

3-11-2009

# Craig v. Gellings Clerk's Record v. 1 Dckt. 35231

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Craig v. Gellings Clerk's Record v. 1 Dckt. 35231" (2009). *Idaho Supreme Court Records & Briefs*. 2095.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/2095](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/2095)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

Vol. 1 of 2

LAW CLERK

IN THE

volume 1 of 1

SUPREME COURT

OF THE

STATE OF IDAHO

COPY

FILED COPY

MAR 11 2009

Supreme Court Court of Appeals  
Entered on ATS by:

LEEANN CRAIG

Plaintiff and

Appellant  
vs.

STEVEN JOHN GELLINGS, DEVERL WATTNBARGER, BART

WATTNBARGER, CAROL WATTNBARGER AND  
WATTNBARGER FARMS

Defendant and

Respondants

Appealed from the District Court of the Seventh Judicial

District of the State of Idaho, in and for Bonneville County

Hon. Gregory S. Anderson, District Judge

Paul T. Curtis SBN #6042 598 N Capital Avenue, Idaho Falls, ID 83402

Attorney for Appellant

Jennifer K. Brizee P.O. Box 1276 Twin Falls, ID 83303-1276

Attorney for Respondent

Filed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

By 35231 Clerk  
Deputy

IN THE SUPREME COURT OF THE STATE OF IDAHO

LEANN CRAIG,

Plaintiff/Appellant,

vs.

STEVEN JOHN GELLINGS,  
DEVERL WATTNBARGER,  
BART WATTENBARGER,  
CAROL WATTENBARGER, AND  
WATTENBARGER FARMS,

Defendants/Respondants.

\*\*\*\*\*  
AMENDED  
CLERK'S RECORD ON APPEAL

\*\*\*\*\*

Appeal from the District Court of the  
Seventh Judicial District of the State of Idaho,  
in and for the County of Bonneville

HONORABLE GREGORY S. ANDERSON, District Judge.

\*\*\*\*\*

Paul T. Curtis SBN #6042  
CURTIS & BROWNING, PA  
598 N Capital Avenue  
Idaho Falls, ID 83402

*Attorney for Appellant*

Jennifer K. Brizee ISB #5070  
TOLMAN & BRIZEE  
P.O. Box 1276  
Twin Falls, Idaho 83303-1276

*Attorney for Respondent*

**TABLE OF CONTENTS**

	Page
Register of Actions, printed 7-15-08.....	1
Complaint for Damages and Jury Demand, filed 5-4-06.....	6
Summons, filed 5-4-06 .....	11
Summons, filed 5-4-06 .....	13
Summons, filed 5-4-06 .....	14
Summons, filed 5-4-06 .....	16
Summons, filed 5-4-06 .....	18
Minute Entry, dated 1-2-07.....	20
Order Setting Trial and Pretrial Conference, filed 1-25-06.....	21
Answer to Complaint and Demand for Jury Trial, filed 2-1-07 .....	25
Minute Entry on Motion to Continue Trial, dated 5-16-07.....	32
Minute Entry, dated 4-2-08.....	34
Minute Entry, dated 1-24-08.....	35
Motion to Dismiss, filed 1-25-08.....	37
Memorandum in Support of Motion to Dismiss, filed 1-25-08.....	39
Reply Memorandum in Support of Motion to Dismiss, filed 2-25-08 .....	45
Memorandum Decision RE: Motion to Dismiss, filed 3-13-08 .....	52
Order RE: Motion to Dismiss, filed 3-13-08.....	58
Memorandum in Support of Defendants' Memorandum of Costs, Disbursements and Attorney's Fees, filed 3-27-08 .....	60

Defendants' Memorandum of Costs, Disbursements and Attorney's Fees, filed 3/27-08 .....	68
Opposition to defendant's Memorandum of Costs, filed 4-9-08.....	71
Pages 74 thru 100 removed per Order Granting Defendant's Objection to Clerk's	
Record on appeal, filed 9-18-08.....	74
Notice of Appeal, filed 4-18-08.....	101
Defendant's Request for Additional Clerk's Record, filed 5-2-08.....	103A
Minute Entry on Request for Attorney Fees and Costs, dated 5-15-08.....	104
Memorandum Decision RE: Motion for Attorney Fees and Costs, filed 6-18-08.....	106
Order RE: Motion for Attorney Fees and Costs, filed 6-18-08.....	116
Clerk's Certification of Exhibits, .....	118
Clerk's Certificate of Service, dated 7-15-08.....	120

INDEX

	Page
Answer to Complaint and Demand for Jury Trial, filed 2-1-07 .....	25
Clerk's Certificate of Service, dated 7-15-08.....	120
Clerk's Certification of Exhibits, .....	118
Complaint for Damages and Jury Demand, filed 5-4-06.....	6
Defendant's Request for Additional Clerk's Record, filed 5-2-08.....	103A
Defendants' Memorandum of Costs, Disbursements and Attorney's Fees, filed 3-27-08 .....	68
Memorandum Decision RE: Motion for Attorney Fees and Costs, filed 6-18-08 .....	106
Memorandum Decision RE: Motion to Dismiss, filed 3-13-08 .....	52
Memorandum in Support of Defendants' Memorandum of Costs, Disbursements and Attorney's Fees, filed 3-27-08 .....	60
Memorandum in Support of Motion to Dismiss, filed 1-25-08.....	39
Minute Entry on Motion to Continue Trial, dated 5-16-07 .....	32
Minute Entry on Request for Attorney Fees and Costs, dated 5-15-08 .....	104
Minute Entry, dated 1-2-07 .....	20
Minute Entry, dated 1-24-08 .....	35
Minute Entry, dated 4-2-08 .....	34
Motion to Dismiss, filed 1-25-08 .....	37
Notice of Appeal, filed 4-18-08 .....	101
Opposition to defendant's Memorandum of Costs, filed 4-9-08 .....	71
Order RE: Motion for Attorney Fees and Costs, filed 6-18-08 .....	116

Order RE: Motion to Dismiss, filed 3-13-08.....	58
Order Setting Trial and Pretrial Conference, filed 125-06.....	21
Pages 74 thru 100 removed per Order Granting Defendant's Objection to Clerk's	
Record on appeal, filed 9-18-08.....	74
Register of Actions, printed 7-15-08.....	1
Reply Memorandum in Support of Motion to Dismiss, filed 2-25-08 .....	45
Summons, filed 5-4-06 .....	11
Summons, filed 5-4-06 .....	13
Summons, filed 5-4-06 .....	14
Summons, filed 5-4-06 .....	16
Summons, filed 5-4-06 .....	18

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

LEANN CRAIG,

Plaintiff/Appellant,

vs.

STEVEN JOHN GELLINGS,  
DEVERL WATTNBARGER,  
BART WATTENBARGER,  
CAROL WATTENBARGER, AND  
WATTENBARGER FARMS,

Defendants/Respondants.

\*\*\*\*\*

**CLERK'S RECORD ON APPEAL**

\*\*\*\*\*

Appeal from the District Court of the  
Seventh Judicial District of the State of Idaho,  
in and for the County of Bonneville

HONORABLE GREGORY S. ANDERSON, District Judge.

\*\*\*\*\*

Paul T. Curtis SBN #6042  
CURTIS & BROWNING, PA  
598 N Capital Avenue  
Idaho Falls, ID 83402

*Attorney for Appellant*

Jennifer K. Brizee  
TOLMAN, BRIZEE & MARTENS. P.C.  
P.O. Box 1276  
Twin Falls, ID 83303-1276

*Attorney for Respondent*



**TABLE OF CONTENTS**

	Page
Register of Actions, printed 7-15-08.....	1
Complaint for Damages and Jury Demand, filed 5-4-06.....	6
Summons, filed 5-4-06 .....	11
Summons, filed 5-4-06 .....	13
Summons, filed 5-4-06 .....	14
Summons, filed 5-4-06 .....	16
Summons, filed 5-4-06 .....	18
Minute Entry, dated 1-2-07.....	20
Order Setting Trial and Pretrial Conference, filed 1-25-06.....	21
Answer to Complaint and Demand for Jury Trial, filed 2-1-07 .....	25
Minute Entry on Motion to Continue Trial, dated 5-16-07.....	32
Minute Entry, dated 4-2-08.....	34
Minute Entry, dated 1-24-08.....	35
Motion to Dismiss, filed 1-25-08.....	37
Memorandum in Support of Motion to Dismiss, filed 1-25-08.....	39
Reply Memorandum in Support of Motion to Dismiss, filed 2-25-08 .....	45
Memorandum Decision RE: Motion to Dismiss, filed 3-13-08 .....	52
Order RE: Motion to Dismiss, filed 3-13-08.....	58
Memorandum in Support of Defendants' Memorandum of Costs, Disbursements and Attorney's Fees, filed 3-27-08 .....	60

Defendants' Memorandum of Costs, Disbursements and Attorney's Fees, filed 27-08 .....	68
Opposition to defendant's Memorandum of Costs, filed 49-08.....	71
Plaintiff's Answers to Defendant's Interrogatories and Requests for Production of	
Documents, First Set, filed 4-18-08 .....	74
Notice of Appeal, filed 4-18-08 .....	101
Minute Entry on Request for Attorney Fees and Costs, dated 5-15-08 .....	104
Memorandum Decision RE: Motion for Attorney Fees and Costs, filed 6-18-08 .....	106
Order RE: Motion for Attorney Fees and Costs, filed 6-18-08 .....	116
Clerk's Certification of Exhibits, .....	118
Clerk's Certificate of Service, dated 7-15-08.....	120

INDEX

	Page
Answer to Complaint and Demand for Jury Trial, filed 21-07 .....	25
Clerk's Certificate of Service, dated 715-08.....	120
Clerk's Certification of Exhibits, .....	118
Complaint for Damages and Jury Demand, filed 54-06.....	6
Defendants' Memorandum of Costs, Disbursements and Attorney's Fees, filed 27-08 .....	68
Memorandum Decision RE: Motion for Attorney Fees and Costs, filed 618-08 .....	106
Memorandum Decision RE: Motion to Dismiss, filed 313-08 .....	52
Memorandum in Support of Defendants' Memorandum of Costs, Disbursements and Attorney's Fees, filed 327-08 .....	60
Memorandum in Support of Motion to Dismiss, filed 125-08.....	39
Minute Entry on Motion to Continue Trial, dated 5-16-07 .....	32
Minute Entry on Request for Attorney Fees and Costs, dated 515-08 .....	104
Minute Entry, dated 1-2-07.....	20
Minute Entry, dated 1-24-08.....	35
Minute Entry, dated 4-2-08.....	34
Motion to Dismiss, filed 1-25-08.....	37
Notice of Appeal, filed 4-18-08 .....	101
Opposition to defendant's Memorandum of Costs, filed 49-08.....	71
Order RE: Motion for Attorney Fees and Costs, filed 618-08 .....	116
Order RE: Motion to Dismiss, filed 313-08.....	58

Order Setting Trial and Pretrial Conference, filed 125-06.....	21
Plaintiff's Answers to Defendant's Interrogatories and Requests for Production of	
Documents, First Set, filed 4-18-08.....	74
Register of Actions, printed 7-15-08.....	1
Reply Memorandum in Support of Motion to Dismiss, filed 225-08 .....	45
Summons, filed 5-4-06 .....	11
Summons, filed 5-4-06 .....	13
Summons, filed 5-4-06 .....	14
Summons, filed 5-4-06 .....	16
Summons, filed 5-4-06 .....	18

Date: 7/15/2008

Sever Judicial District Court - Bonneville Co

User: SHULTS

Time: 11:19 AM

ROA Report

Page 1 of 5

Case: CV-2006-0002509 Current Judge: Gregory S. Anderson

Leeann Craig vs. Steven John Gellings, etal.

Leeann Craig vs. Steven John Gellings, Deverl Wattenbarger, Bart Wattenbarger, Carol I Wattenbarger, Wattenbarger Farms

Date	Code	User		Judge
5/4/2006	NCPI	WILLIAMS	New Case Filed-Personal Injury	Gregory S. Anderson
	SMIS	WILLIAMS	Summons Issued - 5	Gregory S. Anderson
	NOAP	WILLIAMS	Plaintiff: Craig, Leeann Notice Of Appearance Paul T Curtis	Gregory S. Anderson
		WILLIAMS	Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: Curtis, Paul T (attorney for Craig, Leeann) Receipt number: 0019043 Dated: 5/4/2006 Amount: \$82.00 (Check)	Gregory S. Anderson
9/21/2006	COMP	WILLIAMS	Complaint for Damages and Jury Demand Filed	Gregory S. Anderson
	AFFD	PHILLIPS	Affidavit of Service 9/20/06 Bart Wattenbarger	Gregory S. Anderson
	AFFD	PHILLIPS	Affidavit of Service 9/20/06 Wattenbarger Farms	Gregory S. Anderson
	AFFD	PHILLIPS	Affidavit of Service 9/20/06 Deverl Wattenbarger	Gregory S. Anderson
	AFFD	PHILLIPS	Affidavit of Service 9/20/06 Carol Wattenbarger	Gregory S. Anderson
10/4/2006	AFFD	PHILLIPS	Affidavit of Service 9/20/06 Steven Gellings	Gregory S. Anderson
10/10/2006	AFFD	PHILLIPS	AMENDED Affidavit of Service 9/20/06	Gregory S. Anderson
		DOOLITTL	Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Tolman, Brizee & Martens Receipt number: 0043116 Dated: 10/11/2006 Amount: \$58.00 (Check)	Gregory S. Anderson
	NOAP	DOOLITTL	Defendant: Gellings, Steven John Notice Of Appearance Jennifer Kauth Brizee	Gregory S. Anderson
	NOAP	DOOLITTL	Defendant: Wattenbarger, Deverl Notice Of Appearance Jennifer Kauth Brizee	Gregory S. Anderson
	NOAP	DOOLITTL	Defendant: Wattenbarger, Bart Notice Of Appearance Jennifer Kauth Brizee	Gregory S. Anderson
	NOAP	DOOLITTL	Defendant: Wattenbarger, Carol I Notice Of Appearance Jennifer Kauth Brizee	Gregory S. Anderson
	NOAP	DOOLITTL	Defendant: Wattenbarger Farms Notice Of Appearance Jennifer Kauth Brizee	Gregory S. Anderson
1/3/2007	HRSC	LMESSICK	Hearing Scheduled (Status Conference 01/17/2007 08:35 AM)	Gregory S. Anderson
	ORDR	LMESSICK	Order for Status Conference	Gregory S. Anderson
1/11/2007	HRVC	LMESSICK	Hearing result for Status Conference held on 01/17/2007 08:35 AM: Hearing Vacated	Gregory S. Anderson
	HRSC	LMESSICK	Hearing Scheduled (Status Conference 01/24/2007 09:50 AM)	Gregory S. Anderson
	ORDR	LMESSICK	Amended Order for Status Conference	Gregory S. Anderson
1/22/2007	NTOS	DOOLITTL	Notice Of Service of Discovery Document	Gregory S. Anderson
1/25/2007	HRHD	LMESSICK	Hearing result for Status Conference held on 01/24/2007 09:50 AM: Hearing Held	Gregory S. Anderson

Date: 7/15/2008

Sever Judicial District Court - Bonneville Co

User: SHULTS

Time: 11:19 AM

ROA Report

Page 2 of 5

Case: CV-2006-0002509 Current Judge: Gregory S. Anderson

Leeann Craig vs. Steven John Gellings, etal.

