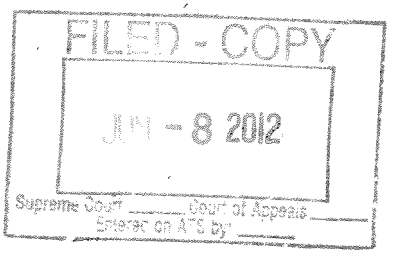
6-8-2012

Beers v. Corporation of President of Church Cross Appellant's Brief Dckt. 39319

IN THE SUPREME COURT OF THE STATE OF IDAHO

GREGORY AND CARALEE BEERS, individually, and on behalf of HEIDI L.BEERS, a minor,	)	Supreme Court Case No. 39319
Plaintiffs-Appellants-Cross Respondents,	)	
vs.	)	
SHAROLYN RIRIE, BRENT RASMUSSEN, BRENDA KROPF, GARRET HAUETER,	)	
Defendants-Respondents-Cross Appellants,	)	
and	)	
THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a non-profit entity, WARREN RIRIE, PHIL AND MERLINDA HAUETER, husband and wife, RICHARD and KATHY KARTCHNER, husband and wife, and BETH RASMUSSEN, MARK KROPF, KIRT and KATIE NIELSEN, husband and wife, BRADLEY J. DAY, an individual,	)	
Defendants-Respondents.	)	



BRIEF OF RESPONDENTS WARREN RIRIE, SHAROLYN RIRIE, PHIL HAUETER, BRENT RASMUSSEN, BETH RASMUSSEN, MARK KROPF, BRENDA KROPF, BRADLEY DAY AND GARRETT HAUETER
AND
BRIEF OF CROSS APPELLANTS SHAROLYN RIRIE, BRENT RASMUSSEN, BRENDA KROPF AND GARRET HAUETER

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for the County of Ada

Honorable Michael Wetherell
District Judge

Charles M. Murphy
Murphy Law Office, PLLC
847 E Fairview Avenue
Meridian, Idaho 83642
Attorneys for Plaintiffs-Appellants Gregory and Caralee Beers and Heidi Beers

Larry Hunter
Moffatt Thomas Barrett Rock & Fields
P.O. Box 829
Boise, Idaho 83701
Attorneys for Defendant-Respondent The Corporation of the President of the Church of Jesus Christ of Latter-Day Saints

J. Kevin West
Parsons Behle & Latimer
960 South Broadway Avenue, Suite 250
Boise, Idaho 83706
Attorneys for Defendants-Respondents Warren and Sharolyn Ririe, Phil and Merlinda Haueter, Brent and Beth Rasmussen, Mark and Brenda Kropf, Kirt and Katie Nielsen, Garrett Haueter and Bradley J. Day
Attorneys for Cross Appellants Sharolyn Ririe, Brent Rasmussen, Brenda Kropf and Garrett Haueter

Michael Kelly
Lopez & Kelly, PLLC
P.O. Box 856
Boise, Idaho 83701
Attorneys for Defendants-Respondents Richard and Kathy Kartchner

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STATEMENT OF THE CASE

1. Nature of the Case

This appeal involves a personal injury action filed by Gregory and Caralee Beers, individually and on behalf of Heidi Beers ("Heidi"), their 13 year old daughter, who was injured jumping into a river from the Smiths Ferry Bridge in Smiths Ferry, Idaho. The District Court granted summary judgment to 12 individually named defendants on the negligence cause of action brought by the Beerses, holding that none of them owed any legally recognized duty to Heidi when she jumped from the Smiths Ferry Bridge. The Beerses have appealed this decision as to 9 of these individual defendants: Warren Ririe, Sharolyn Ririe, Phil Haueter, Brent Rasmussen, Beth Rasmussen, Mark Kropf, Brenda Kropf, Bradley Day and Garrett Haueter (the "Individual Respondents"). The Court also granted summary judgment on the Beers' statutory claims for injury to a child as to eight of the individual defendants, but denied summary judgment as to the remaining four.[1]

2. Statement of Facts

a. Background

The Individual Respondents in this case are all members of the Church of Jesus Christ of Latter-day Saints ("LDS Church" or "Church"). All individual Respondents, except Garrett Haueter, were members of the Autumn Faire Ward (the "Ward"), a congregation of the LDS Church located in Meridian, Idaho. Garrett Haueter was a member of another Ward of the LDS Church. (R., pp. 000790-000791, Garrett Haueter Depo., pp. 9-10.) At the time of the incident

[1] The Beerses are not appealing this aspect of the District Court's decision. (R., 002011-002017.)

in question, Heidi participated in the Ward, though her parents, Greg and Caralee Beers, were not generally active in the ward. (R., pp. 000813-000814, Heidi Beers Depo., pp. 41-42; R., 000849 and 000851, Caralee Beers Depo., pp. 176, 183-84.)

The Autumn Faire Ward (the "Ward"), like most LDS wards, plans and carries out various social activities for its members. In 2007, those general ward social activities were planned and organized by an "Activities Committee," which acted under the general direction of the bishop of the Ward. (R., 000747, Mark Kropf Depo., pp. 16-17; R., 000856, Lisa Panek Depo., p. 12.) The chairperson (and sole member) of the Activities Committee was Lisa Panek. (R. 000747, Mark Kropf Depo., pp. 16-17; R., 000855-000856, Lisa Panek Depo., pp. 9-10.) In August 2007, the bishop of the Ward was Karl Christensen. (R., 000747, Mark Kropf Depo., p. 14.)

b. Greg and Caralee Beers Acted at All Times as Heidi's Parents

Gregory and Caralee Beers provided all necessary financial support for Heidi, as Heidi's parents. (R., 000868.) They have also provided all necessary education, instruction, and care for Heidi's general welfare. (R., 000869.) Heidi Beers has always resided in the home maintained by her parents, Gregory and Caralee Beers. (R., 000869.) Gregory and Caralee Beers have always given Heidi the affection commensurate with the parent-child relationship. (R., 000870.)

The Individual Respondents did not act in a parental role as to Heidi. For example, Warren and Sharolyn Ririe, Phil and Merlinda Haueter, Brent and Beth Rasmussen, Mark and Brenda Kropf, Kirt and Katie Nielsen, Brad Day or Garrett Haueter have not provided financial

support of a parent to Heidi or provided necessary education, instruction and care for Heidi's general welfare. (R., 000868-000869.) Furthermore, Heidi has never resided with these Respondents. (R., 000869-000870.) Additionally, these Respondents have never given Heidi the affection commensurate with the parent-child relationship. (R., 000870-000871.) Also, neither Gregory nor Caralee Beers contacted any of the Respondents prior to the subject Ward activity (i.e., camp-out) to arrange for any of these Respondents to watch or supervise Heidi at the camp-out. (R., 000871-000872.)

c. The Campout

In the Summer of 2007, the Ward Activities Committee planned a Ward campout to be held August 17-18, 2007, at a cabin near Smiths Ferry, Idaho. (R., 000857, Lisa Panek Depo., pp. 16-17.) The cabin was owned by two members of the Ward, Frank and Gloria Skinner (referred to hereafter as the "Skinners' cabin" or the "Skinners' property"). (R., 000819, Heidi Beers Depo., p. 75.) During the planning of the activity, there was never any discussion of swimming in the river or jumping from the bridge as part of the activity. (R., 000864, Karl Christensen Depo., pp. 62-63.)

There was no formal signup, payment or RSVP process for the families who desired to attend the Ward camp-out. (R., 000756, Brenda Kropf Depo., p. 14; R., 000706, Sharolyn Ririe Depo., p. 17; R., 000730, Brent Rasmussen Depo., p. 23; R., 000859, Lisa Panek Depo., p. 22.) The event was announced at Church meetings and those who wished to go were welcome to do so.

As admitted by Heidi Beers herself, the "agenda" of organized events for the camp-out were as follows:

August 17 (Friday): Dutch oven, potluck dinner
Evening campfire devotional and sing-along

August 18 (Saturday): Breakfast cooked by Ward members

(R., 000818, Heidi Beers Depo., pp. 70-73; R., 000707, Sharolyn Ririe Depo., pp. 18-19; R., 000699, Warren Ririe Depo., pp. 22-23; R., 000729, Brent Rasmussen Depo., p. 17; R., 000858, Lisa Panek Depo., p. 19; R., 000864, Karl Christensen Depo., p. 63.) She also admits that following the Saturday morning breakfast, the Church sponsored and organized events of the campout were concluded. (R., 000818, Heidi Beers Depo., pp. 70-73; *see also* R., 000858, Lisa Panek Depo., p. 19; R., 000800, Richard Kartchner Depo, p. 31; R., 000864, Karl Christensen Depo., p. 63; R., 000775- 000776, Katie Nielsen Depo., pp. 20, 27-28; R., 000749, Mark Kropf Depo., pp. 31-32; R., 000707, Sharolyn Ririe Depo., pp. 18-19; R., R., 000729, Brent Rasmussen Depo., p. 17.) Thereafter, families and individuals were free to go home or engage in whatever activities they chose. (R. 000818, Heidi Beers Depo., pp. 70-73; R., 000775, Katie Nielsen Depo., p. 20.) Some people left directly after breakfast (R., 000786, Brad Day Depo., pp. 39-40; R., 000776, Katie Nielsen Depo., pp. 27-28), some went fishing (R., 000741, Beth Rasmussen Depo., pp. 22-23), some shot off pop bottle rockets (R., 000770, Kirt Nielsen Depo., pp. 30-31), some went for a hike (R., 000719, Phil Haueter Depo., pp. 22-24), some went to play by or swim in the river (R., 000740, Beth Rasmussen Depo, p. 20; R., 000709, Sharolyn Ririe Depo., p. 32), and some decided play in or around the river. Any and all of these activities were at the choice

and discretion of the individual Ward members; there was no Ward involvement, direction or supervision for such. (R., 000775, Katie Nielsen Depo. p. 20.) Ward members were simply free to go and do as they chose following the breakfast. (R., 000818, Heidi Beers Depo., pp. 70-73; R., 000775, Katie Nielsen Depo., p. 20; R., 000770, Kirt Nielsen Depo., pp. 31-32; R., 000864, Karl Christensen Depo., p. 63.)

