7-1-2009

Craig v. Gellings Appellant's Reply Brief Dckt. 35231

IN THE SUPREME COURT OF THE STATE OF IDAHO

LEANN CRAIG, Plaintiff, Appellant, vs. STEVEN JOHN GELLINGS, DEVERL WATTENBARGER, BART WATTENBARGER, CAROL WATTENBARGER, AND WATTENBARGER FARMS, Defendants/Respondents.	)	Supreme Court No. 35231 APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

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APPEAL FROM THE DISTRICT COURT of the
SEVENTH JUDICIAL DISTRICT OF THE STATE of IDAHO,
in and for the COUNTY OF BONNEVILLE, the Honorable
Gregory S. Anderson, District Judge, Presiding

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APPELLANT'S REPLY

In their Opposition to Plaintiff's Opening Brief, defendants argue that Idaho has adopted the common law, and that the common law "prohibits continuation of a personal injury action upon the death of a plaintiff." Defendants further contend this appeal is "frivolous, unreasonable and without foundation" and request attorney's fees and costs.

REPLY ARGUMENT

Plaintiff agrees with defendants that Idaho has adopted the common law, unless abrogated by statute, and the issue presented has not been addressed by the Idaho legislature. Plaintiff disputes defendants' contention that the common law provides that in actions arising *ex delicto*, a plaintiff's claim for both non-economic and economic damages abate.

Although plaintiff has agreed with defendants that the common law in Idaho presently holds that claims for non-economic damages for such things as pain and suffering abate, the common law in Idaho is unclear regarding claims for economic damages in such circumstances.

Defendants concede that had plaintiff been married, her claim for economic damages would not have abated. Plaintiff's position is that "the community" is the same as "the estate" of the deceased Leeann Craig.

IDAHO LAW

In the point that follows it will be explained how the United States Supreme Court got all the state Courts off track by creating the belief that wrongful death and survival statutes were needed to override the common laws.

> This statute, when enacted, **created a new cause of action that did *not* exist at common law.** *Whitley v. Spokane Ry. Co.*, 23 Idaho 642, 132 P. 121 (1913); See also, Gavica v. Hanson, 101 Idaho 58, 608 P.2d 861 (1980); Hughes v. Hudelson, 67 Idaho 10, 169 P.2d 712 (1946). Thus, the right of a person to recover for the wrongful death of another is statutory, and a person seeking to recover must qualify under the statute. Hepp v. Ader, 64 Idaho 240, 130 P.2d 859 (1942) * * * Our legislature wished to change the common law to allow recovery for wrongful death, while at the same time limiting that recovery...." — *Everett v. Trunnell,* 105 Idaho 787, 789-90, 673 P.2d 387, 389-90 (1983)
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> * * *
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> *Except for this statute*, no such action could be prosecuted in this state and ***no such cause of action*** could accrue in this state. Webster[1] v. Norwegian Mining Co., 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181; Burk[2] v. Arcata, etc., R. R. Co., 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52; Munro v. P. C. D. & B. Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248. — *Whitley v. Spokane Ry. Co.*, 23 Idaho 642, 132 P. 121 (1913)

Whitley affirmed a wrongful death judgment for Mary Elizabeth Whitley, the mother of A. P. Whitley who was killed near Coeur d'Alene while a passenger on Defendant's railroad. A. P. Whitley left a wife but no children and the railroad settled

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[1] *Webster* (decided in 1902) held that a personal representative could not bring a wrongful death claim if there were no heirs, "if there are no heirs there can be no damage" — "At common law no such right of action existed."

[2] *Burk* (decided in 1899) remanded a wrongful death jury verdict of $1500 for the brothers and sisters of an married man because "The English courts held that only pecuniary loss could be recovered" and the plaintiffs had not shown any damage — "The majority of men die without much property" — but that "The suit could have been maintained by the administrator for the benefit of the estate."

with his wife. Under Idaho law at that time the mother was also an heir. The *Whitley* court spoke of there being no wrongful death action "Except for this statute" but did not discuss the common law. 132 Pac at 123, 126.

POINT TWO

FAULTY HISTORICAL PREMISE

Many early court decisions in Idaho — and even some more recent ones — have perpetrated an erroneous belief that injury and negligence actions were extinguished upon the death of either the victim or the tortfeasor. Unfortunately, the United States Supreme Court played a big part in this misstatement of the common law and it took many decades to reverse. It the meantime there became a big body of law in the states that unfortunately lead to the dismissal of injury actions when the victim or tortfeasor died.