Leeann Craig vs. Steven John Gellings, Deverl Wattenbarger, Bart Wattenbarger, Carol I Wattenbarger, Wattenbarger Farms

Date	Code	User		Judge
1/25/2007	HRSC	LMESSICK	Hearing Scheduled (Pretrial Conference 08/15/2007 09:00 AM)	Gregory S. Anderson
	HRSC	LMESSICK	Hearing Scheduled (Jury Trial 08/21/2007 10:00 AM)	Gregory S. Anderson
	MINE	LMESSICK	Minute Entry: status conference	Gregory S. Anderson
	ORPT	LMESSICK	Order Setting Pretrial Conference/trial	Gregory S. Anderson
	JTSC	LMESSICK	Jury Trial Scheduled	Gregory S. Anderson
2/1/2007	ANSW	WILLIAMS	Answer to Complaint and Demand for Jury Trial (Jennifer Brizee for all Defendants)	Gregory S. Anderson
4/26/2007	MOTN	DOOLITTL	Motion to Continue Trial and Amend Scheduling Order	Gregory S. Anderson
	HRSC	LMESSICK	Hearing Scheduled (Motion 05/16/2007 09:30 AM) Motion to Continue Trial	Gregory S. Anderson
5/7/2007	AFFD	PHILLIPS	Affidavit of Jennifer Kauth Brizee in Support of Motion to Continue Trial	Gregory S. Anderson
5/17/2007	HRHD	LMESSICK	Hearing result for Motion held on 05/16/2007 09:30 AM: Hearing Held Motion to Continue Trial	Gregory S. Anderson
	HRVC	LMESSICK	Hearing result for Jury Trial held on 08/21/2007 10:00 AM: Hearing Vacated	Gregory S. Anderson
	HRVC	LMESSICK	Hearing result for Pretrial Conference held on 08/15/2007 09:00 AM: Hearing Vacated	Gregory S. Anderson
	HRSC	LMESSICK	Hearing Scheduled (Pretrial Conference 02/27/2008 09:00 AM)	Gregory S. Anderson
	HRSC	LMESSICK	Hearing Scheduled (Jury Trial 03/04/2008 10:00 AM)	Gregory S. Anderson
	MINE	LMESSICK	Minute Entry	Gregory S. Anderson
	ORPT	LMESSICK	2nd Order Setting Trial and Pretrial Conference	Gregory S. Anderson
	JTSC	LMESSICK	Jury Trial Scheduled	Gregory S. Anderson
8/3/2007	NDDT	DOOLITTL	Notice Of Deposition Duces Tecum of Leann J. Craig	Gregory S. Anderson
9/19/2007	NTOS	PHILLIPS	Notice Of Service (Discovery) 9/19/07 (PI Answers to Interrogatories and Response to Defendant's Request for Production of Docs)	Gregory S. Anderson
11/29/2007	NTOS	DOOLITTL	Notice Of Service (Plaintiff's Expert Witness Disclosure)	Gregory S. Anderson
12/6/2007	STIP	PHILLIPS	Stipulation to Continue Trial ***FAX***	Gregory S. Anderson
12/7/2007	ORDR	LMESSICK	Order for Status conference	Gregory S. Anderson
	HRSC	LMESSICK	Hearing Scheduled (Status Conference 01/02/2008 11:00 AM)	Gregory S. Anderson
1/2/2008	HRHD	LMESSICK	Hearing result for Status Conference held on 01/02/2008 11:00 AM: Hearing Held	Gregory S. Anderson
1/4/2008	HRSC	LMESSICK	Hearing Scheduled (Status Conference 01/23/2008 08:20 AM)	Gregory S. Anderson
	MINE	LMESSICK	Minute Entry	Gregory S. Anderson

Leeann Craig vs. Steven John Gellings, Deverl Wattenbarger, Bart Wattenbarger, Carol I Wattenbarger, Wattenbarger Farms

Date	Code	User	Judge
1/4/2008	ORDR	LMESSICK	Order for Status Conference Gregory S. Anderson
1/23/2008	HRHD	LMESSICK	Hearing result for Status Conference held on 01/23/2008 08:20 AM: Hearing Held Gregory S. Anderson
1/24/2008	HRVC	LMESSICK	Hearing result for Jury Trial held on 03/04/2008 10:00 AM: Hearing Vacated Gregory S. Anderson
	HRVC	LMESSICK	Hearing result for Pretrial Conference held on 02/27/2008 09:00 AM: Hearing Vacated Gregory S. Anderson
	HRSC	LMESSICK	Hearing Scheduled (Pretrial Conference 07/09/2008 09:00 AM) Gregory S. Anderson
	HRSC	LMESSICK	Hearing Scheduled (Jury Trial 07/15/2008 10:00 AM) Gregory S. Anderson
	HRSC	LMESSICK	Hearing Scheduled (Motion 02/28/2008 08:00 AM) Motion to Dismiss Gregory S. Anderson
	MINE	LMESSICK	Minute Entry Gregory S. Anderson
	ORPT	LMESSICK	3rd Order Setting Pretrial Conference/trial Gregory S. Anderson
1/25/2008	MEMO	WILLIAMS	Memorandum in Support of Motion to Dismiss **fax** Gregory S. Anderson
	MOTN	WILLIAMS	Motion to Dismiss **fax** Gregory S. Anderson
	NOTH	WILLIAMS	Notice Of Hearing - 2/28/08 @ 8 a.m. **fax** Gregory S. Anderson
2/14/2008		DOOLITTL	opposition to Defendant's Motion to Dismiss Gregory S. Anderson
	MOTN	DOOLITTL	Plaintiff's Motion to Substitute Personal Representative of Estate for Deceased Plaintiff Gregory S. Anderson
	NOTH	DOOLITTL	Notice Of Hearing 2-28-08 @ 8:00 a.m. Gregory S. Anderson
2/25/2008		TAWILLIAMS	Reply Memorandum in supprot of Motion to Dismiss ***FAXED*** Gregory S. Anderson
2/28/2008	HRHD	TBROWN	Hearing result for Motion held on 02/28/2008 08:00 AM: Hearing Held Motion to Dismiss Gregory S. Anderson
3/13/2008	MEMO	LMESSICK	Memorandum Decision Re: Motion to Dismiss Gregory S. Anderson
	ORDR	LMESSICK	Order Re: Motion to Dismiss Gregory S. Anderson
	CDIS	LMESSICK	Civil Disposition entered for: Gellings, Steven John, Defendant; Wattenbarger Farms, Defendant; Wattenbarger, Bart, Defendant; Wattenbarger, Carol I, Defendant; Wattenbarger, Deverl, Defendant; Craig, Leeann, Plaintiff. order date: 3/13/2008 Gregory S. Anderson
	HRVC	LMESSICK	Hearing result for Jury Trial held on 07/15/2008 10:00 AM: Hearing Vacated Gregory S. Anderson
	HRVC	LMESSICK	Hearing result for Pretrial Conference held on 07/09/2008 09:00 AM: Hearing Vacated Gregory S. Anderson
	STATUS	LMESSICK	Case Status Changed: closed Gregory S. Anderson
3/27/2008	MEMO	DOOLITTL	Defendants' Memorandum of Costs, Disbursements and Attorney's Fees Gregory S. Anderson
	MEMO	DOOLITTL	Memorandum in Support of Defendants' Memorandum of Costs, Disbursements and Attorney's Fees Gregory S. Anderson

Leeann Craig vs. Steven John Gellings, Deverl Wattenbarger, Bart Wattenbarger, Carol I Wattenbarger, Wattenbarger Farms

Date	Code	User	Judge
3/27/2008	AFFD	DOOLITTL	Affidavit of Jennifer K. Brizee in Support of Defendants' Memorandum of Costs, Disbursements and Attorney's Fees
4/9/2008	MEMO	ROBBINS	Opposition to Defendant's Memorandum of Costs
4/18/2008		DOOLITTL	Filing: T - Civil Appeals To The Supreme Court (\$86.00 Directly to Supreme Court Plus this amount to the District Court) Paid by: Craig, Leeann (plaintiff) Receipt number: 0015836 Dated: 4/18/2008 Amount: \$15.00 (Check) For: Craig, Leeann (plaintiff)
	APDC	DOOLITTL	Appeal Filed In District Court
	NOTC	DOOLITTL	Notice of Appeal
		DOOLITTL	Plaintiff's Answers to Defendant's Interrogatorise and REquests for Production of Doucments, 1st Set
4/22/2008		SHULTS	Clerk's Certificate of Appeal sent to S.C. along with \$86.00 filing fee.
	BNDK	SHULTS	Bond Posted - Cash (Receipt 16259 Dated 4/22/2008 for 100.00)
	STATUS	SHULTS	Case Status Changed: Closed pending clerk action
4/24/2008	HRSC	LMESSICK	Hearing Scheduled (Hearing 05/15/2008 09:00 AM) attorney fees
4/29/2008	NOTH	DOOLITTL	Notice Of Hearing 5-15-08 @ 9:00 a.m.
5/2/2008		ROBBINS	Def Request for Additional Clerks Record
5/15/2008		SHULTS	S.C. Acknowledgment of Appeal & Receipt for \$86.00
	DCHH	LMESSICK	Hearing result for Hearing held on 05/15/2008 09:00 AM: District Court Hearing Held Court Reporter: Karen Konvalinka Number of Transcript Pages for this hearing estimated: 50 pages
	MINE	LMESSICK	Minute Entry on Request for Attorney Fees and Costs
5/22/2008		SHULTS	DOCKET # 35231
		SHULTS	S.C. DUE DATE#7-2-08
		SHULTS	S.C. Respondents motion to strike appellant's notice of appeal in part was filed in the S.C. on 5-14-08
5/23/2008	MEMO	ROBBINS	Def's Supplemental Memorandum in Support of Their Memorandum of Costs and Fees
5/30/2008	TRAN	SHULTS	Transcript Filed
6/4/2008		SHULTS	File with Judge Anderson. (Decision)
6/18/2008	ORDR	SHULTS	S.C. Order Denying Without Prejudice Respondents' Motion to Strike
	ORDR	LMESSICK	Order Re: Motion for Attorney Fees and Costs



Date: 7/15/2008

Sevier Judicial District Court - Bonneville Co

User: SHULTS

Time: 11:19 AM

ROA Report

Page 5 of 5

Case: CV-2006-0002509 Current Judge: Gregory S. Anderson

Leeann Craig vs. Steven John Gellings, etal.

Leeann Craig vs. Steven John Gellings, Deverl Wattenbarger, Bart Wattenbarger, Carol I Wattenbarger, Wattenbarger Farms

Date	Code	User		Judge
6/18/2008	MEMO	LMESSICK	Memorandum Decision Re: Motion for Attorney Fees and Costs	Gregory S. Anderson
7/15/2008	LODG	SHULTS	Lodged transcript from Karen	Gregory S. Anderson

CASE ASSIGNED TO  
JUDGE GREGORY S. ANDERSON

BONNEVILLE COUNTY  
ID 83402

705 MAY -4 PM 124

Paul T. Curtis, SBN #6042  
CURTIS & BROWNING, PA  
598 N. Capital Ave.  
Idaho Falls, ID 83402  
Telephone: (208) 542-6995  
Facsimile: (208) 542-6993

*Attorney for Plaintiff*

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
IN AND FOR THE STATE OF IDAHO, COUNTY OF BONNEVILLE**

LEEANN CRAIG,

Case No.: *CV-06-2509*

Plaintiff,

**COMPLAINT FOR DAMAGES  
and JURY DEMAND**

vs.

STEVEN JOHN GELLINGS,  
DEVERL WATTENBARGER,  
BART WATTENBARGER,  
CAROL WATTENBARGER,  
and WATTENBARGER FARMS,

Defendants.

COMES NOW, Plaintiff LEEANN CRAIG, by and through her attorney of record, Paul T. Curtis of CURTIS & BROWNING, PA, and complains and alleges against Defendants STEVEN JOHN GELLINGS, DEVERL WATTENBARGER, CAROL WATTENBARGER, and WATTENBARGER FARMS, as follows:

1. This is an action for personal injury damages sustained in an automobile accident occurring on May 12, 2004, on Highway 26, at the intersection of Ammon Road, in Bonneville County, Idaho, proximately caused by the Defendants' negligence. Plaintiff seeks general and special damages, attorney's fees, court costs, and other relief.

2. Plaintiffs' permanent residence is in Idaho Falls, Idaho.

3. On information and belief, based upon the motor vehicle accident report, Defendant STEVEN JOHN GELLINGS is a resident of Idaho Falls, Bonneville County, Idaho.

4. The Court has subject matter jurisdiction over this matter, in that the amount in controversy, exclusive of interest and costs, exceeds the jurisdictional minimums for actions filed in the district court. The Court has *in personam* jurisdiction over Defendants pursuant to Idaho Code § 5-514, in that the Defendants resided in the State of Idaho at the time of the motor vehicle accident, and committed a tortious act within the State of Idaho during the period of their residency here.

5. Venue is proper in the Seventh Judicial District, Bonneville County, in that at least one defendant resides in said County, the accident occurred in said county, and most of plaintiff's medical treatment has been by physicians and providers located in Bonneville County.

6. The motor vehicle accident that is the subject of this action occurred on May 12, 2004. At the time of this accident, Plaintiff LEEANN CRAIG was driving her vehicle northbound on Ammon Road, in Idaho Falls, Idaho. At the same time, Defendant STEVEN JOHN GELLINGS, while in the course and scope of his employment, was traveling northbound on US Highway 26. At the intersection of Ammon Road and US Highway 26, Defendant

STEVEN JOHN GELLINGS failed to stop at the stop light controlling his direction of travel, proximately causing this accident.

**FIRST CLAIM FOR RELIEF**  
**(Negligence against Defendant STEVEN JOHN GELLINGS)**

7. Plaintiff incorporates herein paragraphs 1 through 6 of this Complaint.

8. At the time and place of the accident, Defendant STEVEN JOHN GELLINGS failed to exercise due care by failing to stop at the stop light controlling his direction of travel at the time. Defendant STEVEN JOHN GELLINGS' negligence is attributed to Defendants DEVERL WATTENBARGER, BART WATTENBARGER, CAROL WATTENBARGER, and WATTENBARGER FARMS by operation of law because they, and or each of them, were the owners of the vehicle being operated by Defendant STEVEN JOHN GELLINGS.

9. As a proximate result of Defendants' negligence, the Plaintiff has sustained bodily injuries, and other special damages, pain and suffering and other injuries, all in an amount to be proven at trial.

**SECOND CLAIM FOR RELIEF**  
**(Imputed Negligence of Defendant DEVERL WATTENBARGER, BART WATTENBARGER, CAROL WATTENBARGER, and WATTENBARGER FARMS)**

10. Plaintiff incorporates herein paragraphs 1 through 9 of this Complaint.

11. Plaintiff is informed and believes thereon that Defendants DEVERL WATTENBARGER, CAROL WATTENBARGER, BART WATTENBARGER, and/or WATTENBARGER FARMS, were the owners of the vehicle being driven by Defendant STEVEN JOHN GELLINGS at the time of the above-described motor vehicle accident.

12. Plaintiff believes, and alleges thereon, that Defendant STEVEN JOHN GELLINGS was operating the aforesaid vehicle with the permission of said defendants.

13. As owner(s) of the negligently-driven vehicle, Defendants DEVERL WATTENBARGER, CAROL WATTENBARGER, BART WATTENBARGER, and/or WATTENBARGER FARMS are liable for plaintiff's damages to the extent allowed by Idaho law.

14. Further, plaintiff believes and alleges thereon that, at the time of this accident, Defendant STEVEN JOHN GELLINGS was in the course and scope of his employment with WATTENBARGER FARMS, and/or one or all of the other defendants. As such, Defendants are liable for Defendant STEVEN JOHN GELLINGS' negligence by operation of the principle of *respondeat superior*.

**THIRD CLAIM FOR RELIEF  
(Attorney's fees and court costs)**

15. Plaintiffs incorporate herein paragraphs 1 through 14 of this Complaint.

16. Plaintiffs have been required to obtain the legal services of Paul T. Curtis and CURTIS & BROWNING, PA, to prosecute their claim for damages, and have obligated themselves to pay these attorneys a reasonable fee for their services, as well as to reimburse all court costs and expenses of litigation.

WHEREFORE, Plaintiff prays for relief in excess of \$10,000.00 against Defendants STEVEN JOHN GELLINGS, DEVERL WATTENBARGER, CAROL WATTENBARGER, BART WATTENBARGER, and WATTENBARGER FARMS, as follows:

1. For general damages for Plaintiff's pain and suffering, bodily injuries, and other damages in an amount to be proven at trial;
2. For Plaintiff's past wage loss, loss of future earnings and earning capacity, property damage, out-of-pocket expenses, and other special damages in an amount to be proven at trial;
3. For Plaintiff's attorney's fees, court costs, and other disbursements in an amount to be determined at or after trial; and
4. For such other and further relief as the Court deems appropriate under the circumstances.

