

DISTRICT COURT, CLEAR CREEK COUNTY,
STATE OF COLORADO

Court Address: Clear Creek County Courthouse
405 Argentine Street
Georgetown, CO 80444

Interpleader-Plaintiffs: MENDAKOTA
INSURANCE COMPANY
v.

Defendants: PAUL SAVAGE, PAM SAVAGE,
RANDALL GUY, JUSTIN GUY, and
KEVIN RUSZKOWSKI

and

PAUL SAVAGE and PAM SAVAGE, defendants and
cross-claimants

v.

RANDALL GUY, JUSTIN GUY and KEVIN
RUSZKOWSKI, cross-claim defendants

▲ COURT USE ONLY ▲

Case Number: 2008 CV 104

Div/Ctrm: G

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial to the court on January 12, 2010. The court has heard the testimony of the witnesses and parties, received exhibits, and heard arguments of counsel.

The court, having weighed the evidence, including the credibility of the witnesses, finds the following facts are supported by a preponderance of the evidence, or a higher legal standard where indicated, and makes the following legal conclusions based thereon.

I. FINDINGS OF FACT

Paul Savage was catastrophically injured on January 8, 2008. At 5:20 PM, he was changing the oil in his wife's Subaru in the driveway of their home at 423 Virginia Canyon Rd., Idaho Springs, Clear Creek County, Colorado. A 1988 Jeep Cherokee with Colorado license plate 973OYC, (herein, "the Jeep") ran off Virginia Canyon Road into the Savage's driveway, over Mr. Savage, crushing his pelvis and then crashed into the Savage home.

The Jeep was driven by cross-claim defendant Kevin Ruszkowski. The Jeep was owned

and registered in the name of cross-claim defendant Randall Guy. Sitting in the front passenger seat at the time of the incident was Justin Guy. Justin Guy is the son of Randall Guy. Daniel Weeks, who was neither a named party nor a designated non-party at fault, C.R.S. 13-21-111.5(3), was in the back seat.

Mr. Ruszkowski's birth date is June 13, 1985. Justin Guy's birth date is August 19, 1989. Ruszkowski did not have a valid driver's license on January 8, 2008, and Justin Guy admitted to having knowledge that Mr. Ruszkowski was an unlicensed driver, and admitted that he understood Ruszkowski had his driving privileges either suspended or revoked for prior driving misconduct. Justin Guy admitted that at least on one occasion he had driven the Jeep while drunk prior to January 8, 2008. Randall Guy admitted to having knowledge prior to January 8, 2008 that Justin Guy had driven the Jeep while drunk. Randall Guy also admitted to knowing that Justin Guy had a history of substance and alcohol abuse. Further, Randall Guy admitted he had knowledge prior to January 8, 2008 that for several months prior, Justin Guy and Mr. Ruszkowski were "hanging out," and drinking alcohol/getting drunk together.

Immediately after the incident, Mr. Ruszkowski and Justin Guy fled the scene and were apprehended by Idaho Springs Police (ISPD) within a short period of time. A blood draw was performed at 6:41 PM on January 8, 2008 on Mr. Ruszkowski. It resulted in a blood ethanol content of 0.198. A second blood draw was performed at 8:48 PM on January 8, 2008 on Mr. Ruszkowski. It resulted in a blood ethanol content of 0.137. A blood cannaboid screen was performed on the first blood draw, and resulted in a finding of Delta-9-THC-COOH 31ng/ml. A cannaboid screen on the second blood draw also resulted in a presumptive positive reading. (Cross-claimants' Exhibit 3_62 - 3_65).

Mr. Ruszkowski was charged with, pled guilty to, was convicted of, and was sentenced for violating C.R.S. 18-3-205(1)(b), vehicular assault - DUI, a class 4 felony. He also was charged with, pled guilty to, was convicted of, and was sentenced for violating C.R.S. 42-4-1601(2)(b), leaving the scene of an accident involving serious bodily injury, a class 5 felony.

The Clear Creek County District Court on June 16, 2008 sentenced Mr. Ruszkowski to 6 years on the class 4 felony, and 4 years on the class 5 felony, with the sentences to run concurrently. After successful completion of the Colorado Correctional Alternative Program (boot camp), the sentence was modified by the Court to four years of intense supervised probation, with the first six months in a halfway house. At the time of trial Mr. Ruszkowski was living at home on probation.

Justin Guy was charged with, pled guilty to, was convicted of, and was sentenced for a misdemeanor offense of obstructing government operations. He was sentenced to 40 hours of useful public service and 12 months of unsupervised probation. That plea was entered March 18, 2008 in Clear Creek County Court.

At the time of the incident, Paul Savage was married to Pam Savage. Mrs. Savage was in the 423 Virginia Canyon Road home when the Jeep injured Mr. Savage and crashed into the

house. She witnessed Daniel Weeks exit the vehicle and flee the scene. She called 911, which initiated the law enforcement and rescue response.

The Jeep's passenger tires crushed Mr. Savage's ilia, acetabula, pubic rami, colon and penis, creating a complex pelvic fracture. The spinning of the wheels against Mr. Savage's body separated the skin from the subcutaneous tissue, creating bilateral morel lesions. He also sustained extensive vascular and organ damage. As a result of his injuries, Mr. Savage sustained economic and noneconomic damages, C.R.S. § 13-21-102.5(2)(b), and compensatory damages for physical impairment and disfigurement, C.R.S. § 13-12-102.5(5). Mrs. Savage sustained derivative noneconomic injuries C.R.S. § 13-21-102.5(2)(a).

