

12-28-2009

Stephen v. Sallaz & Gatewood, CHTD.
Augmentation Record Dckt. 36322

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In the Supreme Court of the State of Idaho

PAMELA K. JOERGER STEPHEN,

Plaintiff-Respondent-Cross Appellant,

v.

SALLAZ & GATEWOOD, CHTD., DENNIS
SALLAZ and SCOTT GATEWOOD,

Defendants-Appellants-Cross
Respondents.

LAW CLERK

ORDER GRANTING MOTION TO
AUGMENT THE RECORD

Supreme Court Docket No. 36322-2009
Ada County Docket No. 2006-14241

LAW CLERK

A MOTION TO AUGMENT THE RECORD AND STATEMENT IN SUPPORT THEREOF was filed by counsel for Respondent/Cross-Appellant on December 22, 2009. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Respondent/Cross-Appellant's MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include document listed below, file stamped copies of which accompanied this Motion:

1. Answer and Counterclaim (Plaintiff's Exhibit 102), file-stamped June 20, 2003.

IT FURTHER IS ORDERED that the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion, as EXHIBITS:

1. Motion for Appointment of Guardian *Ad Litem* for Plaintiff, file-stamped January 17, 2007;
2. Affidavit of Eric R. Clark, file-stamped January 17, 2007;
3. Affidavit of Robert A. Wallace, file-stamped January 17, 2007; and
4. Order Granting Motion for Appointment of Guardian *Ad Litem* for Plaintiff, stamped March 16, 2007.

DATED this 28th day of December 2009.

For the Supreme Court


for Stephen W. Kenyon, Clerk

cc: Counsel of Record

AUGMENTATION RECORD

In the Supreme Court of the State of Idaho

PAMELA K. JOERGER STEPHEN,)
)
 Plaintiff-Respondent-Cross Appellant,) ORDER GRANTING MOTION TO
) AUGMENT THE RECORD
 v.)
) Supreme Court Docket No. 36322-2009
 SALLAZ & GATEWOOD, CHTD., DENNIS) Ada County Docket No. 2006-14241
 SALLAZ and SCOTT GATEWOOD,)
)
 Defendants-Appellants-Cross)
 Respondents.)

APPELLANTS' SECOND MOTION TO AUGMENT THE RECORD ON APPEAL IN RESPONSE TO ORDER GRANTING MOTION FOR RECONSIDERATION and an AFFIDAVIT OF GARY L. QUIGLEY IN SUPPORT OF APPELLANTS' SECOND MOTION TO AUGMENT THE RECORD ON APPEAL were filed by counsel for Appellants on June 28, 2010. Therefore, good cause appearing,

IT HEREBY IS ORDERED that APPELLANTS' SECOND MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion:

1. Order Re: Confidentiality of Plaintiff's Medical Records and Information, file-stamped February 4, 2008;
2. Motion for Summary Judgment, file-stamped December 21, 2007;
3. Amended Motion for Summary Judgment, file-stamped May 5, 2008;
4. Affidavit of G. Scott Gatewood, file-stamped May 5, 2008;
5. Memorandum in Support of Motion for Summary Judgment, file-stamped May 5, 2008;
6. Affidavit of Gary Stephen, file-stamped May 27, 2008;
7. Affidavit of Counsel Filed in Opposition to Defendant Gatewood's Motion for Summary Judgment, file-stamped May 27, 2008;
8. Affidavit of Cathy L. Naugle, Esq., file-stamped May 27, 2008;
9. Plaintiff's Memorandum in Opposition to Defendant Gatewood's Motion for Summary Judgment, file-stamped May 27, 2008;
10. Defendant's Reply memorandum in Support of Summary Judgment, file-stamped June 2, 2008;
11. Motion to Reconsider, file-stamped June 24, 2008;


12. Affidavit of Charles C. Crafts in Support of Motion to Reconsider, file-stamped June 24, 2008;
13. Plaintiff's Pre-Trial Memorandum, file-stamped July 28, 2008;
14. Plaintiff's *Supplemental* Pre-Trial Memorandum, file-stamped August 1, 2008;
15. Plaintiff's Motion in Limine re: Evidence of Illegal Conduct, file-stamped August 6, 2008;
16. Motion to Remove Bob Wallace as Guardian and/or Not Refer to Him as Guardian During Trial, file-stamped August 7, 2008;
17. Memorandum in Support of Motion to Remove Bob Wallace as Guardian and/or Not Refer to Him as Guardian During Trial, file-stamped August 7, 2008;
18. Plaintiff's Bench Brief Re: Relevant Evidence and Request for Continuing Objection, file-stamped August 14, 2008;
19. Motion to Reconsider Pursuant to IRCP 11(a)(2)B, file-stamped October 17, 2008;
20. Memorandum in Support of Motion for Reconsideration Pursuant to IRCP 11(a)(2)B, file-stamped October 17, 2008;
21. Plaintiff's Memorandum in Response to Defendant Gatewood's Motion to Reconsider, file-stamped November 12, 2008; and
22. Motion for Stay of Execution on Money Judgment, file-stamped June 16, 2009.

IT FURTHER IS ORDERED that the District Court Clerk shall submit to this Court, within seven (7) days of the date of this order, the items listed below as EXHIBITS, items which was NOT submitted with this Motion, and not contained in this record on appeal:

1. All trial exhibits submitted to the district court shall be lodged with the Supreme Court for purposes of facilitating the review of the issues raised on this appeal.

DATED this 8th day of July 2010.

For the Supreme Court


Stephen W. Kenyon, Clerk

cc: Counsel of Record

FEB -4 2008

By J. DAVID NAVARRO, Clerk
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN
Plaintiff,

v.

SALLAZ & GATEWOOD, CHTD.,
DENNIS SALLAZ, and SCOTT
GATEWOOD,
Defendants.

Case No.: CV OC 0614241
**ORDER RE: CONFIDENTIALITY OF
PLAINTIFF'S MEDICAL RECORDS
AND INFORMATION**

It is hereby ordered that the Plaintiff and/or Plaintiff's treating physician(s), or other health care providers, or their agents or employees, will release, provide, disclose or furnish medical records that pertain to the Plaintiff, Pamela K. Joerger Stephen, to the Defendants' Attorney(s) or Law Firms, or their duly authorized agents and employees, certain "protected health information" (PHI) as that term is defined in the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and the related federal Privacy Regulations.