None of the Individual Respondents were on the Activities Committee that planned the campout. (R., 000698, Warren Ririe Depo., p. 11; R., 000705, 000707, Sharolyn Ririe Depo., pp. 11, 20; R., R., 000723, Merlinda Haueter Depo., p. 9; R., 000717, Phil Haueter Depo., p. 14; R., 000728, Brent Rasmussen Depo., pp. 10-11; R., 000774, Katie Nielsen Depo., pp. 8-9; R., 000766, Kirt Nielsen Depo., pp. 12-13; R., 000739, Beth Rasmussen Depo., p. 12; R., 000746, Mark Kropf Depo., p. 12; R., 000755, Brenda Kropf Depo., p. 11; R., 000780, Brad Day Depo., p. 14.) None were involved in any way in planning, organizing or leading the Ward campout in question. (*Id.*) They simply attended as Ward members who wished to go.

Heidi was 13 years old in August 2007. She heard the Ward campout being announced at Church and wished to attend. (R., 000815, Heidi Beers Depo., p. 61.) She talked to her parents and was planning to go to the campout with her Mother and younger sister. (R., 000816, *Id.* at pp. 63-64.) Later, however, Heidi's parents decided they would not or could not go. (Id.) Accordingly, Heidi asked a friend in the Ward, Shelby Wolfe, if she could get a ride to the campout with the Wolfe family. (R., 000815, *Id.* at pp. 61-62.) This was initially agreed to, but just before the campout, Heidi learned that the Wolfes would not be able to attend the campout. (R., 000816, *Id.* at pp. 65.) Accordingly, Heidi asked another friend, Claire Kartchner, if she

could ride up to Smiths Ferry with her family. (R., 000816-000817, *Id.* at pp. 65-66.) Claire said this would be all right, after checking with her parents. (R., 000817, *Id.* at pp. 66-67.) This request was made the morning of the day the camp-out was to begin. (R., 000817, *Id.* at p. 67.)

Greg and Caralee Beers had no discussions with the Kartchners about their daughter Heidi riding to the Smiths Ferry with them. (R., 000846-000848, Caralee Beers Depo., pp. 32-35, 41; R., 000806, Kathy Kartchner Depo., pp. 21-23.) Indeed, they did not ask any adult to keep an eye on Heidi. (R., 000848, Caralee Beers Depo., p. 41.) Specifically, Heidi's parents did not speak to any of the Individual Respondents to make arrangements. (R., 000849, 000850, Caralee Beers Depo., p. 174, 179.) The Kartchners understood that they were merely giving Heidi a ride to the camp-out and had no further role. (R., 000805-000807, Kathy Kartchner Depo., pp. 20-21, 24-25.) Heidi simply told her parents that she was going to ride with the Kartchners and Caralee Beers assented. (R., 000847, Caralee Beers Depo., p. 35.) Heidi's grandfather, Ray Beers (who was also a member of the Ward), had offered to take Heidi with him to the campout, but Heidi preferred to go with her friend, Claire. (R., 000816, Heidi Beers Depo., pp. 64-65.) Ray Beers ultimately drove to the campout by himself. (R., 000846, Caralee Beers Depo., p. 30.) Heidi's mother did not even ask Ray Beers to supervise Heidi. (R., 000848, Caralee Beers Depo., p. 41.)

The Kartchners and Heidi arrived at the campout on Friday evening, August 17, 2007, in the early evening. (R., 000820, Heidi Beers Depo., p. 79.) Heidi had dinner with her friends. (*Id.*)

d. The Events on Friday, August 17, 2007

In the evening of Friday, August 17, 2007, a small group of youths approached Brad Day, an adult in the Ward who was at the campout with his own family, and asked if he would drive them to the Smiths Ferry Bridge in his pickup. (R., 000821, Heidi Beers Depo., pp. 82-84; R., R., 000782-000783, Brad Day Depo., pp. 25-26.) He told them he would be agreeable if they got permission from their parents. (R., 000782-000783, Brad Day Depo., pp. 25-26.) The youths returned a short while later and said they had permission. (*Id.*) Heidi did not ask the Kartchners or anyone for permission to go to the bridge. (R., 000822, Heidi Beers Depo., pp. 86-87.) Brad Day then took the group, which included Heidi, to the bridge, which was approximately one mile away. Some of the kids wanted to jump into the river from the bridge, so Mr. Day had some of them check for rocks or other obstructions in the water. (R., 000823, Heidi Beers Depo., pp. 90-91, 216-17; R., 000738, Brad Day Depo., pp. 26-28.) After finding none and determining that it was safe, 10-11 kids jumped into the water without injury. (R., 000824, Heidi Beers Depo., p. 94.) Mr. Day told the youths to jump between the pilings where they had checked the water for obstructions. (R., 000784-000785, Brad Day Depo., pp. 33-34.) Heidi chose not to jump on Friday evening, though she urged other kids to do so. (R., 000824, Heidi Beers Depo., p. 96.) Heidi did not believe it was dangerous or that they would get hurt by jumping. (*Id.*) The group then returned to the Skinners' cabin without incident.

It was not generally known on Friday evening that the small group of kids had gone to the bridge and jumped. (R., 000825, Heidi Beers Depo., pp. 106-07; R., 000860, Lisa Panek Depo., pp. 26-27; R., 000785, Brad Day Depo., pp. 35-36; R., 000718, Phil Haueter Depo., p. 21;

R., 000769, Kirt Nielsen Depo., p. 27; R., 000776, Katie Nielsen Depo., p. 28; R., 000792-000793, Garrett Haueter Depo., pp. 17-18; R., 000748, Mark Kropf Depo., pp. 26-28; R., 000700, Warren Ririe Depo., p. 27; R., 000708, Sharolyn Ririe Depo., p. 26; R., 000731, Brent Rasmussen Depo., p 29; R., 000742, Beth Rasmussen Depo., p. 26; R., 000808, Kathy Kartchner Depo., p. 29.) Heidi Beers, and virtually all the other persons deposed in the case, testified that there was no general discussion back at the camp Friday evening about the jumping, and none of the individual Ward members knew of the jumping except Brenda Kropf. (*Id.*; see also R., 000757, Brenda Kropf Depo., p. 25.)

e. The Events on Saturday, August 18, 2007

On the morning of Saturday, August 18, 2007, the Ward members arose and ate the scheduled breakfast. (R., 000826, Heidi Beers Depo., p. 110; R., 000698, 000701, Warren Ririe Depo., pp. 11, 30.) After breakfast, the Church activity ended and people were free to do as they chose. (R. 000818, Heidi Beers Depo., pp. 70-73; R., 000775, Katie Nielsen Depo., p. 20.) Several families, including adults and children, decided to go down to the river, some to play in the water and others to jump from the bridge. (R., 000709, Sharolyn Ririe Depo., p. 32.) Heidi went to the bridge with some friends. (R., 000826, Heidi Beers Depo., p. 111.) Again, she did not seek permission to do so from any of the Individual Respondents. (R., 000826, Heidi Beers Depo., p. 113.) The record is unclear as to whether Heidi walked to the bridge or was given a ride by Sharolyn Ririe. (R., 000827, Heidi Beers Depo., p. 114; R., 000709, Sharolyn Ririe Depo., p. 32.) It is undisputed, however, that on Saturday morning Heidi did not tell any of the

Ward members that she planned to go down to the Smiths Ferry Bridge. (R., 000826-000827, Heidi Beers Depo., pp. 112-15.)