To the extent Idaho law and the law of most states adopted the common law of England, the most important error to recognize — is that defense claims that an action did not exist at common law or did not survive the death of the victim — are invalid; the right to bring or *continue* an action is not in fact dependent upon a statute based on the belief that it was *creating* something that did not exist at common law.

Every state has a wrongful death statute.

In enacting these laws state legislators believed they were creating causes of action where none had existed at common law. Lawyers and courts have, therefore, often stated they had little choice but to defer to the legislature, parties to litigation "must take the bitter with the sweet." *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974) (plurality opinion, per Rehnquist, J.).

That assumption is wrong. As the U.S. Supreme Court recognized 27 years ago in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 379, 389 n.2 (1970), actions for wrongful death were, in fact, cognizable at common law, and in the American colonies, if not always in England.

Historical research has proven that wrongful death statutes *limit* common law rights and *do not bestow* new rights. Thus, those statutes must be regarded as violating state constitutional guarantees, particularly the right to a certain or complete remedy. This is so regardless of a state legislature's ostensibly generous impulses or putatively good intentions.

Origin of Confusion

The confusion regarding the common law origins of wrongful death actions came from Lord Ellenborough's 1808 pronouncement that there was no tort action at common law for the death of a human being, made in *Baker v. Bolton,* 1 Camp. 493, 170 Eng. Rep. 1033 (nisi prius 1808) ("in a civil court, the death of a human being cannot be complained of as an injury").

That statement was not only "obviously unjust" but also inaccurate and "technically unsound," as "based upon a misreading of legal history."[3]

Felony — Merger Doctrine

The basis for the supposed absence of wrongful death actions at common law as the English felony-merger doctrine. Under this rule, common law courts routinely held that private suits for damages for an act that was also a felony were not tenable. The courts reasoned that because a civil tort against a private person was less important than a

[3] 3 William Searle Holdsworth, *History of English Law* 336 (3d ed. 1927)

criminal offense against the Crown, the tort or "merged" into the felony.

The doctrine found practical justification in the fact that wrongful death suits would never be filed because felons not only lost their lives but also forfeited all property to the Crown, rendering them effectively judgment-proof. Thus, after the crime had been punished, nothing remained of the tortfeasors' property on which to base a viable lawsuit.

Recovery Theories

However, even before the Norman Conquest in 1066, English courts had recognized that the accidental killing of a human being *was* a compensable wrong.[4] Indeed, far from being disenfranchised or disfavored at early English law, wrongful death claimants could sue under an assortment of legal theories throughout the Middle Ages. The "wer," the "wite," "the compromise," and the "appeal of murder" were all conventional causes of action by which the deceased's family could obtain compensation at ancient common law.

For example, the wer and wite were reparations paid to the deceased's family *and* the Crown, respectively, in amounts based on the deceased's status or rank.[5] The compromise was similar to an action for damages.[6] The "criminal appeal" was not

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[4] 1 Frederick Pollock & Frederick William Maitland, *The History of English Law* 48 (2d ed. 1898)

[5] See generally, Wex S. Malone, "The Genesis of Wrongful Death," 17 STANFORD LAW REVIEW 1043, 1055 (1965)

[6] See generally George E. Woodbine, "The Origins of the Action of Trespass," 33 YALE LAW JOURNAL 799, 803 (1924)

an appeal as we know it. It was a criminal proceeding that a private person initiated to punish homicide, and it was used more often than an indictment for that purpose.

The unintended side effects of the felony-merger rule may have made it often futile to seek compensation from the tortfeasor-felon. But it is wrong to equate the lack of an incentive to sue with the absence of a legal right to do so. Given both the confounding nature of Lord Ellenborough's ruling and its conflict with prior common law practice, some English judges have questioned whether his ruling was accurately reported.[7]

The decision was a *nisi prius* ruling, meaning that it arose in a local less formal county trial conducted by a single judge. Not in the more formal context of the court sitting en banc at Westminster. Lord Ellenborough gave no reason for, and cited no precedent or other authority in support of his assertion.

In Colonial America

In any event, the American colonies won independence from England before *Baker v. Bolton* was announced by Lord Ellenborough as the state of British law circa 1808. More important, his conclusion was contrary to the practice that was followed by American courts before the Revolution and was based on early principles never adopted by the colonies.

Not surprisingly, one leading constitutional scholar discovered that there is "*no* observation in colonial statutes or decisions lending *any* support to a belief that a

[7] See, e.g., *Osborn v. Gillett*, 8 L.R. 8 Exch. 88, 96 (1873) (Bramwell, B., dissenting)

death claim would have been denied by our colonial ancestors."[8]

As Justice Joseph Story, one of the principal expositors of early U.S. law, emphasized, although "our ancestors brought with them [the] general principles [of the common law] and claimed it as their birthright; . . . they brought with them and adopted only that portion which was applicable to their situation." *Van Ness v. Pacard*, 2 Pet. 137, 144 (1829).