**PLAINTIFF RESPECTFULLY REQUESTS A TRIAL BY JURY IN THIS MATTER.**

DATED this 4 day of May, 2006.

  
Paul T. Curtis

CA. SIGNED TO  
JUDGE GREGORY S. ANDERSON

BONNEVILLE COUNTY  
IDAHO

Paul T. Curtis, SBN #6042  
CURTIS & BROWNING, PA  
598 N. Capital Ave.  
Idaho Falls, ID 83402  
Telephone: (208) 542-6995  
Facsimile: (208) 542-6993

06 MAY -4 P 3:25

*Attorney for Plaintiff*

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
IN AND FOR THE STATE OF IDAHO, COUNTY OF BONNEVILLE**

LEEANN CRAIG, )  
)  
)  
Plaintiff, )  
)  
)  
vs. )  
)  
)  
STEVEN JOHN GELLINGS, )  
DEVERL WATTENBARGER, )  
BART WATTENBARGER, )  
CAROL WATTENBARGER, )  
and WATTENBARGER FARMS, )  
)  
Defendants. )  
\_\_\_\_\_ )

Case No.: CV-06-2509

**SUMMONS**

**NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF(S). THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.**

**TO: STEPHEN JOHN GELLINGS**

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within 20 days after service of this *Summons* on you. If you fail to so respond, the court may enter judgment against you as demanded by the plaintiff(s) in the Complaint.

A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

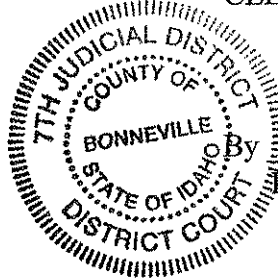
An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of the case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED this 4 day of May, 2006.

CLERK OF THE COURT



*Ronald Longmore*

By *James Williams*  
Deputy Clerk



CASE ASSIGNED TO  
JUDGE GREGORY S. ANDERSON

BONNEVILLE COUNTY  
IDAHO

Paul T. Curtis, SBN #6042  
CURTIS & BROWNING, PA  
598 N. Capital Ave.  
Idaho Falls, ID 83402  
Telephone: (208) 542-6995  
Facsimile: (208) 542-6993

'06 MAY -4 P 3:25

*Attorney for Plaintiff*

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
IN AND FOR THE STATE OF IDAHO, COUNTY OF BONNEVILLE**

LEEANN CRAIG,

Case No.: CV-06-2509

Plaintiff,

**SUMMONS**

vs.

STEVEN JOHN GELLINGS,  
DEVERL WATTENBARGER,  
BART WATTENBARGER,  
CAROL WATTENBARGER,  
and WATTENBARGER FARMS,

Defendants.

**NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF(S). THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.**

**TO: DEVERL WATTENBARGER**

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within 20 days after service of this Summons on you. If you fail to so respond, the court may enter judgment against you as demanded by the plaintiff(s) in the Complaint.

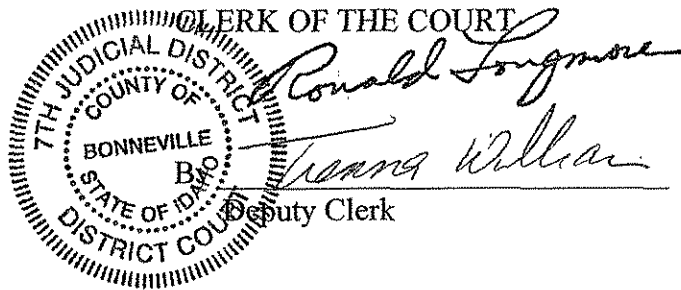
A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of the case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED this 4 day of May, 2006.



CASE FILED TO  
JUDGE GREGORY S. ANDERSON

BONNEVILLE COUNTY  
IDAHO

Paul T. Curtis, SBN #6042  
CURTIS & BROWNING, PA  
598 N. Capital Ave.  
Idaho Falls, ID 83402  
Telephone: (208) 542-6995  
Facsimile: (208) 542-6993

'06 MAY -4 P 3:25

*Attorney for Plaintiff*

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT**

**IN AND FOR THE STATE OF IDAHO, COUNTY OF BONNEVILLE**

LEEANN CRAIG, )  
)  
)  
Plaintiff, )  
)  
)  
vs. )  
)  
)  
STEVEN JOHN GELLINGS, )  
)  
DEVERL WATTENBARGER, )  
)  
BART WATTENBARGER, )  
)  
CAROL WATTENBARGER, )  
)  
and WATTENBARGER FARMS, )  
)  
)  
Defendants. )  
)  
\_\_\_\_\_ )

Case No.: CV-06-2509

**SUMMONS**

**NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF(S). THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.**

**TO: BART WATTENBARGER**

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within 20 days after service of this Summons on you. If you fail to so respond, the court may enter judgment against you as demanded by the plaintiff(s) in the Complaint.

A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

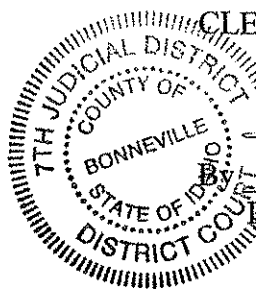
An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of the case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED this 4 day of May, 2006.

CLERK OF THE COURT  
*Ronald Longmore*  
*Jenna Williams*  
Deputy Clerk



CASE FILED TO  
JUDGE GREGORY S. ANDERSON

BONNEVILLE COUNTY  
IDAHO

Paul T. Curtis, SBN #6042  
CURTIS & BROWNING, PA  
598 N. Capital Ave.  
Idaho Falls, ID 83402  
Telephone: (208) 542-6995  
Facsimile: (208) 542-6993

'06 MAY -4 P 3:25

*Attorney for Plaintiff*

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
IN AND FOR THE STATE OF IDAHO, COUNTY OF BONNEVILLE**

LEEANN CRAIG, )  
)  
)  
Plaintiff, )  
)  
)  
vs. )  
)  
)  
STEVEN JOHN GELLINGS, )  
DEVERL WATTENBARGER, )  
BART WATTENBARGER, )  
CAROL WATTENBARGER, )  
and WATTENBARGER FARMS, )  
)  
Defendants. )  
\_\_\_\_\_ )

Case No.: *CV-06-2509*

**SUMMONS**

**NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF(S). THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.**

**TO: CAROL WATTENBARGER**

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within 20 days after service of this Summons on you. If you fail to so respond, the court may enter judgment against you as demanded by the plaintiff(s) in the Complaint.

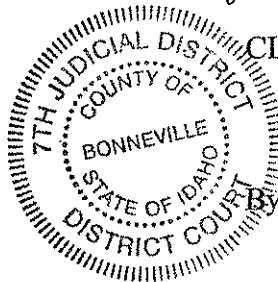
A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of the case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED this 4 day of May, 2006.



CLERK OF THE COURT

*Ronald Longmore*

*Teresa Williams*

Deputy Clerk

CASE ASSIGNED TO  
JUDGE GREGORY S. ANDERSON

BONNEVILLE COUNTY  
IDAHO

Paul T. Curtis, SBN #6042  
CURTIS & BROWNING, PA  
598 N. Capital Ave.  
Idaho Falls, ID 83402  
Telephone: (208) 542-6995  
Facsimile: (208) 542-6993

'06 MAY -4 P 2:26

*Attorney for Plaintiff*

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
IN AND FOR THE STATE OF IDAHO, COUNTY OF BONNEVILLE**

LEEANN CRAIG, )

Case No.: CV-06-2509

Plaintiff, )

**SUMMONS**

vs. )

STEVEN JOHN GELLINGS, )  
DEVERL WATTENBARGER, )  
BART WATTENBARGER, )  
CAROL WATTENBARGER, )  
and WATTENBARGER FARMS, )

Defendants. )

**NOTICE: YOU HAVE BEEN SUED BY THE ABOVE-NAMED PLAINTIFF(S). THE COURT MAY ENTER JUDGMENT AGAINST YOU WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.**

**TO: WATTENBARGER FARMS**

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within 20 days after service of this Summons on you. If you fail to so respond, the court may enter judgment against you as demanded by the plaintiff(s) in the Complaint.

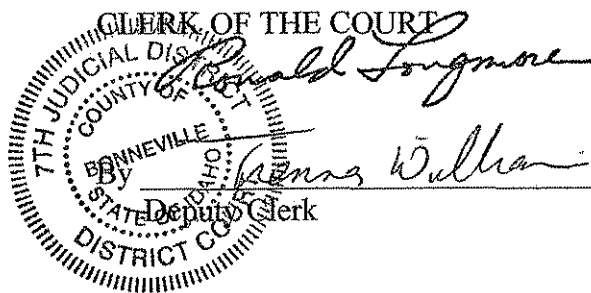
A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of the case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the Clerk of the above-named Court.

DATED this 4 day of May, 2006.





IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

LEEANN CRAIG,	)	
	)	
Plaintiff,	)	Case No. CV-06-2509
vs.	)	
	)	MINUTE ENTRY
STEVEN JOHN GELLINGS, DEVERL	)	
WATTENBARGER, BART	)	
WATTENBARGER, CAROL	)	
WATTENBARGER, and	)	
WATTENBARGER FARMS,	)	
	)	
Defendants.	)	
<hr/>		

January 24, 2007, at 10:20 A.M., a status conference came on for hearing before the Honorable Gregory S. Anderson, District Judge, sitting in open court at Idaho Falls, Idaho.

Ms. Karen Konvalinka, Court Reporter, and Ms. Lettie Messick, Deputy Court Clerk, were present.

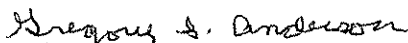
Mr. Paul Curtis appeared on behalf the plaintiff. Ms. Jennifer Brizee appeared by telephone on behalf of the defendants.

The Court instructed Ms. Brizee to file an answer within one (1) week.

The Court scheduled a jury trial for 10:00 a.m., August 21, 2007. A pre-trial conference was scheduled for 9:00 a.m., August 15, 2007.

Court was thus adjourned.

c: Paul Curtis  
Jennifer Brizee

  
\_\_\_\_\_  
GREGORY S. ANDERSON  
District Judge

2006 JAN 25 PM 2:01  
7TH JUDICIAL COURT  
BONNEVILLE DISTRICT  
IDAHO

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

LEEANN CRAIG, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 STEVEN JOHN GELLINGS, DEVERL )  
 WATTENBARGER, BART )  
 WATTENBARGER, CAROL )  
 WATTENBARGER, and )  
 WATTENBARGER FARMS, )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

Case No. CV-2006-2509

ORDER SETTING TRIAL AND  
PRETRIAL CONFERENCE

Pursuant to Rule 16 of the Idaho Rules of Civil Procedure, the following pre-trial schedule shall govern all proceedings in this case:

**I. IT IS HEREBY ORDERED<sup>1</sup>:**

1. A pre-trial conference shall be held at 9:00 A.M., on August 15, 2007.
2. Jury trial shall commence at 10:00 A.M., on August 21, 2007.
3. No later than ninety (90) days before the date set for trial, counsel shall disclose the names, addresses, and telephone numbers of expert witnesses that may be called to testify at trial.
4. All discovery shall be completed seventy (70) days prior to trial.<sup>2</sup>
5. All Motions for Summary Judgment must be filed sixty (60) days prior to trial in conformance with Rule 56(a), I.R.C.P.

<sup>1</sup>The disclosure cut-off date, discovery completion date and motion dates are for the benefit of the Court in managing this case. They will be enforced at the Court's discretion. The disclosure date should not be relied on by the parties for discovery purposes. The disclosure, discovery and motion dates will not be modified by the Court without a hearing and assurance from the parties that the modification will not necessitate continuance of the trial.

<sup>2</sup> Discovery requests must be served so that timely responses will be due prior to the discovery cutoff date.

6. All Motions for Summary Judgment must be heard at least twenty-eight (28) days prior to trial.

**II. IT IS FURTHER ORDERED** that each attorney shall, no later than fourteen (14) days before trial:

1. Submit a list of names to the court of persons who may be called to testify.
2. Submit a descriptive list of all exhibits proposed to be offered into evidence to the court indicating which exhibits counsel have agreed will be received in evidence without objection and those to which objections will be made, including the basis upon which each objection will be made.
3. Submit a brief to the court citing legal authorities upon which the party relies as to each issue of law to be litigated.
4. If this is a jury trial, counsel shall submit proposed jury instructions to all parties to the action and the court. All requested instructions submitted to the court shall be in duplicate form as set out in Idaho Rule of Civil Procedure 51(a)(1).
5. Submit that counsel have in good faith tried to settle this action.
6. State whether liability is disputed.

**III. IT IS FURTHER ORDERED** that each attorney shall no later than seven (7) days before trial:

1. Submit any objections to the jury instructions requested by an opponent specifying the instruction and the grounds for the objection.
2. Deposit with the clerk of the court all exhibits to be introduced, except those for impeachment. The clerk shall mark plaintiff's exhibits in numerical sequence as requested by plaintiff and shall mark all defendant's exhibits in alphabetical sequence as requested by defendant.
3. A duplicate set of all exhibits to be introduced, except those for impeachment, shall be placed in binders, indexed, and deposited with the clerk of the court.

**IV. IT IS FURTHER ORDERED** that:

1. Any exhibits or witnesses discovered after the last required disclosure shall immediately be disclosed to the court and opposing counsel by filing and service

stating the date upon which the same was discovered.

2. No exhibits shall be admitted into evidence at trial other than those disclosed, listed and submitted to the clerk of the court in accordance with this order, except when offered for impeachment purposes or unless they were discovered after the last required disclosure.
3. This order shall control the course of this action unless modified for good cause shown to prevent manifest injustice.
4. The court may impose appropriate sanctions for violation of this order.

DATED this 25<sup>th</sup> day of January, 2007.

Gregory S. Anderson  
GREGORY S. ANDERSON  
District Judge


CERTIFICATE OF SERVICE

I hereby certify that on this 25<sup>th</sup> day of January, 2007, I did send a true and correct copy of the aforementioned Order upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be hand delivered.

Paul Curtis  
CURTIS & BROWNING  
Courthouse Box  
Idaho Falls, Idaho

Steven Tolman  
Jennifer Brizee  
TOLMAN BRIZEE & MARTENS, PC  
PO Box 1276  
Twin Falls, ID 83303-1276

RONALD LONGMORE  
Clerk of the District Court  
Bonneville County, Idaho

  
Deputy Clerk

Steven K. Tolman (ISB #1790)  
Jennifer Kauth Brizee (ISB #5070)  
TOLMAN, BRIZEE & MARTENS, P.C.  
132 3<sup>rd</sup> Avenue East  
P.O. Box 1276  
Twin Falls, Idaho 83303-1276  
Telephone: (208) 733-5566

2007 FEB -1 PM 3:41  
DISTRICT COURT  
MAGISTRATE DIVISION  
BONNEVILLE COUNTY  
IDAHO

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

\*\*\*\*\*

LEEANN CRAIG,

Plaintiff,

vs.

STEVEN JOHN GELLINGS,  
DEVERL WATTENBARGER,  
BART WATTENBARGER,  
CAROL WATTENBARGER,  
and WATTENBARGER FARMS,

Defendants.

Case No. CV-06-2509

**ANSWER TO COMPLAINT AND  
DEMAND FOR JURY TRIAL**

COME NOW the defendants, by and through their attorney of record, Jennifer Kauth Brizee of Tolman, Brizee & Martens, P.C., and in answer to plaintiff's complaint, admit, deny and allege as follows:

### INTRODUCTION

The following defenses are not stated separately as to each claim for relief or allegation of the plaintiff. Nevertheless, the following defenses are applicable, where appropriate, to any and all of plaintiff's claims for relief. These answering defendants, in asserting the following defenses, do not admit that the burden of proving the allegations or denials contained in the defenses are upon defendants, but, to the contrary, assert that by reason of said denials, and by reason of relevant statutory and judicial authority, the burden of proving the facts relevant to many of the defenses and the burden of proving the inverse of the allegations contained in many of the defenses is upon the plaintiff. Moreover, defendants do not admit, in asserting any defense, any responsibility or liability on their part but, to the contrary, specifically deny any and all allegations of responsibility and liability contained in plaintiff's complaint.