The Smiths Ferry Bridge spans the Payette River. Some have compared its height to the height of a high dive at a public swimming pool. (R., 000738, Brent Rasmussen Depo., p. 35.) It was only about six to eight feet above the water. (R., 000809, Kathy Kartchner Depo, p. 34; R., 000801, Richard Kartchner Depo., p. 42.) Before anyone jumped that Saturday morning, certain areas of the water were checked for obstructions and none were found. (R., 000795-000796, Garrett Haueter Depo., pp. 29-30; R., 000740, Sharolyn Ririe Depo., p. 35.) No hazards were observed at the bridge. (R., 000795-000796, Garrett Haueter Depo., pp. 29-30.) Garrett Haueter told everyone at the bridge to jump at the location that had been checked. (R., 000795-000796, *Id.* at pp. 28-30.) The water was sufficiently deep at the location of the jumping. (R., 000795-000796, *Id.*; R., 000708, Sharolyn Ririe Depo., pp. 28-29; R., 000783, Brad Day Depo., pp. 26-27.) The adults present at the bridge did not see any unusual danger or risk in jumping from the bridge into the water, and many allowed their own children to do so. (R., 000795, Garrett Haueter Depo., p. 29; R., 000785, Brad Day Depo., p. 34; R., 000752, Mark Kropf Depo., p. 62; R., 000759-000760, Brenda Kropf, pp. 37-39, 66-67; R., 000808-000809, Kathy Kartchner Depo., pp. 32-34; R., 000712, Sharolyn Ririe Depo., pp. 43-44; R., 000738-000739, Brent Rasmussen Depo., pp. 35, 37-38.) Indeed, one family allowed their seven-year-old son, who was a capable swimmer, to jump into the water. (R., 000711, Sharolyn Ririe Depo., p. 41; R., 000738, Brent Rasmussen Depo., pp. 34-35.) Ironically, Heidi's mother told one of the

Respondents that she would have allowed Heidi to jump if she had been at the campout. (R., 000735, Brent Rasmussen Depo., p. 61.)

Several youths jumped from the bridge Saturday morning, many jumping multiple times and all without incident. (R., 000828, Heidi Beers Depo., p. 122.) Heidi stood on the bridge during this time, urging others to jump but initially stating that she was afraid to do so. (R., 000831, Heidi Beers Depo., p. 140; R., 000712-000713, Sharolyn Ririe Depo., pp. 42-43, 53.) A while later, she suddenly changed her mind, said, "Wish me luck," and jumped. (R., 000831, Heidi Beers Depo., p. 140; R., 000712-000713, Sharolyn Ririe Depo., pp. 42-43, 53.)

There is a conflict in the testimony as to where Heidi jumped, with some saying she jumped between the pillars of the bridge, and others, including Heidi herself, saying that she jumped over a pillar. (R., 000829-000830, Heidi Beers Depo., pp. 132-34; R., 000761, Brenda Knopf Depo., pp. 48-49.) It is undisputed, though, that Heidi chose the location from which she jumped and did not consult with anyone or ask anyone's permission about her choice before suddenly jumping. (R., 000830, 000838, Heidi Beers Depo., pp. 134-35, 216-17.) Further, to the extent that she jumped over the pillar, this was a <u>different</u> location from that checked for hazards where the others jumped.

It is unclear at this point how Heidi was injured. No one saw her hit anything. She adamantly denies hitting the bottom of the river, and cannot say that she hit the bridge's support pillar either. (R., 000832-000833, Heidi Beers Depo., pp. 143-44, 146.) Her testimony is merely that she felt pain as she "hit the water." (*Id.*) It is undisputed that Heidi injured her right ankle/leg as a result of jumping from the Smiths Ferry Bridge.

Because of the number of Respondents involved in this case, it is helpful to precisely state the location of each at the time of the incident and their involvement, or lack thereof, in the events of Saturday, August 18, 2007. The following matrix, based entirely on the undisputed deposition testimony in the case, is an effort to assist the Court in understanding the role, if any, of the various individuals at issue:

Name	Attended Campout	Aware people planned to jump Saturday a.m.	On the bridge Saturday morning when Heidi jumped	Aware Heidi Beers intended to jump	Saw Heidi Beers jump
Warren Ririe[2]	Yes	No	No	No	No
Sharolyn Ririe[3]	Yes	No	Yes	No	Yes
Phil Haueter[4]	Yes	No	No	No	No
Merlinda Haueter[5]	No	No	No	No	No
Brent Rasmussen[6]	Yes	Yes	No	No	No
Beth Rasmussen[7]	Yes	Yes	No	No	No
Mark Kropf[8]	Yes	His daughter only	No	No	No
Brenda Kropf[9]	Yes	Yes	Yes	No	Yes
Kirt Nielsen[10]	Yes	No	No	No	No
Katie Nielsen[11]	Yes	No	No	No	No

[2] R., 000700-000701, Warren Ririe Depo., pp. 27, 31-32 (was not aware of people jumping off the bridge; did not go to the bridge).

[3] R., 000708, 000712, Sharolyn Ririe Depo., pp. 26, 42-45 (Heidi originally said she was not going to jump; later saw Heidi Beers jump).

[4] R., 000717, 000719, Phil Haueter Depo., pp. 14, 24 (never went to the bridge Saturday morning).

[5] R., 000724, Merlinda Haueter Depo., pp. 11-12 (did not attend the camp-out).

[6] R., 000732-000733, Brent Rasmussen Depo., pp. 30-31, 34 (was not on the bridge when Heidi Beers jumped).

[7] R., 000742, Beth Rasmussen Depo., pp. 27-28 (did not go to the bridge prior to the accident).

[8] R., 000749-000751, Mark Kropf Depo., pp. 33, 37-40 (was not present at the bridge when the accident happened).

[9] R., 000757-000758, Brenda Kropf Depo., pp. 25, 30-32 (saw Heidi Beers jump).

[10] R., 000767-000768, 000770, Kirt Nielsen Depo., pp. 21-22, 33 (did not go to the bridge prior to the accident).

Brad Day[12]	Yes	No	No	No	No
Garrett Haueter[13]	Yes	Yes	Yes	No	No

*(The individuals in bold are dismissed from the case and are not Respondents.)

There is no evidence that any of the individual ward members at issue agreed to supervise, chaperone or take care of Heidi at the Ward campout. (See record, generally.) Indeed, they were all engaged in taking care of their own families. (See record, generally.) There is no evidence that any of the individual Ward members encouraged Heidi to jump from the bridge. (See record, generally.) Most of them were not even present when she jumped from the bridge. (See chart above.) One Respondent named by the Beerses, Merlinda Haueter, did not even attend the campout and was not in Smiths Ferry, Idaho at the time of Heidi's jump and injury. (R., 000724, Merlinda Haueter Depo., pp. 11-12.) The two or three who were at the bridge did not know Heidi planned to jump until the last second, when she announced that she had changed her mind and quickly jumped. (R., 000708, 000712, Sharolyn Ririe Depo., pp. 26, 42-45.) It was Heidi's choice, and hers alone to jump, and she chose where to jump. (R., 000830, 000836, Heidi Beers Depo., pp. 134-35, 200.)

f. Church Callings of the Individual Respondents

Sharolyn Ririe's calling in the Ward in August 2007 was as "Instructor for Achievement Day Girls or Activity Day, Girls Ages 8-10." (Appellants' Brief, p. 39.) In her deposition, Ms. Ririe explained that in this calling, she was merely a daytime teacher for girls 8 to 10, and

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[11] R., 000776, Katie Nielsen Depo., pp. 26-28 (did not go to the bridge prior to the accident).

[12] R., 000781, 000785-000786, Brad Day Depo., pp. 19, 35-40 (left after breakfast, before accident).

[13] R., 000793-000794, Garrett Haueter Depo., pp. 21-22 (was at the bridge; did not see Heidi Beers jump).

sometimes 11, years old. (R., 000705, Sharolyn Ririe Depo., p. 11, ll. 17-24.) As a 13 year old, Heidi was not in her class. Regardless, there is no evidence that Ms. Ririe, because of her voluntary, unpaid religious calling with the Church, had any leadership responsibilities in the Ward or at the campout, or that she had any responsibility for Heidi.

Regarding Phil Haueter, he testified his calling with the church in August 2007 was as "Teacher's Quorum Advisor." (R., 1202, Philip Haueter Depo., p. 9, ll. 17-20.) This calling did not involve Heidi Beers in anyway. There is no evidence that Mr. Haueter, because of his religious calling with the Church, had any responsibilities at the campout or that he had any responsibility for Heidi.

With respect to Warren Ririe, his calling in the Church in August 2007 was as "high priest group leader." (R., 000698, Warren Ririe Depo, p. 11, ll. 11-15.) His duties were "Primarily to be responsible for the high priest priesthood quorum and home teaching of families that were assigned to that group." (*Id.*, p. 11, ll. 16-20.) This calling did not involve Heidi Beers. The Beerses claim that Mr. Ririe was the leader at the Ward Campout in the absence of Noal Fisher and Karl Christensen. (Appellants' Brief, p. 39.) The citations by the Beerses, however, only evidence that Mr. Ririe was the high priest group leader and that Noal Fisher testified that when he left the campout, "the responsibility of the ward would have been left to the high priest group leader or the elders quorum presidency and also to the individual parents and families." (R., 001126, Noal Fisher Depo., 32:12-33:6.) At most, Mr. Ririe was tasked with cooking breakfast at the campout. (R., 00698, Warren Ririe Depo., p. 13. ll. 1-9.) There is no

evidence that Mr. Ririe's religious calling required him to be responsible for the campout or that he had any responsibility for Heidi Beers because of this calling.

Brent Rasmussen's calling in August 2007 was as a "Ward Clerk." (R. 1141, 11:25 – 12:4; 12:12-21.) This clerical calling entailed taking minutes on meetings and recording attendance at meetings, such as ward council meetings and regular Sunday meetings at the Church. (R. 001141, p. 12, ll. 5-11.) Again, there is no evidence that Mr. Rasmussen's religious calling made him responsible for the campout or that he had any control or responsibility over Heidi Beers in light of this calling.

