 A. Yes.
 8 Q. Okay. Did you always pay your rent to
 9 Mr. Prouty?
 10 A. Yes.
 11 Q. Okay.
 12 A. Except for when I closed.
 13 Q. Okay. In terms of moving equipment or
 14 rolling stock, what did Custom Rock Tops use at the
 15 premises?
 16 A. I'm sorry?
 17 Q. In terms of moving equipment like vehicles,
 18 what did Custom Rock Tops have to use at the premises?
 19 A. Mainly just -- our vehicles didn't really
 20 get moved too much. You know, we just had our parking
 21 spots where everybody would just park and then back
 22 there was a loading zone, and that was --
 23 Q. Okay. Where was the parking area?
 24 A. The parking area -- we parked in the front
 25 of the store over along one side.

1 Q. Who was your insurance through?
 2 A. It was through -- I can't remember the
 3 name. I can't think of it.
 4 Q. Yeah. Did you have an agent that you
 5 worked through, an insurance agent?
 6 A. Yes. It was over in Eagle. It was at
 7 Golden Medallion, I think it is, is where it went
 8 through. I think it was called -- oh, man, what is
 9 that? I've got the papers at the shop, but --
 10 Q. Okay.
 11 A. -- I can't remember.
 12 Q. Those will be in the records that we'll get
 13 into later?
 14 A. Uh-huh.
 15 Q. Do you recall what the coverage limits
 16 were?
 17 A. It was like a couple million or something,
 18 I think.
 19 Q. And was Wesley Prouty listed as an
 20 additional insured?
 21 A. I do not know.
 22 Q. Okay. Now, if you'll turn to page 5 of the
 23 lease.
 24 A. (Witness complied.)
 25 Q. You'll see at paragraph 27 that it reads:

1 BY MR. CLAIBORNE:
 2 **Q. When you say "Marc," are you referring to**
 3 **Marc Jung?**
 4 A. Marc Jung.
 5 **Q. And when did they go through this class?**
 6 A. What's that?
 7 **Q. When did they go through the class that you**
 8 **referenced?**
 9 A. I sent everybody that worked there to the
 10 class after this accident.
 11 **Q. Okay. Before this accident what training**
 12 **had been done with regard to forklifts?**
 13 A. Marc -- I'm not exactly sure how much
 14 training he had. I know he was going through it with
 15 Lonnie. Lonnie and Marc at that time were the only two
 16 people that operated the forklift.
 17 **Q. Okay. And did Lonnie have any training**
 18 **before the accident?**
 19 A. Yes. Lonnie worked at another stone
 20 company.
 21 **Q. Okay. And did Marc have any training**
 22 **before the accident?**
 23 A. That I -- I know he had some, but exactly
 24 what extent I don't know. It's just what I was told.
 25 **Q. Who told you that?**

1 A. Depends on which stone company brought it
 2 down.
 3 **Q. And then when the truck gets there with the**
 4 **granite, where does it park?**
 5 A. Either it would park in front, over in
 6 front of Idaho Hardwood, if we had to put it in there
 7 for storage, or it would park behind the building and
 8 we'd take it off the truck and put it onto the saw.
 9 **Q. How would you get it from the truck to the**
 10 **saw?**
 11 A. With the forklift.
 12 **Q. When Custom Rock Tops entered into**
 13 **possession of the premises on Chinden, did you -- were**
 14 **there any hazards apparent to you in the loading and**
 15 **unloading area that you've described?**
 16 MR. DAVIS: Object --
 17 THE WITNESS: No.
 18 MR. DAVIS: -- to the form of the
 19 question.
 20 Go ahead.
 21 THE WITNESS: No. I'm sorry.
 22 BY MR. CLAIBORNE:
 23 **Q. That's okay. The answer was "no," correct?**
 24 MR. DAVIS: Same objection.
 25 MR. CLAIBORNE: I didn't hear what his

1 A. Huh?
 2 **Q. Who told you that?**
 3 A. Marc and Lonnie.
 4 **Q. Okay. So before the accident in November**
 5 **who was allowed to use the forklift?**
 6 A. Marc. I believe so, yes.
 7 **Q. And was Lonnie allowed to use it?**
 8 A. (Indicating.)
 9 **Q. Before the accident in November of 2006 --**
 10 A. Yeah.
 11 **Q. -- was Lonnie allowed to use the forklift?**
 12 A. Lonnie -- yes.
 13 **Q. Was Marc Jung allowed to use the forklift?**
 14 A. Yes.
 15 **Q. Did you use the forklift?**
 16 A. No.
 17 **Q. Okay. Did anyone else use the forklift?**
 18 A. Not to my knowledge.
 19 **Q. Okay. So when granite was delivered to**
 20 **your premises, how was it delivered?**
 21 A. By truck.
 22 **Q. Like a semi truck and trailer?**
 23 A. No. Just a flatbed truck usually or a lot
 24 of times on a flatbed trailer.
 25 **Q. Okay.**

1 answer was.
 2 (The record was read.)
 3 BY MR. CLAIBORNE:
 4 **Q. Did you take any time to go out and inspect**
 5 **the loading and unloading area to determine whether it**
 6 **was safe for use of a forklift?**
 7 MR. DAVIS: Object to the form of the
 8 question only because it doesn't define whether we're
 9 talking about before or after the accident.
 10 Go ahead and answer.
 11 THE WITNESS: I did not actually inspect
 12 it, but I'd worked for Wes Prouty in years prior to and
 13 they've always had semis pull back there and stuff; and
 14 we always unloaded carpet and stuff with forklifts back
 15 there with the semis and stuff. So I never thought
 16 there would ever be a reason to -- you know.
 17 BY MR. CLAIBORNE:
 18 **Q. How many years had you worked for Wes**
 19 **Prouty in the past?**
 20 A. Approximately eight to ten.
 21 **Q. Eight to ten years before you entered into**
 22 **possession of the premises for Custom Rock Tops?**
 23 A. Before that, yes.
 24 **Q. Okay. During all the time that you'd**
 25 **worked with Mr. Prouty there for the previous eight to**

1 A. Yes.
 2 Q. Do you know how it compares to the one that
 3 you purchased for Custom Rock Tops?
 4 A. Yeah. It's a smaller forklift than the one
 5 I purchased.
 6 Q. Do you know what kind of tires it had?
 7 A. Solid rubber.
 8 Q. Okay. And were you using that forklift
 9 outside and inside?
 10 A. Yes.
 11 Q. Would you please look at Exhibit 3.
 12 A. (Witness complied.)
 13 Q. Do you have that in front of you?
 14 A. Yes.
 15 Q. Okay. On Exhibit 3 somebody has written
 16 "Intermountain Interiors" on the top of the building
 17 that's in about the center of the page; is that correct?
 18 A. Yes.
 19 Q. And that would indicate roughly where
 20 Mr. Prouty's business was located?
 21 A. Yes.
 22 Q. Do you note immediately behind the building
 23 on the Fenton Street side of the property that the
 24 surface area (indicating) is lighter colored?
 25 A. Yes.