This case was initiated by Mendakota as an action in Interpleader. The Savages filed cross-claims against Randall Guy, Justin Guy, and Kevin Ruskowski seeking the damages enumerated above, plus exemplary damages. C.R.S. § 13-21-102. The interpleader portion of the case was resolved by Order dated January 4, 2010. Mendakota Insurance Company was dismissed as a party. The Savages' cross-claims were tried to the Court January 12-15 and 19, 2010.

II. CONCLUSIONS OF LAW - LIABILITY AND APPORTIONMENT

A. JOINT AND SEVERAL LIABILITY AS TO JUSTIN GUY AND KEVIN RUSZKOWSKI

“Joint liability shall be imposed on two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortious act.” C.R.S. § 13-21-111.5(4).

“For plaintiff to be entitled to recover damages under a civil conspiracy claim, there must be (1) two or more persons, (2) an object to be accomplished, (3) an agreement on the object or course of action, (4) one or more unlawful overt acts, and (5) damages as the proximate result thereof.” *Schneider v. Midtown Motor Co.*, 854 P.2d 1322, 1326 (Colo. App. 1992) (citing *Jet Courier Service, Inc. v. Mulei*, 771 P.2d 486 (Colo.1989)). “A conspiracy may be implied by a course of conduct and other circumstantial evidence.... There must be some indicia of agreement in an unlawful means or end.” *Id.* at 1327 (quoting *Martinez v. Winner*, 548 F.Supp. 278 (D.Colo.1982)).

“[T]he tort of negligent entrustment can constitute the predicate ‘tortious act’ required to establish joint liability pursuant to § 13-21-111.5(4)” *Id.* Justin Guy admitted and stipulated he negligently entrusted the Jeep to Mr. Ruskowski.

On January 8, 2008, Justin Guy and Kevin Ruskowski met at Mr. Ruskowski's home. Mr. Ruskowski did not have a valid drivers' license; Mr. Justin Guy knew this. There, Mr. Justin Guy and Mr. Ruskowski smoked marijuana and Mr. Ruskowski drank alcohol. Mr. Justin Guy offered the use of the Jeep for the purpose of driving to pick up Mr. Ruskowski's paycheck from UPS. Mr. Justin Guy permitted Mr. Ruskowski to drive the Jeep to UPS.

Daniel Weeks was in the Jeep at this time.

After cashing Mr. Ruszkowski's paycheck, Mr. Ruszkowski resumed the driver duties with the approval of Mr. Justin Guy. The group then drove to a liquor store, where a bottle of whiskey and two 24 oz beers were purchased, and to a gas station, where Mr. Ruszkowski paid to fuel the Jeep.

Mr. Ruszkowski suggested taking the Jeep for a drive to the mountains. Mr. Justin Guy agreed, and indicated his agreement by his actions, permitting Mr. Ruszkowski to drive the Jeep. The court finds the first three elements of civil conspiracy are thus satisfied.

Throughout the morning, Mr. Ruszkowski's alcohol and marijuana consumption was either with, or within plain view of Mr. Justin Guy. Mr. Ruszkowski drove the Jeep to the top of Virginia Canyon Road where he stopped to smoke more marijuana with Mr. Justin Guy. Mr. Ruszkowski resumed the driver seat with the continued permission of Mr. Justin Guy. Mr. Ruszkowski began to drive the Jeep down Virginia Canyon Road, gunning the engine and spinning the wheels, and drove the Jeep into a ditch.

As they attempted to put the Jeep back on the road, they engaged in a conversation with a young woman in a pickup truck. The cross-claim defendants all testified and agreed that a woman stopped and warned them against drinking and driving on Virginia Canyon Road. The testimony was undisputed that, above the Savages' home, Virginia Canyon Road is unpaved, narrow, winding, and steep. The testimony was also undisputed that Ruszkowski lost control of the jeep, prior to the incident involving Paul Savage, and put the jeep into a ditch on Virginia Canyon Road. These facts, taken together, would constitute notice to any reasonable person that driving on the Virginia Canyon Road was hazardous, that care was required, and that Mr. Ruszkowski's intoxication would pose a danger to others. Additionally, that a third party apparently recognized the intoxication of the Jeep occupants, and further that Ruszkowski had lost control and put the jeep into a ditch, would indicate that the intoxication of the parties was evident, and that Mr. Ruszkowski's intoxication would be apparent, including to Mr. Justin Guy. The Court finds this evidence persuasive of the open and obvious nature of Mr. Ruszkowski's intoxication.

As part of the effort to return the Jeep to the roadway, Mr. Justin Guy assumed the driver seat, and again relinquished it to Mr. Ruszkowski.

The Court finds Mr. Justin Guy knew Mr. Ruszkowski was operating the Jeep while under the influence of alcohol and marijuana, and that Mr. Justin Guy's entrustment of the Jeep to Mr. Ruszkowski constitutes an "indicia of an agreement in an unlawful means." Mr. Ruszkowski admits he drove the vehicle under the influence of alcohol and marijuana, in violation of C.R.S. § 42-4-1301 *et seq.* The court finds the fourth element of civil conspiracy is satisfied.

Shortly after the Jeep was freed from the ditch, Mr. Ruszkowski lost control of the

vehicle, left the roadway, ran over Paul Savage and collided into the Savage home. The court finds all damages discussed *infra* were the direct and proximate result of the agreement between Mr. Justin Guy and Mr. Ruskowski to drive in the mountains, that agreement being accomplished by the unlawful means of an intoxicated, unlicensed driver. This satisfies the fifth element of civil conspiracy. The court therefore finds Justin Guy and Kevin Ruskowski are jointly and severally liable for all damages resulting from the civil conspiracy. C.R.S. § 13-21-111.5(4).