Beth Rasmussen's calling with the Church in August 2007 was "Teacher and Activity Day Leader, Girls Ages 11-12." (R., 001150, p. 12, ll. 3 – 9.) Her calling involved teaching 11-12 year old girls on Sunday and once a week every other week. (R., 001150, p. 12, ll. 10-15.) This calling did not involve Heidi Beers. There is no evidence that Ms. Rasmussen's religious calling required her to be responsible for the campout attended by the Ward members or that she had any responsibility for Heidi Beers due to this calling.

In August 2007, Mark Kropf's calling with the Church was as "Counselor for Stake Young Men's Presidency."[14] (R., 001087, p. 12, ll. 18-25.) This calling did not involve Heidi Beers. There is no evidence that Mr. Kropf's religious calling required him to be responsible for the campout attended by the Ward members or that he had any responsibility of Heidi Beers due to this calling.

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[14] A "Stake" is a division of ecclesiastical territory in the LDS Church, consisting of a number of Wards.

Brenda Kropf could not remember her calling with the Church in August 2007, but thought it may have been as "Primary Instructor." (R., 001129, p. 11, ll. 4 – 11.) This calling did not involve Heidi Beers. As with the other individuals singled out by the Beerses, there is no evidence that Ms. Kropf's religious calling required her to be responsible for the campout attended by the Ward members or that she had any responsibility of Heidi Beers due to this calling.

With respect to Bradley Day, his Church calling in August 2007 was as Sunday School Teacher for Boys and Girls who were 13, turning 14 years of age. (R., 001183, p. 14, ll. 10-21.) His calling entailed teaching classes from a Sunday school manual. (R., 001183, p. 15, ll. 17-21.) While Heidi Beers may have attended his classes on Sundays, there is no evidence that Mr. Day's religious calling required him to be responsible for the campout attended by the Ward members or that he had any responsibility of Heidi Beers due to this calling.

3. Statement of District Court Proceedings

On August 11, 2009, the Beerses filed their Complaint in this action. (R., 000014-000027.) Answers were filed by all defendants, including the 9 individual defendants/ respondents at issue in this appeal. (R., 000091-000098; R. 000116-000128; 000392-000404.)

On July 20, 2010, the Beerses filed a Motion to Amend Complaint and Demand for Jury Trial seeking leave to amend their Complaint to name additional defendants and to add a cause of action for child abuse under the "Tort Actions in Child Abuse Cases Act," I.C. § 6-1701 et seq. (R., 000300-000302.) Respondents filed objections to the Beers' Motion to Amend. (R., 000355-000362 and 000416-000426.) On September 8, 2010, the Court granted the Beers'

Motion to Amend their Complaint. (R., 000434-000436.) On September 15, 2010, the Beerses filed their Amended Complaint asserting (1) negligence and, (2) a violation of the child abuse statutes against a total of 14 individual defendants and the Church. (R., 000461-000479.) All Defendants subsequently filed Answers and Jury Demands to the Amended Complaint, including the 9 defendants/respondents at issue in the appeal. (R., 000501-000518; R., 000619-000636.)

In March 2011, 12 of the individual defendants, excluding Richard and Kathy Kartchner, filed Motions for Summary Judgment seeking the dismissal of all of the Beers' claims in the action against them. (R. at 000688-000901.) In its May 10, 2011 Order, the District Court granted all 12 individual defendant's summary judgment on the negligence causes of action. (R., 001545-001559.) The Court also granted summary judgment to 8 of the 12 individual defendants on the child abuse tort cause of action. (R., 001560-1561.) On that claim, the Court denied summary judgment as to 4 individual defendants - Sharolyn Ririe, Garrett Haueter, Mark Kropf and Brent Rasmussen (R., 001559-1561.)

On or about August 26, 2011, the Beerses filed a Motion for Rule 54(b) Certification of the District Court's May 10, 2011 Order, which granted the 12 individual defendants' motion for summary judgment on the negligence cause of action. (R. at 001878-001880.) The Beers' Rule 54(b) Certification motion went to hearing on September 2, 2011 before the District Court. (See September 2, 2011 transcript.) Following the hearing the District Court certified its Judgment pursuant to Rule 54(b). (R. at 002009.) Although the District Court signed this Rule 54(b) Certification, the District Court did not enter a written order regarding its decision on the Rule 54(b) Certification issue. (See Record, generally.) During the September 2, 2011 hearing on the

certification issue, however, the District Court indicated it was granting the Rule 54(b) certification and vacating the trial. (September 2, 2011 Transcript (T.) at pp. 180-187.)

On October 26, 2011, the Beerses filed a Notice of Appeal to the Idaho Supreme Court appealing the District Court's dismissal of their negligence claims as to 9 of the 12 individual defendants.[15] (R. at 002011-002017.) On November 15, 2011, Sharolyn Ririe, Brent Rasmussen, Brenda Kropf and Garrett Hauter filed a Notice of Cross-Appeal in the matter before the Idaho Supreme Court regarding the District Court's denial of their summary judgment motion on the child abuse tort action claims against them by the Beerses. (R. at 002030-002036.)

ADDITIONAL ISSUES ON APPEAL

A Cross-Appeal has been filed by Sharolyn Ririe, Brent Rasmussen, Brenda Kropf and Garrett Haueter in this action involving the issue of whether the District Court erred in its May 10, 2011 Order, in part, in its determination of the scope of the law and duties required under Idaho's Tort Actions in Child Abuse Cases, I.C. § 6-1701, et seq. (R., 002030-002036.)

In the alternative to their Cross-Appeal, Sharolyn Ririe, Brent Rasmussen, Brenda Kropf and Garrett Haueter respectfully ask the Supreme Court to consider the issues and the arguments in the Cross-Appeal as "Additional Issues on Appeal" pursuant to I.A.R. 35(b)(4). As such, all substance and arguments in their cross-appeal are incorporated herein. It is insufficient to simply address the Beers' arguments on the issue of negligence. Clearly, there is a significant

[15] As noted later in this brief, the Beerses admitted in their Memorandum in Opposition to the individual Respondent's Motion for Summary Judgment ("Memorandum in Opposition") that they had no factual or legal basis for any claims against Merlinda Haueter, Kirt Nielsen and Katie Nielsen, who they had named as Defendants. (R., 001241, footnote 1.) Hence, the Beerses have not appealed the summary judgment order against these defendants.

inconsistency in that the District Court found that none of the Individual Respondents were liable under any theory of negligence, but nevertheless held that some of them could be guilty of "child abuse" under I.C. § 6-1701 et seq. simply because they were in the general vicinity when Heidi jumped from the bridge and hurt herself. Further error is found in the District Court's ruling that the injury to child statute creates an "affirmative duty to act." (R., 001559.) These issues should be addressed in the cross-appeal, but can also be addressed under I.A.R. 35(b)(4).

STANDARD OF REVIEW

Summary judgment may be entered when "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 judgment as a matter of law." I.R.C.P. 56(c); *see also Kelso v. Lance*, 134 Idaho 373, 375, 3 P.3d 51, 53 (2000). The moving party has the burden of showing that there is no genuine issue of material fact. *BMC West Corp. v. Horkley*, 144 Idaho 890, 893, 174 P.3d 399, 402 (2007). In opposing the motion, however, "'a mere scintilla of evidence or slight doubt as to facts' is not sufficient to create a genuine issue for purposes of summary judgment." *See Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 88, 996 P.2d 303, 307 (2000). The nonmoving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Id.* When reviewing a district court's order for summary judgment, the Idaho Supreme Court exercises the same standard as that used by the district court in ruling on the motion. *Castorena v. General Elec.*, 149 Idaho 609, 613, 238 P.3d 209, 213 (2010)(internal citations omitted).

The Idaho Supreme Court exercises free review over all questions of law. *Id.*

ARGUMENT

A. The Beers' Negligence Claims Have No Basis in Law or Fact.

1. The Beers' Negligence Claims Have No Basis in Fact.

The most remarkable thing about the Beers' claims against the Individual Respondents is their utter randomness. Here, plaintiffs sued ordinary Ward members who had no leadership or supervisory role whatsoever as to the campout.

Even more bizarre and random is the fact that the Beerses did not include most or all of the adults actually present at the bridge at the time of Heidi Beers' accident, although those adults would not have been liable either. Instead, they sued 12 individuals, 9 of whom were not even on the bridge when Heidi jumped. One of the individuals was never even in Smiths Ferry for the campout! Others had already left the campout after the planned activity, to go home prior to the incident. Thus, whom the Beerses chose to sue is so random and illogical that their claims simply make no sense from a factual standpoint.

Perhaps the clearest evidence of the ill-conceived nature of this case is the huge shifts in theories and concessions made throughout the course of the case in the District Court. For example, the Beers' sole negligence theory in the First Amended Complaint was Count One, denominated "Negligence – *In Loco Parentis*." (R. 000470-000473.) (Counts Two and Three are derivative, merely seeking damages for economic loss to Heidi Beers' parents.) At summary judgment, however (as well as in this appeal), the Beerses completely abandoned the *in loco parentis* theory, making no arguments in support. (R. 001239-001261.)