1 Q. So you're indicating that --
 2 A. In the blacktop --
 3 Q. Okay.
 4 A. -- area. And then the Hyster would come
 5 out, load off, and then take it back in.
 6 Q. Now, do you have Exhibit 4?
 7 A. Yes.
 8 Q. Okay. You've indicated with a red marking
 9 on Exhibit 4 where there was another overhead door that
 10 was added to the back of the building?
 11 A. Yes.
 12 Q. Prior to that door being added, did people
 13 park on the Fenton Street side of the property?
 14 A. I never saw anybody there because this
 15 laundrymat (indicating) when I first got there was open
 16 for a very short time, and then cars would pull in over
 17 here (indicating) once in a while.
 18 But after that whenever we'd pull back here
 19 (indicating) to load and unload and stuff, it was always
 20 empty because the laundrymat was closed for years.
 21 Q. Okay. I believe Mr. Prouty testified in
 22 his deposition that there was a laundromat in that
 23 location until about 2005 prior to your leasing some of
 24 the property.
 25 Is that inconsistent with your memory?

1 Q. Do you know what that is?
 2 A. Concrete.
 3 Q. Okay. And the area that's just immediately
 4 to the side of that is a darker color?
 5 A. Yes, I see that.
 6 Q. And do you know what that is?
 7 A. Blacktop.
 8 Q. So it's asphalt?
 9 A. Yes.
 10 Q. Okay. This four or five times that you
 11 operated the forklift, did you operate it in the area of
 12 the concrete?
 13 A. Yes.
 14 Q. Would there have been any reason -- well,
 15 strike that.
 16 In your experience when you were in the
 17 back of this building, was there ever an occasion where
 18 there was a truck parked down in the direction away from
 19 the concrete area (indicating) where there would have
 20 been a truck parked with carpeting or something that had
 21 to be moved from clear down there into that building
 22 (indicating)?
 23 A. A lot of times when they came down Fenton
 24 Street, they would pull up here (indicating) and they'd
 25 park in here (indicating).

1 A. The laundrymat was there, I know that, but
 2 I believe it was shut down for three or four years
 3 before they actually moved the machines out.
 4 Q. Okay.
 5 A. If I remember right, I know it was shut
 6 down for a while. Because people, when we were back
 7 there, they would always come over and say, "Hey, are
 8 they going to open the laundrymat?" And I'd say, "It's
 9 been shut down for a while," you know.
 10 Q. When the laundromat was operating, did cars
 11 park on the Fenton Street side of the property by the
 12 laundromat?
 13 A. Yes, I believe so.
 14 Q. And just so we have a clear record, on
 15 Exhibit 4, which is the photograph of the back of the
 16 building, there's actually another overhead door that
 17 would be to the right-hand side of the door that you've
 18 indicated was for Intermountain Interiors, correct?
 19 A. Yes.
 20 Q. Okay. Now, you testified that when you --
 21 your business moved into this building on Chinden, that
 22 there was some remodeling that was done on the interior
 23 of the building?
 24 A. Yes.
 25 Q. Did you do the remodeling?

1 would actually cover in it and stuff. They said nothing
 2 was brought up about any kind of manhole covers, none of
 3 that kind of stuff.
 4 **Q. Was any -- did any of your employees report**
 5 **to you that the class talked about who should operate a**
 6 **forklift?**
 7 A. No.
 8 **Q. Okay. Will you get Exhibit 3? Exhibit 3.**
 9 A. (Witness complied.)
 10 **Q. Okay. On Exhibit 3 in the back area you**
 11 **had indicated that the light-colored area is concrete**
 12 **and the dark-colored area is asphalt, right?**
 13 A. Yes.
 14 **Q. Okay. In the years before Custom Rock Tops**
 15 **started when you would be doing work for Wes, did you**
 16 **ever drive a forklift out on that blacktop area?**
 17 A. Yes.
 18 **Q. Did you see other people drive forklifts**
 19 **out in that blacktop area?**
 20 A. Yes.
 21 **Q. Okay. And how about Exhibit 4? Grab**
 22 **Exhibit 4. Right here, sir (indicating).**
 23 A. (Witness complied.)
 24 **Q. In front of the overhead door that's**
 25 **pictured in Exhibit 4, what is the surface composed of**

1 MR. DAVIS: I'm sorry?
 2 THE WITNESS: Oh, no. No. This one
 3 (indicating), no.
 4 BY MR. CLAIBORNE:
 5 **Q. It was not there?**
 6 A. No, not when I first started there.
 7 **Q. So it came about sometime during the time**
 8 **that you were working with Mr. Prouty?**
 9 A. Yeah.
 10 **Q. But do you have any recollection of that**
 11 **construction being done?**
 12 A. I just know it was when he did Custom
 13 Vents, and I'm not sure --
 14 **Q. Now, back to the forklift accident. In the**
 15 **process of that accident it sounds like a piece of**
 16 **granite broke; is that right?**
 17 A. When the accident happened?
 18 **Q. Right.**
 19 A. Yes.
 20 **Q. Is that what was told to you by Mr. Stem,**
 21 **Mr. John Stem?**
 22 A. Yeah. Well, there was granite all over the
 23 whole area (indicating) when I got back there.
 24 **Q. Okay. You saw shattered granite?**
 25 A. Yeah. I picked a lot of it up.