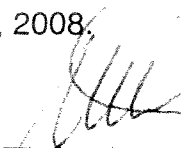
Defendants' attorney(s) shall be allowed by the Plaintiff to inspect all medical records in the possession of the Plaintiff or her attorney or in the alternative shall pay all charges for copies or duplicates of any PHI received pursuant to this order that are in the possession of the Plaintiff or her counsel. Copies of any medical records obtained

1 by the Defendants from physicians or health care professionals that are not in the
2 possession of the Plaintiff or her attorney shall be paid for by the Plaintiff. The
3 Defendants shall provide the Plaintiff with duplicate copies of any medical records
4 received from physicians or health care providers that pertain to the Plaintiff.

5 Defendants' attorney(s) shall keep and maintain the privacy and confidentiality of
6 the Plaintiff's PHI to the greatest extent reasonable possible. In so doing, the
7 Defendants' attorney(s) shall not provide, use, disclose, disseminate or allow access to
8 any such PHI by any person, firm or entity except as may be necessary solely for the
9 evaluation and/or defense of the above referenced case, and further shall only provide,
10 use, disclose, disseminate or allow access to the minimum amount necessary for such
11 purpose(s).
12

13 Upon conclusion of the above-referenced case, the Defendants' attorney(s) shall
14 retrieve and return to the Plaintiff's attorney(s) any and all of the Plaintiff's PHI, and all
15 copies or duplicates thereof, within their possession, custody or control. In so doing,
16 the Defendants' attorney(s) shall provide a verified certification that all such PHI has
17 been retrieved from any and all third party sources to whom the Plaintiff's PHI was
18 supplied, provided, disclosed or disseminated by or through the Defendants' attorney(s)
19 or Law Firm.

20 DATED THIS 4 day of February, 2008.

21
22 
23 _____
24 MICHAEL McLAUGHLIN
25 DISTRICT JUDGE
26

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of February, 2008, I caused to be served via United States Mail, postage prepaid, a true and correct copy of the foregoing to the following:

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
16 12th Avenue South, Suite 113
Nampa, Idaho 83651
Attorney for Sallaz & Gatewood, CHTD.,
And Scott Gatewood

CHARLES C. CRAFT
CRAFTS LAW, INC
410 S. Orchard, Ste. 120
Boise, ID 83705
Attorney for Dennis Sallaz.

ERIC R. CLARK
THE REAL ESTATE LAW GROUP
P.O. Box 2504
Eagle, ID 83616
Attorney for Plaintiff

ROBERT A. WALLACE
ATTORNEY AT LAW
815 Park Blvd. #130
Boise, Idaho 83712
Guardian ad litem for Plaintiff

J. DAVID NAVARRO
Clerk of the District Court

By: 
Deputy Clerk

DEC 21 2007

J. DAVID NAVARRO, Clerk
By KATHY J. BIEHL
DEPUTY

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
ISB #5344
16 12th Avenue S., Suite 113
Nampa, ID 83651
(208) 465-9839 Telephone
(208) 465-9834 Facsimile

Attorney for Defendant Scott Gatewood

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

PAMELA K. JOERGER STEPHEN,)
)
 Plaintiff,)
)
 vs.)
)
 SALLAZ & GATEWOOD, CHTD. and)
 SCOTT GATEWOOD,)
)
 Defendants.)
 _____)

CASE NO. CV 0C 0614241

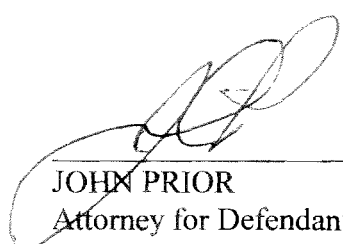
**MOTION FOR SUMMARY
JUDGMENT**

COMES NOW JOHN PRIOR, attorney for Defendant, SCOTT GATEWOOD, and hereby moves this Honorable Court, pursuant to Rule 56 of the Idaho Rules of Civil Procedure, for a summary judgment in said Defendant's favor, dismissing the complaint of the Plaintiff with prejudice on the grounds that there is no genuine issue of material fact, and said Defendant is entitled to judgment as a matter of law.

This motion is based upon the records, files, and pleadings in the above-entitled action. Counsel for the Defendant, SCOTT GATEWOOD, reserves the right to supplement this Motion

with Affidavits and a Memorandum in Support of Defendant's Motion for Summary Judgment and is requesting an extension of time to file the Memorandum in support of the Summary Judgment motion on the basis that discovery is incomplete at this time.

DATED this 21st day of December, 2007.



JOHN PRIOR
Attorney for Defendant

CERTIFICATE OF SERVICE

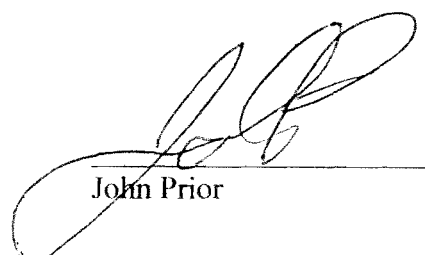
I HEREBY CERTIFY, that on this 21 day of December, 2007, that a true and correct copy of the forgoing document was served by the following method indicated below to each of the following:

Erik Clark
Attorney at Law
PO Box 2504
Eagle, ID 83616
Fax: (208) 939-7136

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Charles Crafts
Attorney at Law
410 S. Orchard St., Suite 120
Boise, ID 83705
Fax: (208) 389-2109

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile



John Prior

NO. _____ FILED 3:35
A.M. _____ P.M.

MAY 05 2008

J. DAVID NAVARRO, Clerk
By J. EARLE
DEPUTY

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
ISB #5344
16 12th Avenue S., Suite 113
Nampa, ID 83651
(208) 465-9839 Telephone
(208) 465-9834 Facsimile

Attorney for Defendant Scott Gatewood

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

PAMELA K. JOERGER STEPHEN,)
)
 Plaintiff,)
)
 vs.)
)
 SALLAZ & GATEWOOD, CHTD, and)
 SCOTT GATEWOOD.)
)
 Defendants.)
 _____)

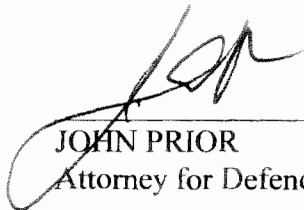
CASE NO. CV 0C 0614241

**AMENDED MOTION
FOR SUMMARY JUDGMENT**

COMES NOW, JOHN PRIOR, attorney for Defendant, SCOTT GATEWOOD, and hereby moves this Honorable Court, pursuant to Rule 56 of the Idaho Rules of Civil Procedure, for a summary judgment in said Defendant's favor, dismissing the complaint of the Plaintiff with prejudice on the grounds that there is no genuine issue of material fact, and said Defendant is entitled to judgment as a matter of law.