Colonial Compensation

In reality, the colonial practice required a person who had been convicted of homicide to compensate the victim's family — a form of a wrongful death action.[9] For example, in 1675, a Massachusetts Bay Colony court found a civil defendant liable for having "accidentally discharg[ed] guns at foules on ye neck thereby wounding Samuel Fflacks son so he died." The court ruled the tortfeasor should pay £10 to the boy's father.[10]

Numerous other 19th-century U.S. decisions during the 1800's permitted common law wrongful death actions.[11] For example, in 1825, a federal district court

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[8] Wex S. Malone, "The Genesis of Wrongful Death," 17 STANFORD LAW REVIEW 1043, note 10, at 1065-66 (emphases added) (1965)

[9] Wex S. Malone, "The Genesis of Wrongful Death," 17 STANFORD LAW REVIEW 1043, 1062-65 (1965)

[10] 1 Mass. Ct. Assts. 54-55 (1675)

[11] *Cross v. Guthery*, 2 Root 90, 92 (Conn. 1794) death of a wife three hours after surgery to remove a breast and breast tumor; it rejected the defense contention that the civil claim was barred by the felony-merger rule of England: "The rule urged by the defendant, is applicable, in England only...."); see also *Piscatauqua Bank v. Turnley*, 1 Miles 312, 316 (Phila. Dist. Ct.

justified its holding that a wrongful death action could be maintained in admiralty on the ground that the felony-merger rule had "never been adopted in this state" and was "entirely in opposition to the system of civil polity established in this country."[12]

Other States Reject Felony-Merger

In 1854, the Supreme Court of Georgia held the felony-merger rule was no bar to a wrongful death action caused by negligence or other noncriminal acts. *Shields v. Yonge*, 15 Ga. 349, 355-56 (1854). The leading antebellum text on the law of domestic relations in the early 1800's made clear that the felony-merger doctrine was irrelevant in the United States.[13] As one commentator correctly concluded,

> Ellenborough's blunt announcement that no civil action can be grounded upon the death of a human being not only lacked historical support at the time but was consistently ignored in America until 1848 (and even later by the English courts), and during this forty-year interval [from 1808 to 1848] *there was no instance of a denial of civil action for wrongful death.*[14]

How Things Got off Track

In *Carey v. Berkshire Railroad,* 55 Mass. (1 Cush.) 475 (1848), that U.S.

1836); *Ford v. Monroe*, 20 Wend. 210 (N.Y. Sup. Ct. 1838); *James v. Christy*, 18 Mo. 162, 163-64 (1853); *Kake v. Horton*, 2 Haw. 209, 212-13 (1860); *Sullivan v. Union Pac. R. Co.*, 23 F. Cas. 368, 371 (No. 13,599) (C.C. Neb. 1874)

[12] *Plummer v. Webb*, 19 F. Cas. 894, 895-96 (No. 11,234) (D. Me. 1825), dismissed on appeal for lack of admiralty jurisdiction, 19 F. Cas. 891 (No. 11,233) (C.C. D. Me. 1827)

[13] Reeves, *Domestic Relations* 377 (Am. ed. 1816)

[14] See generally, Wex S. Malone, "The Genesis of Wrongful Death," 17 STANFORD LAW REVIEW 1043, 1067 (1965) (Emphasis added)

court decreed that no cause of action for wrongful death had existed at common law. *Carey* relied entirely on *Baker v. Bolton.* Other courts followed, citing *Carey* and *Baker*, even though the underlying felony-merger doctrine continued to be universally rejected by U.S. courts as having no application in this country.

State wrongful death statutes were adopted in response to *Carey* and its progeny.

Nonetheless, the myth that there was no common law action for wrongful death, and that legislatures accordingly have a free hand in establishing — and restricting — wrongful death recoveries, created the perverse situation that: "From the defendant's point of view it [is] cheaper to kill a person than to scratch him."[15]

Other scholars termed the rule "barbarous"[16] and concluded that "no satisfactory reason for the rule has ever been suggested."[17] Indeed, a legal system that fully compensated even minor injuries while providing inadequate recovery for the ultimate personal injury--death--would seem to exemplify the very kind of arbitrariness condemned by the U.S. Supreme Court in cases such as the recent *Romer v. Evans*. 26

Moragne decision

The U.S. Supreme Court aimed to level this topsy-turvy landscape. In *Moragne*, it expressly overruled its 1886 decision in *The Harrisburg,* 119 U.S. 199 (1886), and held that the general maritime law — one of the few areas of judge-made

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[15] Prosser and Keeton, *the Law of Torts* (5th ed. 1984)

[16] Frederick Pollock, *Law of Torts* 55 (Landon ed., 1951).