1 **directly in front of that door?**
 2 **Is that part of the concrete area or is**
 3 **that part of the asphalt area?**
 4 A. It's asphalt over here (indicating).
 5 **Q. Okay.**
 6 A. In front of this door (indicating)? There
 7 is a concrete slab right here (indicating) in front of
 8 this door.
 9 **Q. That's a man door, right?**
 10 A. Yes.
 11 **Q. How about in front of the overhead door**
 12 **that's in the picture, not the one you drew in, but the**
 13 **actual man door you can see in the picture? I'm sorry.**
 14 **The overhead door --**
 15 A. Okay.
 16 **Q. -- you see in the picture. What is the**
 17 **surface in front of that door?**
 18 A. Concrete.
 19 **Q. Concrete. Okay. Where does the blacktop**
 20 **start? Does it start where we see that planter?**
 21 A. Yes.
 22 **Q. Okay. When you started working for Prouty**
 23 **out at this Chinden location doing floor covering, was**
 24 **the door you drew in red already there?**
 25 A. Yes.

1 **Q. What happened first? Did the granite --**
 2 **according to what John Stem told you, did the granite**
 3 **break first or did the forklift tip first?**
 4 A. Forklift tipped.
 5 **Q. Okay. So the forklift tipped, causing**
 6 **stress in the granite and causing a fracture?**
 7 MR. SHEEHAN: Objection.
 8 But go ahead.
 9 BY MR. CLAIBORNE:
 10 **Q. Go ahead.**
 11 A. Yeah. It caused that sheet to hit another
 12 sheet that was still on the truck. So they slammed
 13 together (indicating), it shoved Britain back up against
 14 the front of the truck, and it shoved John off the end
 15 of the truck. They were the spotters, guiding it off
 16 (indicating).
 17 **Q. Okay. And you know that from what John**
 18 **Stem told you?**
 19 A. What John told me and what Britain told me.
 20 **Q. Do you know that without what Britain -- I**
 21 **want to only know what John told you. Do you know it**
 22 **happened that way from what John told you?**
 23 A. Yes.
 24 **Q. Okay. How many times before this accident**
 25 **had John Stem unloaded truck from a flatbed -- unloaded**

EXHIBIT NO. 2
RHINEHART
DATE 3-11-03
BURNHAM, HARRIS &
ASSOCIATES, INC.

Custom Rock Tops

COMMERCIAL LEASE AGREEMENT

This Commercial Lease Agreement ("Lease") is made and effective July 1, 2006, by and between Wesley C. Prouty ("Landlord") and Gerald Rhinehart dba Custom Rock Tops ("Tenant").

Landlord is the owner of 4684 Chinden Blvd. Boise, Idaho 83714

Landlord desires to lease the Leased Premises to Tenant, and Tenant desires to lease the Leased Premises from Landlord for the term, at the rental and upon the covenants, conditions and provisions herein set forth

THEREFORE, in consideration of the mutual promises herein, contained and other good and valuable consideration, it is agreed:

1. Term.

- A. Landlord hereby leases the Leased Premises to Tenant, and Tenant hereby leases the same from Landlord, for an "Initial Term" beginning July 1, 2006, and ending July 1, 2007
- B. Tenant may renew the Lease on or before July 1, 2007.

2. Rental.

- A. Tenant shall pay to Landlord during the Initial Term rental of \$ 28,975.20 per year, payable in installments of \$ 2,160.00
+ Triple Net \$ 314.60
= Total \$ 2,474.60
- B. Escalation 3% per year
- C. Tenant shall also pay to Landlord a "Security Deposit" in the amount of \$2160.00

3. Use

Notwithstanding the foregoing, Tenant shall not use the Leased Premises for the purposes of storing, manufacturing or selling any explosives, flammables or other inherently dangerous substance, chemical, thing or device.

4. Sublease and Assignment

Tenant shall have the right without Landlord's consent, to assign this Lease to a corporation with which Tenant may merge or consolidate, to any subsidiary of Tenant, to any corporation under common control with Tenant, or to a purchaser of substantially all of Tenant's assets. Except as set forth above, Tenant shall not sublease all or any part of the Leased Premises, or assign this Lease in whole or in part without Landlord's consent, such consent not to be unreasonably withheld or delayed.

5. Repairs.

During the Lease term, Tenant shall make, at Tenant's expense, all necessary repairs to the Leased Premises. Repairs shall include such items as routine repairs of floors, walls, ceilings, and other parts of the Leased Premises damaged or worn through normal occupancy, except for major mechanical systems or the roof, subject to the obligations of the parties otherwise set forth in this Lease.

Est. No. 2
Date 8-5-08
Name Wesley C. Prouty
M & M Court Reporting

6. Alterations and Improvements.

Tenant, at Tenant's expense, shall have the right following Landlord's consent to remodel, redecorate, and make additions, improvements and replacements of and to all or any part of the Leased Premises from time to time as Tenant may deem desirable, provided the same are made in a workmanlike manner and utilizing good quality materials. Tenant shall have the right to place and install personal property, trade fixtures, equipment and other temporary installations in and upon the Leased Premises, and fasten the same to the premises. All personal property, equipment, machinery, trade fixtures and temporary installations, whether acquired by Tenant at the commencement of the Lease term or placed or installed on the Leased Premises by Tenant thereafter, shall remain Tenant's property free and clear of any claim by Landlord. Tenant shall have the right to remove the same at any time during the term of this Lease provided that all damage to the Leased Premises caused by such removal shall be repaired by Tenant at Tenant's expense.

8. Insurance.

A. If the Leased Premises or any other party of the Building is damaged by fire or other casualty resulting from any act or negligence of Tenant or any of Tenant's agents, employees or invitees, rent shall not be diminished or abated while such damages are under repair, and Tenant shall be responsible for the costs of repair not covered by insurance.

B. Tenant shall maintain fire and extended coverage insurance on the Building and the Leased Premises in such amounts as Landlord shall deem appropriate. Tenant shall be responsible, at its expense, for fire and extended coverage insurance on all of its personal property, including removable trade fixtures, located in the Leased Premises.

C. Tenant and Landlord shall, each at its own expense, maintain a policy or policies of comprehensive general liability insurance with respect to the respective activities of each in the Building with the premiums thereon fully paid on or before due date, issued by and binding upon some insurance company approved by Landlord, such insurance to afford minimum protection of not less than \$1,000,000 combined single limit coverage of bodily injury, property damage or combination thereof. Landlord shall be listed as an additional insured on Tenant's policy or policies of comprehensive general liability insurance, and Tenant shall provide Landlord with current Certificates of Insurance evidencing Tenant's compliance with this Paragraph. Tenant shall obtain the agreement of Tenant's insurers to notify Landlord that a policy is due to expire at least (10) days prior to such expiration. Landlord shall not be required to maintain insurance against thefts within the Leased Premises or the Building.