This motion is based upon the records, files, and pleadings in the above-entitled action. Counsel for the Defendant, SCOTT GATEWOOD, reserves the right to supplement this Motion with Affidavits and a Memorandum in Support of Defendant's Motion for Summary Judgment.

DATED this 5th day of May, 2008.



JOHN PRIOR
Attorney for Defendant

CERTIFICATE OF SERVICE

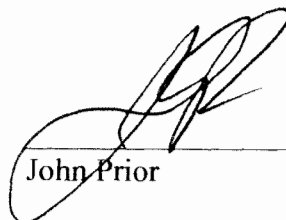
I HEREBY CERTIFY, that on this 5th day of May, 2008, that a true and correct copy of the forgoing document was served by the following method indicated below to each of the following:

Erik Clark
Attorney at Law
PO Box 2504
Eagle, ID 83616
Fax: (208) 939-7136

U.S. Mail, Postage Prepaid
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Charles Crafts
Attorney at Law
410 S. Orchard St., Suite 120
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Fax: (208) 389-2109

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 Hand Delivered
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 Facsimile



John Prior

MAY 05 2008

J. DAVID NAVARRO, Clerk
By **J. EARLE**
DEPUTY

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
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(208) 465-9839
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Attorney for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION

PAMELA K. JOERGER STEPHEN,)
)
 Plaintiff,)
)
 vs.)
)
 SALLAZ & GATWOOD, CHTD.,)
 DENNIS SALLAZ and SCOTT)
 GATEWOOD,)
)
 Defendant.)
 _____)

CASE NO. CV OC 0614241

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT

I. INTRODUCTION

In August, 2004, on the day of her divorce trial, Plaintiff agreed to a divorce settlement with her ex-husband. Plaintiff now claims that she was not competent to enter into an agreement, therefore did not legitimately enter into the agreement and that the settlement was otherwise unfair. Plaintiff claims that Mr. Gatewood was negligent in encouraging the

Plaintiff to accept the divorce settlement and in his failure to fully investigate and pursue for more resulted in the Plaintiff getting less than her share of the community assets. Plaintiff, under oath, testified she understood the terms of the settlement and agreed to comply with the terms of the settlement. Thus, Plaintiff's claim is barred by judicial estoppel. Further, that the Plaintiff's divorce settlement could have been fairer or the property and debt distributed differently does not render Mr. Gatewood negligent. Rather, as a matter of law, Mr. Gatewood's informed decision to recommend that the divorce settlement was based on his reasonable research of the law and facts of the case, does not amount to negligence. Because Plaintiff's claims are barred by judicial estoppel, and because Plaintiff cannot prove negligence or damages, as a matter of law, her complaint should be dismissed and Defendant's motion for summary judgment should be granted.

II. STATEMENT OF FACTS

1. In June, 2003, Plaintiff retained Defendant, ("Mr. Gatewood") to represent her in matters related to her divorce from her ex-husband, Gary Allen Stephen. That during initial conversations, the Plaintiff indicated that she was "bi-polar", however, she was always able to effectively discuss her case in precise details. (See attached Exhibit "A")

2. That based upon the Plaintiff's representation of the facts, an Answer and Counterclaim was filed. The Plaintiff signed an acknowledgment of these issues and facts and never did it appear that the Plaintiff did not have a full understanding of the discussions or documents being filed.

3. That throughout the pending divorce, if at any time the Plaintiff would report that she had received treatment or any medication, at subsequent meetings, she was always

found to be alert, lucid, and completely able to discuss her case in detail without confusion. The Plaintiff never behaved or acted in a manner that would suggest that she was confused or unclear on her positions or on her understanding of the issues during the case. When the Plaintiff and Mr. Gatewood would debate the merits of her case, she was always able to state her arguments clearly and consistently.

4. That while the Plaintiff's divorce was pending, the opposing party submitted a set of interrogatories for the Plaintiff to answer. Upon Mr. Gatewood's request to the Plaintiff, she assisted by responding to the questions presented in the discovery requests. The Plaintiff provided sixteen pages of handwritten answers to the discovery responses. They were written in plain consistent language and displayed her precise knowledge and understanding of the issues regarding property in her divorce case. (See attached Exhibit "B")

5. That in August, 2004, the Plaintiff participated in mediation with Attorney Stephen Beer, for the purposes of settling her divorce. As those negotiations were ongoing, Attorney Stephen Beer would send email communications to my office providing an update of the progress. I received emails on August 2, August 3, and August 4, 2004, just prior to the August 5 trial date. There was nothing in the communications that suggested that the Plaintiff was not fully able to understand and comprehend the proceedings. (See attached Exhibit "C")

6. That prior to her divorce trial, Plaintiff was familiar with the property and debts issues that would be raised at trial.

7. That on the day of the trial, August 5, 2004, Mr. Gatewood met with Ms. Stephen, opposing counsel and her husband, Gary Stephen at the Ada County Courthouse prior to the time set for hearing. During these meetings the parties were able to come to an

agreement regarding the pending issues in their divorce. The Plaintiff was an active participant in the meeting and discussion and was in agreement to the decisions reached.

8. That on the day of trial, August 5, 2004, Plaintiff agreed to the final Judgment and Decree and all of the terms were placed on the record in front of Judge Day. The Plaintiff indicated that she understood and agreed to the final decree. Towards the end of the hearing in front of Judge Day, the Plaintiff informed Mr. Gatewood that she wanted to include in the decree that she return to her maiden name, which further indicated that she was completely aware of the details of the settlement.

III. ARGUMENT

A. Standard for Summary Judgment

Idaho Rule of Civil Procedure 56 provides that summary judgment is proper if the pleadings, depositions, admissions on file, and affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The facts should be construed in a light most favorable to the nonmoving party. *Brown v. Caldwell School Dist.*, 127 Idaho 112, 115, 898 P.2d 43, 46 (1995).

The Idaho Supreme Court has adopted the following standard for granting summary judgment:

In our view, the plain language of Rule 56(c) *mandates* the entry of summary judgment, after adequate time for discovery and upon motion, *against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.* In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Sparks v. St. Luke's Reg'l Med. Ctr., Ltd., 115 Idaho 505, 509, 768 P.2d 786, 772 (1988)
(emphasis in original) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986)).