B. VICARIOUS LIABILITY AS TO RANDALL GUY

1. *Family Car Doctrine*

Vicarious liability may be imposed on the head of household for damages resulting from a household member's permissive use of a family vehicle. *Boyd v. Close*, 257 P. 1079 (Colo. 1927). The household member does not need to be the driver. *Id.* at 154-55.

It is stipulated that Randall Guy was the owner of the Jeep, and that Justin Guy was a resident of the Guy household. Though bare title alone does not render Randall Guy head of household, *Lee v. Degler*, 454 P.2d 937 (Colo. 1969), ownership is sufficient to justify applicability of the family car doctrine. See *Ferguson v. Hurford*, 290 P.2d 229, 234 (Colo. 1955) (“...defendant was the owner of the automobile involved in the accident, and as such was equally liable with her son, the driver thereof, for any damages resulting to another by reason of his negligence while operating, with her permission, the automobile”).

The testimony presented indicates Randall Guy was head of the Guy household. He was the titled owner of the Jeep. Aside from Justin, Randall was the only driver in the Guy household. Randall was responsible for shepherding Mrs. Guy to and from work, took charge of disciplining Justin, and undertook responsibility for maintaining the Jeep.

The Court turns to the question of whether Justin Guy had permission to use the Jeep. Permission, for the purpose of the family car doctrine, may be either express or implied. *Hasegawa v. Day*, 684 P.2d 936, 938 (Colo. App. 1983) (overruled on other grounds). Permission, even if restricted or based upon a condition precedent, may render a vehicle a “family car.” See *Boltz v. Bonner* 35 P.2d 1015, 1018 (Colo. 1934).

True, when Mrs. Boltz was first asked whether her car was used as a family car, she answered in the negative. She then stated that the daughter Wilma drove the car only when given permission to drive it. But Mrs. Boltz thereupon testified that the car ‘is for our own pleasure,’ hers and Wilma's. Asked whether the car was bought to use for Wilma's pleasure as well as her own, she said: ‘Well, I permitted her to use it when she asked me for it, and when it suited me to let her have it for her own pleasure.’ This and all other of Mrs. Boltz's testimony showed clearly, without contradiction, that her car was at Wilma's disposal whenever Wilma's proposed use did not interfere with Mrs. Boltz's own requirements. It was a family car within the principle laid down in *Hutchins v.*

Haffner, supra, and *Boyd v. Close, supra*. The trial court was right in treating the Boltz car as a family car without submitting to the jury an issue in reference thereto.
Id.

Randall Guy and Carole Guy each testified that Justin did not have permission, and that they in fact expressly forbade Justin to use the Jeep. The court has weighed their testimony and finds it lacks credibility, and that other evidence presented on the issue of permission is more reliable.

Carole Guy testified that on January 8, 2008, she was phoned by Justin and asked for permission to use the vehicle, and that she denied that permission. She further testified she then telephoned Randall Guy to inform him of the exchange. Kevin Ruzzkowski testified he heard Justin Guy's end of the conversation with Mrs. Guy, and that the nature of that conversation was Justin notifying his mother where they would be going and when they would return. Ruzzkowski did not hear a request for permission. The Court also notes that though cell phone records would have demonstrated the call from Mrs. Guy to Randall Guy, no such records were produced.

Substantial testimony was presented regarding Justin's history of use of the Jeep. The Guy household has two drivers and two cars. The spare keys for the Jeep were left out in the open for easy access. Justin Guy had a history of driving the Jeep before obtaining his license. Mr. and Mrs. Guy gave Justin permission to drive the Jeep for the purposes of education and employment. In the short period between Justin's becoming a licensed driver and the incident, he had driven on at least one occasion for a family errand. When questioned whether Justin had driven the Jeep or the Durango, Randall replied that it would not matter, as they are both family cars. Most telling of Justin's understanding of his permission, he repeatedly referred to the Jeep as "my car." (Cross-claimants' Exhibit 3_44).

Randall and Carole Guy's actions were inconsistent with their testimony, in which they state they were highly concerned with Justin taking the Jeep and with Randall Guy's statement that he "would take care of it." During the 6-7 hours when Randall Guy knew that son Justin had taken the family Jeep he did nothing to alert anyone that Justin did not have permission to drive the family Jeep. During the 6-7 hours when Carole Guy knew Justin Guy had taken the family Jeep, she did not alert anyone, even during personal breaks or her lunch hour, that Justin did not have permission to operate the family Jeep that day. As a result of the incident, Justin Guy was apprehended and detained at the Clear Creek County Jail, where Randall Guy reported to pick up his son. No conversation was had with, or in the presence of, the ISPD officers in which Randall Guy admonished Justin for taking the Jeep without permission. There is no contemporaneous statement by Randall or Carole Guy indicating a lack of permission.

Finally, the Court considers the testimony of Virginia Olsby, and the contemporaneous notes she took during her conversations with Randall Guy and Justin Guy. Ms. Olsby is an employee with the Mendakota Insurance Company which insured the Jeep. As a senior claims investigator, Ms. Olsby was assigned to investigate the incident. Ms. Olsby had a conversation by phone with Randall Guy, on January 17, 2008. On January 28, 2008, she had a conversation with Justin Guy that was recorded. (Cross-claimants' Exhibits 1 & 2).

Randall Guy testified in trial that he did not recall the conversation he had with Ms. Olsby. Therefore, the Court finds that Ms. Olsby's contemporaneous written notes provide the most accurate record of the statements made.