9. Utilities.

Tenant shall pay all charges for water, sewer, gas, electricity, telephone and other services and utilities used by Tenant on the Leased Premises during the term of this Lease unless otherwise expressly agreed in writing by Landlord. In the event that any utility or service provided to the Leased Premises is not separately metered, Landlord shall pay the amount due and separately invoice Tenant for Tenant's pro rata share of the charges. Tenant shall pay such amounts within fifteen (15) days of invoice. Tenant acknowledges that the Leased Premises are designed to provide standard office use electrical facilities and standard office lighting. Tenant shall not use any equipment or devices that utilize excessive electrical energy or which may, in Landlord's reasonable opinion, overload the wiring or interfere with electrical services to other tenants.

10. Signs.

Following Landlord's consent, Tenant shall have the right to place on the Leased Premises, at locations selected by Tenant, any signs which are permitted by applicable zoning ordinances and private restrictions. Landlord may refuse consent to any proposed signage that is in Landlord's opinion too large, deceptive, unattractive or otherwise inconsistent with or inappropriate to the Leased Premises or use of any other tenant. Landlord shall assist and cooperate with Tenant in obtaining any necessary permission from governmental

authorities or adjoining owners and occupants for Tenant to place or construct the foregoing signs. Tenant shall repair all damage to the Leased Premises resulting from the removal of signs installed by Tenant

11. Entry.

Landlord shall have the right to enter upon the Leased Premises at reasonable hours to inspect the same, provided Landlord shall not thereby unreasonably interfere with Tenant's business on the Leased Premises

12. Parking.

During the term of this Lease, Tenant shall have the non-exclusive use in common with Landlord, other tenants of the Building, their guests and invitees, of the non-reserved common automobile parking areas, driveways, and footways, subject to rules and regulations for the use thereof as prescribed from time to time by Landlord. Landlord reserves the right to designate parking areas within the Building or in reasonable proximity thereto, for Tenant and Tenant's agents and employees. Tenant shall provide Landlord with a list of all license numbers for the cars owned by Tenant, its agents and employees.

13. Building Rules.

Tenant will comply with the rules of the Building adopted and altered by Landlord from time to time and will cause all of its agents, employees, invitees and visitors to do so; all changes to such rules will be sent by Landlord to Tenant in writing.

14. Damage and Destruction.

Subject to Section B A. above, if the Leased Premises or any part thereof or any appurtenance thereto is so damaged by fire, casualty or structural defects that the same cannot be used for Tenant's purposes, then Tenant shall have the right within ninety (90) days following damage to elect by notice to Landlord to terminate this Lease as of the date of such damage. In the event of minor damage to any part of the Leased Premises, and if such damage does not render the Leased Premises unusable for Tenant's purposes, Landlord shall promptly repair such damage at the cost of the Landlord. In making the repairs called for in this paragraph, Landlord shall not be liable for any delays resulting from strikes, governmental restrictions, inability to obtain necessary materials or labor or other matters which are beyond the reasonable control of Landlord. Tenant shall be relieved from paying rent and other charges during any portion of the Lease term that the Leased Premises are inoperable or unfit for occupancy, or use, in whole or in part, for Tenant's purposes. Rentals and other charges paid in advance for any such periods shall be credited on the next ensuing payments, if any, but if no further payments are to be made, any such advance payments shall be refunded to Tenant. The provisions of this paragraph extend not only to the matters aforesaid, but also to any occurrence which is beyond Tenant's reasonable control and which renders the Leased Premises, or any appurtenance thereto, inoperable or unfit for occupancy or use, in whole or in part, for Tenant's purposes.

15. Default.

If default shall at any time be made by Tenant in the payment of rent when due to Landlord as herein provided, and if said default shall continue for fifteen (15) days after written notice thereof shall have been given to Tenant by Landlord, or if default shall be made in any of the other covenants or conditions to be kept, observed and performed by Tenant, and such default shall continue for thirty (30) days after notice thereof in writing to Tenant by Landlord without correction thereof then having been commenced and thereafter diligently prosecuted, Landlord may declare the term of this Lease ended and terminated by giving Tenant written notice of such intention, and if possession of the Leased Premises is not surrendered, Landlord may reenter said premises. Landlord shall have, in addition to the remedy above provided, any other right or remedy available to Landlord on account of any Tenant default, either in law or equity. Landlord shall use reasonable efforts to mitigate its damages.

16. Condemnation.

If any legally constituted authority condemns the Building or such part thereof which shall make the Leased Premises unsuitable for leasing, this Lease shall cease when the public authority takes possession, and Landlord and Tenant shall account for rental as of that date. Such termination shall be without prejudice to the rights of either party to recover compensation from the condemning authority for any loss or damage caused by the condemnation. Neither party shall have any rights in or to any award made to the other by the condemning authority.

17. Subordination.

Tenant accepts this Lease subject and subordinate to any mortgage, deed of trust or other lien presently existing or hereafter arising upon the Leased Premises, or upon the Building and to any renewals, refinancing and extensions thereof, but Tenant agrees that any such mortgagee shall have the right at any time to subordinate such mortgage, deed of trust or other lien to this Lease on such terms and subject to such conditions as such mortgagee may deem appropriate in its discretion. Landlord is hereby irrevocably vested with full power and authority to subordinate this Lease to any mortgage, deed of trust or other lien now existing or hereafter placed upon the Leased Premises of the Building, and Tenant agrees upon demand to execute such further instruments subordinating this Lease or attorning to the holder of any such liens as Landlord may request. In the event that Tenant should fail to execute any instrument of subordination herein required to be executed by Tenant promptly as requested, Tenant hereby irrevocably constitutes Landlord as its attorney-in-fact to execute such instrument in Tenant's name, place and stead, it being agreed that such power is one coupled with an interest. Tenant agrees that it will from time to time upon request by Landlord execute and deliver to such persons as Landlord shall request a statement in recordable form certifying that this Lease is unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect as so modified), stating the dates to which rent and other charges payable under this Lease have been paid, stating that Landlord is not in default hereunder (or if Tenant alleges a default stating the nature of such alleged default) and further stating such other matters as Landlord shall reasonably require.