### FIRST DEFENSE

#### I.

Plaintiff's complaint fails to state a cause of action upon which relief may be granted and as such, should be dismissed pursuant to I.R.C.P. 12(b)(6).

#### II.

Defendants deny each and every allegation and/or paragraph contained within plaintiff's complaint unless specifically admitted herein.

#### III.

Defendants admit an automobile collision occurred on May 12, 2004, at the intersection of Highway 26 and Ammon Road. Defendants deny the remainder of the allegations contained in this paragraph of plaintiff's complaint.

**IV.**

Defendants are without sufficient information, knowledge and/or belief with which to admit the allegations contained within paragraph 2 of plaintiff's complaint and as such, deny the same on that basis at this time.

**V.**

Defendants admit paragraph 3 of plaintiff's complaint.

**VI.**

In answering paragraph 6 of plaintiff's complaint, it is admitted that on or about May 12, 2004, plaintiff LeeAnn Craig was the driver of a vehicle traveling northbound on Ammon Road. It is also admitted Steven John Gellings was operating a loaded potato truck traveling eastbound on U.S. Highway 26. It is further admitted a collision occurred between these two vehicles at the intersection of Ammon Road and U.S. Highway 26. Defendants deny the remainder of the allegations set forth in paragraph 6.

**VII.**

Since the allegations in paragraphs 7 and 10 constitute reallegations of previous paragraphs, defendants reallege their answers to said allegations as if set forth fully herein.

**VIII.**

In answering paragraph 11 of plaintiff's complaint, defendants admit only that the potato truck involved in the subject collision was owned by Wattenbarger Farms. Defendants deny the remainder of the allegations set forth in paragraph 11.



**IX.**

In answering paragraph 12 of plaintiff's complaint, defendants admit Steven John Gellings was operating the potato truck with the permission of DeVerl Wattenbarger. Defendants deny the remainder of the allegations set forth in paragraph 12.

**X.**

Since the allegations in paragraph 15 constitute reallegations of previous paragraphs, defendant realleges its answers to said allegations as if set forth fully herein.

**REQUEST FOR ATTORNEY'S FEES**

The defendants have been required to retain the services of an attorney in order to defend against plaintiff's complaint and are entitled to reasonable attorney's fees and costs of suit pursuant to Idaho Code §§ 12-120, 12-121 and Rule 54 of the Idaho Rules of Civil Procedure and other state and federal statutes and/or regulations which may be applicable.

**FIRST AFFIRMATIVE DEFENSE**

Idaho Code § 6-801 is or may be applicable to this action.

**SECOND AFFIRMATIVE DEFENSE**

Plaintiff failed to take appropriate action to mitigate the alleged damages she claims to have sustained.

**THIRD AFFIRMATIVE DEFENSE**

The negligence of plaintiff in connection with the matters and damages at issue herein proximately caused and contributed to said matters and resultant damages, and said negligence is greater than or equal to the negligence of defendants, if any. By

asserting this defense, defendants do not admit any negligence or breach of duty, and to the contrary, deny all allegations of negligence or breach of duty.

**FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's damages, if any, were proximately caused by the superseding, intervening, negligence, omissions or actions of other third persons, parties and/or causes, and any negligence or breach of duty on the part of defendants, if any, was not a proximate cause of the alleged loss to plaintiff. By asserting this defense, defendants do not admit any negligence or breach of duty, and to the contrary, deny all allegations of negligence or breach of duty.

**FIFTH AFFIRMATIVE DEFENSE**

Plaintiff cannot recover from defendants because the alleged damages stem from the conduct of plaintiff, and not from the conduct of defendants.

**SIXTH AFFIRMATIVE DEFENSE**

Any negligence or breach of duty on the part of defendants, if any, is or may be excused. By asserting this defense, defendants do not admit any negligence or breach of duty, and to the contrary, deny all allegations of negligence or breach of duty.

**SEVENTH AFFIRMATIVE DEFENSE**

Defendants allege that some or all of the injuries claimed by plaintiff pre-existed the incident alleged in the complaint and were the result of medical factors and conditions, or other emotional or mental disorders, not proximately caused by any action of defendants.

**EIGHTH AFFIRMATIVE DEFENSE**

If defendants have any liability to plaintiff, which liability defendants deny, any award made to plaintiff in this action must be reduced by the court, pursuant to Idaho

Code § 6-1606, the Collateral Source Doctrine, in the event any such award includes compensation for damages for which plaintiff has been compensated independently. Defendants are entitled to a set off against plaintiff's damages, if any, for the amount she has been compensated by any other person, entity, corporation, insurance fund or governmental program, as a result of the payments for plaintiff's care, treatment or other injuries or alleged damages.

**NINTH AFFIRMATIVE DEFENSE**

The doctrines of waiver, estoppel and/or laches may apply to bar or limit plaintiff's causes of action.

**TENTH AFFIRMATIVE DEFENSE**

As of the date of this answer, discovery is not complete and defendants have had little or no opportunity to ascertain in full, the nature and extent of plaintiff's allegations. Subsequently, discovery may disclose the existence of further and additional affirmative defenses, the right to assert, which defendants expressly claim and reserve.

WHEREFORE, defendants pray for judgment as follows:

1. That plaintiff's complaint be dismissed with prejudice and plaintiff take nothing thereby;
2. For costs incurred herein, including reasonable attorney fees; and
3. For such other and further relief as may be deemed just and proper.

DATED this 15<sup>th</sup> day of February, 2007.

TOLMAN, BRIZEE & MARTENS, P.C.

BY:   
JENNIFER KAUTH BRIZEE

**DEMAND FOR JURY TRIAL**

COME NOW defendants, Steven John Gellings, DeVerl Wattenbarger, Bart Wattenbarger, Carol Wattenbarger, and Wattenbarger Farms, by and through their attorney of record, Jennifer Kauth Brizee, and demand a twelve-person jury trial pursuant to Rule 38(b) of the Idaho Rules of Civil Procedure.

DATED this 1<sup>st</sup> day of February, 2007.

TOLMAN, BRIZEE & MARTENS, P.C.

BY:   
JENNIFER KAUTH BRIZEE

**CERTIFICATE OF DELIVERY**

I hereby certify that on this 1<sup>st</sup> day of February, 2007, I faxed and mailed a true and correct copy of the foregoing ANSWER TO COMPLAINT AND DEMAND FOR JURY TRIAL by facsimile transmission to (208) 542-6993, and by then depositing same in the United States mail, postage prepaid, in an envelope, addressed to the following:

Paul T. Curtis  
CURTIS & BROWNING, PA  
598 N. Capital Ave.  
Idaho Falls, ID 83402

  
JENNIFER KAUTH BRIZEE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

LEEANN CRAIG,	)	
	)	
Plaintiff,	)	Case No. CV-2006-2509
	)	
vs.	)	MINUTE ENTRY ON
	)	MOTION TO CONTINUE
STEVEN JOHN GELINGS,	)	TRIAL
DEVERL WATTENBARGER,	)	
BART WATTENBARGER,	)	
CAROL WATTENBARGER,	)	
and WATTENBARGER FARMS,	)	
	)	
Defendants.	)	
<hr style="border: 0.5px solid black;"/>		

May 16, 2007, at 9:30 A.M., plaintiff's motion to continue trial came on for hearing before the Honorable Gregory S. Anderson, District Judge, sitting in open court at Idaho Falls, Idaho.

Ms. Karen Konvalinka, Court Reporter, and Ms. Janie Ker, Deputy Court Clerk, were present.

Mr. Paul Curtis appeared on behalf of the plaintiff. Ms. Jennifer Brizee appeared by telephone on behalf of the defendants.

Mr. Curtis presented argument supporting plaintiff's motion. Mr. Curtis noted the plaintiff has been diagnosed with stomach cancer.

Ms. Brizee addressed the Court.

The Court granted plaintiff's motion to continue trial. The Court scheduled a jury trial for 10:00 a.m., March 4, 2008. A pre-trial conference was scheduled for 9:00 a.m., February 27, 2008.

Court was thus adjourned.

*Gregory S. Anderson*  
GREGORY S. ANDERSON  
District Judge

c: Paul Curtis  
Jennifer Brizee

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

LEEANN CRAIG,	)	
	)	
Plaintiff,	)	Case No. CV-06-2509
vs.	)	
	)	MINUTE ENTRY
STEVEN JOHN GELLINGS, DEVERL	)	
WATTENBARGER, BART	)	
WATTENBARGER, CAROL	)	
WATTENBARGER, and	)	
WATTENBARGER FARMS,	)	
	)	
Defendants.	)	
<hr/>		

January 2, 2008, at 11:45 A.M., a status conference came on for hearing before the Honorable Gregory S. Anderson, District Judge, sitting in open court at Idaho Falls, Idaho.

Ms. Karen Konvalinka, Court Reporter, and Ms. Lettie Messick, Deputy Court Clerk, were present.

Mr. Paul Curtis appeared on behalf the plaintiff. Ms. Jennifer Brizee appeared by telephone on behalf of the defendants.

The Court and counsel had a discussion regarding the status of this case. Counsel need to determine how to proceed since the plaintiff's death.

The Court continued this status conference until 8:20 a.m., January 23, 2008.

Court was thus adjourned.

Gregory S. Anderson  
GREGORY S. ANDERSON  
District Judge

c: Paul Curtis  
Jennifer Brizee

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

LEEANN CRAIG,	)	
	)	
Plaintiff,	)	Case No. CV-06-2509
vs.	)	
	)	MINUTE ENTRY
STEVEN JOHN GELLINGS, DEVERL	)	
WATTENBARGER, BART	)	
WATTENBARGER, CAROL	)	
WATTENBARGER, and	)	
WATTENBARGER FARMS,	)	
	)	
Defendants.	)	
<hr/>		

January 24, 2008, at 8:20 A.M., a status conference came on for hearing before the Honorable Gregory S. Anderson, District Judge, sitting in open court at Idaho Falls, Idaho.

Ms. Karen Konvalinka, Court Reporter, and Ms. Lettie Messick, Deputy Court Clerk, were present.

Mr. Brandon Porter appeared on behalf the plaintiff. Ms. Jennifer Brizee appeared by telephone on behalf of the defendants.

Mr. Porter updated the Court as to the status of this case and requested the trial be continued.

Ms. Brizee also agreed the trial should be continued.

The Court scheduled a hearing on defendant's motion to dismiss at 8:00 a.m., February 28, 2008.



The Court rescheduled trial for 9:00 a.m., July 15, 2008. A pre-trial conference was scheduled for 9:00 a.m., July 9, 2008.

Court was thus adjourned.

c: Paul Curtis  
Jennifer Brizee

*Gregory S. Anderson*  
GREGORY S. ANDERSON  
District Judge

BONNEVILLE COUNTY

Steven K. Tolman (ISB #1790)  
Jennifer K. Brizee (ISB #5070)  
TOLMAN & BRIZEE, P.C.  
132 3<sup>rd</sup> Avenue East  
P.O. Box 1276  
Twin Falls, Idaho 83303-1276  
Telephone: (208) 733-5566

9 01 25 10:02

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

\*\*\*\*\*

LEEANN CRAIG,

Plaintiff,

vs.

STEVEN JOHN GELLINGS,  
DEVERL WATTENBARGER,  
BART WATTENBARGER,  
CAROL WATTENBARGER,  
and WATTENBARGER FARMS,

Defendants.

Case No. CV-06-2509

**MOTION TO DISMISS**

COMES NOW the defendants, by and through their attorney of record, Tolman & Brizee, P.C., and moves the court pursuant to applicable case law and the Idaho Rules of Civil Procedure, to dismiss plaintiff's cause of action against defendants with prejudice on the grounds and for the reasons the plaintiff is now deceased and her personal injury cause of action is abated.

This motion is based upon the records, files and pleadings in the above-entitled action, together with the Memorandum in Support of Motion to Dismiss filed herewith.

Oral argument is requested.

DATED this 25<sup>th</sup> day of January, 2008.

TOLMAN & BRIZEE, P.C.

BY   
JENNIFER K. BRIZEE

**CERTIFICATE OF DELIVERY**

I hereby certify that on this 25<sup>th</sup> day of January, 2008, I faxed and mailed a true and correct copy of the foregoing MOTION TO DISMISS by faxing to (208) 542-6993 and by depositing same in the United States mail, postage prepaid, in an envelope, addressed to the following:

Paul T. Curtis  
CURTIS & BROWNING, PA  
598 N. Capital Ave.  
Idaho Falls, ID 83402

  
JENNIFER K. BRIZEE

BONNEVILLE COUNTY

Steven K. Tolman (ISB #1790)  
Jennifer K. Brizee (ISB #5070)  
TOLMAN & BRIZEE, P.C.  
132 3<sup>rd</sup> Avenue East  
P.O. Box 1276  
Twin Falls, Idaho 83303-1276  
Telephone: (208) 733-5566

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

\*\*\*\*\*

LEEANN CRAIG, )  
)  
)  
Plaintiff, )  
)  
vs. )  
)  
STEVEN JOHN GELLINGS, )  
DEVERL WATTENBARGER, )  
BART WATTENBARGER, )  
CAROL WATTENBARGER, )  
and WATTENBARGER FARMS, )  
)  
Defendants. )  
\_\_\_\_\_)

Case No. CV-06-2509

**MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS**

COMES NOW the defendants, by and through their attorney of record, Tolman & Brizee, P.C., and respectfully submit this memorandum in support of their Motion to Dismiss.

**ARGUMENT****I.****FACTUAL BACKGROUND**

The plaintiff in this matter, Leeann Craig is now deceased. She apparently died in her sleep at home this past fall. It is undisputed Ms. Craig was not married either at the time of the subject collision or at the time of her death. It is defendants' position Ms. Craig's personal injury claim has abated with her death.

**II.****PURSUANT TO IDAHO LAW, AN INDIVIDUAL'S PERSONAL INJURY CLAIM ABATES UPON HIS/HER DEATH**

In numerous cases, Idaho's appellate courts have held the common law applies, unless abrogated by statute. The common law has also been adopted in Idaho by statute. *See* I.C. 73-116. Based upon common law, then, these courts have then held an individual's claim for personal injury does not survive the plaintiff's death. *See e.g.*: *Vulk v. Haley*, 112 Idaho 855, 857, 736 P.2d 1309, 1311 (1987) ("At common law, a cause of action did not survive the death of either party and could not be continued by a representative of the decedent."); *Evans v. Twin Falls County* 118 Idaho 210, 215, 796 P.2d 87, 93 (1990) ("At common law if the victim of a tort died before he recovered a judgment, the victim's right of action also died."); *Steele v. Kootenai Medical Center*, 142 Idaho 919, 136 P.3d 905 (2006) (ruling an individual's personal injury cause of action dies unless there has been a negative impact on the community estate and there is a surviving spouse).

While the parties agree Ms. Craig's claims for pain and suffering from the subject automobile collision have abated with her death (*see e.g.*, *Vulk v. Haley*, 112 Idaho at

859, 736 P.2d at 1313), the parties are in disagreement as to whether Ms. Craig's claims for special damages have abated with her death.

The most recent case regarding this issue is Steele v. Kootenai Medical Center, 142 Idaho 919, 136 P.3d 905 (2006). In Steele, the plaintiff sued numerous defendants for medical malpractice. The hospital successfully filed a motion to dismiss on the basis the plaintiff had failed to fulfill the notice requirements of the Idaho Tort Claims Act. The plaintiff appealed this dismissal, but died before the appellate process had been completed. *Id.* 142 Idaho at 920, 136 P.2d at 906.