Ms. Olsby's notes clearly demonstrate that Randall Guy had given permission to Justin Guy to drive the Jeep. The January 17, 2008 handwritten contemporaneous notes taken during the Randall Guy conversation clearly includes the word "permission." (Cross-claimants' Exhibits 2). Her type written notes of January 17, 2008 state: "Insd Randall Guy called ... stated he had given permission for Kevin Ruskowski [*sic*], friend of his son Justin to drive [insured vehicle]."

The Court finds that it does not need to reach the question of whether Randall Guy gave direct permission to Kevin Ruskowski to drive the jeep. The evidence is overwhelming that immediately following the incident, Mr. Randall Guy informed his insurer that the use was permissive, and told neither Ms. Olsby nor any law enforcement personnel that Justin did not have permission to drive the Jeep.

The Court concludes that the more persuasive evidence on this issue indicates that Justin Guy did have permission to use the Jeep. The Court therefore concludes the Jeep is a family car, and Randall Guy shall be vicariously liable for the damages caused by use of the Jeep.

2. *Initial Permission Rule*

The Court also finds it appropriate to examine a doctrine known as the "initial permission rule." Although the initial permission rule has traditionally been applied only in the setting of whether an insurance policy provides coverage for the acts of a third party, the Court finds it appropriate to apply it in the situation *sub judice*. In the following discussion, the Court in no way intends to suggest that it thinks Kevin Ruskowski did not have Randall Guy's permission, as discussed above – in no uncertain terms, the Court finds Ruskowski to have had such permission. The following discussion is undertaken to indicate that, even if such permission had not existed, Randall Guy would remain liable as a matter of law under the given facts.

The initial permission rule provides that if the owner of a vehicle allows a permittee to use the vehicle, then the owner has also given permission for the use of the vehicle by a subsequent permittee if the original permittee so allows. *Raitz v. State Farm Mut. Auto. Ins. Co.*, 960 P.2d 1179, 1184-86 (Colo. 1998).¹

Assuming *arguendo* that Kevin Ruskowski did not have Randall Guy's permission to use the Jeep, the court finds that Justin Guy did have such permission. For purposes of the initial

¹ The Court notes that *Raitz*, and the other Colorado cases involving the initial permission rule, were decided under the now-repealed No Fault Act, C.R.S. §10-4-701, *et seq.* The Court, however, only relies upon the initial permission rule to the extent that it imputes consent to a subsequent permittee through the initial permission granted an original permittee. The Court finds the initial permission rule to only apply to the extent that consent is imputed to Randall Guy. Liability is not automatically imputed through the initial permission rule in this case.

permission rule, Justin Guy was the original permittee. When Justin Guy allowed Kevin Ruskowski to operate the Jeep, Kevin Ruskowski became the subsequent permittee. Under the initial permission rule, even if Kevin Ruskowski did not have express permission, permission would still be imputed to Randall Guy through the initial permission rule.

The Court thus finds that the initial permission rule provides an alternative basis for determining Randall Guy to have given permission to Kevin Ruskowski operating the Jeep. With such permission, the family car doctrine as discussed above operates to impose vicarious liability upon Randall Guy.

III. CONCLUSIONS OF LAW - DAMAGES

A. COMPENSATORY DAMAGES

1. Economic losses

The parties stipulate that all medical care rendered to Mr. Savage since January 8, 2008 has been reasonable and made necessary as a result of the injuries he sustained in the January 8, 2008 incident involving the Jeep. Mr. Savage's medical bills incurred to date total \$4,329,553.61. (Cross-claimants' Exhibit 43). At the time of the incident, Mr. Savage carried health insurance, which paid to providers \$1,528,270.70, and which the medical providers accepted as payment for their services. The evidence also shows Mr. Savage paid \$5,112.00 for medical insurance in 2008. (Cross-claimants Exhibit 31). The Court finds that the reduced payments accepted by medical providers represents a discount that Mr. Savage paid consideration for, and does not reflect the reasonable value of the services rendered. The Court also finds as a matter of public policy, the benefit of a contract purchased by Mr. Savage should not inure to reduce the cross-claim defendants' liability.

Given the gravity of the injuries, impressive qualifications and experience of the treating physicians, and high degree of skill required in providing Mr. Savage's medical care, the Court finds the reasonable value of the necessary medical care to be \$4,329,553.61. *Lawson v. Safeway, Inc.*, 878 P.2d 127, 130-31 (Colo. App. 1994).

James Gracey, Ed.D. was offered and accepted by the Court as an expert in rehabilitation counseling and life care planning. (Cross-claimants' Exhibit 24, Gracey *Curriculum Vitae*). Dr. Gracey reviewed Mr. Savage's extensive medical records from St. Anthony Central, Craig Hospital, and the records of the numerous physicians who treated Mr. Savage. On June 8, 2009, Dr. Gracey met with Mr. Savage. Dr. Gracey also read the life care plan comments presented by a rehabilitation expert who was retained and disclosed by the cross-claim defendants. Dr. Gracey made adjustments to his recommended life care plan as a result of the criticisms and comments in the cross-claim defendants' expert's report. Additionally, Dr. Gracey read the deposition of Ross Wilkins, M.D., who is Mr. Savage's current treating orthopedist. Dr. Gracey reviewed other relevant materials in the case.

Dr. Ross Wilkins was qualified as an expert in the field of medicine, with a speciality in orthopedic surgery, and a sub-specialty in limb preservation.