18. Security Deposit

The Security Deposit shall be held by Landlord without liability for interest and as security for the performance by Tenant of Tenant's covenants and obligations under this Lease, it being expressly understood that the Security Deposit shall not be considered an advance payment of rental or a measure of Landlord's damages in case of default by Tenant. Unless otherwise provided by mandatory non-waivable law or regulation, Landlord may commingle the Security Deposit with Landlord's other funds. Landlord may, from time to time, without prejudice to any other remedy, use the Security Deposit to the extent necessary to make good any arrearages of rent or to satisfy any other covenant or obligation of Tenant hereunder. Following any such application of the Security Deposit, Tenant shall pay to Landlord on demand the amount so applied in order to restore the Security Deposit to its original amount. If Tenant is not in default at the termination of this Lease, the balance of the Security Deposit remaining after any such application shall be returned by Landlord to Tenant. If Landlord transfers its interest in the Premises during the term of this Lease, Landlord may assign the Security Deposit to the transferee and thereafter shall have no further liability for the return of such Security Deposit.

19. Notice.

Any notice required or permitted under this Lease shall be deemed sufficiently given or served if sent by United States certified mail, return receipt requested, addressed as follows:

If to Landlord to:

Wesley C. Prouty
4688 Chinden Blvd
Boise, Idaho 83714

If to Tenant to:

Gerald Rhinehart dba Custom Rock Tops
4684 Chinden Blvd.
Boise, Idaho 83714

20. Brokers.

Tenant represents that Tenant was not shown the Premises by any real estate broker or agent and that Tenant has not otherwise engaged in, any activity which could form the basis for a claim for real estate commission, brokerage fee, finder's fee or other similar charge, in connection with this Lease.

21. Waiver.

No waiver of any default of Landlord or Tenant hereunder shall be implied from any omission to take any action on account of such default if such default persists or is repeated, and no express waiver shall affect any default other than the default specified in the express waiver and that only for the time and to the extent therein stated. One or more waivers by Landlord or Tenant shall not be construed as a waiver of a subsequent breach of the same covenant, term or condition.

22. Memorandum of Lease.

The parties hereto contemplate that this Lease should not and shall not be filed for record, but in lieu thereof, at the request of either party, Landlord and Tenant shall execute a Memorandum of Lease to be recorded for the purpose of giving record notice of the appropriate provisions of this Lease.

23. Headings.

The headings used in this Lease are for convenience of the parties only and shall not be considered in interpreting the meaning of any provision of this Lease.

24. Successors.

The provisions of this Lease shall extend to and be binding upon Landlord and Tenant and their respective legal representatives, successors and assigns.

25. Consent.

Landlord shall not unreasonably withhold or delay its consent with respect to any matter for which Landlord's consent is required or desirable under this Lease.

26. Performance.

If there is a default with respect to any of Landlord's covenants, warranties or representations under this Lease, and if the default continues more than fifteen (15) days after notice in writing from Tenant to Landlord specifying the default, Tenant may, at its option and without affecting any other remedy hereunder, cure such default and deduct the cost thereof from the next accruing installment or installments of rent payable hereunder until Tenant shall have been fully reimbursed for such expenditures, together with interest thereon at a rate equal to the lessor of twelve percent (12%) per annum or the then highest lawful rate. If this Lease terminates prior to Tenant's receiving full reimbursement, Landlord shall pay the un-reimbursed balance plus accrued interest to Tenant on demand.

27. Compliance with Law.

Tenant shall comply with all laws, orders, ordinances and other public requirements now or hereafter pertaining to Tenant's use of the Leased Premises. Landlord shall comply with all laws, orders, ordinances and other public requirements now or hereafter affecting the Leased Premises.

28. Final Agreement.

This Agreement terminates and supersedes all prior understandings or agreements on the subject matter hereof. This Agreement may be modified only by a further writing that is duly executed by both parties.

29. Governing Law.

This Agreement shall be governed, construed and interpreted by, through and under the Laws of the State of Idaho.

IN WITNESS WHEREOF, the parties have executed this Lease as of the day and year first above written

[Landlord Signature]

[Tenant Signature]

EXHIBIT D

AFFIDAVIT OF COUNSEL RE: DEFENDANT PROUTY'S SECOND MOTION FOR
SUMMARY JUDGMENT - 8

000576

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN STEM,)
Plaintiff,) Case No. CV-PI-08-06177
vs.)
CITY OF GARDEN CITY, IDAHO and)
WESLEY C. PROUTY,)
Defendants.)
_____)

COPY

DEPOSITION OF MAX STITH

MARCH 31, 2009

REPORTED BY:

MARIA D. GLODOWSKI, CSR No. 725, RPR

Notary Public

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- COEUR D'ALENE, ID 208-765-1700
- SPOKANE, WA 509-465-9575

005577

1 them in a more intelligent format. And if you have
2 questions you need to speak with your counsel, just
3 indicate that, and we'll give you some time off the record
4 and some privacy to discuss that. Okay?

5 A. Okay.

6 MR. CRANDALL: Anything else anyone wants to
7 add to the record at this point?

8 MR. DAVIS: Not I.

9 MR. REID: No.

10 MR. COPPLE: No.

11 Q. (BY MR. CRANDALL) Max, do you mind if I call
12 you Max?

13 A. No, that's fine.

14 Q. Okay. Could you please state your name and
15 spell it for the record, please?

16 A. Max Stith, M-a-x, S-t-i-t-h.

17 Q. Okay. And, Max, what is your current address?

18 A. 3820 Hillcrest Drive.

19 Q. Okay. How long --

20 A. Boise, Idaho.

21 Q. How long have you lived at that address?

22 A. Seventeen years.

23 Q. Okay. And, Max, could you please briefly give
24 me a background in terms of your post-high school
25 education.

1 Q. Is that a business your father started?

2 A. Yes, it is.

3 Q. How long has Tri State Electric been in
4 business?

5 A. Since 1964; 45 years.

6 Q. What are your responsibilities at Tri State
7 Electric?

8 A. I would say everything.

9 Q. Okay. Can you --

10 A. Take out the trash, and sales.

11 Q. Okay. I'm assuming then you don't do the
12 actual electrical hands-on work?

13 A. No, I do not.

14 Q. Okay. What is your current title at Tri State
15 Electric?

16 A. President.

17 Q. Okay. Does Tri State Electric have an
18 additional name that it goes by?

19 A. No, it does not.

20 Q. What is WM3?

21 A. WM3 was a partnership.

22 Q. Okay. Explain that to me, if you would,
23 please.

24 A. WM3 was a partnership of a piece of real estate
25 that we purchased in Garden City.

1 Q. Okay.

2 A. Actually, acquired in Garden City from Dewey
3 Bills as part of a debt. And WM3 was my father William,
4 and three other partners were Mark McKibben, Mike Peck,
5 and Max Stith.