Further, the Beerses conceded at summary judgment that they had no factual or legal basis for claims against three of the individual defendants, Merlinda Haueter, Kirt Nielsen and Katie Nielsen. (R. 001242-001252.) Moreover, the Beerses conceded the lack of any negligence claims against three other individual defendants, Warren Ririe, Beth Rasmussen, and Phil Haueter. (*Id.*)

Finally, in their Motion to Reconsider, the Beerses only asked the District Court to specifically reconsider its ruling as to the conduct of 2 individuals – Brent Rasmussen and Garrett Haueter. (R., 001685-001688.)

The randomness and shotgun nature of the Beers' claims, as well as their ever-shifting theories, is indicative of the factual insufficiencies, as shown herein. Little wonder then that the District Court found no factual basis for their negligence claims.

B. The Beers' Negligence Claims Have No Basis in Law.

1. There is No Basis for a General Duty of Care.

To sustain a cause of action for negligence, a plaintiff must show: (1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage. *See West v. Sonke,* 132 Idaho 133, 142, 968 P.2d 228, 237 (1998) *citing Brooks v. Logan,* 127 Idaho 484, 489, 903 P.2d 73, 78 (1995); *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A.,* 119 Idaho 171, 175-76, 804 P.2d 900, 904-05 (1991); *Alegria v. Payonk,* 101 Idaho 617, 619, 619 P.2d 135, 137 (1980). No liability for negligence arises unless the defendant owes a duty to the plaintiff. *See Hoffman v. Simplot Aviation,* 97 Idaho 32, 539

P.2d 584 (1975). The question of whether a duty exists generally is a question of law. *Freeman v. Juker,* 119 Idaho 555, 808 P.2d 1300 (1991). Also, as discussed later in this brief, there is "no affirmative duty to act to assist or protect another absent unusual circumstances, which justify imposing such an affirmative responsibility." *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 399, 987 P.2d 300, 311 (1999).

The Beerses cite *Doe v. Garcia* for the rule that "one owes the duty to every person in our society to use reasonable care to avoid injury **to** the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury." 131 Idaho 578, 581, 961 P.2d 1181, 1184(1998), *quoting Alegria v. Payonk,* 101 Idaho 617, 619, 619 P.2d 135, 137 (1980)(emphasis added). Notably, however, *Doe v. Garcia* was later abrogated by the Idaho Supreme Court, which held that the *Garcia* case "extend[ed] the duty of an employer too far for consequences outside employment over which the employer has no realistic control." *Hunter v. State of Idaho*, 138 Idaho 44, 50, 57 P.3d 755, 761 (2002). Also, the *Alegria* case, relied on in *Garcia*, "involved a suit against bartenders who served an obviously intoxicated minor liquor. The minor then killed a woman in an automobile accident. The theory of the [Alegria] case was that the bartenders had **acted affirmatively**; they served the minor before he got in his automobile." *Hunter*, 138 Idaho at 50 (emphasis added). In other words, the duty of ordinary care applies when a person is affirmatively doing something to someone else.

The case at bar, however, does not involve allegations by the Beerses that any of the Individual Respondents acted affirmatively to injure Heidi. Rather, the crux of the Beers'

contention is that the Individual Respondents failed to act by "not personally inspect[ing] the safety of the Bridge and the River or provid[ing] any meaningful caution about the potential danger readily apparent." (See Appellants' Brief, p. 32.) Since the Beerses do not claim that any of the Respondents affirmatively injured Heidi or otherwise committed any affirmative acts toward Heidi, the general duty of ordinary care is inapplicable to these Respondents. The Beers' general negligence claims against the Respondents were properly dismissed by the District Court because the Beerses failed to establish, as a matter of law, that any of the Respondents owed a duty to Heidi Beers.

2. The Circumstances of this Case Do Not Justify the Creation of a New Duty.

Having failed to show that any Individual Respondent owed a duty to Heidi Beers, the Beerses argue that this case presents a situation where the Court should "balance" factors to determine whether a new duty arises in this particular situation. The Idaho Supreme Court has previously identified several factors for the Court to consider in determining whether a duty arises in a particular situation:

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Rife v. Long, 127 Idaho 841, 846, 908 P.2d 143, 148 (1995)(quoted cases omitted). However, this "balancing of the harms" is only done in rare circumstances where there is a question as to

whether a duty recognized by law needs to be expanded. *Id.* at 148. The Beerses have identified no authority that supports the need for "balancing of the harms" in this case.

In *Rife*, the Idaho Supreme Court indicated that it previously had "recognized a common law duty to protect against the reasonably foreseeable risk of harm to a student while in [a School] District's custody", but determined that it needed to balance the harms to decide whether it would extend the duty of a school district once the student is no longer in a relationship of control or supervision by the District. *Id.*

By asking this Court to consider *Rife's* "balancing of the harms" factors, the Beerses admit that there currently is no legally recognized duty owed by any of the 9 individual Respondents to Heidi because they are asking this Court to expand or create a new duty of care in a situation where it has never before been recognized. Additionally, as further discussed below, there is no special relationship (as there was in *Rife*), which requires consideration of expanding or adding a new duty of care.

Nonetheless, even if the "balancing of the harms" factors are considered, the facts of the case do not support expanding a duty to any of the Individual Respondents who either were not present at the bridge during the jumping, or were innocent bystanders with no connection or special relationship to Heidi.

The Beerses spend a lot of effort arguing that a duty should attach because Heidi's injury was reasonably foreseeable. The Beerses suggest that Respondents knew that the bridge jumping was dangerous prior to Heidi's jump from the bridge. This is simply false. There is absolutely no evidence that any of the Respondents had any knowledge that persons or children had been

previously injured jumping from the subject bridge. To the contrary, the facts reveal that Heidi's injury was not "reasonably foreseeable" by any of the Individual Respondents, nor could it have been by any reasonable person. There was nothing unusually dangerous about the bridge-jumping activity. Dozens, if not, hundreds of jumps occurred without incident the evening and the morning prior to Heidi Beers' accident. The water was sufficiently deep; there were no rocks or obstructions in the water. Even adults on the scene felt the activity was safe and allowed their own children to jump. Heidi herself urged others to jump and she concedes that if she had not gotten hurt, she probably would not have considered this a dangerous activity. (R., 000836-000837, Heidi Beers Depo., pp. 203-04.) Additionally, Heidi never indicated prior to her jump that she had any desire to participate in the jumping, she merely was a spectator. Heidi's last minute change of mind and quick jump from the bridge was unpredictable. Notably, as well, Heidi's mother indicated that if she had been at the bridge, she would have allowed Heidi to jump, obviously not foreseeing any harm to her own loved daughter.

Not only was injury to Heidi unforeseeable, but also other factors considered in *Rife* clearly weigh against the creation of a new duty under the circumstances. Moral blame should not be placed on these Respondents simply because they were in somewhat close proximity to where the accident occurred. The Individual Respondents were bystanders who had no relationship to Heidi Beers, had no control over her and had not undertaken to act on her behalf. Imposing a duty in this instance would inappropriately create a specter of unlimited liability, of liability that no one would expect or foresee from merely having attended a casual social gathering. In summary, it should not be appropriate, under circumstances like these, to impose

liability on individuals who had nothing to do with Heidi Beers other than being present at the same campout.

Each of the six Individual Respondents' conduct, called into question by the Beerses, is further evaluated below. At the end of the day, none of these Individual Respondents' conduct justify creating a new duty of care.

Brad Day. The Beerses argue that Brad Day created an unreasonable, foreseeable risk of harm to Heidi and thus assumed the duty of supervising Heidi Beers' safety. The Beerses appear to ignore, however, that Mr. Day was not present at the bridge the following day when the accident happened, nor did he have any knowledge that Heidi Beers or the other youth planned to go to the bridge the next day. In fact, Mr. Day and his family left the campout before the accident occurred. (R., 000785, Brad Day Depo, p. 36.) The Beerses claim that Mr. Day had a duty to the children when they were jumping on Friday evening. Even if he owed a duty to the jumpers on Friday evening, Mr. Day did not owe a duty to Heidi at some other time. Even if Mr. Day had a duty to Heidi on Friday evening, that duty simply did not carry over to the following day's events at which Mr. Day was not present, and of which he did not have knowledge. In other words, it could not be foreseen that Heidi would jump from the bridge or that Heidi or anyone would get injured from the bridge jumping. Mr. Day's activities the evening before the accident did not justify the creation of a duty to Heidi the following day.

In reality, the Beerses are not arguing that a new duty should be created, but that Mr. Day assumed a duty by his action. It is possible to create a duty where one previously did not exist "[i]f one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises

to perform the act in a non-negligent manner." *Featherstone v. Allstate Ins. Co.,* 125 Idaho 840, 843, 875 P.2d 937, 940 (1994) (citing *Bowling v. Jack B. Parson Cos.,* 117 Idaho 1030, 1032, 793 P.2d 703, 705 (1990)). Liability for an assumed duty, however, can only come into being to the extent that there is in fact an undertaking. *See Bowling,* 117 Idaho at 1032, 793 P.2d at 705. Although a person can assume a duty to act on a particular occasion, the duty is limited to the discrete episode in which the aid is rendered. *See City of Santee v. County of San Diego,* 211 Cal.App.3d 1006, 259 Cal.Rptr. 757 (1989). In other words, past voluntary acts do not entitle the benefited party to expect assistance on future occasions, at least in the absence of an express promise that future assistance will be forthcoming. *See id.* at 762. *See also, Fort Bend County Drainage Dist. v. Sbrusch,* 818 S.W.2d 392, 397 (Tex.1991) ("A person's duty to exercise reasonable care in performing a voluntarily assumed undertaking is limited to that undertaking, and will not normally give rise to an obligation to perform additional acts of assistance in the future.") Thus, even assuming arguendo that Mr. Day owed any duty of care the night before Heidi's injury, it could only be imputed for limited and specific purposes that evening. In addition, the duty allegedly assumed must have been a duty to supervise Heidi. It is undisputed that Mr. Day did not undertake that duty.