The hospital moved to dismiss the appeal due to the plaintiff's death, and argued the plaintiff's cause of action abated with his death. *Id.* The Steele court reviewed the common law holding and analysis, and then clarified the community property exception that had arisen based upon Idaho Code §32-906 and the case of Doggett v. Boiler Engineering & Supply Co., 93 Idaho 888, 477 P.2d 511 (1970). The court explained that when an injured spouse dies, his/her personal injury claim may survive if there has been "a depletion of community assets, reduction of the ability of the community to earn income, and costs and expenses chargeable against the community property arising from the injury to the deceased spouse prior to his or her death." *Id.* 142 Idaho at 920-21, 136 P.2d at 906-07.

The Steele court then went on to rule: "In this case, Steele did not leave a surviving spouse. Therefore, his cause of action alleged in this case abated upon his death in July 2005." *Id.* 142 Idaho at 921, 136 P.2d at 907.<sup>1</sup>

---

<sup>1</sup> Procedurally, the court declined to dismiss the appeal because it ruled the district court had erred in dismissing the claim against the hospital, and instead of dismissing the appeal, remanded to district court to allow an opportunity to amend the complaint to allege a wrongful death claim. *Id.* 142 Idaho at 921, 136 P.2d at 907.

In Evans v. Twin Falls County, 118 Idaho 210, 796 P.2d 87 (1990), the plaintiffs, Mr. and Mrs. Evans, brought claims against Twin Falls County for violation of their constitutional rights, assault and battery, false arrest and interference with contract. During the litigation, Mrs. Evans died, and her estate was substituted in as a party. *Id.* 118 Idaho at 211, 796 P.2d at 87. One of the claims involved an allegation wherein a deputy grabbed Mrs. Evans' arms, twisted them, forcing her downward and knocking her glasses off her face. *Id.* Mrs. Evans also claimed she suffered hyperventilation and acute anxiety, for which she sought and received medical attention. *Id.* She also claimed she subsequently suffered from headaches and backaches which she attributed to the incident. *Id.* 118 Idaho at 212, 796P.2d at 88. She was also diagnosed with a shoulder injury. *Id.*

Mr. and Mrs. Evans claimed damages for emotional distress, punitive damages, and special damages for medical expenses and lost wages. *Id.*

Subsequent to Mrs. Evans' death, the defendants' moved for summary judgment. The district court ruled Mrs. Evans' claims for assault and battery "and the consequent physical and emotional injury and pain" was "personal to Mrs. Evans and therefore did not survive her death." *Id.* Mr. Evans appealed.

On appeal, the Idaho Supreme Court upheld the dismissal of Mrs. Evans' personal injury claims, which included the tort of assault and battery and economic damages in the form of medical expenses. While the Evans court cited case law and discussed the applicable case law in terms of whether the decedent's claims for general damages could continue, it is clear Mrs. Evans' claims included special damages. The Evans court's analysis includes a lengthy discussion of non-economic damages because Mr. Evans had raised the case of Doggett v. Boiler Engineering & Supply Co.,

93 Idaho 888, 477 P.2d 511 (1970) in his appeal. The Evans court took this opportunity to clarify the inconsistency between the Doggett opinion and the more recent decision in Rogers v. Yellowstone Park Co., 97 Idaho 14, 539 P.2d 566 (1975), which overruled Doggett on the issue of whether pain and suffering is community property or separate property.

Ironically, it must be noted, Doggett dealt with more claims in addition to pain and suffering. Doggett was the watershed case that allowed a personal injury claim to continue via a spouse so long as "there has been alleged, and the applicant can prove, damage to the community by way of depletion of community assets, reduction of the ability of the community to earn income, costs and expense chargeable against community property...."Doggett, 93 Idaho at 892, 477 P.2d at 515. While the Doggett court acknowledged the common law rule of non-survival of a personal injury claim, recognized the common law had been adopted by Idaho, and agreed the common law could only be abrogated by the Idaho Legislature, it deemed the Idaho Legislature's adoption of community property laws to be an abrogation of the common law. Id. 93 Idaho at 889-91, 477 P.2d at 512-14. Clearly, the Doggett ruling is limited to those scenarios wherein a spouse exists, since it had to rely on Idaho's community property statute to abrogate common law.

Most certainly, the Doggett court would not have needed to create this exception, if the rule had not been, and still is, that an individual's personal injury claim abates with his or her death.

Again, in the case at bar, Ms. Craig was not married either at the time of the subject collision or at the time of her death. Therefore, the common law rule applies, and her personal injury claim has abated.



**CONCLUSION**

Based upon the foregoing, defendants respectfully request Ms. Craig's personal injury claim be dismissed, with prejudice, as required by the applicable law of the state of Idaho.

Oral argument is requested.

DATED this 25<sup>th</sup> day of January, 2008.

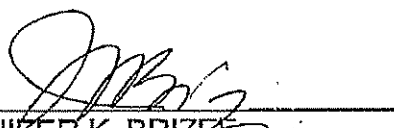
TOLMAN & BRIZEE

BY   
JENNIFER K. BRIZEE

**CERTIFICATE OF DELIVERY**

I hereby certify that on this 25<sup>th</sup> day of January, 2008, I faxed and mailed a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DISMISS by faxing to (208) 542-6993 and by then depositing same in the United States mail, postage prepaid, in an envelope, addressed to the following:

Paul T. Curtis  
CURTIS & BROWNING, PA.  
598 N. Capital Ave.  
Idaho Falls, ID 83402

  
JENNIFER K. BRIZEE

Steven K. Tolman (ISB #1790)  
Jennifer K. Brizee (ISB #5070)  
TOLMAN & BRIZEE, P.C.  
132 3<sup>rd</sup> Avenue East  
P.O. Box 1276  
Twin Falls, Idaho 83303-1276  
Telephone: (208) 733-5566

2008 FEB 25 PM 3:57

DISTRICT COURT  
MAGISTRATE DIVISION  
BONNEVILLE COUNTY  
IDAHO

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE.

\*\*\*\*\*

LEEANN CRAIG, )  
 )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 STEVEN JOHN GELLINGS, )  
 DEVERL WATTENBARGER, )  
 BART WATTENBARGER, )  
 CAROL WATTENBARGER, )  
 and WATTENBARGER FARMS, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

Case No. CV-06-2509

**REPLY**  
**MEMORANDUM IN SUPPORT OF**  
**MOTION TO DISMISS**

COME NOW the defendants, by and through their attorney of record, Tolman & Brizee, P.C., and respectfully submit this reply memorandum in support of their Motion to Dismiss.

### **ARGUMENT**

In their opening memorandum, defendants outlined for this court recent case law in support of their position an individual's entire cause of action for personal injury abates with an individual's death, unless there is a spouse, and evidence the assets of the marital community have been depleted.

Plaintiff has only responded by arguing a 1919 case and a 1926 case control on this issue. Plaintiff has ignored the recent cases of Steele v. Kootenai Medical Center, 142 Idaho 919, 136 P.3d 905 (2006), and Evans v. Twin Falls County 118 Idaho 210, 215, 796 P.2d 87, 93 (1990). Both of these recent cases hold an individual's personal injury action abates with his/her death. Both of these cases included components of noneconomic and economic damages. Defendants submit the case law on this issue is clear.

The two old cases plaintiff relies upon on are distinguishable and/or have been effectively overruled by the Idaho Supreme Court's recent opinions.

In plaintiff's first case, Kloepfer v. Forch, 32 Idaho 415 (1919), it was the defendant who died during litigation, not the plaintiff. *Id.* at 417 (the defendant Jacob Forch died, and the issue was whether the cause of action could continue against the executor of his estate). Therefore, this case is distinguishable, and should not be relied upon in determination of the issue in the case at bar, which involves the death of the plaintiff. Further, while it is difficult to discern due to the archaic language of the opinion, it appears the Kloepfer case involved a breach of contract claim, with a fraud claim. This case involved damage to crops as a result of the sale by the defendant to the plaintiffs of the wrong chemical. *Id.* at 417 This did not involve a "personal injury" in today's sense of the phrase. It involved only a property damage claim.

In fact, this is clearly spelled out further in the opinion, where the court distinguishes between causes of action "*ex delicto*"<sup>1</sup> and causes of action "*ex contractu*."<sup>2</sup> The *Kloepfer* court stated: "As a general rule, in the absence of a statute providing otherwise, causes of action *ex contractu* survive while causes of action *ex delicto* do not." *Id.* at 418. The *Kloepfer* court then concluded the subject cause of action was for breach of contract, and therefore, did survive. *Id.* In doing so, the court again reiterated that personal injury actions do not survive death:

The injury for which recovery is sought grows out of the contract of purchase of sodium arsenate represented by the vendor to be sodium arsenite, and the application thereof to the crops of appellant and his assignors whereby those specific pieces of property were destroyed. These facts distinguish this case from those where recovery is sought for injury to the person or for torts resulting in damage to the estate, generally, and make these claims assignable and cause them to survive the death of a party to the action.

*Id.* (emphasis added)

Therefore, *Kloepfer* actually supports defendants Wattenbargers' position in the case before this court, since it states contract actions can survive death, but personal injury claims do not. Defendants submit the emphasized phrase above also shows even if there is damage to a decedent's estate due to the tort, this still does not survive the death of the plaintiff.

Plaintiff's second case, *McLeod v. Stelle et al*, 43 Idaho 64 (1926), involved a claim of fraud in the sale of stock of a company, based upon misrepresentations relative to the amount of property held by the subject corporation. *Id.* at 69. The real

---

<sup>1</sup> The term "ex" is a Latin preposition meaning "from, out of, by, on account of, or according to." The term "delictum" is also Latin, and means "a delict, tort, wrong or offense." Under the definition of "delictum" in Black's Law Dictionary, there is the statement: "Actions *ex delicto* are such as are founded in tort, as distinguished from actions on contract." *Black's Law Dictionary*, abridged sixth edition, 1993.

<sup>2</sup> The term "contractus" is Latin meaning contract. *Id.*

issue to be decided by the court was whether the plaintiff could represent 31 other claimants through an assignment. *Id.* No one had died. However, the court did refer to *Kloepfer, supra*, in its discussion of assignability. Interestingly, the *McLeod* court, in referring to the *Kloepfer* opinion, reiterated "actions of a personal nature are not assignable." *Id.* at 75. This court also distinguished between personal injuries, and, it appears, contractual damages:

The later, and to me the better considered, cases have tended toward, and many of them have reached, the conclusion that the injuries of a personal nature which do not survive are such as injury to a person, malicious prosecution, false imprisonment, libel, slander, and the like; and that an injury which lessens the estate of the injured party does survive and is thus assignable. ... I think that the statute is but a statement of the principle which should control our decision, even in its absence, and that an injury such as alleged herein does diminish the estate, **is an injury to property**, survives and is assignable.

*Id.* at 75 (emphasis added).

It appears plaintiff in the case at bar may be misinterpreting the phrase "injury which lessens the estate of the injured party" in the above-outlined paragraph from the *McLeod* court's opinion. Clearly, the court is, again, distinguishing between a personal injury cause of action, and a cause of action that can be deemed to be damage to "property" (ie the stocks purchased).

Plaintiff also cites to the case *Doggett v. Boiler Engineering & Supply Co.*, 93 Idaho 888, 477 P.2d 511 (1970). However, plaintiff merely pulls from this opinion part of a citation of a Michigan law review journal article authored by an individual who does not agree with the current status of the law which calls for abatement of a personal injury action upon death. This criticism merely shows the current status of the law, and does not, itself, provide any precedential case law.

Plaintiff cites to the court only part of the language included at 93 Idaho 890

when she represents: "The Idaho Supreme Court overruled the concept that "an action ex delicto abates upon the death of the plaintiff." See page 2 of Opposition to Defendants Motion to Dismiss. The full quotation qualifies the court's reference to abatement to ensure its opinion is only applied to plaintiffs in the same situation as the plaintiff in Doggett (ie plaintiffs who leave behind a spouse): "In any event, to the extent that *Bullock* suggests that an action ex delicto abates upon the death of the plaintiff **in a case such as presented herein**, it is overruled." *Id.* 93 Idaho 890 (emphasis added).

Furthermore, plaintiff ignores the actual ruling of the Doggett court, which relates only to circumstances involving community assets:

We hold therefore, that to the extent there has been alleged, and the appellant can prove, damage to the community by way of depletion of community assets, reduction of the ability of the community to earn income, costs and expenses chargeable against community property, and the general damages for pain and suffering, such cause of action survives the death of the deceased spouse **and no other person** and the damages are restricted to those which accrued prior to the death of Doggett.

*Id.* at 892 (emphasis added).<sup>3</sup>

Plaintiff further ignores the clear holding of Steele, *supra*, which clarified the Doggett court's holding, and limited its application, again, to community property scenarios. Steele, 142 Idaho at 920-21, 136 P.2d at 906-07.

Specifically, the Steele court then went on to rule: "**In this case, Steele did not leave a surviving spouse. Therefore, his cause of action alleged in this case abated upon his death in July 2005.**" *Id.* 142 Idaho at 921, 136 P.2d at 907 (emphasis added).

---

<sup>3</sup>As previously discussed, in Steele, the court clarified general damages do not survive the death of an individual, even if there is a community property estate.

Defendants submit, again, Idaho case law is clear, upon the death of an unmarried individual, even if special damages are alleged, his/her cause of action of personal injury abates. This is the law of the state of Idaho until the Idaho Legislature sees fit to amend the same.

**CONCLUSION**

Based upon the foregoing, defendants respectfully request Ms. Craig's personal injury claim be dismissed, with prejudice, as required by the applicable law of the state of Idaho.

Oral argument is requested.

DATED this 25<sup>th</sup> day of February, 2008.

TOLMAN & BRIZEE

BY   
JENNIFER K. BRIZEE

**CERTIFICATE OF DELIVERY**

I hereby certify that on this 25<sup>th</sup> day of February, 2008, I faxed and mailed a true and correct copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS by faxing to (208) 542-6993 and by then depositing same in the United States mail, postage prepaid, in an envelope, addressed to the following:

Paul T. Curtis  
CURTIS & BROWNING, PA  
598 N. Capital Ave.  
Idaho Falls, ID 83402

  
\_\_\_\_\_  
JENNIFER K. BRIZEE



THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE  
OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

2008 MAR 13 11:30 AM  
DISTRICT COURT  
7TH JUDICIAL DISTRICT  
BONNEVILLE COUNTY ID

LEEANN CRAIG,

Plaintiff,

-vs.-

STEVEN JOHN GELLINGS, DEVERL  
WATTENBARGER, BART  
WATTENBARGER, CAROL  
WATTENBARGER and  
WATTENBARGER FARMS,

Defendants.

Case No. CV-06-2509

**MEMORANDUM DECISION RE:  
MOTION TO DISMISS**

**I. FACTUAL AND PROCEDURAL BACKGROUND**

LeeAnn Craig and Steven John Gellings were involved in an automobile accident on May 12, 2004, in Bonneville County, Idaho.

DeVerl Wattenbarger, Bart Wattenbarger, Carol Wattenbarger and/or Wattenbarger Farms owned the vehicle Gellings was driving at the time of the accident.

Craig filed a complaint commencing this case on May 4, 2006. Craig's complaint sought damages for pain and suffering, bodily injuries, lost wages, loss of future earnings, property damage and other special damages.

Sometime during Fall 2007, Craig passed away from causes unrelated to the accident at issue in this case. She did not leave a surviving spouse.

Defendants filed a Motion to Dismiss on January 25, 2008.

On February 14, 2008, counsel for Plaintiff filed an Opposition to Defendant's Motion to Dismiss.

Defendants filed a Reply Memorandum on February 25, 2008.

## II. DISCUSSION

Both parties agree Craig's claims for pain and suffering abated with her death.

Defendants argue Craig's economic damages also abate upon her death.

Defendants cite *Steele v. Kootenai Medical Center*, 142 Idaho 919, 136 P.3d 905 (2006), for the proposition an action for economic damages only survives the death of the plaintiff if the community property of the plaintiff's surviving spouse is adversely impacted by the damage.

Plaintiff responds *MacLeod v. Stelle*, 43 Idaho 64, 249 P. 254 (1926), holds an injury which lessens the value of the injured party's estate does not abate.