Idaho has adopted the United States Supreme Court's standard in *Celotex v. Catrett*, 477 U.S. 317, 322 (1986), which mandates summary judgment if the nonmoving party fails to make a showing sufficient to establish the existence of an element that is essential to its case and upon which it will bear the burden of proof at trial. As the court stated in *Jarman vs. Hale*, 122 Idaho 952, 842 P.2d (Ct. App. 1992):

A party opposing a motion for summary judgment has the burden of presenting sufficient evidence to establish a triable issue which arises from the facts, and a genuine issue of fact is not created by a mere scintilla of evidence. Summary judgment is proper if the evidence before the court on the motion would warrant a directed verdict if the case were to go [to] trial. *Id.* Further, **a nonmoving party's failure to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof at trial, requires the entry of summary judgment.** *Celotex Corp. v. Catrett, supra*; see also I.R.C.P. 56(c). "In such a situation, there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. at 322-23, 106 S.Ct. at 2552.

Jarman, 122 Idaho at 955-56, 842 P.2d at 291-92 (emphasis added; citation omitted). See also *Nelson By & Through Nelson v. City of Rupert*, 128 Idaho 199, 202, 911 P.2d 1111, 1114 (1996); *Olsen v. JA Freeman Co.*, 117 Idaho 706, 720-21, 791 P.2d 1285, 1299-1300 (1990); *Garzee v. Barkley*, 121 Idaho 771, 774, 828 P.2d 334, 337 (Ct. App. 1992).

In opposing the motion, "a mere scintilla of evidence or slight doubt as to facts' is not sufficient to create a genuine issue for purposes of summary judgment." See *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 88, 996 P.2d 303, 307 (2000) (citing

Harpole v. State, 131 Idaho 437, 439, 958 P.2d 594, 596 (1998) (emphasis added). The nonmoving party “*must* respond to the summary judgment motion with *specific facts* showing there is a genuine issue for trial.” *Id.* (citing *Tuttle v. Sudenga Indus., Inc.*, 125 Idaho 145, 150, 868 P.2d 473, 478 (1994) (emphasis added).

Summary judgment is an efficient resolution to a case. The *Celotex* court, addressing the federal counterpart to Idaho Rule of Civil Procedure 56, stated:

[s]ummary judgment procedure is properly regarded as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’

Celotex, 477 U.S. at 327 (citation omitted). Under these established rules of summary judgment, Plaintiff cannot produce evidence that is sufficient to create a genuine issue of material fact. Rather, at best, Plaintiff can only show a scintilla of speculation to support her claim. A “mere scintilla of evidence...” is *not sufficient* to create a *genuine* issue for purposes of summary judgment.” *See Samuel, supra*, 134 Idaho at 88, 996 P.2d at 307. Accordingly, Plaintiff’s cause of action cannot succeed as a matter of law and Defendant’s motion for summary judgment should be granted.

B. Plaintiff is Judicially Estopped from Asserting a Legal Malpractice Claim and Therefore Plaintiff’s Cause of Action Must Fail.

Idaho courts have adopted the doctrine of judicial estoppel holding: “Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position....” *McKay v. Owens*, 130 Idaho 148, 152, 927 P.2d 1222, 1226 (1997) (citation omitted). “[J]udicial estoppel “rests upon the principle that a

litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.” *Vogel v. Touhey*, 151 Md.App. 682, 707, 828 A.2d 268, 283 (2003) (citations omitted). “Judicial estoppel [also] ensures “the ‘integrity of the judicial process’ by ‘prohibiting parties from deliberately changing positions according to the exigencies of the moment[.]’” *Id.* Finally, Idaho courts have held that “[judicial estoppel] should only be applied “when the party maintaining the inconsistent position either did have, or was chargeable with, full knowledge of the attendant facts prior to adopting the initial position.” *McKay, supra*, 130 Idaho at 155, 937 P.2d at 1229 (emphasis added).

In *McKay, supra*, the plaintiff brought a medical malpractice claim against St. Luke’s Regional Center and her obstetrician after her son was born with severe birth defects. During the course of the lawsuit, the plaintiff’s attorney and guardian ad litem negotiated a proposed settlement with which the plaintiff allegedly disagreed. Nevertheless, at a subsequent compromise hearing, the plaintiff stated to the court that she understood the settlement offer and approved and accepted the offer. The plaintiff later filed a malpractice claim against the defendants alleging that they negligently settled her malpractice claim without her consent.

The trial court granted the defendant’s motions for summary judgment finding that the plaintiff was judicially estopped from asserting her malpractice claim. Affirming the trial court, the Idaho Supreme Court found that at the minor’s compromise hearing the plaintiff, with full knowledge of the facts and circumstances underlying the settlement, accepted the proposed settlement without reserving any objections. *McKay*, 130 Idaho at 154, 937 P.2d at 1228. the court further held: “By taking the position of agreeing to the settlement, [the

plaintiff] obtained an advantage (the settlement) from one party (the medical malpractice defendant). *She cannot now repudiate that statement made in open court in front of a judge, and by means of her inconsistent positions, obtain recovery against another party, arising out of the same transaction.*” *Id.* (emphasis added).

In *Lamb v. Manweiler*, 129 Idaho 269, 923 P.2d 976 (1996), the plaintiff, in an underlying criminal proceeding, plead guilty to two felony charges and was sentenced to several years of prison. Subsequent to his sentencing, the plaintiff sued his former attorney, the defendant, alleging that due to the defendant’s negligent advice, the plaintiff entered guilty pleas and was sentenced. The district court granted summary judgment to the defendant holding that the plaintiff failed to come forward with evidence to rebut his admissions of guilt or to establish the existence of a genuine issue of fact regarding his guilt. The Idaho Court of Appeals reversed.

On appeal, the Idaho Supreme Court affirmed the defendant’s motion for summary judgment holding that the plaintiff could not establish that the defendant’s advice was the cause of damages to the plaintiff. In support of this holding, the court noted that the district court engaged in a lengthy discussion with the plaintiff during which the court thoroughly advised the plaintiff that once his guilty pleas were entered they could not be withdrawn. *Manweiler*, 129 Idaho at 273, 923 P.2d at 980. The court stated:

[The plaintiff] specifically acknowledged his understanding that when he pled guilty he gave up his constitutional right to a trial, the presumption of innocence, the right of confrontation and cross-examination, and the right against compulsory self-incrimination. He had no questions about those rights, said he understood them, and voluntarily and intentionally waived those rights. Additionally, [the plaintiff] indicated that his education consisted of high school and two years of college.