Sharolyn Ririe. Unlike Brad Day, Ms. Ririe was physically present on the bridge when Heidi jumped, but her mere presence on the bridge did not create a duty of care toward Heidi. Ms. Ririe was there to be with her children, not to supervise Heidi. Ms. Ririe had no responsibility whatsoever toward Heidi Beers either during or after the campout. Heidi told Ms. Ririe she was fearful of jumping and Ms. Ririe simply stated that she also was afraid of heights,

not of reasonably foreseeable harm. (R., 000712, Sharolyn Ririe Depo, p. 43, ll. 9-13.) No duty attached by this simple exchange between Ms. Ririe and Heidi. Moreover, there is no evidence that Ms. Ririe knew Heidi was going to jump. In fact, her conversation with Heidi indicated that Heidi was not going to jump because she was afraid of heights. Ms. Ririe did ask some of the children if they checked for rocks or anything hazardous under the water. (R., 000710, Sharolyn Ririe Depo, p. 35.) Such a comment does not show that Ms. Ririe determined the bridge jumping to be dangerous, however. The simple comments by Sharolyn Ririe should not be enough to create a new duty under the circumstances.

As further discussed in this brief below, Ms. Ririe would only have a duty to Heidi if she had a special relationship to her and had the ability to control her actions. *Turpen v. Granieri*, 133 Idaho 244, 248, 985 P.2d 669, 673 (1999). Ms. Ririe had no such control over Heidi because she was not supervising her and was not in a position to control her actions, as would her parent. Furthermore, there is no evidence that Ms. Ririe knew or believed that the bridge jumping was dangerous or that anyone had sustained any prior injuries jumping from the subject bridge. Since Ms. Ririe was not affirmatively supervising Heidi and did not voluntarily assume any such duties toward her, the general rule applies that she had no affirmative duty to protect or warn her, especially since Heidi's injury was not foreseeable. See *Coghlan,* supra.

Brent Rasmussen. See section 4 of this brief below. Mr. Rasmussen did not assume a duty to Heidi and his conduct clearly does not justify imputing a new duty of care to him.

Garrett Haueter. See section 4 of this brief below. Mr. Haueter did not assume a duty to Heidi and his conduct clearly does not justify imputing a new duty of care to him.

Mark Kropf. Mark Kropf was not present on the bridge and he was nowhere in the vicinity of the bridge when Heidi was injured. Despite this, the Beerses assert that because Mr. Kropf had generalized concerns about children possibly jumping off the bridge[16], a new duty of care should be recognized under such a situation toward the children, including Heidi. There is no evidence, however, that Mr. Kropf knew of prior injuries sustained from jumping from the bridge and could not have anticipated that Heidi would jump or sustain an injury. In fact, he did not stop his own children from jumping, which was also allowed by his wife. As Mr. Kropf was not affirmatively supervising Heidi and did not assume such a duty, the general rule applies that did not owe a duty to protect or warn her. See *Coghlan,* supra. He merely had concerns in his own mind which he did not discuss with anyone else. The imposition of duty in such a situation would lead to absurd results requiring people to warn everyone about one's own subjective concerns. Every activity has some risk and, absent an undertaking or relationship or control, people do not have a duty to warn others about the risks.

Brenda Kropf. Again, the Beerses appear to suggest that Ms. Kropf owed a duty of care to Heidi merely because she was present at the bridge when Heidi jumped and because Ms. Kropf told her own children to "be careful" when jumping into the river. While Ms. Kropf certainly has responsibilities to her own children, none of her actions or comments justify creating a new duty of care toward others, including Heidi. Furthermore, she assumed no duty of

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[16] Plaintiffs failed to acknowledge Mr. Kropf's qualifying statements that he was "concerned" about jumping from the bridge only because he personally did not have the opportunity to evaluate the situation himself. (R., 000751, Mark Kropf Depo., p. 38, ll. 17-21.) He also added that he trusted the judgment of his wife, who did believe it was totally safe to jump from the bridge. (*Id.)*

care toward Heidi. Notably, Ms. Kropf allowed her own children to jump from the bridge. If anything, this demonstrates her belief that it was a safe activity. There is no evidence that Ms. Kropf knew of prior injuries sustained from jumping from the bridge and could not have anticipated that Heidi would jump or sustain an injury. As Ms. Kropf was not affirmatively supervising Heidi and did not assume such a duty, the general rule applies that she did not owe a duty to protect or warn her. See *Coghlan,* supra.

In summary, none of the Individual Respondents owed any duty of care to Heidi Beers, as a matter of law, and, therefore, the District Court's dismissal of all negligence causes of action against her should be affirmed.

3. There is No "Special Relationship" Between the Individual Respondents and Heidi.

The Beerses paint in very broad strokes and inaccurately suggest that 8 of the Respondents constituted the "Ward Leadership" and had the "ability to supervise and control Heidi at the Ward Campout." (Appellants' Brief, p. 40.) There is no such evidence.

As discussed above, there is "no affirmative duty to act to assist or protect another absent unusual circumstances, which justify imposing such an affirmative responsibility." *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 399, 987 P.2d 300, 311 (1999). "An affirmative duty to aid or protect arises **only** when a special relationship exists between the parties." *Coghlan*, 133 Idaho at 399, 987 P.2d at 311 *citing* Restatement (Second) of Torts § 314A (emphasis added). A special relationship can arise when the actor "has knowledge of an unreasonable risk

of harm and the right and ability to control the third party's conduct." *Turpen v. Granieri*, 133 Idaho 244, 248, 985 P.2d 669, 673 (1999)(emphasis added).

As previously discussed, none of the individual Respondents undertook to supervise and control Heidi. None of them viewed jumping from the bridge as unreasonably dangerous. Further, nothing in the record suggests that any of the Individual Respondents had the right and ability to control Heidi's conduct. The Beerses have conceded the absence of any *in loco parentis* relationship. The Beerses cite no authority for a rule that any adult near a minor child assumes a duty and responsibility for that child's actions. None of the Respondents were Heidi's parents or were given any *in loco parentis* type authority, nor assumed any. Indeed, if any of the Respondents had told Heidi not to jump, she clearly could have ignored them. By failing to seek permission from any adult, Heidi did effectively demonstrate a lack of supervision and control. Since none of the Individual Respondents had the right and ability to control Heidi's conduct, there was no special relationship that existed from which a duty of care to Heidi could arise.

The Beerses mischaracterize the record and claim that some of the Individual Respondents were "Ward Leadership" and thereby assumed a duty to exercise reasonable care to supervise and protect Heidi from unreasonable risks of harm. The Beerses apparently make this assertion because the Individual Respondents had "callings," i.e., voluntary, part-time, unpaid, assignments, in the LDS Church.[17] The Beerses cite no authority to support the conclusion that these church callings subjected the individual defendants to personal liability.

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[17] The Beerses ignore the fact that virtually all members of the LDS Church have callings. That does not mean they are "leaders." Further, having a calling in the Sunday School does not mean one has any responsibilities in other

As previously shown, none of the Individual Respondents had any role in leading, planning or carrying out the Ward campout. (See record, generally.) The Beerses attempt to argue that 8 of the Respondents' religious callings established a special relationship between them and Heidi and gave them the right and ability to control Heidi's actions. This is simply not accurate.

Warren Ririe's religious calling was High Priest Group Leader. His only role at the campout was to cook breakfast. (R., 00698, p. 13. ll. 1-9.) Not only did Mr. Ririe not have any knowledge of an unreasonable risk of harm to Heidi, but also his religious calling did not grant him the right and ability to control Heidi's conduct. As such, he had no special relationship to Heidi and was not liable for her injury.

The remaining Respondents identified by the Beerses also had religious callings, but none of these callings conferred on them the right or ability to control Heidi at the campout. Sharloyn Ririe, Phil Haueter, Beth Rasmussen, Brenda Kropf and Bradley Day's callings were as various religious instructors or teachers during the general work week and/or on Sundays. They had no role during the campout in question as a result of their callings. Brent Rasmussen calling was as Ward Clerk, which entailed taking minutes and counting members present and certain meetings. His also had no role at the campout due to his religious calling. Mark Kropf's calling was as Counselor for Stake Young Men's Presidency, which required no role as to the campout.

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areas, such as Ward social activities. It is one of the great ironies in this case that the Beerses did not sue the individuals who actually did have responsibility for the campout, while at the same time suing numerous individuals who had no such responsibility.

Hence, none of these Individual Respondents owed any duty to Heidi and were not liable for her injury.

In conclusion, none of the Individual Respondents had a "special relationship" with Heidi that would impose a duty of care on them to Heidi. Indeed, the standard rule applies that the Respondents had no affirmative duty to act to assist or protect Heidi. As such, the District Court's dismissal of all negligence claims against these Respondents should be affirmed.