Unless modified by statute, the common law is in effect in Idaho. *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990). "Under the common law, a cause of action for personal injuries ceased to exist upon the death of the person injured." *Steele*, 142 Idaho at 920, 136 P.3d at 906.

The Idaho Supreme Court has explained:

The common law rule precluding any claim on behalf of the relatives or dependents of a deceased person was modified in 1881 by the enactment of I.C. § 5-311, which provided:

5-311. Action for wrongful death.--When the death of a person . . . is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death;  
.....

Statutes similar to I.C. § 5-311 have been enacted in nearly every other state and were modeled after the Lord Campbell's Act, adopted in England in 1846. See McCormick, *Damages* § 93 (1982).

However, the Idaho legislature has not enacted any statute specifically abrogating the common law rule of non-survival of causes of action *ex delicto* in cases where the victim dies before recovery. . . .

*Evans v. Twin Falls County*, 118 Idaho 210, 215, 796 P.2d 87, 92 (1990). This is not a wrongful death action, and Idaho Code § 5-311 does not apply to Craig's claim.

In *Steele*, the plaintiff filed a lawsuit against Kootenai Medical Center seeking to recover for medical negligence. The district court dismissed Steele's complaint for failure to give notice to the Medical Center of his tort claim within the time period required by Idaho Code § 6-906. Steele appealed the district court's dismissal, but died while the appeal was pending. The Medical Center moved to dismiss the appeal on the basis Steele's cause of action abated with his death. The Idaho Supreme Court held:

Idaho Code § 5-319 provides, "An action or proceeding does not abate by the death . . . of a party . . . if the cause of action or proceeding survive or continue." The legislature has adopted the common law of England as the rule of decision unless otherwise provided for. I.C. § 73-116. Under the common law, a cause of action for personal injuries ceased to exist upon the death of the person injured. *Doggett v. Boiler Engineering & Supply Co.*, 93 Idaho 888, 477 P.2d 511 (1970). We have held, however, that the common-law rule was impliedly modified by Idaho Code § 32-906, which created a co-equal interest in both spouses to community property. When the injured spouse dies, his or her claim survives to the extent that the surviving spouse is entitled to recover damages for depletion of community assets, reduction of the ability of the community to earn income, and costs and expenses chargeable against community property arising from the injury to the deceased spouse prior to his or her death. *Id.*; *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990). *In this case, Steele did not leave a surviving spouse. Therefore, his cause of action alleged in this case abated upon his death in July 2005.*

*Steele*, 142 Idaho at 21, 136 P.3d at 907 (emphasis added).

Craig did not leave a surviving spouse. Therefore, her cause of action abated upon her death.

In *MacLeod*, the Idaho Supreme Court held:

The assignability of a cause of action is by the authorities intimately associated with, and in most cases held to depend upon, the same principle as the survival of a cause of action. Thus, if it survives, it may be assigned; if not, it may not. C. S. § 6652. Broadly stated and referred to in *Kloepfer v. Forch*, supra, actions of a personal nature are not assignable. A long line of authorities has established this principle. Some cases have held that an injury suffered by fraud, false representations, or deceit, is of such personal nature, does not survive, and is not assignable. This was not involved in the Kloepfer Case, and not therein decided or necessary to the decision. The later, and to me the better considered, cases have tended toward, and many of them have reached, the conclusion that the injuries of a personal nature which do not survive are such as injury to person, malicious prosecution, false imprisonment, libel, slander, and the like; and that an injury which lessens the estate of the injured party does survive, and thus is assignable. While the New York cases cited at 23 Cyc. 409, are decided under a statute which defines injury to property, yet this statute was adopted in 1876, and these authorities have been widely cited as sustaining the principle that an injury suffered through fraud, false representations, or deceit, resulting in the diminution of the estate of the injured party, survives and is assignable. I think that the statute is but a statement of the principle which should control our decision, even in its absence, and that an injury such as alleged herein does diminish the estate, is an injury to property, survives, and is assignable. C. S. § 5364; . . . .

*Id.* at 67, 249 P. at 257.

*MacLeod* addressed whether claims of fraud, not personal injury, were assignable and is, therefore, distinguishable from this case. Furthermore, subsequent to *MacLeod*, the United States District Court, applying Idaho law, held “hospital bills, doctors’ bills, claims for lost wages, and claims for pain and suffering were purely personal and did not survive at common law.” *Estate of Shaw v. Dauphin Graphic Machines, Inc.*, 392 F. Supp. 2d 1230, 1233 (D. Idaho 2005) (citing *Moon v. Bullock*, 65 Idaho 594, 601, 151 P.2d 765, 772 (1944)).

The common law rule, as it applies in this case, has not been abrogated by statute in Idaho. Consequently, plaintiff’s cause of action against Defendants for economic damages stemming from the May 12, 2004, accident does not survive her death.

### III. CONCLUSION

Defendants' motion to dismiss this action with prejudice should be granted.

DATED this 13<sup>th</sup> day of March 2008.

*Gregory S. Anderson*  
\_\_\_\_\_  
GREGORY S. ANDERSON  
District Judge


CERTIFICATE OF SERVICE

I hereby certify that on this 13<sup>th</sup> day of March 2008, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Paul T. Curtis  
CURTIS & BROWNING  
598 N. Capital Ave.  
Idaho Falls, ID 83402

Jennifer K. Brizee  
TOLMAN & BRIZEE  
P.O. Box 1276  
Twin Falls, ID 83303

RONALD LONGMORE  
Clerk of the District Court  
Bonneville County, Idaho

By:   
Deputy Clerk

THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE  
OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

2008 MAR 13 PM 3:16

LEEANN CRAIG, )  
 )  
 Plaintiff, )  
 )  
 -vs.- )  
 )  
 STEVEN JOHN GELLINGS, DEVERL )  
 WATTENBARGER, BART )  
 WATTENBARGER, CAROL )  
 WATTENBARGER and )  
 WATTENBARGER FARMS, )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

DISTRICT COURT  
7TH JUDICIAL DISTRICT  
BONNEVILLE COUNTY ID  
Case No. CV-06-2509

**ORDER RE: MOTION TO DISMISS**

This cause having come before this Court pursuant to Defendants' January 25, 2008, motion to dismiss, and this Court being fully advised in the premises, and good cause appearing;

NOW, THEREFORE: Plaintiff's complaint is dismissed with prejudiced.

DATED this 13<sup>th</sup> day of March 2008.

Gregory S. Anderson  
GREGORY S. ANDERSON  
District Judge

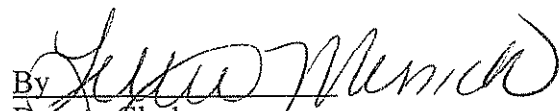
CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of March 2008, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Paul T. Curtis  
CURTIS & BROWNING  
598 N. Capital Ave.  
Idaho Falls, ID 83402

Jennifer K. Brizee  
TOLMAN & BRIZEE  
P.O. Box 1276  
Twin Falls, ID 83303

RONALD LONGMORE  
Clerk of the District Court  
Bonneville County, Idaho

By   
Deputy Clerk



2006 JUN 27 10:59

Steven K. Tolman (ISB #1790)  
Jennifer K. Brizee (ISB #5070)  
TOLMAN & BRIZEE, P.C.  
132 3<sup>rd</sup> Avenue East  
P.O. Box 1276  
Twin Falls, Idaho 83303-1276  
Telephone: (208) 733-5566

Attorney for Defendants

ORIGINAL

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

\*\*\*\*\*

LEEANN CRAIG,

Plaintiff,

vs.

STEVEN JOHN GELLINGS,  
DEVERL WATTENBARGER,  
BART WATTENBARGER,  
CAROL WATTENBARGER,  
and WATTENBARGER FARMS,

Defendants.

Case No. CV-06-2509

**MEMORANDUM IN SUPPORT OF  
DEFENDANTS' MEMORANDUM  
OF COSTS, DISBURSEMENTS  
AND ATTORNEY'S FEES**

COMES NOW the defendants, by and through their counsel of record, Tolman & Brizee, P.C., and respectfully submits this memorandum in support of their memorandum of costs, disbursements and attorney's fees.

## ARGUMENT

### I.

#### DEFENDANT IS ENTITLED TO COSTS UNDER IDAHO RULE OF CIVIL PROCEDURE 54(d)(1)

Idaho Rule of Civil Procedure 54(d)(1) states that costs shall be allowed "as a matter of right" to the prevailing party, unless otherwise ordered by the court. IRCP 54(d)(1)(A).

Preliminary to awarding costs under this rule, the Court must find defendant was the prevailing party. Rule 54(d)(1)(B) provides the Court with the following instructions:

*In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties, whether there were multiple claims, multiple issues, counterclaims, third party claims, cross-claims, or other multiple or cross issues between the parties, and the extent to which each party prevailed upon each of such issue or claims. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.*

IRCP 54(d)(1)(B).

It is clear from the record that the defendant was the prevailing party in this litigation. The Court granted defendants' motion to dismiss this matter due to the death of plaintiff, and submitted a final Order dismissing the claims with prejudice. See Exhibit A.

Defendants, therefore, request this Court award them their costs as a matter of right, pursuant to Idaho Rule of Civil Procedure 54(d)(1)(C), as outlined in the Defendants; Memorandum of Costs, Disbursements and Attorney's Fees and Affidavit of Jennifer K. Brizee in Support of Defendants' Memorandum of Costs, Disbursements and Attorney's

Fees, filed contemporaneously herewith. Defendants' costs as a matter of right total \$815.50.

Idaho Rule of Civil Procedure 54(d)(1)(D) allows the Court to award discretionary costs in addition to costs as a matter of right. Based upon the nature of this litigation, and the fact Idaho case law is clear a plaintiff's entire cause of action abates upon his/her death, defendants submit discretionary costs are warranted in this case, and requests the Court award the discretionary costs listed in Defendants' Memorandum of Costs, Disbursements and Attorney's Fees. Defendants are only requesting costs incurred after the death of the plaintiff, which death occurred either on the evening of September 30, 2007, or the early morning hours of October 1, 2007. Defense counsel was not notified of the death until October 2, 2007. See Affidavit of Jennifer K. Brizee. A review shows these costs were necessary, exceptional and reasonably incurred. See also Affidavit of Jennifer K. Brizee. These costs should be awarded to defendants in the interest of justice, especially given the efforts by defense counsel to attempt to informally resolve the issue of the impact of the death of plaintiff, and plaintiff's continued pursuit of this matter. Defendants have requested a total of \$882.51 in discretionary costs, excluding attorney fees.

## II.

### **AWARD OF ATTORNEY'S FEES IS APPROPRIATE UNDER IDAHO CODE § 12-121 AND IDAHO RULE OF CIVIL PROCEDURE 54(e)(1)**

Defendants submit they are entitled to attorney's fees pursuant to Idaho Code §12-121 and Idaho Rule of Civil Procedure 54(e)(1). Rule 54(e)(1) provides that attorney's fees may be awarded by the court when it finds the case was brought or pursued frivolously, unreasonably or without foundation.

In this case, the plaintiff died either on the evening of September 30, 2007, or in the early morning hours of October 1, 2007. Defense counsel was notified of this death on October 2, 2007. From this initial conversation, defense counsel began discussions with plaintiff's counsel as to whether any portion of plaintiff's cause of action could continue after the death. These discussions were ongoing. See Affidavit of Jennifer K. Brizee. Defense counsel also sent to plaintiff's counsel an informal letter outlining the clear case law supporting defendants' position. See letter of January 4, 2008, from Jennifer K. Brizee to Paul Curtis, attached hereto as Exhibit B. See Affidavit of Jennifer K. Brizee. Plaintiff's counsel responded in a letter of January 8, 2008, and retained his original unsupportable position. See January 8, 2008, letter from Paul Curtis to Jennifer K. Brizee, attached hereto as Exhibit C.

Despite the clear letter of the law, plaintiff's counsel and/or survivors and/or estate opted to continue with this litigation. Out of necessity, defendants were required to continue to defend this matter, and, ultimately, file a formal motion to dismiss. It is defendants' position the law of Idaho is clear on the issue involved, plaintiff's position was not supported by Idaho law, and plaintiff's position did not include any argument or support for a change in Idaho law. Therefore, defendants submit the continued pursuit of this matter after the death of the plaintiff was frivolous, unreasonable and without foundation. Defendants should not be forced to bear the financial burden of defending such a lawsuit after the death of the plaintiff.

Attorney's fees have been awarded in other cases. See e.g., Hough v. Fry, 131 Idaho 230, 953 P.2d 980 (1998). Whether such fees should be awarded is within the

discretion of the trial court. Landvik By Landvik v. Herbert, 130 Idaho 54, 61, 936 P.2d 697, 704 (Ct.App. 1997).

**CONCLUSION**

Based upon the foregoing, Defendants respectfully request this Court grant the costs and attorney's fees they have incurred in defending this matter.

DATED this 20<sup>th</sup> day of March, 2008.

TOLMAN & BRIZEE, P.C.

BY:   
JENNIFER K. BRIZEE

**CERTIFICATE OF DELIVERY**

I hereby certify that on this 20<sup>th</sup> day of March, 2008, I shipped via overnight delivery with Federal Express a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF DEFENDANT'S MEMORANDUM OF COSTS, DISBURSEMENTS AND ATTORNEY'S FEES in an envelope, addressed to the following:

Paul T. Curtis  
CURTIS & BROWNING, PA  
598 N. Capital Ave.  
Idaho Falls, ID 83402

  
JENNIFER K. BRIZEE

Paul T. Curtis, SBN #6042  
CURTIS & BROWNING, PA  
598 N. Capital Ave.  
Idaho Falls, ID 83402  
Telephone: (208) 542-6995  
Facsimile: (208) 542-6993

2007 FEB 16 PM 1:16

*Attorney for Plaintiff*

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
IN AND FOR THE STATE OF IDAHO, COUNTY OF BONNEVILLE

LEEANN CRAIG,	)	Case No.: CV-2006-2509
	)	
	)	OPPOSITION TO DEFENDANT'S
Plaintiff,	)	MOTION TO DISMISS
	)	
vs.	)	
	)	
STEVEN JOHN GELLINGS,	)	
DEVERL WATTENBARGER,	)	
BART WATTENBARGER,	)	
CAROL WATTENBARGER,	)	
and WATTENBARGER FARMS,	)	
	)	
Defendants.	)	
_____	)	

COMES NOW, Plaintiff LEEANN CRAIG, by and through her attorney of record, Paul T. Curtis of CURTIS & BROWNING, PA, and hereby files this Opposition to Defendant's Motion to Dismiss as follows:

On October 1, 2007, Plaintiff LEEANN CRAIG died. Defendant has moved to dismiss the entire action on the basis that none of her claims survive her death because she was not married at the time of her death. It is apparently the law that plaintiff's claim for pain and

OPPOSITION TO DEFENDANTS MOTION TO DISMISS

suffering abated at the time of her death. However, plaintiff's claims for economic damages survives and is assignable to her personal representative to pursue. Plaintiff's attorney has moved to amend the complaint to substitute the personal representative of the estate of Leeann Craig as the plaintiff in this action to pursue the economic damages sustained by Leeann Craig in the underlying motor vehicle accident.

Plaintiff relies on long-standing precedent, i.e., *MacLeod v. Stelle*, 43 Idaho 64, 249 P. 254 (1926), referenced with I.R.C.P. Rules, Annotated, Rule 25(a)(2), which holds that in personal injury actions, injury which lessens the estate of the injured party does survive and is thus assignable. "Assignability and survivability are convertible terms at common law." *H.P. Kloepfer v. Jacob Forch*, 32 Idaho 415, 184 P. 477 (1919).

The Idaho Supreme Court overruled the concept that "an action ex delicto abates upon the death of the plaintiff." See *Doggett v. Boiler Engineering & Supply Co.*, 93 Idaho 888, 890; 477 p.2D 511, (1970). The same case, same page, citing the Michigan Law Review, the Court quoted "that it is almost "inconceivable" that we should continue to deny survival of actions where the estate of the injured person has been lessened." The community property issue relied upon by the defendant in the present action is an issue separate and distinct from the above rule and not relevant to this action.