The district judge specifically addressed the question of whether [the plaintiff] could withdraw his guilty pleas:

COURT: Do you realize that if I accept your pleas of guilty they are final pleas? I will not allow you to withdraw those pleas like I did in the other cases?

DEFENDANT: Yes, sir.

Id. Based on these findings, the court held:

Whatever [the plaintiff] claims his attorney said, those statements cannot be a proximate cause of any damages to him. He was properly informed in court by the judge as to his rights and the consequences of his guilty pleas. Specifically, he could not withdraw those pleas. He acknowledged that he understood that fact, indicated he did not have questions, and said he still wanted to enter pleas of guilty. Thereafter he pled guilty. The district judge engaged him in extensive discussion of the charges and his decision to proceed with the guilty pleas. The advice the court gave [the plaintiff], together with [the plaintiff's] clear indications that he understood the proceedings, supersedes any ideas he might have had before that he could withdraw the pleas.

Id. Because the plaintiff could not prove that the defendant's advice caused damage, the defendant's summary judgment motion was affirmed.

Under the principles of judicial estoppel, Plaintiff should not be allowed to claim that the settlement was unfair and that Mr. Gatewood was negligent. To allow Plaintiff to assert a position wholly inconsistent with the position she took by accepting the settlement would completely ignore the benefit that she received by accepting the settlement. Furthermore, allowing Plaintiff to claim the settlement was unfair and that Mr. Gatewood was negligent would offend the "integrity of the judicial process" by allowing Plaintiff to "deliberately [change] positions according to the exigencies of the moment." *Vogel v. Touhey*, 151 MD.App. 682, 707, 828, A.2d 268, 283 (2003) (citations omitted).

C. Defendant Made and Informed Judgment Based on His Reasonable Research of the Law and Facts and Therefore, As a Matter of Law, Defendant was Not Negligent.

In *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 4, 981 P.2d 236, 239 (1999) the Idaho Supreme Court, for the first time, explicitly addressed the doctrine of judgmental immunity. The court noted that the doctrine of judgmental immunity precludes an attorney from being liable for decisions that were made “in good faith and upon an informed judgment after undertaking reasonable research of the relevant legal principles and facts of the given case.” Analyzing this rule, the court stated:

Rather than being a rule which grants some type of “immunity” to attorneys, [the judgmental immunity rule] appears to be nothing more than a recognition that if an attorney’s actions could under no circumstances be held to be negligent, then a court may rule as a matter of law that there is no liability.

Sun Valley Potatoes, 133 Idaho at 5, 981 P.2d at 240. Thus, where an attorney acts in good faith and makes an informed judgment based on a reasonable research of the law and facts of a case, as a matter of law, that attorney breached no duty and was not negligent.

In *Sun Valley Potatoes, supra*, the plaintiff was involved in a prior lawsuit in which a jury awarded damages against the plaintiff in the amount of \$546,506.79. Thereafter, the plaintiff filed a malpractice claim against its attorneys, the defendants, alleging that they negligently failed to contest the damages in the underlying case. Three days prior to the summary judgment hearing, defendants submitted an affidavit alleging that the defendant’s alleged malpractice involved tactical decisions protected by the judgmental immunity doctrine. The plaintiffs moved to strike the affidavit on the grounds that it was untimely and did not give them time to respond. The district court denied the motion to strike. After considering the

defendants' affidavit, the district court granted defendants' motion for summary judgment finding that there were no genuine issues of material fact that defendants' allegedly negligent conduct was actually an informed tactical decision protected by the judgmental immunity doctrine.

Reversing the trial court, the Idaho Supreme Court held that the defendants' affidavit was not filed within the time period proscribed by Idaho Rule of Civil Procedure 56(c) and therefore the trial court should not have considered the affidavit. The court further held that without the defendants' supporting affidavit, summary judgment was improper because there was no evidence supporting the defendants' argument that their alleged negligence was an informed tactical decision.

Plaintiff fails to recognize that there is no such thing as a perfect settlement. "[T]he amount of a compromise settlement is often an educated guess of the amount that can be recovered at trial and what the opponent was willing to pay or accept. Even skillful and experienced negotiators do not know whether they received the maximum settlement or paid out the minimum acceptable." *Barnard v. Langer*, 109 CalApp.4th 1453, 1463, N.13, 1 Cal.Rptr.3d 175 (2003) (citation omitted); *see also* 3 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 30.44 (2005 ED. 2005).

That a party is dissatisfied with a settlement does not justify allowing the party to second-guess their attorney based on speculative allegations that their attorney could have obtained more out of settlement. *See Scholmer v. Perina*, 173, Wis.2d 889, 894, 473 N.W.2d 6, 9 (1991). The factors that an attorney "should have" considered before recommending a settlement and the amount of money that a case "could have" settled for are determinations that

are subject to infinite speculation. Similarly, in the present case, there are an infinite number of factors that Mr. Gatewood could have considered as well as an infinite number of ways that her case could have either settled or ended at trial.

Because Mr. Gatewood's actions were based on reasonable knowledge of the law and facts, as a matter of law, Mr. Gatewood was not negligent. Therefore, Plaintiff's negligence claim should be dismissed.

D. Plaintiff's Cause of Action Must Fail Because Plaintiff Cannot Prove that Mr. Gatewood's Alleged Negligence was the Proximate Cause of Plaintiff's Damages.

In Idaho, it is well settled that in order to prove a claim for legal malpractice a party must show (1) the existence of an attorney-client relationship; (2) the existence of a duty on the part of the lawyer; (3) the failure to perform that duty; and (4) that the failure to perform the duty was a proximate cause of the damage suffered by the party. *Nepanuseno v. Hansen*, 140 Idaho 942, 945, 104 P.3d 984, 987 (2004), *Merzlak v. Purcell*, 252 Mont. 527, 830 P.2d 1278 (1992).