[17] Francis Buchanan Tiffany, *Death by Wrongful Act* §12 (2d ed. 1913).

federal common law — did afford a cause of action for wrongful death. 398 U.S. 375 (1970).

The Court based its ruling in large part on its reevaluation of both English and American legal history. Pointedly, that reassessment revealed that "the historical justification marshaled for the [felony-merger] rule in England never existed in this country." 398 U.S. at 384. As the Court explained, the absence of wrongful death suits "in primitive English legal history . . . was based on a particular set of factors that had, [even in 1886], long since been thrown into discard even in England, and that *had never existed in this country at all.*" 398 U.S. at 381. The Supreme Court stated:

> "The first explicit statement of the common-law rule against recovery for wrongful death came in the opinion of Lord Ellenborough, sitting at nisi prius, in Baker v. Bolton, 1 Camp 493, 170 Eng. Rep. 1033 (1808). That opinion did not cite authority, or give supporting reasoning, or refer to the felony-merger doctrine in announcing that "in a civil court, the death of a human being could not be complained of as an injury."

Following *Moragne*, several state courts have recognized that wrongful death actions are properly regarded as having their genesis in common law rights, not legislative largesse. Chief among those courts has been the Supreme Judicial Court of Massachusetts, whose erroneous 1848 decision in *Carey v. Berkshire Railroad,* 55 Mass. (1 Cush.) 475, 476-77 (1848) marked the first time a U.S. court embraced Lord Ellenborough's characterization of the common law and denied a widow the right to recover for the wrongful death of her husband holding it was only "an offense against the crown" and because it was a felony the felony "prevails over the wrong done to the master, and his action by that is gone* * * If these actions, or either of them, can be

maintained, it must be upon some established principle of the common law [but at common law] the death of a human being is not the ground of an action for damages." *Carey* started an erroneous trend that continued for decades.

In 1972, two years after *Moragne* was decided, Massachusetts's high court expressly overruled *Carey*, observing that

> Upon consideration of the Moragne decision and the sound reasoning upon which it is based, we are convinced that the law in this Commonwealth has also evolved to the point where it may now be held that the right to recovery for wrongful death is of common law origin, and we so hold. * * * Consequently, ***our wrongful death statutes will no longer be regarded as "creating the right" to recovery*** for wrongful death. *Gaudette v. Webb*, 284 N.E.2d 222, 229 (Mass. 1972)

Six years later, the Illinois Supreme Court described the view that wrongful death actions are wholly statutory in nature as "a much criticized concept stemming from questionable antecedents." *Wilbon v. D.F. Bast Co.*, 382 N.E.2d 784, 790 (Ill. 1978).

The following year, the Supreme Court of Alaska in *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087, 1092 n.11 (Alaska 1979) explained that it did not find that state's wrongful death statute to be in derogation of the common law, because "if there were no statute, we would in all probability follow the lead of the United States Supreme Court in *Moragne*."[18]

In 1984, the Supreme Court of Alaska again rejected the proposition that wrongful death statutes are in derogation of the common law and therefore should be

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[18] *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087, 1092 n.11 (Alaska 1979)

construed strictly. *Hanenbuth v. Bell Helicopter Int'l*, 694 P.2d 143, 145-46 (Alaska 1984):

> In rejecting the application of the discovery rule in wrongful death actions, these cases proceed from the assumption that wrongful death is an exclusively statutory creation. Thus, as an integral part of the statute creating the action, a period of limitations has been imposed which is a condition of the right of action. [citations omitted]. The underlying reasoning is that wrongful death actions are created by statute in derogation of the common law and thus should be construed strictly. * * * We disagree with these cases, both in their characterization of the underlying assumptions of wrongful death actions and I their interpretation of the statutory language. 694 P.2d at 145-46

Similarly, in 1985, the Arizona Supreme Court acknowledged that "it appears . . . that reliance on *Baker* as the basis for lack of recovery at common law may be misplaced." *Summerfield v. Superior Court*, 698 P.2d 712, 716 (Ariz. 1985). The court held that wrongful death "statute and precedent have combined to produce a cause of action with common law attributes." *Summerfield v. Superior Court*, 698 P.2d 712, 718 (Ariz. 1985). The court explained that even if the Arizona legislature had "believed that it was creating a new statutory right of action in enacting the Wrongful Death Acts," there was "no evidence to suggest that [the legislature] intended to occupy the field completely, thus leaving no room for future judicial initiative." Summerfield v. Superior Court, 698 P.2d 712, 717 (Ariz. 1985). See also RESTATEMENT (SECOND) OF TORTS Â§925, cmt. k (1979).