In the present case the plaintiff has alleged to have suffered "special damages" as a result of this accident. Obviously, economic damages are going to affect the estate of the deceased plaintiff, whether they involve property damage, medical bills or wage loss. Such economic damages are assignable and, as such, survive the death of the plaintiff.


DATED this 14 day of February, 2008.

  
Paul T. Curtis

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 14 day of February, 2008, I caused to be served a true and correct copy of the foregoing OPPOSITION TO DEFENDANTS MOTION TO DISMISS, in the above-referenced matter by the method indicated below and addressed to the following:

Jennifer Kauth Brizee, Esq.	<input type="checkbox"/> Mail
TOLMAN, BRIZEE & MARTENS, P.C.	<input type="checkbox"/> Hand Delivery
P.O. Box 1276	<input checked="" type="checkbox"/> Facsimile (208) 733-5444
Twin Falls, ID 83303-1276	<input type="checkbox"/> Overnight Mail

  
Paul T. Curtis, Esq.



ORIGINAL

BONNEVILLE COUNTY  
IDAHO

Steven K. Tolman (ISB #1790)  
Jennifer K. Brizee (ISB #5070)  
TOLMAN & BRIZEE, P.C.  
132 3<sup>rd</sup> Avenue East  
P.O. Box 1276  
Twin Falls, Idaho 83303-1276  
Telephone: (208) 733-5566

8 MAR 27 10:59

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

\*\*\*\*\*

LEEANN CRAIG,	)	
	)	Case No. CV-06-2509
	)	
Plaintiff,	)	<b><u>DEFENDANTS' MEMORANDUM OF</u></b>
	)	<b><u>COSTS, DISBURSEMENTS AND</u></b>
vs.	)	<b><u>ATTORNEY'S FEES</u></b>
	)	
STEVEN JOHN GELLINGS,	)	
DEVERL WATTENBARGER,	)	
BART WATTENBARGER,	)	
CAROL WATTENBARGER,	)	
and WATTENBARGER FARMS,	)	
	)	
Defendants.	)	
_____	)	

COMES NOW the defendants, by and through its attorney of record, Jennifer K. Brizee of Tolman & Brizee, P.C., and submits this Defendants' Memorandum of Costs, Disbursements and Attorney's Fees pursuant to Rule 54(d)(1) and 54(e)(1) of the Idaho Rules of Civil Procedure and Idaho Code § 12-120 and 12-121.

### I. COSTS AS A MATTER OF RIGHT

1.	Filing Fee	\$58.00
2.	Deposition of LeeAnn Craig	\$757.50
<b>TOTAL COSTS AS A MATTER OF RIGHT</b>		<b>\$815.50</b>

### II. DISCRETIONARY COSTS

1.	Travel expenses	\$186.85
2.	Copy charges	\$36.50
3.	Copy charges (Smart Doc-EIRMC med records)	\$659.16
<b>TOTAL DISCRETIONARY COSTS:</b>		<b>\$882.51</b>
<b>TOTAL COSTS AND DISBURSEMENTS:</b>		<b>\$1,698.01</b>

### III. ATTORNEY FEES

I, Jennifer K. Brizee, respectfully request attorney's fees and paralegal fees in the amount of \$4,157.00, pursuant to Idaho Code §§ 12-120 and 12-121 and Rule 54(e)(1) of the Idaho Rules of Civil Procedure. The foregoing attorneys fees are reasonable and based upon the hourly rates hereinafter set forth and the time and labor expended as illustrated in the Affidavit in Support of Defendants' Memorandum of Costs, Disbursements and Attorney's Fees filed herewith.

The following is a summary of the time and charges reflected in said affidavit after plaintiff's death in the evening of September 30, 2007, or the early morning hours of October 1, 2007:

ATTORNEY	HOURS	RATE PER HOUR	TOTAL FEES
Jennifer K. Brizee	27.50	\$130.00	\$ 3,575.00
Samuel S. Beus	1.50	\$130.00	\$ 195.00
Paralegal (Judy Graf and Heather Bennett)	4.30	\$ 90.00	\$ 387.00
<b>TOTAL ATTORNEY FEES:</b>			<b>\$4,157.00</b>

DATED this 26<sup>th</sup> day of March, 2008.

TOLMAN & BRIZEE, P.C.

BY:   
JENNIFER K. BRIZEE

**CERTIFICATE OF DELIVERY**

I hereby certify that on this 26<sup>th</sup> day of March, 2008, I shipped via overnight delivery with Federal Express a true and correct copy of the foregoing DEFENDANTS' MEMORANDUM OF COSTS, DISBURSEMENTS AND ATTORNEY'S FEES in an envelope, addressed to the following:

Paul T. Curtis  
CURTIS & BROWNING, PA  
598 N. Capital Ave.  
Idaho Falls, ID 83402

  
JENNIFER K. BRIZEE

Paul T. Curtis, SBN #6042  
CURTIS & BROWNING, PA  
598 N. Capital Ave.  
Idaho Falls, ID 83402  
Telephone: (208) 542-6995  
Facsimile: (208) 542-6993

2008 APR -9 PM 3:37

DISTRICT COURT  
MAGISTRATE DIVISION  
BONNEVILLE COUNTY

*Attorney for Plaintiff*

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
IN AND FOR THE STATE OF IDAHO, COUNTY OF BONNEVILLE

LEEANN CRAIG,	)	Case No.: CV-2006-2509
	)	
	)	OPPOSITION TO DEFENDANT'S
Plaintiff,	)	MEMORANDUM OF COSTS
	)	
vs.	)	
	)	
STEVEN JOHN GELLINGS,	)	
DEVERL WATTENBARGER,	)	
BART WATTENBARGER,	)	
CAROL WATTENBARGER,	)	
and WATTENBARGER FARMS,	)	
	)	
Defendants.	)	
	)	

COMES NOW, Plaintiff LEEANN CRAIG, by and through her attorney of record, Paul T. Curtis of CURTIS & BROWNING, PA, and hereby files this Opposition to Defendant's Memorandum of Costs as follows:

Defendant has filed a Memorandum of Costs, and is claiming costs, attorney fees, and paralegal fees totaling \$5,855.01, claiming to be the prevailing party in this action.

First, plaintiff's counsel contends that defendants are not the prevailing party. Due to the death of the plaintiff, the action was dismissed as not surviving the plaintiff's death. As such, there was no prevailing party, since upon the death of the plaintiff, the entire action automatically abated.

Secondly, since the action was found by the Court to not survive the plaintiff's death, the issue as to whether or not the Court should substitute the personal representative of the estate of the plaintiff was moot, and was not ruled on. The estate of the plaintiff is therefore not a party to this action. The plaintiff is dead, and any bills related to this accident were not found to be assignable, according to Idaho law. As such, the defendant's request for costs and fees is also a moot issue, there being no live person or estate liable for such costs and fees.

Plaintiff's counsel respectfully requests that the Court deny defendants' request for costs and fees.

DATED this 8 day of April, 2008.

  
\_\_\_\_\_  
Paul T. Curtis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of April, 2008, I caused to be served a true and correct copy of the foregoing OPPOSITION TO DEFENDANTS MEMORANDUM OF COSTS, DISBURSEMENTS AND ATORNEY FEES, in the above-referenced matter by the method indicated below and addressed to the following:

Jennifer Kauth Brizee, Esq.	<input type="checkbox"/> Mail
TOLMAN, BRIZEE & MARTENS, P.C.	<input type="checkbox"/> Hand Delivery
P.O. Box 1276	<input checked="" type="checkbox"/> Facsimile (208) 733-5444
Twin Falls, ID 83303-1276	<input type="checkbox"/> Overnight Mail



\_\_\_\_\_  
Paul T. Curtis, Esq.

Paul T. Curtis SBN #6042  
CURTIS & BROWNING, PA  
598 N. Capital Avenue  
Idaho Falls, ID 83402  
Telephone: (208) 542-6995  
Facsimile: (208) 542-6993

8 APR 18 P3:32

*Attorney for Plaintiff*

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT  
IN AND FOR THE STATE OF IDAHO, COUNTY OF BONNEVILLE

LEEANN CRAIG,	)	Case No.: CV-06-2509
	)	
Plaintiff (Appellant),	)	
	)	NOTICE OF APPEAL
vs.	)	
	)	
STEVEN JOHN GELLINGS, DEVERL	)	
WATTENBARGER, BART	)	
WATTENBARGER, CAROL	)	
WATTENBARGER, and	)	
WATTENBARGER FARMS,	)	
	)	
Defendants (Respondents).	)	
	)	

TO: THE ABOVE NAMED RESPONDENTS, AND THAT PARTY'S ATTORNEY, JENNIFER K. BRIZEE, OF TOLMAN, BRIZEE & MARTENS, P.C., P.O. BOX 1276, TWIN FALLS, IDAHO, 83303, AND THE CLERK OF THE ABOVE ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, LEEANN CRAIG, appeals against the above named respondents to the Idaho Supreme Court from the District Court's Order dismissing the case in it's entirety based on the facts that the plaintiff died from


causes unrelated to the underlying accident, and was not married. The Court further did not hear the plaintiff's motion to substitute the Personal Representative of the plaintiff's estate to pursue the economic damages, being a moot issue given the Court's decision. Said Order was entered in the above entitled action on the 13 day of March, 2008, the Honorable Judge Gregory Anderson, presiding.

2. Appellant has the right to appeal on the basis that said decision is final as per I.A.R. 11(a)(1).
3. Appellant contends that it was error to dismiss the action because, despite the fact that the plaintiff died from causes unrelated to the accident, the plaintiff contends the Court should have allowed plaintiff to amend the complaint substituting in the Personal Representative of the estate of the plaintiff in order to allow said estate to pursue the economic damages affecting the estate of the plaintiff.
4. A reporter's transcript is requested regarding oral argument on Defendant's Motion to Dismiss, heard on February 28, 2008.
5. The appellant designates the clerk's record on appeal to include the following documents:
  - Complaint for Damages, filed 5/4/06;
  - Answer of Defendants;
  - Plaintiff's Answers to Interrogatories and Responses to Requests for Production of Documents (copy attached hereto);
  - Defendant's Motion to Dismiss and memorandum in support thereof;
  - Plaintiff's Opposition to Defendant's Motion to Dismiss;



- Defendant's Reply;
  - Plaintiff's Motion to Substitute the Personal Representative of the Estate for Plaintiff, with exhibits;
  - The Court's Memorandum Decision and Order dated March 13, 2008;
  - Defendant's Memorandum of Costs and Request for Fees;
  - Plaintiff's Opposition to Defendant's Memorandum of Costs.
6. I certify that the estimated fee for preparation of the clerk's record has been paid, and that service has been made upon all parties required to be served pursuant to Rule 20 I.A.R.


DATED THIS 18 day of April, 2008.

  
\_\_\_\_\_  
Paul T. Curtis  
CURTIS & BROWNING, PA  
Attorneys for the Appellant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 18 day of April, 2008, I caused to be served a true and correct copy of the foregoing **NOTICE OF APPEAL**, in the above-referenced matter by U.S. Mail, postage pre-paid and addressed to the following:

Jennifer K. Brizee  
TOLMAN, BRIZEE & MARTENS, P.C.  
P.O. Box 1276  
Twin Falls, ID 83303-1276

  
\_\_\_\_\_  
Paul T. Curtis, Esq.

Clark

Steven K. Tolman (ISB #1790)  
Jennifer K. Brizee (ISB #5070)  
TOLMAN & BRIZEE, P.C.  
132 3<sup>rd</sup> Avenue East  
P.O. Box 1276  
Twin Falls, Idaho 83303-1276  
Telephone: (208) 733-5566

2008 MAY -2 AM 11:01  
CLERK OF DISTRICT COURT  
BONNEVILLE COUNTY

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

\*\*\*\*\*

LEEANN CRAIG, )  
 )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 STEVEN JOHN GELLINGS, )  
 DEVERL WATTENBARGER, )  
 BART WATTENBARGER, )  
 CAROL WATTENBARGER, )  
 and WATTENBARGER FARMS, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

Case No. CV-06-2509

**DEFENDANTS' REQUEST FOR  
ADDITIONAL CLERK'S RECORD**

**TO: THE ABOVE NAMED APPELLANT AND HER ATTORNEY, AND THE  
CLERK OF THE ABOVE ENTITLED COURT:**

NOTICE IS HEREBY GIVEN that defendants/respondents, Steven John Gellings, Deverl Wattenbarger, Bart Wattenbarger, Carol Wattenbarger and Wattenbarger Farms, in the above entitled proceeding hereby request, pursuant to

Idaho Appellate Rule 19, the inclusion of the following documents in the Clerk's Record, in addition to that required to be included by Idaho Appellate Rule 28, and in addition to the documents requested by appellant in her Notice of Appeal<sup>1</sup>:

- ✓ 1. Motion to Dismiss filed on or about January 24, 2008;
- PA 2. Memorandum in Support of Motion to Dismiss filed on or about January 24, 2008;
- PA 3. Reply Memorandum in Support of Motion to Dismiss filed on or about February 25, 2008;
- PA 4. Memorandum Decision RE: Motion to Dismiss filed on or about March 13, 2008;
- PA 5. Order RE: Motion to Dismiss filed on or about March 13, 2008.

I certify that a copy of this request was served upon the Clerk of the District Court and upon all parties required to be served pursuant to Rule 20 of the Idaho Appellate Rules.

DATED this 30<sup>th</sup> day of April, 2008.

TOLMAN & BRIZEE, P.C.

BY:   
JENNIFER K. BRIZEE

<sup>1</sup> Please note, some of the documents requested by defendants/respondents to be included in the Clerk's Record may be duplicative, as they have already been requested by plaintiff. However, plaintiff's request for the Clerk's Record in some instances did not include the full title of documents, combined documents on one line, and did not provide filing dates. Therefore, defendants/respondents have requested some of these documents to ensure their inclusion on the Clerk's Record in the instance they are not accurately described in plaintiff's Notice of Appeal.

**CERTIFICATE OF DELIVERY**

I hereby certify that on this 20<sup>th</sup> day of April, 2008, I faxed and mailed a true and correct copy of the foregoing DEFENDANTS' REQUEST FOR ADDITIONAL CLERK'S RECORD by faxing to (208) 542-6993 and by depositing same in the United States mail, postage prepaid, in an envelope, addressed to the following:

Paul T. Curtis  
CURTIS & BROWNING, PA  
598 N. Capital Ave.  
Idaho Falls, ID 83402

  
\_\_\_\_\_  
JENNIFER K. BRIZEE

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

LEEANN CRAIG,	)	
	)	
Plaintiff,	)	Case No. CV-2006-2509
	)	
vs.	)	MINUTE ENTRY ON
	)	REQUEST FOR ATTORNEY
STEVEN JOHN GELINGS,	)	FEES AND COSTS
DEVERL WATTENBARGER,	)	
BART WATTENBARGER,	)	
CAROL WATTENBARGER,	)	
and WATTENBARGER FARMS,	)	
	)	
Defendants.	)	
	)	

---

May 15, 2008, at 9:00 A.M., defendants' request for attorney fees and costs came on for hearing before the Honorable Gregory S. Anderson, District Judge, sitting in open court at Idaho Falls, Idaho.

Ms. Karen Konvalinka, Court Reporter, and Ms. Janie Ker, Deputy Court Clerk, were present.

Mr. Paul Curtis appeared on behalf of the plaintiff. Ms. Jennifer Brizee appeared by telephone on behalf of the defendants.

Mr. Brizee presented argument supporting defendants' request for attorney fees.

Mr. Curtis argued in opposition to defendants' request.

Mr. Brizee presented additional argument supporting defendants' request for attorney fees.

The Court will allow counsel until 5:00 p.m., Friday, May 23, 2008, to submit additional  
briefs.

Court was thus adjourned.