6 Q. I see.

7 And was the sole purpose of that partnership to
8 own and manage that particular piece of real estate?

9 A. Yes, it was.

10 Q. Okay. When was that partnership established,
11 if you know?

12 A. I don't know.

13 Q. Okay. The focus of this lawsuit is upon some
14 property in Garden City, 4688 and 4684 Chinden Boulevard.
15 Are you familiar with that property?

16 A. I don't know the current addresses.

17 Q. Okay.

18 A. You say Garden City. There's only one piece of
19 property we're involved in.

20 Q. Okay. And are you aware of -- what was the
21 address that you remember, if you do, as it pertained to
22 that address?

23 A. I do not.

24 Q. Okay. If I represented that it is now
25 currently 4688 and 4684 Chinden Boulevard, would you

1 dispute that?

2 A. I can't dispute it.

3 Q. When I refer to that address, I'm referring to
4 the -- are we in agreement that we're referring to the
5 same building that you previously owned as part of WM3
6 partnerships so the record will be clear?

7 A. Okay. Yes.

8 Q. Okay. At the time of the original purchase of
9 that property, was there a building affixed to that
10 property, or was it vacant?

11 A. There was the 4688, and the 46 whatever else
12 you said.

13 Q. 4684, I believe.

14 A. No, there was not.

15 Q. And so it was just vacant land when you first
16 purchased it?

17 A. Yes.

18 Q. Okay. Subsequent to the purchase then, did you
19 put a building on them?

20 A. Yes, we did.

21 Q. And whom, if anyone, did you hire to construct
22 that building?

23 A. Wright Brothers Construction.

24 Q. Okay. And were you involved in the planning
25 phase of the construction of that particular building?

1 A. Yes.

2 Q. Okay. After the building was constructed, did
3 you yourself occupy the building as part of Tri State
4 Electric?

5 A. No, we did not.

6 Q. Okay. Did you have any businesses that ever
7 operated out of that particular location?

8 A. Yes, we did.

9 Q. What business was that?

10 A. M & M Rentals.

11 Q. Okay.

12 MR. REID: I'm sorry, I didn't --

13 THE WITNESS: M & M. Here we go again, Max and
14 Mike.

15 MR. CRANDALL: Rentals.

16 THE WITNESS: M & M.

17 Q. (BY MR. CRANDALL) Okay. And when did you
18 operate M & M Rentals?

19 A. Date-wise, I still -- I can't refer to the
20 dates, but it was the laundromat.

21 Q. Okay. When you first constructed that
22 particular building, did it exist as one single building,
23 or was it broken up into separate rentals inside the
24 building?

25 A. It was constructed as one separate building

1 with three spaces.

2 Q. Okay. Were each of these spaces rented out as
3 separate businesses?

4 A. Yes.

5 Q. What were the three spaces originally rented
6 out?

7 A. Pro Am Sports, M & M Rentals, which would have
8 been the laundry -- Maytag Laundromat, then the center
9 space was never rented.

10 Q. Okay. And when you originally purchased the
11 property, Mr. Prouty was part of the partnership?

12 A. No, he was not.

13 Q. Okay. At some point, do you rent out that
14 particular location, or at least part of it, to Mr. Wes
15 Prouty?

16 A. Yes.

17 Q. Do you remember approximately when you did
18 that?

19 A. No, I do not.

20 Q. Okay. When you originally built that building,
21 were you involved at all in the building permit process?

22 A. No, I was not.

23 Q. If I represent to you that there was a building
24 permit on file with WM3 Properties, contractor Wright
25 Brothers in September of 1985, would that sound about

1 right?

2 MR. COPPLE: Let me see that. See if you
3 recognize that, Max.

4 THE WITNESS: I signed it. I better have, huh?
5 Okay.

6 Q. (BY MR. CRANDALL) Is that your signature at
7 the bottom of that?

8 A. Yes, it is.

9 MR. CRANDALL: Okay. I'm going to have that
10 marked as Exhibit 1 to the deposition.

11 (Deposition Exhibit No. 1 was
12 marked for identification.)

13 Q. (BY MR. CRANDALL) So am I correct in
14 understanding that in September of 1985, you applied and
15 were granted a building permit to build the building
16 located at 4688 and 4684 Chinden Boulevard?

17 A. Yes.

18 Q. And you did that through Wright Brothers
19 Construction?

20 A. That's correct.

21 Q. At the time of the construction of the
22 building, did you -- or were you involved at all in the
23 planning process concerning the parking spaces?

24 A. No, I was not.

25 Q. Are you familiar with how the parking spaces

1 were laid out at that particular location?

2 A. No.

3 Q. Are you familiar with the rear of that
4 building --

5 A. I guess --

6 Q. -- generally?

7 A. Generally, yes.

8 Q. Okay. At the time you owned the building, were
9 there service doors affixed to the rear of that building?

10 A. Pro Am Sports only.

11 Q. Okay. And --

12 A. That would have been the -- I call it west end.

13 Q. Okay.

14 A. Northwest end. Does that make more sense?

15 Q. It does.

16 A. Okay.

17 Q. I'll represent to you at this point, there are
18 two additional service doors that have been put into that
19 building. Do you know whether or not any of those were
20 put in during your ownership of that building?

21 MR. DAVIS: Object to the form of the question.
22 Lack of foundation.

23 MR. REID: Yeah. I'll join.

24 MR. CRANDALL: That's what I said, I thought.
25 Okay. He indicated that there was only one, initially.

1 Q. Okay. Has it been 20 years since you've seen
2 the property?

3 A. Pretty close.

4 Q. Okay.

5 A. Fifteen probably.

6 Q. Do you have any memory in terms of how the
7 water valve covers sat behind that building?

8 A. No, I don't.

9 Q. Did you, or anyone associated with WM3
10 Properties, place valve covers over any of the water
11 meters at that particular property?

12 MR. DAVIS: Object --

13 THE WITNESS: Not to my knowledge.

14 MR. DAVIS: May I have the question read back?

15 (Requested portion read back.)