Stare decisis is no bar

To be sure, other courts have declined to follow *Moragne*, usually citing considerations of stare decisis and the longstanding nature of state wrongful death

statutes.[19] But plaintiffs seeking to challenge the continued vitality--and constitutional legitimacy--of statutory limitations on common law wrongful death claims ought not be deterred by either factor. After all, neither one impeded the *Moragne* Court from overruling an 84-year-old precedent.

Indeed, neither stare decisis nor the mere passage of years provides sufficient justification for perpetuating *Baker*'s inequitable results. The fact that it took more than 150 years for scholars and the U.S. Supreme Court to correct Lord Ellenborough's errors is no reason why other courts should continue to replicate his (or perhaps his scribe's) mistakes.

CONCLUSION

The doctrine of stare decisis should not stand as an insuperable shield against correcting injustice. As the U.S. Supreme Court recently explained, "Stare decisis is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision.'" [20]

Automatic allegiance to dogma is particularly inappropriate where, as in this area,

* state constitutional rights and not mere statutory interpretations

are at issue;[21]

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[19] See, e.g., *Ecker v. Town of West Hartford*, 530 A.2d 1056, 1062 (Conn. 1987); *Sullivan v. Carlisle*, 851 S.W.2d 510, 516 (Mo. 1993); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 356 n.7 (Tex. 1990)

[20] *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991) (citations omitted)

[21] *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); See generally *United States v.*

* the sort of reliance interests that exist in cases involving property and contract rights are not present;[22]

* relatively few courts have squarely addressed the issues or carefully surveyed the relevant history;[23] and

* new facts, specifically those about the customs observed by colonial American courts, have been uncovered.[24]

Moreover, the common law has always been regarded as the special domain of the courts and been subject to judicial modification when society's needs dictate change. There is no legitimate reason for the courts to refrain from correcting judicial error and from returning to the proper historical understanding of wrongful death

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Barnett, 376 U.S. 681, 699 (1964); *Smith v. Allwright*, 321 U.S. 649, 665 (1944); *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2756 (1990) (Scalia, J., dissenting).

[22] *Payne v. Tennessee*, 501 U.S. 808, 828. See generally *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-11 (1932) (Brandeis, J., dissenting); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472 (1924); *The Genesee Chief v. Fitzhugh*, 13 L. Ed. 1058 (1852)

[23] See generally *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1718 (1993), citing *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974); *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting) ("Since none of our prior holdings is on point, the doctrine of stare decisis is not controlling." (citation omitted)).

[24] See generally *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 558 (1989) (Blackmun, J., concurring in part and dissenting in part) (citations omitted).

actions under the common law.

If wrongful death suits are recognized as arising under the common law and not as being solely statutory in origin, then statutorily proscribed recoveries should be viewed not as a matter of legislative grace--as creating a remedy where none has existed before--but rather as caps on damages.

In cases outside the wrongful death category, courts in many jurisdictions have invalidated damages caps and other restrictions on who can sue, when, and why. Courts have condemned these limitations as arbitrary measures that violate state constitutional guarantees of substantive due process, the right to jury trial, and the right to a complete and certain remedy. Courts have also condemned these limitations as legislative remittiturs that invade the province of the judiciary, contrary to the separation of powers principle.

The defense premise for dismissal of this action is the erroneous reliance on the *Steele* case and the erroneously perpetuated belief that a victim's injury claim expired with his death or the death of the tortfeasor. That, however, is not a valid basis under Idaho law or common law.

With respect to defendants' claim for fees and costs, plaintiff respectfully requests that it be denied, since this appeal is not "frivolous, unreasonable or without foundation." Given the manifest injustice of the rule promoted by the defendants and supported by the lower court, coupled with the lack of precedent on the issue, this action is brought in good faith and attorney's fees are not warranted should this court side with defendants. There is sufficient ambiguity in the common law that, coupled with the manifest injustice

in the outcome in the lower court and the lack of controlling statute, this appeal is justified for express clarification of the law on the issue presented.

Plaintiff respectfully asks this Court for relief from the unjust consequences of the rule advocated by defendants and asks for express clarification of the common law in Idaho on the issue presented.

Dated:

PAUL T. CURTIS
Attorney for Appellant Leeann Craig

Certificate of Service

I hereby certify that on the ____ day of June, 2009, two copies of the foregoing **APPELLANT'S REPLY BRIEF** were served upon the following attorneys of record by the method indicated:

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