4. Garrett Haueter and Brent Rasmussen Did Not Assume a Duty to Heidi Beers at the Time of Her Injury.

The Beerses wrongly assert that Garrett Haueter and Brent Rasmussen assumed duties as to Heidi. As to Garrett Haueter, the Beerses focus on his deposition testimony that he told the other kids the specific area that had been checked in the river so that they would jump in those areas. (R., 000796, Garrett Haueter Depo, pp. 30-31.) This is a far cry from undertaking a duty to supervise Heidi. The Beerses have not shown that Mr. Haueter, a 19-year old young man, voluntarily undertook specific supervision of Heidi, as required by *Featherstone*, supra. Mr. Haueter had no Church responsibility over Heidi; in fact, he was not even a member of the Autumn Faire Ward. There is no evidence that Mr. Haueter specifically undertook a duty to supervise Heidi. Even if Mr. Haueter was supervising the bridge jumping activities, there is no evidence that he knew Heidi was participating in the activities (she had opted out and said she would not jump), and no evidence Mr. Haueter was in a position to control Heidi's actions. Additionally, there is no evidence that Mr. Haueter knew of any prior injuries sustained from jumping from the bridge and could not have anticipated that Heidi would jump or sustain an

injury, especially since Heidi said she was not going to jump and then unexpectedly changed her mind. As Mr. Haueter was not affirmatively supervising Heidi and did not assume such a duty, the general rule applies that he did not owe a duty to protect or warn her. See *Coghlan,* supra. Therefore, summary judgment on the Beers' negligence claims against Mr. Haueter should be affirmed.

The Beerses also contend that there is a genuine issue of material fact as to whether Brent Rasmussen assumed a duty to supervise Heidi when she was injured. In support of this statement, the Beerses argue that Brenda Kropf and Sharolyn Ririe, who were at the subject campout, believed Brent Rasmussen was supervising the bridge-jumping activity. (Appellants' Brief, p. 42.) Such statements by the Beerses are not accurate. In the context of discussing her own children, Brenda Kropf testified simply that it was her understanding that Mr. Rasmussen was already at the bridge; which she apparently assumed meant he was supervising the bridge jumping activity. (R., 001132-001133, Brenda Kropf Depo, pp. 29-31.) Contrary to the Beers' assertions, Sharolyn Ririe never testified that she believed Brent Rasmussen was supervising the bridge jumping activity. Ms. Ririe simply testified that her daughter, Camille, asked if she could go to the river with the Rasmussens and she said "yes", but then felt she needed to go as well. (R., 000709, Sharolyn Ririe Depo, pp. 30-31) Sharolyn Ririe did not directly speak with the Rasmussens about going to the bridge. (*Id.*, p. 32, ll. 3-5.) In summary, the actual deposition testimony of Brenda Kropf and Sharolyn Ririe, if properly scrutinized, provides absolutely no evidence that Mr. Rasmussen specifically assumed any supervision over Heidi at the bridge.

The general rule is that there is "no affirmative duty to act to assist or protect another absent unusual circumstances, which would justify imposing such an affirmative responsibility," such as from a special relationship. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 399, 987 P.2d 300, 311 (1999). In order to overcome this general rule and assume a duty, that specific person must voluntarily undertake to perform a specific act. *See Featherstone*, supra. The Beerses have identified no evidence that shows that Mr. Rasmussen specifically assumed a duty to supervise Heidi while she was on the bridge. Moreover, there is no evidence that Heidi or Mr. Rasmussen had a specific understanding that he was supervising her.

The best the Beerses can do is to suggest that others may have assumed that Mr. Rasmussen was supervising the bridge-jumping activity. Since the person has to voluntarily undertake the specific act to assume a duty, *see Featherstone*, supra, it is clear that a third party cannot convey a duty of care on someone else by simply assuming they undertook the specific activity and duty. It obviously makes sense that the person assuming the duty needs to be aware that he is doing so. The Beerses, however, have identified no evidence that Mr. Rasmussen or Heidi understood Mr. Rasmussen to be supervising her on the bridge.

Furthermore, assuming, without admitting, that Mr. Rasmussen assumed the duty to supervise the bridge-jumping (which, of course, is vehemently denied by Respondents), there is no evidence that Mr. Rasmussen knew Heidi wanted to participate in the activity he was allegedly supervising. Heidi said she was afraid to jump and stood off to the side when other children were jumping. (R., 000831, Heidi Beers Depo., p. 140, 142-43; R., 000712-713, Sharolyn Ririe Depo., pp. 42-43, 53.) Then, she quickly changed her mind and unexpectedly

jumped into the river in an area where none of the other children were jumping. (*Id.*) Since all signs point to Heidi opting out of the bridge jumping activity, Mr. Rasmussen could not have assumed a duty of care to supervise Heidi as there was no indication she was participating. In fact, Mr. Rasmussen was not aware Heidi intended to jump and was not on the bridge when Heidi jumped. (R., 000731-000733, Brent Rasmussen Depo., pp. 29-31, 34.) Therefore, since Heidi's jump was unexpected and Mr. Rasmussen was not on the bridge when she jumped, there was nothing Mr. Rasmussen could reasonably have done to protect Heidi from her jump or the alleged injury that she sustained. Most importantly, the general rule applies that he did not owe a duty to protect or warn Heidi. *See Coghlan*, supra.

The Beerses also claim that there is evidence that Mr. Rasmussen was one of the first adults to aid Heidi when she was injured and that supposedly shows he assumed a duty to supervise Heidi prior to the injury while Heidi was on the bridge. Such evidence, though, only shows that Mr. Rasmussen tried to help Heidi after she was injured. This evidence is insufficient to show that Mr. Rasmussen voluntarily undertook a duty to supervise Heidi on the bridge. To reach such a conclusion is too far removed and too speculative to create a genuine issue of material fact.

In summary, the District Court's granting of summary judgment on all negligence claims against Garrett Haueter or Brent Rasmussen should be affirmed since they did not assume any duties as to Heidi Beers.

CONCLUSION

In conclusion, the District Court's granting of summary judgment on all negligence claims by the Beerses against all Individual Respondents named in this appeal should be affirmed.

CROSS-APPEAL

STATEMENT OF CASE FOR THE CROSS-APPEAL

Cross-Appellants Sharolyn Ririe, Garrett Haueter, Mark Kropf and Brent Rasmussen incorporate by reference herein the entire Statement of Case above. In its May 10th Order, the District Court denied summary judgment to Sharolyn Ririe, Garrett Haueter, Mark Kropf and Brent Rasmussen ("4 Individuals") on the child abuse tort cause of action under I.C. § 6-1701, holding that the statute creates a duty to affirmatively act to protect children where a reasonable person would know Heidi Beers was likely to be harmed and finding that there was a genuine issue of material fact as to whether these 4 Individuals should have known that Heidi Beers was likely to get hurt jumping from the bridge and should have acted to stop her from jumping. (R., 001545-001561.) The 4 Individuals appeal this decision for two main reasons: (1) the District Court incorrectly interpreted the child abuse tort statute as requiring an "affirmative duty to act", and (2) the District Court failed to construe the statue as requiring actual knowledge of danger to a child.

STANDARD OF REVIEW OF CROSS-APPEAL

"The standard of review of the lower court's determination on issues of statutory interpretation is one of free review." *Big City Paramedics, LLC v. Sagle Fire Dist.*, 140 Idaho

435, 436, 95 P.3d 53, 54 (2004); *see also Curlee v. Kootenai County Fire & Rescue*, 2008 WL 4595239 (Idaho 2008) ("Our standard of review for statutory interpretation is well established: The interpretation of a statute is a question of law over which this Court exercises free review."). Statutory analysis begins with the literal words of the statute, giving the language its plain, usual and ordinary meaning. *State v. Parker*, 141 Idaho 775, 777, 118 P.3d 107, 109 (2005). However, statutes should not be construed so as to yield an absurd result. *See, e.g., State v. Doe*, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004); *State v. Yager*, 139 Idaho 680, 690, 85 P.3d 656, 666 (2004); *State v. Burtlow*, 144 Idaho 455, 456-57, 163 P.3d 244, 245-46 (Ct. App. 2007). Further, "[t]he Court should, whenever possible, construe a statute so as to achieve a constitutional result." *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 68, 28 P.3d 1006, 1011 (2001). "When the court finds that a statute is capable of two interpretations, one which would make it constitutional and the other unconstitutional, the court should adopt that construction which upholds the validity of the act." *State v. Prather*, 135 Idaho 770, 772, 25 P.3d 83, 85 (2001). The existence of a duty is a question of law over which the Idaho Supreme Court exercises free review. *Freeman v. Juker*, 119 Idaho 555, 556, 808 P.2d 1300, 1301 (1991).