16 MR. DAVIS: Okay. Just for the purposes of the
17 record, I object to the form of the question. It's
18 multiple objections, including it's compound. Lack of
19 foundation. Let the record reflect that the witness
20 answered before I had an opportunity to assert the
21 objection.

22 Q. (BY MR. CRANDALL) My understanding is, is as
23 the water valve covers sat behind that building, it's been
24 about 20 years since you've seen that?

25 A. Yes.

1 Q. And you, as you sit here today, would not be
2 able to identify the location of those water valve covers
3 behind 4684 and 4688 Chinden Boulevard?

4 A. That's correct.

5 Q. Okay. While you owned, or was in partnership
6 with the ownership of 4684 and 4688 Chinden Boulevard, did
7 you do any subsequent modifications to that property after
8 the construction was completed by Wright Brothers
9 Construction?

10 A. No.

11 Q. Do you have any idea who placed water valve
12 covers on the water valves behind 4684 and 4688 Chinden
13 Boulevard?

14 A. No, I don't.

15 Q. Do you have any independent -- or any knowledge
16 as you sit here today as to the makeup of the parking
17 spaces behind 4684 and 4688 Chinden Boulevard?

18 A. No, I don't.

19 Q. Do you know whether -- do you remember whether
20 or not there were parking spaces behind 4684 and
21 4688 Chinden Boulevard?

22 A. No, I don't.

23 Q. Did you ever use a forklift at 4688 or
24 4684 Chinden Boulevard?

25 A. No, I did not.

1 Q. What were the purpose of the service doors that
2 were added there?

3 A. Don't know.

4 Q. Do you remember the date that you sold 4684 and
5 4688 to Mr. Prouty?

6 A. About a year. And the only reason is we just
7 looked at the deed. '94.

8 Q. 1994?

9 A. It's the only thing that I could find.

10 Q. Okay. So from at least -- we know from at
11 least from 1985 to 1994 that particular partnership owned
12 4688 and 4684 Chinden Boulevard?

13 A. Yes.

14 Q. Okay. Approximately, give or take a year, nine
15 years.

16 A. Okay.

17 Q. During that particular nine-year period of
18 time, were you present on the location daily?

19 A. No.

20 Q. Okay. Did you work out of that location?

21 A. No.

22 Q. Okay. About how often would you visit that
23 location, if you remember?

24 A. Once every two to three weeks possibly.

25 Q. Okay. Do you know who would have been present

1 at M & M Rentals at that location during that nine-year
2 period of time?

3 A. Employees only.

4 Q. Okay. Did you have a manager that ran
5 M & M Rentals at that time, or a supervisor?

6 A. There'd be a supervisor, and I can't remember
7 her name.

8 Q. Do you have --

9 A. Joanne somebody. Joanne -- I can't remember
10 her last name.

11 Q. During that period of time that you owned 4688
12 and 4684 Chinden Boulevard, did you ever witness anyone
13 using a forklift at that location?

14 A. I don't believe so.

15 Q. Did anyone ever approach you, or did you
16 ascertain independent knowledge about someone seeking
17 permission to use a forklift at that location?

18 A. No.

19 Q. Do you know what the service door that was at
20 the rear of 4684 -- do you want --

21 A. Time out.

22 Q. -- to go --

23 A. Please.

24 Q. Okay.

25 (Off-the-record discussion.)

1 the conclusion of that sale vacate 4688 and 4684 Chinden
2 Boulevard?

3 A. Yes, we did.

4 Q. So after 1994, is it a fair assumption that not
5 only were you not involved in that property from an
6 ownership standpoint, but neither you nor other employees
7 and so forth were present on that location on a daily
8 basis?

9 A. That's correct.

10 Q. For point of clarification, I'm going to have
11 you look at --

12 MR. CRANDALL: Let me have this marked as
13 Exhibit 2 to this deposition. You can just mark over that
14 exhibit of a previous depo.

15 (Deposition Exhibit No. 2 was
16 marked for identification.)

17 MR. COPPLE: Do you have an extra one there?

18 MR. CRANDALL: I'm going to make a couple of
19 extras.

20 (Off the record.)

21 Q. (BY MR. CRANDALL) Max, I'll represent that's
22 an aerial of 4688 and 4684 Chinden Boulevard. Does that
23 look at all familiar to you?

24 A. Yes.

25 Q. Is that the same building that we've been

1 that, you know, there hasn't been any modifications to the
2 building that you recognize from that photograph?

3 A. Well, that's -- I can't tell whether --

4 MR. COPPLE: It looks like an L.

5 THE WITNESS: -- the locations -- yeah, it
6 looks like an L. That's about it.

7 Q. (BY MR. CRANDALL) All right. Okay. Drawing
8 your attention to the Fenton side of the building. With
9 me there?

10 A. Yeah.

11 Q. Okay. There are what appears to be -- there's
12 some -- a little cross right there that is marked on that
13 diagram.

14 A. There's two crosses.

15 Q. Yeah. The first one that is on the south side
16 of the building.

17 A. Okay.

18 Q. I'll represent to you that's the location of
19 the water valve cover that fractured.

20 A. Okay.

21 Q. Are you familiar with that water valve cover?

22 A. No, I'm not.

23 Q. Does that photograph bring back any refreshment
24 of your memory?

25 A. No.

1 Q. Okay. Do you remember the configuration of the
2 parking at that location where that first cross is at?

3 A. No, I don't.

4 Q. Okay. Do you remember whether or not there
5 were marked parking stalls at that location?

6 A. No, there was not. I do remember that.

7 Q. It appears to me from that photograph that
8 there is a car parked there. Do you ever remember cars
9 parking in that location?

10 A. Yes.

11 Q. Okay.

12 A. That was the entry into the laundromat.

13 Q. Okay. Was that the front entry to the
14 laundromat, or the back entry?

15 A. That was the back entry.

16 Q. Okay. And while you operated the laundromat
17 there, did your employees or customers use those
18 parking -- that parking area to park their vehicles when
19 frequenting the laundromat?

20 A. Yes.

21 Q. During the ownership of your -- well,
22 partnership and ownership with WM3 Properties, do you ever
23 remember anyone operating a forklift in the area where
24 that X is located on the south portion of the building?

25 A. No, I don't.

1 north bay section, or whatever you want to call it over
2 there.