Gregory S. Anderson  
GREGORY S. ANDERSON  
District Judge

c: Paul Curtis  
Jennifer Brizee

2008 JUN 18 PM 2:00

THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

SEVENTH JUDICIAL DISTRICT BONNEVILLE COUNTY ID

LEEANN CRAIG, )  
 )  
 Plaintiff, )  
 )  
 -vs.- )  
 )  
 STEVEN JOHN GELLINGS, DEVERL )  
 WATTENBARGER, BART )  
 WATTENBARGER, CAROL )  
 WATTENBARGER and )  
 WATTENBARGER FARMS, )  
 )  
 Defendants. )

Case No. CV-06-2509

**MEMORANDUM DECISION RE:  
MOTION FOR ATTORNEY FEES AND  
COSTS**

**I. FACTUAL AND PROCEDURAL BACKGROUND**

LeeAnn Craig and Steven John Gellings were involved in an automobile accident on May 12, 2004, in Bonneville County, Idaho.

DeVerl Wattenbarger, Bart Wattenbarger, Carol Wattenbarger and/or Wattenbarger Farms owned the vehicle Gellings was driving at the time of the accident.

Craig filed a complaint commencing this case on May 4, 2006. Craig's complaint sought damages for pain and suffering, bodily injuries, lost wages, loss of future earnings, property damage and other special damages.

Sometime during Fall 2007, Craig passed away from causes unrelated to the accident at issue in this case. She did not leave a surviving spouse.

Defendants filed a Motion to Dismiss on January 25, 2008.

On February 14, 2008, Craig filed an Opposition to Defendant's Motion to Dismiss.

Defendants filed a Reply Memorandum on February 25, 2008.

On March 13, 2008, this Court entered a memorandum decision and order granting Defendants' motion to dismiss.

Defendants filed a Memorandum of Costs, Disbursements and Attorney's Fees on March 27, 2008.

Craig filed an Opposition to Defendant's Memorandum of Costs on April 9, 2008.

## II. STANDARD OF ADJUDICATION

An award of attorney fees must be supported by statutory or other authority. *Webb v. Webb*, 143 Idaho 521, 526, 148 P.3d 1267, 1272 (2006). The amount of attorney fees and costs awarded is generally discretionary. *Lettunich v. Lettunich*, 141 Idaho 425, 435, 111 P.3d 110, 120 (2005).

## III. DISCUSSION

Defendants request attorneys fees pursuant to Idaho Code §§ 12-120 and 12-121 and Rule 54(e)(1) of the Idaho Rules of Civil Procedure and costs under 54(d)(1) of the Idaho Rules of Civil Procedure.

### A. Attorney Fees Under Idaho Code § 12-120

Only two subsections of Idaho Code § 12-120 are potentially relevant to Defendants' request for attorney fees in this case.

#### 1. Idaho Code § 12-120(1)

Idaho Code § 12-120(1) provides:

Except as provided in subsections (3) and (4) of this section, in any action where the amount pleaded is twenty-five thousand dollars (\$25,000)



or less, there shall be taxed and allowed to the prevailing party, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees. For the plaintiff to be awarded attorney's fees, for the prosecution of the action, written demand for the payment of such claim must have been made on the defendant not less than ten (10) days before the commencement of the action; provided, that no attorney's fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action, an amount at least equal to ninety-five percent (95%) of the amount awarded to the plaintiff.

The Idaho Supreme Court has held:

Because I.C. § 12-120[(1)] is to be construed narrowly, "[t]his Court has placed a premium on examining the pleadings when evaluating [its] applicability." *Aberdeen-Springfield*, 133 Idaho at 95, 982 P.2d at 930. The pleadings must precisely comply with the statutory mandate and formally plead an amount of \$25,000 or less.

*L & W Supply Corp. v. Chartrand Family Trust*, 136 Idaho 738, 746, 40 P.3d 96, 104 (2002). Where the exact amount of damages is uncertain, the plaintiff's complaint may allege that the claim for damages will "not exceed the limit established by I.C. § 12-120(1) . . . ." *Cox v. Mueller*, 125 Idaho 734, 737, 874 P.2d 545, 548 (1994).

The Complaint in this case states: "Plaintiff prays for relief in excess of \$10,000.00 . . ." Complaint at 4. Plaintiff did not limit the amount pleaded to \$25,000.00 or less. Consequently, Defendants may not recover attorney fees under Idaho Code § 12-120(1).

## **2. Idaho Code § 12-120(4)**

Idaho Code § 12-120(4) provides:

In actions for personal injury, where the amount of plaintiff's claim for damages does not exceed twenty-five thousand dollars (\$25,000), there shall be taxed and allowed to the claimant, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees. . . .

The Idaho Supreme Court has held: “that the ‘amount of plaintiff’s claim for damages’ is the amount set forth in the statement of claim, not the amount pled in the complaint.” *Cox v. Mulligan*, 142 Idaho 356, 358, 128 P.3d 893, 895 (2005).

Generally, a moving party carries the burden of proof. *See Intermountain Health Care, Inc. v. Board of County Com’rs of Blaine County, Idaho*, 107 Idaho 248, 251, 688 P.2d 260, 263 (Ct. App. 1984) (*quoting* E. Cleary, MCCORMICK ON EVIDENCE § 357 (3d ed. 1984) (“The customary common law rule that the moving party has the burden of proof--including not only the burden of going forward but also the burden of persuasion--is generally observed in administrative hearings.”)).

Defendants bear the burden of demonstrating Idaho Code § 12-120(4) authorizes this Court to award them attorney fees. Defendants have not submitted evidence, nor is there anything in the record, which indicates “plaintiff’s claim for damages” was less than \$25,000. Consequently, Defendants have not properly supported their claim for attorney fees under Idaho Code § 12-120(4).

#### **B. Attorney Fees Under Idaho Code § 12-121**

Idaho Code § 12-121 states:

In any civil action, the judge may award reasonable attorney’s fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney’s fees. The term “party” or “parties” is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

I.R.C.P 54(e)(1) states:

In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. *Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from*

*the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.*

(Emphasis added).

The Idaho Court of Appeals has held: “Legal arguments that are supported by a good faith argument for the extension or modification of the law in Idaho are not so plainly fallacious to be deemed frivolous.” *Gibson v. Bennett*, 141 Idaho 270, 277, 108 P.3d 417, 424 (Ct. App. 2005).

Defendants’ position that Craig’s cause of action abated with her death is supported by Idaho case law. *See* Memorandum Decision Re: Motion to Dismiss , March 13, 2008. However, in her opposition to Defendants’ motion to dismiss and at the February 28, 2008, hearing, Craig cited authority and made policy arguments supporting her position that an action for economic damages should survive a plaintiff’s death. This case – where Craig was involved in an automobile accident with Gelling; Craig suffered injuries and damages as a result of that accident; Craig subsequently died of causes unrelated to the accident; and Craig’s estate suffered any loss sustained by Craig as a result of the accident, even if the accident was Gelling’s fault – demonstrates the inequities involved in the law as it now stands in Idaho.

Although, at common law, a cause of action for personal injuries did not survive the death of the person injured, the Idaho Legislature has recognized the unfair nature of the common law and modified it, to the extent it impacts the community property rights of a surviving spouse, by adopting Idaho Code § 32-906. *Steele v. Kootenai Medical Center*, 142 Idaho 919, 920, 136 P.3d 905, 906 (2006). As a result, “When [an] injured spouse dies, his or her claim survives to the extent that the surviving spouse is entitled to

recover damages for depletion of community assets, reduction of the ability of the community to earn income, and costs and expenses chargeable against community property arising from the injury to the deceased spouse prior to his or her death.” *Id.* Craig argued the existing law should be modified to permit the survival of an action for economic damages on behalf of the injured person’s estate.

Craig has supported her position with a “good faith argument for the extension *or modification* of the law in Idaho.” Therefore, Craig’s defense of Defendants’ motion to dismiss was not frivolous.

Defendants motion for attorney fees under Idaho Code § 12-121 should be denied.

### **C. Costs**

Defendants have filed a memorandum and affidavit in support of costs, which indicates Defendants incurred \$ 815.50 in costs which it should receive as a matter of right for filing fees and deposition transcript fees. Defendants also request discretionary costs totaling \$ 882.51 for their attorney’s travel expenses to the hearing on the motion to dismiss and for photocopy expenses.

Rule 54(d)(1)(A) states:

Parties Entitled to Costs. Except when otherwise limited by these rules, costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.

#### **1. Prevailing Party**

Rule 54(d)(1)(B) states:

Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between

and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

In *Daisy Manufacturing Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 259, 999 P.2d 914 (Ct. App. 2000), the plaintiff moved to dismiss the case with prejudice after it discovered defendant was not the real party in interest. The defendant then filed for costs and attorney fees. Because the defendant had delayed in providing the plaintiff with the information needed to determine the defendant was not the real party in interest, the trial court held the defendant was not the prevailing party. The Idaho Court of Appeals reversed the trial court, holding:

[U]nder I.R.C.P. 54(d)(1)(B), there are three principal factors the trial court must consider when determining which party, if any, prevailed: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues. *Chadderdon*, 104 Idaho at 411, 659 P.2d at 165. . . .

In our view, the district court did not properly apply the criteria of Rule 54(d)(1)(B) in holding that Paintball was not the prevailing party. The “result obtained” in this case was a dismissal of Daisy’s action with prejudice, the most favorable outcome that could possibly be achieved by Paintball as defendant. Daisy gained no benefit as a consequence of the litigation. . . . Although the prevailing party determination is discretionary in nature, this discretion must be exercised within the bounds of governing legal standards. Under some circumstances application of these standards requires a holding that one party is the prevailing party on a particular claim as a matter of law. *Holmes v. Holmes*, 125 Idaho 784, 788, 874 P.2d 595, 599 (Ct.App.1994). This is such a case, for application of the Rule 54(d)(1)(B) factors can lead only to a conclusion that Paintball was the prevailing party.

*Daisy Manufacturing Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 259, 261-62, 999 P.2d 914, 916-17 (Ct. App. 2000).

In this case, all of Craig's claims were dismissed. The Defendants could not have achieved a more favorable outcome. Craig gained no benefit as a consequence of the litigation. Consequently, Defendants are the prevailing parties.

## **2. Costs as a Matter of Right**

Filing fees and “[c]harges for reporting and transcribing of a deposition” are costs awarded as a matter of right under Rule 54(d)(1)(C)(1) and (9). As the prevailing party, Defendants are entitled to costs of \$815.50 as a matter of right.

## **3. Discretionary Costs**

Rule 54(d)(1)(D) states:

*Discretionary Costs. Additional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party. The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed. In the absence of any objection to such an item of discretionary costs, the court may disallow on its own motion any such items of discretionary costs and shall make express findings supporting such disallowance.*

(Emphasis added).

The Idaho Supreme Court has held that an attorney's travel fees and photocopying expenses are not exceptional costs. *Fish v. Smith*, 131 Idaho 492, 494, 960 P.2d 175, 177 (1998). In this case, Defendants' travel and photocopying expenses are likewise unexceptional. Defendants' motion for discretionary costs should be denied.

#### IV. CONCLUSION

Defendants should not be awarded attorney fees.

Defendants should be awarded \$815.50 in costs as a matter of right.

Defendants should not be awarded discretionary costs.

DATED this 17<sup>th</sup> day of June 2008

*Gregory S. Anderson*

GREGORY S. ANDERSON  
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 18<sup>th</sup> day of June 2008, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Paul T. Curtis  
CURTIS & BROWNING  
598 N. Capital Ave.  
Idaho Falls, ID 83402

Jennifer K. Brizee  
TOLMAN & BRIZEE  
P.O. Box 1276  
Twin Falls, ID 83303

RONALD LONGMORE  
Clerk of the District Court  
Bonneville County, Idaho

By   
Deputy Clerk



2008 JUN 18 PM 2:00

THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

DISTRICT COURT  
SEVENTH JUDICIAL DISTRICT  
BONNEVILLE COUNTY ID

LEEANN CRAIG, )  
 )  
 Plaintiff, )  
 )  
 -vs.- )  
 )  
 STEVEN JOHN GELLINGS, DEVERL )  
 WATTENBARGER, BART )  
 WATTENBARGER, CAROL )  
 WATTENBARGER and )  
 WATTENBARGER FARMS, )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

Case No. CV-06-2509

**ORDER RE: MOTION FOR ATTORNEY FEES AND COSTS**

This cause having come before this Court pursuant to Defendants' March 27, 2008, Memorandum of Costs, Disbursements and Attorney's Fees; this Court being fully advised in the premises; and good cause appearing;

NOW, THEREFORE:

Defendants' request for attorney fees is denied.

Defendants' request for \$815.50 in costs as a matter of right is granted.

Defendants' request for discretionary costs is denied.

DATED this 17<sup>th</sup> day of June 2008

*Gregory S. Anderson*  
GREGORY S. ANDERSON  
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 18<sup>th</sup> day of June 2008, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Paul T. Curtis  
CURTIS & BROWNING  
598 N. Capital Ave.  
Idaho Falls, ID 83402

Jennifer K. Brizee  
TOLMAN & BRIZEE  
P.O. Box 1276  
Twin Falls, ID 83303

RONALD LONGMORE  
Clerk of the District Court  
Bonneville County, Idaho

By   
Deputy Clerk

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

LEANN CRAIG, )  
 )  
 Plaintiff/Appellant, )  
 )  
 vs. )  
 )  
 STEVEN JOHN GELLINGS, )  
 DEVERL WATTNBARGER, )  
 BART WATTENBARGER, )  
 CAROL WATTENBARGER, AND )  
 WATTENBARGER FARMS, )  
 )  
 Defendants/Respondents.. )  
 \_\_\_\_\_ )

**CLERK'S CERTIFICATION  
OF EXHIBITS**

Case No. CV-2006-2509

Docket No. 35321

STATE OF IDAHO )  
 )  
 County of Bonneville )

I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the foregoing Exhibits were marked for identification and offered in evidence, admitted, and used and considered by the Court in its determination: please see attached sheets.

Affidavit of Jennifer Kauth Brizee in Support of Motion to continue Trial, filed 5-7-07  
Affidavit of Jennifer K. Brizee in Support of Defendants' Memorandum of Costs, Disbursement and Attorney's Fees, filed 3-27-08.  
Exhbits A-B-C from Memorandum in Support of defendants' Memorandum of Costs, disbursements and Attorney's Fees, filed 3-27-08 page 60 of the clerk's record.

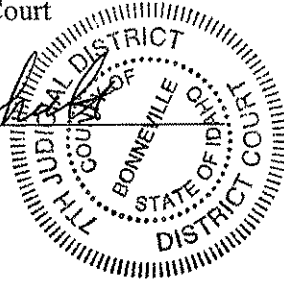
And I further certify that all of said Exhibits are on file in my office and are part of this record on Appeal in this cause, and are hereby transmitted to the Supreme Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court

this 15<sup>th</sup> day of July, 2008.

RONALD LONGMORE  
Clerk of the District Court

By *Jerry Shanks*  
Deputy Clerk



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

LEANN CRAIG, )  
 )  
 Plaintiff/Appellant, )  
 )  
 vs. )  
 )  
 STEVEN JOHN GELLINGS, )  
 DEVERL WATTNBARGER, )  
 BART WATTENBARGER, )  
 CAROL WATTENBARGER, AND )  
 WATTENBARGER FARMS, )  
 )  
 Defendants/Respondents.. )  
 \_\_\_\_\_ )

**CERTIFICATE OF SERVICE**

Case No. CV-2006-2509

Docket No. 35231

I HEREBY CERTIFY that on the 15<sup>th</sup> day of September, 2008, I served a copy of the Reporter's Transcript (if requested) and the Clerk's Record in the Appeal to the Supreme Court in the above entitled cause upon the following attorneys:

Paul T. Curtis, Esq.  
CURTIS & BROWNING  
598 North Capital Avenue  
Idaho Falls, ID 83402


Jennifer K. Brizee  
TOLMAN & BRIZEE  
P.O. Box 1276  
Twin Falls, ID 83303-1276

*Attorney for Appellant*

*Attorney for Respondent*

by depositing a copy of each thereof in the United States mail, postage prepaid, in an envelope addressed to said attorneys at the foregoing address, which is the last address of said attorneys known to me.

RONALD LONGMORE  
Clerk of the District Court

By:   
Deputy Clerk