"In an attorney malpractice action, the burden is upon the plaintiff to show that the attorney's negligence proximately caused the plaintiff to lose the right to recover in the underlying case." *Jordan v. Beeks*, 135 Idaho 586, 590, 21 P.3d 908, 912 (2001). The plaintiff's alleged damages must be based on more than sheer speculation. See *O'Neil v. Vasseur*, 118 Idaho 257, 796 P.2d 134 (1990) (affirming summary judgment for the defendants where the plaintiff's proof of damage was speculative and therefore insufficient to support the plaintiff's malpractice claim). "Breach of duty causing only speculative harm is insufficient to create" a cause of action for legal malpractice. *Willie Thompson v. Paul N. Halvonik*, 36

Cal.App.4th 657, 43 Cal.Rptr.2d 142 (1995) (citation omitted). “[D]amages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable.” *Id.* In proving a malpractice claim, the “burden must be on plaintiff...to demonstrate by evidence rather than by conclusory allegations, that he indeed suffered substantial financial loss.” *Murray Becker v. Julien, Blitz & Schlesinger, P.C.*, 95 Misc.2d 64, 68, 406 N.Y.S.2d 412 (1977).

In *O'Neil, supra*, the plaintiff brought a malpractice action against his attorneys, the defendants, alleging that their failure to take action in his alienation of affections case for nearly four years resulted in his recovering one-half of what he should have recovered. The trial court granted summary judgment to the defendants because it was “unable to find as a matter of law that [the defendants’] negligence [was] the proximate cause of [the plaintiff’s] loss of one-half of the alienation award...” *O'Neil*, 118 Idaho at 261, 796 P.2d at 138.

Affirming the district court, the Idaho Supreme Court found that in order for the plaintiff to prove that the defendants’ negligence caused a diminution in the amount of his award, the plaintiff would be required to prove the amount that a jury would have awarded absent the delay. *Id.* (emphasis added). Further, any evidence introduced by the plaintiff in order to prove what the jury would have awarded absent the defendants’ negligence would “be inadmissible due to its speculative nature.” *Id.* Thus, because the plaintiff’s alleged damages were speculative and inadmissible, the plaintiff could not support his malpractice claim and summary judgment was proper.

Under the standard established in *O'Neil*, in order to prove her allegations of damage, Plaintiff will be required to engage in extensive speculation. Plaintiff cannot prove,

without extensive speculation, that, had she not settled, the court would have valued her and her ex-husband's assets and would have distributed the community property in a manner that would have resulted in a greater benefit to Plaintiff.

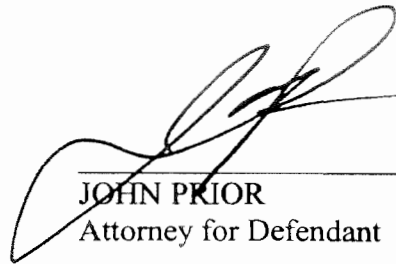
Finally, under the Idaho Supreme Court's holding in *Lamb v. Manweiler*, *supra*, Plaintiff cannot prove that Mr. Gatewood's allegedly negligent conduct caused damage to Plaintiff. As discussed above, prior to Plaintiff's adoption of the settlement, the court engaged in a lengthy discussion regarding the terms and effect of the settlement. Finally, after the court's lengthy discussion of the settlement, Plaintiff, under oath, in open court, and in front of the judge, indicated that she understood the terms of the settlement and promised to abide by those terms. Thus, regardless of any conduct by Mr. Gatewood, it was Plaintiff who, after a lengthy discussion by the court, indicated that she understood and accepted the terms of the settlement. Like the Plaintiff in *Manweiler*, "the advice the court gave [the plaintiff], together with [the plaintiff's] clear indications that she understood the proceedings, supersedes any ideas he might have had" that the settlement was unfair. *Manweiler*, 129 Idaho at 273, 923 P.2d at 980. Further, "[w]hatever [plaintiff] claims [Mr. Gatewood did], those [actions] cannot be a proximate cause of damages to him." *Id.* Because Plaintiff cannot prove that Mr. Gatewood's advice was negligent and that it was the proximate cause of Plaintiff's damages, as a matter of law, her malpractice claim must fail and Mr. Gatewood's motion for summary judgment should be granted.

IV. CONCLUSION

Plaintiff is judicially estopped from asserting that the divorce settlement was unfair. Further, Mr. Gatewood's recommendation to settle was an informed decision based on

the relevant law and facts of this case and therefore Mr. Gatewood was not negligent. Finally, Plaintiff cannot prove that, had things been done differently, she would have obtained a better settlement. Plaintiff cannot prove that the advice caused her damages. Accordingly, Plaintiff's claim cannot succeed and, as a matter of law, Mr. Gatewood's motion for summary judgment should be granted.

DATED this 5th day of May, 2008.



JOHN PRIOR
Attorney for Defendant

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on the 5th day of May, 2008, I caused a true copy of the foregoing Memorandum In Support of Motion for Summary Judgment to be served by the method indicated below, and addressed to the following:

Eric R. Clark
THE REAL ESTATE LAW GROUP
P.O. Box 2504
Eagle, ID 83616
Fax: (208) 939-7136

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Charles Crafts
Attorney at Law
410 S. Orchard St., Suite 120
Boise, ID 83705
Fax: (208) 389-2109

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile



JOHN PRIOR

EXHIBIT A

FEE AGREEMENT

THIS AGREEMENT, between SALLAZ & GATEWOOD, CHTD., Attorneys and Counselors at Law, located at 1000 S. Roosevelt, P.O. Box 8956, Boise, ID. 83707, (hereinafter referred to as "Attorney") and PAMELA STEPHENS, (hereinafter referred to as "Client"), recites as follows:

Thank you for engaging this office to represent you. You hereby retain us to represent your interests in connection with a divorce and related matters. This agreement will confirm such representation and indicate how services are provided and payment is to be made.

We will represent you only in connection with the above matters(s), unless we agree to additional representation in writing.

We will be as available and prompt in responding to your calls as our business permits. Our receptionist is here to take your calls from 8:30 a.m. to 5:00 p.m., Monday through Friday. You may leave a message with her, or talk directly with our legal assistant appointed to this case.

Our retainer for this case is \$5000.00. (Title to 1990 Chevrolet truck to be held in lieu of retainer until retainer is paid). We will always attempt to negotiate and consult along with you to make every effort to settle this matter short of a trial and control costs. However, each case is unique in its own circumstances. You agree that whatever work needs to be expended in the proper handling of your case, in our judgment, will be done and authorized by you. The hourly charge for our time is \$200.00. You will be billed monthly for such excess. You agree to promptly pay all monthly invoices, which will include time spent and description of work done. Unpaid balance shall accrue interest at the rate of 1 ½% per month (18% per annum).

