



The above-named Defendants, Diane Schmillen and Toni Miller ("Third Party Plaintiffs"), by and through their undersigned counsel of record, Ron R. Shepherd of the law firm of Hamilton, Michaelson & Hilty, LLP, pursuant to Idaho Rule of Civil Procedure 14(a), hereby allege as follows:

### **I.R.C.P. 8(e)(2) DISCLAIMER**

Third Party Plaintiffs hereby give notice that they are asserting their rights under Rule 8(e)(2) of the Idaho Rules of Civil Procedure to assert several claims regardless of consistency. Third Party Plaintiffs' assertions of such rights should not be used against Third Party Plaintiffs for impeachment or otherwise. To the extent this Complaint makes inconsistent claims, such inconsistencies are made within the spirit and the letter of Rule 8(e)(2).

### **PARTIES**

1. Third Party Plaintiff Diane Schmillen ("Schmillen") is an adult resident of Ada County, Idaho. Schmillen resides and owns the property located at 427 Linder Avenue, Kuna, Ada County, Idaho.

2. Third Party Plaintiff Toni Miller ("Miller") is an adult resident of Ada County, Idaho. Miller resides and owns the property located at 144 West 4<sup>th</sup> Street, Kuna, Ada County, Idaho.

3. Defendant City of Kuna (the "City") is a municipal corporation located in Ada County, Idaho.

4. Defendant Ada County Highway District ("ACHD") is a highway district formed under the laws of the State of Idaho and operating in the state of Idaho.

5. Defendant Richard L. Jordan ("Jordan") is an individual licensed under the Idaho Contractor's Board and doing business in the state of Idaho. Jordan is a resident of Ada County, Idaho.

6. Defendant Jim Russell Excavation, Inc. ("Russell Excavation") is an incorporation organized under the laws of the State of Idaho and a licensed contractor under the authority of the Idaho Contractor's Board.

7. All of the above-named Defendants are liable to Third Party Plaintiffs for all or part of Plaintiff All Star Plumbing Inc.'s ("All Star") claims against Third Party Defendants.

#### **JURISDICTION AND VENUE**

8. This court has jurisdiction under Idaho Code § 1-705 because this dispute involves parties and causes of action that all occurred in Idaho.

9. Venue is proper in Ada County, Idaho under Idaho Code §§ 5-401 and 5-404 because this matter involves foreclosure of a lien on real property, and at least one of the Third Party Plaintiffs resides in Ada County.

#### **GENERAL ALLEGATIONS**

10. On or about October 4, 2012, construction work was being done on Linder Avenue in Kuna, Idaho near the Third Party Plaintiffs' respective residences. Third Party Plaintiffs' residences are next door to each other.

11. Upon information and belief, the construction was being done by the City and/or ACHD who had hired contractors Jordan and Russell Excavation for such construction.

12. Upon information and belief, the City was responsible for properly identifying and marking the location of the water main that was broke.

13. Upon information and belief, the construction project as a whole was sponsored by and under the supervision of ACHD.

14. Upon information and belief, Jordan was the general contractor hired by ACHD to perform the overall construction project.

15. Upon information and belief, Russell Excavation was a subcontractor hired by Jordan. Russell Excavation was directly responsible for damaging the water main.

16. In the course of construction, a City water main was damaged causing significant water to flood Third Party Plaintiffs' respective homes.

17. As a result of such water flooding Schmillen's home, Schmillen contacted All Star to extract the water from Schmillen's basement and to take the necessary steps to mitigate the damage that Schmillen suffered as a result of the significant water damage to her home.

18. Similarly, Miller also contacted All Star to extract water from her home and to dry her home so as to mitigate the damage that was being done by the water that flooded Miller's home.

19. All Star filed the present action to collect money allegedly owed.

20. Each of the Third Party Defendants is directly or vicariously liable to Third Party Plaintiffs for the damage Third Party Plaintiffs suffered as a result of the flooding of Third Party Plaintiffs' homes.

21. Specifically, Russell Excavation was negligent in carelessly and heedlessly digging without first determining where the water main was located.