Based upon his study, experience, education and training, Dr. Gracey developed a life care plan for Mr. Savage. (Cross claimants' Exhibits 25_13 - 25_19). The life care plan covered elements such as Medical Care, Evaluations, Therapeutic Modalities, Medications, Laboratory Studies, Durable Medical Equipment, Supplies, Care Providers, Future Hospitalizations, and Transportation. Dr. Wilkins commented on several portions of the life care plan, and the economic net present value of the life care plan was modified to comply with the deposition testimony of Dr. Wilkins.

The Court also finds that the cross-claimants furnished the life care plan to Frederick R. Buchwald, M.D., who is Mr. Savage's primary care physician, for review. Dr. Buchwald testified at trial. He was qualified as an expert in the art and science of medicine, with a speciality in the field of primary care and family medicine. (Cross-claimants' Exhibit 18, Dr. Buchwald *Curriculum Vitae*). Dr. Buchwald testified that based on the complicated and intensive nature of the care needed to date for Mr. Savage, and the severity of injuries Mr. Savage had suffered, that the care outlined in the life care plan was reasonable and necessary. He further opined that the level of care which will be needed for Mr. Savage would, to a reasonable degree of medical probability, be at the high end of the plan's projections. Dr. Wilkins also testified that with regard to the elements of the plan that are needed for paraplegics, Mr. Savage will require the high end of the range.

The cross-claim defendants criticized Dr. Gracey on a number of grounds. First, on the basis of bias, interest or favor. Secondly, the cross-claim defendants criticized Dr. Gracey for not being thorough enough, while at the same time, for having billed too much, and thus by implication for having over-worked the file. The cross-claim defendants also criticized Dr. Gracey for staffing his work-up of the case with a nurse who reviewed and digested much of the medical record. Finally, the cross-claim defendants criticized Dr. Gracey for having changed his prospective plan with regard to the stipulated life expectancy of Mr. Savage, having testified at deposition that Mr. Savage, with optimal care, would have a normal life expectancy. The Court does not find that these criticisms affect Dr. Gracey's credibility, or the weight that should be accorded his opinions.

In addition to Drs. Buchwald and Wilkins, the cross-claimants also called three other physicians who testified as to the severity, complexity and permanency of Mr. Savage's injuries. Robert H. Madayag, M.D. was qualified as an expert in the field of medicine with a speciality in surgery, and a sub-speciality in critical care and shock trauma. (Cross-claimants' exhibit 20, Madayag *Curriculum Vitae*). Trained at one of the top trauma hospitals in the United States, Dr. Madayag now practices with the surgical team that staffs the St. Anthony Central trauma service. Dr. Madayag met the Flight for Life helicopter which transported Mr. Savage emergently from Clear Creek County to the hospital. Dr. Madayag described at length the injuries sustained by Mr. Savage, and the surgeries, procedures, and care given during his initial hospitalization from January 8, 2008 through March 13, 2008 at St. Anthony Central.

Glenn Hermann, M.D., is double board certified in both surgery and in plastic and reconstructive surgery. He has a special interest in reconstructive surgery, post-trauma. He was qualified in those fields as an expert. Dr. Herrmann testified at length about the difficulty and complications in the medical efforts to “close” Mr. Savage’s large wounds, and in regard to the many grafts, and disfiguring scars now evident on Mr. Savage. (Cross-claimants Exhibits 13, 47 - 50).

Donald J. May, M.D., (Cross-claimants’ Exhibit 21, Dr. May’s *curriculum vitae*) is a board certified urologist, and was qualified as such at trial. He works with The Urology Center of Colorado (TUCC) which provides staffing for urology services at the Craig Hospital, and which provided urology services for Mr. Savage from the time he was admitted to St. Anthony Central in January 2008, Dr. May is a highly qualified, superbly trained urologist who demonstrated in depth knowledge, and explained forward-looking medical planning for Mr. Savage. Dr. May testified at length concerning Mr. Savage’s urologic injuries from the January 8, 2008 incident including damage to his urethra, the nerves and vascular system controlling Mr. Savage’s voluntary urination and his sexual function. Dr. May testified as to Mr. Savage’s incontinence, his lack of urinary and sexual function and how that was caused by the January 8, 2008 incident. (Cross-claimants’ Exhibit 16).

Dr. Gracey considered the evidence and medical records related to each of these areas of medical specialization. His life care plan treats the care needed in each of these medical areas, and the economic adjustments properly took into account the “write down,” supported by Dr. Wilkins, in Mr. Savage’s life expectancy; it took into account the “write down” also suggested by Dr. Wilkins in Mr. Savage’s daily home health care requirements; and it accounted for the “write up,” in Mr. Savage’s projected annual hospitalizations.

Cross-claim defendants presented no reliable alternative life care plan.² The Court finds that the only testimony of the reasonable needs for Mr. Savage over the course of his remaining life is that presented in Dr. Gracey’s life care plan. The Court finds that the testimony demonstrated that Dr. Gracey was qualified in life care planning; indeed, the cross-claim defendants did not object to the offer of Dr. Gracey as an expert in the fields of rehabilitation counseling and life care planning. A sufficient foundation for Dr. Gracey’s life care planning was laid through his testimony regarding the facts he considered, and the basis for his projections. That parts of the plan were considered and favorably commented upon by Dr. Wilkins, and the plan was approved by Dr. Buchwald, further bolstered Dr. Gracey’s findings. The court will accept the life care plan offered by Dr. Gracey as presenting the reasonably probable range of care needed to provide reasonably necessary care for Mr. Savage.

² Cf., *Hill v. United States of America*, 854 F. Supp. 727 (D. Colo. 1994). Judge Babcock compared two submitted life care plans, including one submitted by Dr. Gracey. The court compared elements of each one and made specific findings as to the reasonableness of each element of the competing submissions.