If you fail to comply with the above arrangements, we have the right to immediately stop performing legal work until the account is brought current, and we may also withdraw from further representation of you, as our Client, in any pending court cases.


We appreciate your expression of confidence in our firm and we look forward to representing you. If you have any questions or concerns during the course of our relationship, please discuss them with our office promptly so they can be resolved.

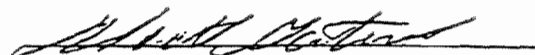
Attorney is under no obligation to appear on Client's behalf until said minimum fee has been PAID IN FULL. Client agrees that should Attorney be discharged from further representation at any point after the initial fee has been paid, Client is NOT entitled to a refund.

ENFORCEABILITY: This Agreement shall be enforceable under the laws of the State of Idaho. Should legal action be required to enforce this Agreement, Client agrees to pay any and all Attorney fees and costs incurred therefrom. No agreement other than as stated herein shall be valid and any amendment hereof must be in writing and signed by the parties to be enforceable.

COSTS: Client agrees to pay ANY and ALL costs and out of pocket expenses incurred by Attorney, in addition to the RETAINER or other legal fees described above; if advanced by Attorney these costs shall be repaid by Client upon demand; these costs may include fees for investigators, witnesses, court reporters, travel expenses, fees of process service, as well as any and all other costs other than attorney fees.

DATED: 6/16/03


CLIENT


ATTORNEY

Payment agreement as follows:

PAYMENT TO BE MADE IN FULL no later than August 15, 2003. Should the balance of this account exceed the retainer, the account balance is to be paid off monthly.

I agree to the terms described above.

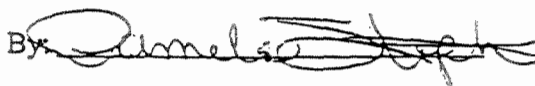
By: 

EXHIBIT B

1. Crescent Rim Property 385,500

Beach Property 95,000

2. See ATTACHED

3. 3309 Crescent Rim House
527 S. Beach
Townhouse
BMW
Navigator
Discover Card

5. ~~X~~
SAVINGS acct \$35,000
Checking acct 1,000
jewelry 1,000
Henckle Knives 50
Corning ware 50
Mink Blanket 50
Clothes 300
white dishes 75

money down
on construction
loan - do not
have total to

money down on
Beach St.

~~X~~
4. None

6.

Savings + checking money from
uncle - Herir

gifts + wedding ring - Jewelry

gift from GARY - Henckle Knives

Corning Ware had before married

White dishes had before married

Mink Blanket gift from GARY

Clothes -

Money down on construction

loan was from a personal injury

lawsuit

money down on Beach street

was from met life which

originated from the sell of

property that I had before

we were married

7. NO

8. [redacted] Smith & Wesson
9mm gun + case Gary or Jennifer took from
[redacted] several years ago and won't return -

9. NONE

10. Metropolitan 3050 N. Lakeharbor Lane Boise
79456256m \$2,000 \$1,000 \$1,000
'8946753214m 945830973

11. \$10

12. USBANK - Separate money
[redacted] 153391004711 \$35,000 \$1,000 153351932136

13. DL EVANS, jewelry 7207 W. Franklin Boise

14. NONE

15. NONE

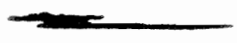
16. NONE

17. [redacted] Pool table \$650 ad in paper don't
know who purchased

18. NONE

19. XMAS GIFTS + Birthdays earrings + necklace
bra + undies, toiletry items, jewelry, Toys, sweater
Easter baskets, kite, one pair of tennis shoes, drill
one pair of sunglasses, Baskin Robbing gift certificate \$5

2 gift certificates to mall for boys \$45 ea.



20. Food , Gary is paying utility bills + MTG
~~500~~ Trash - \$20.00 , cable \$50 Chase \$100
Radio Shack \$100 , Home Depot \$100 , Lowes \$100

21. Don't know

22. ~~22~~ white couch
Living room coffee table + sideboard
white table
LR rug
Dining room rug
LR Lamps
Family room TV + Stand
Leather chairs
Desk + hutch + chairs
computer
Bedroom side tables + Bed
Small 13" Rec TV
1/2 Linens
Teakwood trunk
Dresser
Tools + related Tool items
Ladder
Folding ladder
Lg. wet + dry vacuum
Air compressor
table saw
Motorcycle

22. Bmw

1/2 garden tools

one set white patio furniture

one umbrella

his bicycle

gorilla rack

wheel barrow

Brown chair

1/2 garden hoses

grill

Striped chair & half

his books

1/2 dishes & glasses

1/2 Xmas decorations

his laptop

Camaro

video cameras

guns - his

Stereo in family room

VERS

SAFE

1/2 of Stationary Supplies

GARYS ATTIC items Boxes along window

Different Tanks in garage - refrigerant etc.

* Jennifer gets her XMAS DISCS

* Jennifer gets her XMAS ORNAMENTS

small wooden box

hand cart - dolly

car ramps

23

White chair & half
dining room furniture

Silver service

Family room rug

den rug & sitting room rug

~~Family room lamps~~

1/2 linens

1/2 xmas deco

luggage

washer & dryer

rack in utility room

Treadmill

1/2 House equity, plus ^{separate} money I put
into House from Red Lion lawsuit

Down money on Beach property - ^{money} from the
Life Policy

1/2 Beach equity

Navigator

lawn mower

1/2 garden tools

one set white patio furniture

Laptop - mine

white wicker dresser

OAK armoire

wicker armoire

pink furniture

Oak sideboard

Mirrors

unassured

23 cont.

lamps sitting room

lamps bedroom

white TV.

Bedroom TV

Bookshelf stereos

@Alphalon pans

Bowls

white dishes

Kitchen appliances

Corningware

Books

Jens portrait

Vacuum

red truck

Painting

pink bowl

Turtle wax buffer

my tools

games

irons

9mm gun

Ziggy - the dog

Chain saw

Flower pots

Wenckle knives

lg Blk clock

Trunk from cabin

2 oak straight back chairs

24. NONE

25. NONE

26. DONT KNOW

27. DONT KNOW

28. DONT KNOW

29. DONT KNOW

1. STOLEN

2. [REDACTED] Any Financial Statements would have been prepared by Gary which would have been on computer which was dumped 2003

3. Dont Have those

4. None

5. None

6. Dont Have documents

7. Dont Have Titles

8. Dont Have any

See *
Below 9.