3 Q. And the area that is titled Custom Rock
4 Toppers, what existed at that location?

5 A. Half of that was the south. Half would have
6 been the laundromat.

7 Q. Okay. At that time it was just a laundromat
8 and --

9 A. Empty space.

10 Q. -- empty space on that section of the building?

11 A. (Nonverbal response.)

12 Q. And when you sold the property to Mr. Prouty,
13 was that the configuration of the building at that time,
14 that being, Mr. Prouty's carpet business, empty space, and
15 the laundromat?

16 A. Yes, it was.

17 Q. Do you know whether or not the area with the X
18 on it that I've indicated where this accident occurred, do
19 you know whether that area had ever been engineered for
20 the use of a forklift?

21 A. No, I do not.

22 Q. Do you know whether or not any area associated
23 with that property, 4688 and 4684, was ever engineered for
24 use of a forklift?

25 A. No, I do not.

1 MR. CRANDALL: Okay. I don't have any other
2 questions.

3 MR. REID: Do you want me to go next?

4 MR. DAVIS: Please.

5

6

EXAMINATION

7 BY MR. REID:

8 Q. Mr. Stith, my name is Jim Reid, and I represent
9 Wes Prouty. As I understand it, prior to Mr. Prouty
10 purchasing the building on Chinden Boulevard that we've
11 been talking about here today, he actually rented some
12 space from you for a while; is that right?

13 A. Yes, he did.

14 Q. Mr. Prouty says that I think he started renting
15 in 1992 and then bought the building in 1994. Does that
16 sound about right to you?

17 A. Okay. Yes.

18 Q. What I'd like to do -- and I got to admit, I'm
19 a little confused as to exactly who was where when. So
20 what I'd like if -- and we can use Exhibit No. 3, if we
21 want. But when you first constructed this building --
22 which I assume is 1985, is that okay?

23 A. Okay. Yes.

24 Q. I'm only saying that --

25 A. Yes, that's exactly --

1 by tenants other than Intermountain Interiors, do you feel
2 that you were present at the building site enough to know
3 exactly what did and what didn't go on in terms of whether
4 or not forklifts were being used to unload things?

5 A. No, I was not.

6 MR. DAVIS: Object to the form of the question,
7 but go ahead.

8 THE WITNESS: No, I was not.

9 Q. (BY MR. REID) If Mr. Prouty said that he --
10 that during the time he was renting the building he used
11 forklifts on the entire area between the building and
12 Fenton Street, would you dispute that?

13 A. No.

14 Q. Do you know whether or not Pro --

15 A. Pro Am Sports.

16 Q. -- Pro Am Sports -- I don't know why I'm having
17 such a hard time remembering that. Do you know whether or
18 not Pro Am Sports used forklifts to load and unload
19 material for their operations?

20 A. No, I do not.

21 Q. I'm not going to have it marked as an exhibit,
22 but only to maybe refresh your memory. If you look at --
23 this is just another one of the architectural drawings,
24 just another page.

25 A. Elevations, yeah.

1 Q. And it does show two overhead doors on the
2 Fenton side of the building. Does that help refresh your
3 memory as to how many overhead doors were part of the
4 original construction?

5 A. Not really, but --

6 Q. Okay.

7 A. The doors I was referring to would be these
8 three, and not this overhead door.

9 Q. Yeah, these two overhead doors.

10 A. Okay. I can remember this one being there for
11 sure, but I can't remember that one.

12 Q. Okay. Would it be fair to state that there may
13 have been two doors put in, you just don't remember?

14 A. There may have been two doors, that's correct.

15 Q. Okay.

16 A. Right. Yeah.

17 Q. Do you know what the purpose of the overhead
18 doors were -- even if it was only one, do you know what
19 its purpose was? Why did you have that put in the
20 building?

21 A. Multiple use from a standard of office
22 warehouse.

23 Q. Okay. And what would be the -- what would be
24 one of the -- what would be the reason you would have an
25 overhead door put in?

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1 A. Somebody might want to pull a truck in the back
2 of the facility, or unload materials or whatever.

3 Q. Conceivably, forklifts could be used on those
4 materials, correct?

5 A. Yes.

6 Q. Did anybody connected with any governmental
7 agency as part of your permit process advise you that you
8 couldn't use forklifts if there were overhead doors?

9 MR. DAVIS: Object to the form of the question.
10 Lack of foundation. Go ahead and answer.

11 THE WITNESS: I don't remember.

12 Q. (BY MR. REID) Do you recall anybody saying
13 that you could not operate forklifts?

14 MR. DAVIS: Same objection.

15 THE WITNESS: Again, I don't recall.

16 Q. (BY MR. REID) Okay. During the entire time
17 that you owned the property, did anyone tell you that
18 forklifts could not be used on that property?

19 A. Don't recall.

20 Q. Okay. Well, you have no recollection that
21 anyone ever told you you could not uses forklifts; is that
22 right?

23 A. That's true, also.

24 Q. Okay. Do you recall that the -- and you can
25 certainly look at the drawing if you want. Do you recall

R7334150335

CITY OF GARDEN CITY Sept 2 19 2009
BUILDING PERMIT 5199

THE BUILDING INSPECTOR OF GARDEN CITY hereby grants a permit to build, construct, remodel or install according to the following statement:

OWNER J. J. Properties

LOCATION 4678 Linden LOT BLOCK ADDITION

CONTRACTOR Wright Brothers Construction ADDRESS

PERMIT FOR New Commercial Building
at 4678 Linden

This permit is issued subject to the requirements of the Garden City Building Code and Zoning and Setback Ordinances. Before starting operations permittee should read the reverse side of this permit and printed matter on the "Inspection Card." No work shall be done beyond the point indicated in each successive inspection without obtaining the written approval of the Inspector.

Cost \$ 150,000.00 NAME Max Stith

Fees Paid .. \$ 527.00 ADDRESS

STATE COPY

(Over)

Est. No. 1
Date 3-31-09
W. Stith
M & M Court Reporting

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PRINT:

Page 1 of 1



Disclaimer: This map is a representation of features on the ground and is not survey-grade accurate. ACHD shall not be liable for any inaccuracies thereon.

Exh. No.	3
Date	3/1/21
Name	CHS, LLC
At & At Court Reporting	

410 25 51

<http://gisweb/achd/onpoint>

1/5/2017

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EXHIBIT E

AFFIDAVIT OF COUNSEL RE: DEFENDANT PROUTY'S SECOND MOTION FOR
SUMMARY JUDGMENT - 9

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