The Court finds Dr. Gracey's analysis to be reliable and persuasive, and accepts that analysis of Mr. Savage's future needs. The Court recognizes that Mr. Savage's condition is ongoing and dynamic. Each medical professional recognized that he can only give opinions to a reasonable degree of medical probability, not to a certainty. However, uncertainty as to the precise amount of damages does not prevent the court from fixing an amount, and as a matter of policy, the court will not reduce the damages on the speculation that Mr. Savage's recovery will be more miraculous than his doctors testify. The testimony of Mr. Savage's physicians clearly articulated that the history of Mr. Savage's care indicates he will require the high end of the range projected by Dr. Gracey.

The cross-claimants turned Dr. Gracey's life care plan over to Dr. Patricia Pacey for an economic analysis of the present value of the life care plan. Such an analysis is widely accepted, and these experts have previously had their testimony accepted by courts. Dr. Pacey was qualified as an expert in economics, with specialties in labor economics and damage economics.

The Court, having heard the economic analysis of Dr. Pacey and Mr. Darnell, finds that Mr. Darnell's analysis is not reliable. His use of a different analysis when he works for plaintiffs rather than defendants was particularly troubling. The Court finds, due to the medical conditions described *infra*, Mr. Savage is, and has been, permanently unable to work. The value of Mr. Savage's past income and essential home service losses is \$113,700.00. (Cross-claimants' Exhibit 31-37). The value of Mr. Savage's future lost earnings is \$687,000.00. The value Mr. Savage's future needs, adjusted for the stipulated cost of home modifications, which the Court finds Mr. Savage will need, is \$4,935,600.00.

Mr. Savage's total economic loss proximately caused by the collision is as follows:

Medical expenses - \$4,329,554.00.
Essential home services - \$113,700.00
Future lost earnings - \$687,000.00
Life care plan - \$4,935,600.00
Total - \$10,065,854.00.

2. Non-economic losses

The parties stipulate that Mr. Savage incurred non economic losses for his pain and suffering as a result of the January 8, 2008 collision in the amount of \$936,030.00, and is entitled to an award of damages for pain and suffering in that amount, and Mrs. Savage incurred non economic losses for her loss of consortium and pain and suffering as a result of the January 8, 2008 collision in the amount of \$468,010.00, and is entitled to an award of damages for loss of consortium and pain and suffering in that amount. The Court agrees and will abide by the parties stipulations.

3. Physical impairment and disfigurement

Prior to January 8, 2008, Mr. Savage was active, athletic, and physically unimpaired. He snowboarded, he hiked, biked, camped, went out to dinner with his wife, danced, enjoyed intimate relations with his wife, engaged in a variety of physical activities, and gained a great deal of personal satisfaction from his employment and his marriage. He took pride in his appearance and was fastidious in his dress for work.

Under Colorado common law, damages for physical impairment and disfigurement have historically been recognized as a separate element of damages. . . . [P]hysical impairment and disfigurement damages are often the most serious and damaging consequences of a defendant's negligence or misconduct. Thus, we noted that a separate category for physical impairment and disfigurement damages is a necessary and important element in making an injured plaintiff whole.

If someone tortiously inflicts a permanent injury on another he or she has taken away something valuable which is independent and different from other recognized elements of damages such as pain and suffering and loss of earning capacity. For this invasion the plaintiff should be awarded a separate sum in addition to the compensation for the other elements and such recovery should be proportional to the severity of the injury. (Citing authorities)

The principle that a victim is entitled to have a sound body and mind throughout his or her life provides the rationale for this distinction. . . . Physical impairment and disfigurement constitute a permanent injury irrespective of any pain or inconvenience. The tortfeasor caused the victim to have a permanent injury that she did not have before.

Pringle v. Valdez, 171 P. 3d 624 at 631 (Colo. 2007).

Physical impairment and disfigurement is a separate category from the so-called “pain and suffering” elements of noneconomic damages. It is not a “capped” level of damages, and should not be measured against any statutory limitation.

Here, it is undisputed that plaintiff suffered severe physical impairment and disfigurement from which damages of a noneconomic nature could naturally flow. Hence, to harmonize § 13-21-102.5(2)(b) and (3)(a) with (5) and give effect to all three subsections, it is necessary to determine separately damages of a noneconomic nature for physical impairment and disfigurement from the noneconomic loss or injury defined in § 13-21-102.5(2)(b). By such means, the limitation on recoverable damages contained in § 13-21-102.5(3)(a) and the unlimited recovery for physical impairment and disfigurement as provided for in § 13-21-102.5(5) can be harmonized.

Herrera v. Gene's Towing, 827 P.2d 619 at 620 (Colo. App. 1992).

As a direct and proximate result of the negligence, and civil conspiracy of Justin Guy and

Kevin Ruskowski, Mr. Savage was critically injured, has undergone a substantial course of medical care and therapy. The Court finds the medical testimony of Drs. Madayag, Herrmann, Buchwald, Wilkins, and May, and Cross-claimants' Exhibits 13, 15 (partially admitted), 16, 40, and 41 have provided a detailed and reliable picture of Mr. Savage's treatment, present health, prognosis, disfigurement, and permanent physical impairment for his remaining life expectancy, as a functional paraplegic.

In the immediate trauma, Mr. Savage suffered bilateral pubic rami fractures, bilateral acetabular fractures, right sacroiliac diastasis, and a left sacral fracture. These were repaired with sacroiliac screws. He sustained vascular, organ and soft tissue crush injuries to his pelvic and abdominal region including extensive bleeding, urethral disruption, bilateral pelvic hematomas, a retroperitoneal hematoma, bilateral morel lesions, and abdominal compartment syndrome. As a life-saving measure, an interventional radiologist embolized Mr. Savage's iliac artery, permanently cutting off the major route of blood supply to the pelvis and genitals.