22. Jordan is vicariously liable to Third Party Plaintiffs because Jordan hired Russell Excavation and Russell Excavation was acting as an agent of Jordan. Jordan directly supervised and maintained control over the construction. At all time relevant, Russell Excavation was acting within the scope of its agency relationship with Jordan.

23. Similarly, ACHD is liable to Third Party Plaintiffs because ACHD hired Jordan who hired Russell Excavation. At all times relevant, both Jordan and Russell Excavation were

acting within the scope of their authority while acting as an agent and on behalf of ACHD. ACHD also directly supervised and maintained control over the construction.

24. The City was negligent and careless when it, upon information and belief, improperly marked the water main and did not provide accurate information to the contractors on the ground regarding the location of the water main. The City also breached its duty to maintain and protect the water main under its proprietary control, and such breach caused Third Party Plaintiffs damages.

25. Third Party Plaintiffs have complied with the Idaho Tort Claim Act, Idaho Code § 6-901, *et seq.*

#### **ALLEGATIONS INCORPORATED BY REFERENCE**

Each and every of the following counts incorporate by reference each and every allegation of this Complaint whether such allegation is specifically set forth under a particular count or not.

#### **COUNT I**

#### **(Schmillen's Cause of Action Against Third Party Defendants)**

26. Third Party Plaintiffs incorporate herein each and every previous allegation as if such allegations were set forth under this Count in full.

27. Third Party Defendants' negligence caused water to flood Schmillen's home which damaged the home, personal property in such home and the landscaping surrounding such home.

28. Third Party Defendants' negligence, collectively, caused Schmillen damages in an amount to be proven at trial, but in excess of \$10,000.

**COUNT II**  
**(Miller's Cause of Action Against Third Party Defendants)**

29. Third Party Plaintiffs incorporate herein each and every previous allegation as if such allegations were set forth under this Count in full.

30. Third Party Defendants' negligence caused water to flood Miller's home which damaged the home, personal property in such home and the landscaping surrounding such home.

31. Third Party Defendants' negligence, collectively, caused Miller damages in an amount to be proven at trial.

**ATTORNEY FEES**

32. Third Party Plaintiffs have been required to retain the law offices of Hamilton, Michaelson & Hilty, LLP, duly licensed and practicing attorneys of the state of Idaho, to institute and prosecute this action. Third Party Plaintiffs are entitled to recover their costs and attorney fees in prosecuting this action under Idaho Code §§ 12-117, 12-121, as well as Idaho Rules of Civil Procedure 54(d) and 54(e).

**PRAYER FOR RELIEF**

WHEREFORE, Third Party Plaintiffs pray for judgment against Third Party Defendants jointly and severally as follows:

1. For a judgment in favor of each Third Party Plaintiff separately and against the above-named Third Party Defendants, jointly and severally, in an amount to be proven at trial;
2. For an award of costs incurred herein in favor of each Third Party Plaintiff separately;
3. For an award of attorney fees incurred herein in favor of each Third Party Plaintiff separately; and

4. For such other and further relief as the Court deems just and equitable in the premises.

**DEMAND FOR JURY TRIAL**

Pursuant to I.R.C.P. 38, Third Party Plaintiffs hereby respectfully demand a jury trial of twelve people on all issues raised in this Complaint and triable of right by jury.

DATED this 22<sup>ND</sup> day of May, 2013

HAMILTON, MICHAELSON & HILTY, LLP



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RON R. SHEPHERD  
Attorneys for Defendants/Third Party Plaintiffs,  
Diane Schmillen and Toni Miller

**CERTIFICATE OF DELIVERY**

I hereby certify that on the 24 day of May, 2013, I caused a true and correct copy of the foregoing DEFENDANTS' THIRD-PARTY COMPLAINT to be served by the method indicated below, and addressed to the following:

Kevin E. Dinius  
Michael J. Hanby, II  
DINIUS LAW  
5680 East Franklin Road, Suite 130  
Nampa, ID 83687

- U.S. Mail, Postage Prepaid
- Certified Mail/Return Receipt
- Hand Delivered
- Facsimile 475-0101
- Email: kdinius@diniuslaw.com;  
mhanby@diniuslaw.com



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RON R. SHEPHERD