ARGUMENTS IN SUPPORT OF CROSS-APPEAL

1. The District Court Erred by Holding that I.C. § 6-1701 and 18-1501 Create an Affirmative Duty to Act.

Idaho Code § 6-1701(1)(d), entitled "Tort actions in child abuse cases," provides that "[a]n action may be brought by or on behalf of any child against any person who has: Injured a child as defined in section 18-1501, Idaho Code." (Emphasis added.) This statute is unique because it provides for a civil cause of action, but references a criminal statute (I.C. § 18-1501)

to define the elements of the civil injury to child action.[18] The District Court Judge clearly struggled with this crossover between civil and criminal law as he indicated, among other things, at the summary judgment hearing on April 11, 2011 that "... the Idaho Legislature incorporated the term in the criminal statute, which heaven only knows why they decided to do it in that way ... They have incorporated a definition totally unknown to the tort law." (Tr., p. 59, LL. 4-6 and 24-25, p. 60, L. 1.)

Idaho Code § 18-1501 sets forth several scenarios in which liability may be established. The Beers' Motion to Amend Complaint suggested that they were bringing the tort child abuse action pursuant to subsection 2, which provides:

> Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, **willfully causes or permits any child to suffer**, or *inflicts* thereon unjustifiable physical pain or mental suffering, or having the *care or custody* of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health may be endangered, is guilty of a misdemeanor.

Idaho Code § 18-1501(2)(emphasis added).

As there was nothing to suggest that the Cross-Appellants directly "inflicted" pain on Heidi and no evidence that they had "care or custody"[19] of Heidi, the District Court addressed the language wherein "[t]he criminal law defines injury to child as 'willfully caus[ing] or permit[ing] a child to suffer. I.C. § 18-1501(2).'" (R., 001559.) The District Court focused on

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[18] See I.C. § 6-1701(3), which provides: "The civil cause of action provided for in this section exist independently of any criminal action commenced pursuant to chapter 15, title 18, Idaho Code. A civil action may be pursued under the provisions of this chapter even if a criminal prosecution is not pursued."

[19] Indeed, the District Court specifically found, in other portions of its May 10, 2011 Decision, that none of the remaining Individual Defendants undertook supervision of Heidi or had a special relationship with Heidi that brought her into their care or custody. (R., 001552-001159.)

whether the Respondents acted "willfully." Idaho Code § 18-1501(5) defines "willfully" for purposes of the child abuse statute as "acting or failing to act where a reasonable person would know the act or failure to act is likely to result in harm or to endanger the person, health, safety, or well-being of a child."

Most cases that deal with the definition of willfulness are criminal cases. In further determining the meaning of "willfully," the District Court relied on a footnote in a civil case, *Steed v. Grand Teton Council of the Boy Scouts of America, Inc.*, 144 Idaho 848, 172 P.3d 1123 (2007). In *Steed*, plaintiffs alleged that in 1997 they were sexually molested by Bradley Stowell while at a boy scout camp operated by Grand Teton Council of the Boy Scouts of America (Grand Teton Council). *Id.* at 850. Plaintiffs brought the action against Boy Scouts of America, Grand Teton Council, Stowell, and others. *Id.* The Steeds sought to recover for assault and battery, false imprisonment, negligence *per se,* and negligence. *Id. Steed* only addressed the allegations against the nonprofit defendant, Grand Teton Council. *Id.* Among other things, plaintiffs brought suit under the tort child abuse statute, I.C. § 6-1701(4). *Id.* The Idaho Supreme Court looked at the definition of "willfully" in the context of deciding whether a negligence per se cause of action could be applied to this statute. *Id.* at 852-853. The *Steed* Court indicated that the definition of "willfully" meant that the defendant had to have "actual knowledge" that he was, in essence, injuring the child. *Id.* at 853-54. The actual knowledge definition applied because the case fell under the definition determined prior to the child abuse statute being amended in 2005. *Id.* The Idaho Supreme Court then noted, in dicta, in footnote 3 the following:

> In 2005, the legislature amended Idaho Code § 18-1501 to create a negligence standard of care for the conduct in that statute that must be done "willfully." It defined "willfully" in the statute to mean "acting or failing to act where a reasonable person would know the act or failure to act is likely to result in injury or harm or is likely to endanger the person, health, safety or well-being of the child." Ch. 151, § 1, 2005 Idaho Sess. Laws 467. Defining "willfully" to mean what "a reasonable person would know" is a negligence standard of care. *Ahles v. Tabor*, 136 Idaho 393, 34 P.3d 1076 (2001)(a reasonable person standard encompasses the concept of ordinary negligence); *Nelson v. Northern Leasing Co.*, 104 Idaho 185, 657 P.2d 482 (1983)(finding of negligence upheld based upon the risk to a child that a reasonable person would have foreseen); 57A Am.Jur.2d, Negligence, § 133(2004)("The phrasing of the standard of care in negligence cases in terms of the 'reasonable person' is firmly implanted in the American law of negligence).

In referencing the above footnote, the District Court in the case at bar incorrectly found "that Sections 6-1701 and 18-1501 create a duty to affirmatively act to protect children where a reasonable person would know that the child is likely to be harmed." (emphasis added) (R. 001559).

Even if one assumes that the dicta in *Steed* represents Idaho law (i.e., that Section 18-1501 is a negligence standard), which is not admitted, the District Court improperly took this one step too far by ruling that Section 18-1501 creates an affirmative duty to act. As discussed in Respondents' section of this brief above, the law of negligence does not generally require affirmative action unless the defendant has assumed or voluntarily undertaken to act or some special relationship exists. *Steed*, supra, generally involved whether the duties in I.C. §§ 6-1701 and 18-1501 applied to persons or organizations who were in positions of care or control over the plaintiffs. As discussed above, none of the Cross-Appellants in this case were in such a position of care or control and did not assume a duty to Heidi Beers. In other words, Cross-Appellants

were not in a position where they could "cause" or "permit" Heidi Beers to "suffer" as the statutory language requires. As such, the duties in I.C. §§ 6-1701 and 18-1501 do not attach to the Cross-Appellants just as the District Court properly found that no duty applied to these individuals in the negligence portion of its decision.

The preceding discussion reveals the stark inconsistency in the negligence section of the District Court's decision versus the child abuse section: in the negligence section the Court finds no duty to act and no breach of duty by the individual defendants; in the child abuse section, however, the District Court appears to accept just the opposite. It simply cannot be that a person could be exonerated from any negligence but yet be liable for "child abuse." This Court should not allow such a result because it is not only illogical but also bad public policy. Subjecting an individual to the label of "child abuser" should not result from application of a legal standard that is less rigorous than a negligence standard.

2. The District Court Erred by Failing to Recognize that Actual Knowledge of a Danger is the Applicable Standard.

As discussed above, the District Court, relying on a footnote in *Steed*, supra, found that "willful" in the context of I.C. § 6-1701 and I.C. § 18-1501 child abuse statutes means what most attorneys would understand to be negligence. (R., 001559.) A 2008 Idaho Court of Appeals case addressed the issue of the duty applicable under the child abuse statutes when it held as follows in a criminal case involving child abuse:

> The willfulness element of the endangerment clause from I.C. § 18-1501 requires that the person providing care or custody of the child willfully endanger the child by subjected the child to a known risk of harm. *State v. Halbesleben*, 139 Idaho 165, 170, 75 P.3d 219, 224 (Ct. App. 2003). This does not require that the

> defendant intended to harm the child, but it does require that the defendant placed the child in a potential harmful situation with knowledge of the danger. *Id.*

State v. Morales, 146 Idaho 264, 192 P.3d 1088 (2008). The *Morales* case involves an incident that occurred after the 2005 amendment to the child abuse action and suggests that the defendant must actually know of the danger. The holding in *Morales* is a far cry from the affirmative duty to act standard enunciated by the District Court. The definition of willfully in *Morales* is a better compliment to tort law and should be followed here.

It simply does not stand to reason that 12 of the individual defendants were not negligent in any way, as discussed above and as found as a matter of law by the District Court, but that 4 of these defendants, i.e., Cross-Appellants Sharolyn Ririe, Garrett Haueter, Mark Kropf and Brent Rasmussen, were guilty of civil child abuse, simply because they were in a relatively close proximity to Heidi Beers when she jumped. Because a statute should not be construed to reach an absurd result, it makes better sense to adopt the standard listed in *Morales, supra,* that a person/defendant must actually know of the danger to a child in order to be liable under the child abuse tort statutes. As indicated in the original Respondents' brief, above, no one foresaw any injury from the activity, and no injury had occurred the night before or that day.

Cross-Appellants respectfully request that the Supreme Court reverse the District Court and remand with instructions to apply the proper standard under I.C. § 6-1701, et seq.

CONCLUSION FOR CROSS-APPEAL

In conclusion, Cross-Appellants request that the District Court's decision denying summary judgment on the child abuse tort cause of action as to the 4 Individual Defendants be

REVERSED because it applied the wrong standard of law and that the case be remanded with instructions that the correct standard be applied.

DATED this 8 of June, 2012.

PARSONS BEHLE & LATIMER

By /s/ J. Kevin West
J. Kevin West – Of the Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of June, 2012, I caused to be served two true and correct copies of the foregoing, via hand delivery to:

Charles M. Murphy
Murphy Law Office, PLLC
847 E. Fairview Avenue
Meridian, Idaho 83642

Michael E. Kelly
Lopez & Kelly, PLLC
413 W. Idaho Street, Ste. 100
P.O. Box 856
Boise, Idaho 83701

Larry C. Hunter
Moffatt Thomas Barrett Rock & Fields, Chartered
P.O. Box 829
Boise, Idaho 83701

/s/ J. Kevin West
J. Kevin West