Mr. Savage had extensive necrotic tissue, which was debrided in a series of procedures in the weeks following the collision. As a result of the perineal wounds and debridements to the perineum and anterior portion of the anal sphincter, Mr. Savage will permanently eliminate solid waste through a colostomy. As a result of further debridements, heterotopic ossification, skin and flap grafts, and complex wound closure issues, Mr. Savage has lost 90% of the gluteus muscle group, and has no other functional muscle in the thighs, buttocks, or flanks.

On January 19, 2009, Mr. Savage underwent arthroplasty surgery to install a prosthesis to replace the right hip. That prosthesis became infected with methicillin resistant staphylococcus aurea (MRSA). The infection became life threatening, and Mr. Savage was referred to limb preservationist Ross Wilkins, MD. Dr. Wilkins performed a revision arthroplasty in the right hip on August 5, 2009, and noted Mr. Savage's extensive tissue loss. Mr. Savage will require another replacement prosthesis in five years. On October 14, 2009, after he determined that wound to be safely closed, Dr. Wilkins performed a resection of heterotopic ossification in the left hip. Dr. Wilkins excised a piece of muscle that had turned to bone around the left hip approximately eight inches in diameter. Dr. Wilkins visualized the anatomy in the left hip and noted Mr. Savage's extensive tissue loss.

Mr. Savage's extensive skin grafting has rendered him significantly disfigured. Mr. Savage has extensive scarring around the hips, thighs, buttocks, and flanks. Several of his wounds are invaginated to the bone. The function of grafted skin is greatly inferior to natural skin. Its lack of suppleness and adherence directly to bone restricts Mr. Savage's range of motion. Its decreased sensitivity leaves Mr. Savage at constant risk for decubitus ulcers. (Cross-claimants' exhibit 13)

Both Drs. Wilkins and Buchwald diagnose Mr. Savage as a functional paraplegic, meaning though Mr. Savage did not suffer spinal cord disruption, the combined loss of muscle and neurologic function render him a paraplegic. Mr. Savage remains at risk for acute infection in either leg, which would require amputation.

With regard to Mr. Savage's genitourinary system, Mr. Savage is further at risk, according to Dr. May, of renal injury, permanent total sexual dysfunction, and permanent urinary dysfunction requiring an in-dwelling supra-pubic catheter, or an in-dwelling Foley catheter requiring monthly care by a urologist. Mr. Savage presently eliminates fluids through an indwelling Foley catheter, and has no sexual function. To restore continence, Mr. Savage will require a series of four to five surgeries to repair the false passage in his urethra, eliminate scarring in the bulbar urethra at the urinary sphincter, increase the volume of the bladder, and install one to two inflatable cuffs at the bulbar urethra which may be operated by a pump installed in the scrotum. Mr. Savage will not be able to voluntarily empty his bladder, but will need to bend, flex, or use gravity to expel urine. A separate prosthetic will need to be installed if Mr. Savage is to regain sexual function.

Based upon the medical testimony detailing the disfigurement to the interior anatomy, and photographs of Mr. Savage demonstrating the grotesque disfigurement to the exterior anatomy, the Court finds that Mr. Savage has sustained permanent disfigurement.

Mr. Savage has been rendered permanently and severely physically impaired. He is wheelchair bound and will never again walk more than a few heavily assisted steps at a time. His colostomy is permanent, and his urinary function, even in the best case scenario, will be far from normal. Given the constellation of injuries, and specifically the vascular and neurological damage to the pelvis, Mr. Savage will never return to normal sexual function.

The Court has considered the holding in *Pringle v. Valdez*, 171 P.3rd 624 (Colo.2007). In that case the Plaintiff was awarded an amount for disfigurement and physical impairment equal to four times the amount of noneconomic damages. However, in this case the physical disfigurement and impairment is extreme. Noneconomic damages will have a natural limit. For example, loss of consortium remains the same regardless of the level of disfigurement and physical impairment provided that the loss is established. Pain and suffering may vary depending upon the injury. Therefore, the Court finds that a simple ratio of four to one is inappropriate in this case and awards an amount equal to one half of the economic loss or \$5,032,926.00.

B. EXEMPLARY DAMAGES

Justin Guy and Kevin Ruszkowski each admitted the core facts recited in the Court's Statement of Fact, *supra*. The Court accepts these admissions and finds these facts proved beyond a reasonable doubt. To the same standard, the Court finds as follows:

1. Kevin Ruszkowski

On January 8, 2008, Mr. Ruszkowski was driving the Jeep while significantly impaired by alcohol and marijuana. (Cross-claimants' Exhibit 3_62 - 3_65). He was intentionally

gunning the engine and spinning the tires as he descended Virginia Canyon Road, lost control of the Jeep and drove it into a ditch. Knowing he was significantly impaired³, knowing conditions on Virginia Canyon Road were icy, and having been warned by the passerby that drinking and driving on the Virginia Canyon Road was especially dangerous, Mr. Ruskowski nevertheless resumed the driver seat with reckless indifference to the danger he posed to others. He continued down Virginia Canyon Road at excessive speed notwithstanding road signs warning “Residential Area,” “Yield to Uphill Traffic,” “Speed Limit 15 MPH,” and “Blind Driveway.” (Guy Exhibit I; Cross-Claimants’ Exhibit 12_4). He again lost control of the Jeep, ran over Mr. Savage, and crashed into the Savage home.

Immediately upon impact, Mr. Savage stood and took three to five steps towards the Jeep, screaming for someone to call 911. Mrs. Savage heard his screams from inside the home. Mr. Ruskowski admits hearing Mrs. Savage’s screaming. Despite having heard the cries, and in violation of law, Mr. Ruskowski fled the scene. The Court finds these actions to have been undertaken willfully and wantonly, with reckless disregard for the safety of others, particularly Mr. and Mrs. Savage.

Mr. Ruskowski contends that the purpose of exemplary damages has been served by the criminal justice system, and therefore they are inappropriate in this case. However, exemplary damages are to serve both as a punishment to the wrongdoer and as an example to others. *See Barnes v. Lehman*, 193 P.2d 273 (Colo. 1948). “The punishment of the offender and its deterrent effect is the heart and soul of 13-21-102, C.R.S.1973, authorizing exemplary damages.” *Mailloux v. Bradley*, 643 P.2d 797, 799 (Colo. App. 1982). Imposition of a criminal sentence does not exclude liability for exemplary damages. *See, e.g., Bohrer v. DeHart*, 961 P.2d 472 (Colo. 1998).

“[T]he most important indicium of the reasonableness of a[n] [exemplary] damages award is the degree of reprehensibility of the defendant's conduct.” [citations omitted] This inquiry recognizes that certain wrongs are more blameworthy than others and that exemplary damages should correspond to the “enormity of [the] offense.” *Blood v. Qwest Services Corp.*, --- P.3d ----, 2009 WL 1152148 p.9 (Colo.App.,2009).

Reprehensibility is evaluated by a number of relevant factors including whether (1) the harm involved was physical or economic [here, the Savages sustained both physical and extensive economic damages], (2) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others [here, the conduct of the cross-claim defendants evinced a disregard for the safety of others] (3) the victim was financially vulnerable [here, the Savages lost their income, and substantial earning capacity] (4) the conduct involved repeated actions or was an isolated incident [the evidence here demonstrated that both Justin Guy and Kevin Ruskowski had a history of alcohol abuse, and that Justin Guy had previously driven the Jeep while drunk, while Mr. Ruskowski had a prior driving while ability impaired offense.

³

Upon being informed of his breath alcohol test results, Mr. Ruskowski commented that he was surprised his BAC was not much higher than reported.

Blood, supra, at 9-10.

The Court also finds merit in the imposition of exemplary damages as a tool to deter others from repeating Mr. Ruskowski's conduct. To punish Mr. Ruskowski's conduct, both for driving the Jeep while drinking and smoking marijuana, and for fleeing the scene of a collision amid the screams of his victims, and to deter others from doing the same, the Court assesses exemplary damages against Mr. Ruskowski in an amount of \$1,000,000.00.

2. Justin Guy

Justin Guy repeatedly entrusted the Jeep to Kevin Ruskowski on January 8, 2008, in spite of his knowledge that Mr. Ruskowski had been drinking and smoking marijuana throughout the day, and that Mr. Ruskowski was intoxicated. After Mr. Ruskowski put the Jeep in a ditch on the side of Virginia Canyon Road, Mr. Guy entered and exited the driver's seat. Despite being the only person in the Jeep who did not consume alcohol that day, Mr. Guy again, willfully and wantonly, with reckless disregard to the safety of others, permitted Mr. Ruskowski to drive.

Justin Guy's conduct after the collision was as reprehensible as Mr. Ruskowski's. Mr. Guy admitted hearing screams, and admitted having concerns that someone inside the home may have been injured. He was sitting on the passenger side of the vehicle, Mr. Savage walked towards the passenger side of the vehicle and collapsed feet from it. Justin Guy shouted out to "Run," and did so himself. The Court finds these actions to have been undertaken willfully and wantonly, with reckless disregard for the safety of others, particularly Mr. and Mrs. Savage.

To impose a punishment on Mr. Guy, and to serve as an example to the community that reckless and willful disregard for the welfare of others is not tolerated, the Court assesses exemplary damages against Mr. Guy in an amount equal of \$1,000,000.00.

IV. JUDGMENT

Actual Damages:

Judgment shall therefore enter for Paul Savage and against Kevin Ruskowski and Justin Guy, jointly and severally for actual damages, in the amount of \$16,034,809.00, and for Pam Savage and against Kevin Ruskowski and Justin Guy, jointly and severally, in the amount of \$468,010.00.

Randall Guy shall bear vicarious liability for the actual damages pursuant to the family car doctrine. Judgment shall therefore enter for Paul Savage and against Randall Guy for actual damages in the amount of \$16,034,809.00, and for Pam Savage and against Randall Guy in the amount of \$468,010.00.

Exemplary Damages:

Judgment shall therefore enter for Paul Savage and against Kevin Ruszkowski for exemplary damages in the amount of \$1,000,000.00.

Judgment shall therefore enter for Paul Savage and against Justin Guy for exemplary damages in the amount of \$1,000,000.00.

Costs and interest:

Cross claim defendants shall pay interest on the amount damages awarded, calculated at the rate of nine percent per annum from the date the action accrued, January 8, 2008, to the date of satisfying the judgment, and including compounding of interest annually from the date such suit was filed, pursuant to C.R.S. 13-21-101(1). Pursuant to *Seaward Const. Co., Inc. v. Bradley*, 817 P.2d 971 (Colo. 1991), prejudgment interest under C.R.S. 13-21-101 shall not be awarded on the award of exemplary damages.

Cross claimants shall also have their costs upon filing of a bill of costs.

Dated: February 17, 2010

BY THE COURT:

A handwritten signature in blue ink, reading "Russell H. Granger".

Russell Granger
District Court Judge