Don't Have any of these - Threw them away
+ damaged by leak in ceiling - 2003 - Gary may have
some of these

10. Don't Keep These
11. NONE
12. Copy enclosed
13. Do not know where these are
14. Copies enclosed
15. Don't know

* 9 Gary kept Banking on computer and
dumped all the information on computer

#2

White chair & half	\$ 75
dining room furniture	260
Silver service	250
Family room rug	75
den rug & sitting room rug	75 50
Family room lamps	100
1/2 linens	50
1/2 xmas deco	100
luggage	100
washer & dryer	250
rack in utility room	50
Treadmill	150
1/2 House equity, plus ^{separate} money I put into House from Red Lion lawsuit	
Down money on Beach property - ^{money} from met LIFE POWER	
1/2 Beach equity	
Navigator	75,000
lawn mower	75
1/2 garden tools	75
one set white patio furniture	50
laptop - mine	500
white wicker dresser	25
OAK armoire	150
white armoire	150
pink furniture	200
Oak sideboard	35
Mirrors	100

[REDACTED]

lamps sitting room	30
lamps bedroom	30
white TV	50
Bedroom TV	50
Bookshelf stereos	35
@Alphalon pans	150
Bowls	15
white dishes	50
Kitchen appliances	50
Corningware	50
Books	100

Vacuum	35
red truck	1500
Painting	200
pink bowl	100
Turtle wax buffer	10
my tools	25
games	15
irons	20
9mm gun	250

Chain saw	35
Flower pots	75
Henckle knives	50
lg Blk clock	35
Trunk from cabin	50
2 oak straight back chairs	30

white couch	150
Living room coffee Table + sideboard	150
white table	35
LR rug	50
Dining room rug	75
LR Lamps	100
Family room TV + Stand	250 150
Leather chairs	200
Desk + hutch + chairs	250
computer	300
Bedroom side tables + Bed	70 150
Small 13" Rear TV	50
1/2 Linens	50
Teakwood trunk	35
Dresser	50
Tools + related Tool items	500
Ladder	35
Folding ladder	50
L.g. wet + dry vacuum	35
Air compressor	150
table saw	75
Motorcycle	700

Emergency road Kit

25

grandfather clock

175

telescope

25

*

~~Some of my books~~

*

~~Some of my tools~~

clock in den

15

lamp in bedroom

15

his clothes & items in his closet

300

park bench

35

Corvette

6,000

file cabinet

25

Bmw	15,000
1/2 garden tools	35
one set white patio furniture	50
one umbrella	35
his bicycle	15
gorilla rack	25
wheel barrow	10
Brown chair	15
1/2 garden hoses	15
grill	75
Striped chair & half	75
his books	15
1/2 dishes & glasses	50
1/2 Xmas decorations	75
his laptop	300
Camaro	2500
video CAMERAS	150
guns- his	150
Stereo in Family room	75
VERS	50
SAFE	50
1/2 of Stationary Supplies	35
GARYS ATTIC items Boxes Along window	
Different Tanks in garage - refrigerant etc.	
* XXXXXXXXXXXXXXXXXXXXXXXXXXXX	
* XXXXXXXXXXXXXXXXXXXXXXXXXXXX	
small wooden box	500
hand cart - dolly	1500
car ramps	1000

Cello	7500
red wine glasses	1000
Stand in bathroom	1500
dolls in attic	10000
my clothes + items in my closet	30000
2 cabinets in garage	7500
rug shampuser	2500
Steinbach nutcrackers	10000
park bench in attic	1500
File cabinets (2)	5000

GARY has all knowledge of community assets - he took my name off the account so all information of our savings account balance he has. Any other assets stocks etc. he would know as he kept this secret from me.

EXHIBIT C

Scott Gatewood

From: "Steve Beer" <sbeer@beer-cainlaw.com>
To: "Scott Gatewood" <scott@sallazlaw.com>; "Ann Shepard" <annshepard@boiselaw.net>
Sent: Monday, August 02, 2004 3:35 PM
Subject: Stephen Mediation

We met today. We have divided all personal assets. We meet again tomorrow at 10 a.m. and Wednesday at 3 p.m. Good chance we will have all wrapped up by trial date. I have a spreadsheet that will work for both of you as far as a trial exhibit, if it goes to trial. I think there is a 99% chance of full settlement. Steve.

Stephen L. Beer
302 W. Idaho Street
Boise, Idaho 83702
T-208-336-2323
F-208-336-9060
sbeer@beer-cainlaw.com

Scott Gatewood

From: "Steve Beer" <sbeer@beer-cainlaw.com>
To: "Scott Gatewood" <scott@sallazlaw.com>; "Ann Shepard" <annshepard@boiselaw.net>
Sent: Tuesday, August 03, 2004 11:07 AM
Attach: StephenPamGary.xls
Subject: Stephen mediation

Pam failed to show for mediation this morning. We have one more appointment set for 3:00 p.m. I am attaching the spreadsheet. I did not know what you had done on debts so the debt section may be incorrect. I also left the 401 (k) blank because I don't know how the equalization is going to be paid. Steve.

Stephen L. Beer
302 W. Idaho Street
Boise, Idaho 83702
T-208-336-2323
F-208-336-9060
sbeer@beer-cainlaw.com

Scott Gatewood

From: "Steve Beer" <sbeer@beer-cainlaw.com>
To: "Ann Shepard" <annshepard@boiselaw.net>; "Scott Gatewood" <scott@sallazlaw.com>
Sent: Wednesday, August 04, 2004 3:53 PM
Subject: Stephen mediation

Scott and Ann - we finished. There is a little more work for you to do, but it should resolve. Need to watch out for social security eligibility. I tried to call Hugh Mossman, but he is out until Monday. Steve

Stephen L. Beer
302 W. Idaho Street
Boise, Idaho 83702
T-208-336-2323
F-208-336-9060
sbeer@beer-cainlaw.com

JOHN PRIOR
Law Office of John Prior
 16 12th Avenue S., Suite 113
 Nampa, ID 83651
 Telephone: (208) 465-9839
 Facsimile: (208) 465-9834

NO. _____ FILED 3:55
 A.M. _____ P.M.
MAY 05 2008
J. DAVID NAVARRO, Clerk
 By **J. EARLE**
 DEPUTY

Attorney for Defendant G. SCOTT GATEWOOD

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

PAMELA K. JOERGER STEPHEN,)	
	)	Civil No. CV OC 0614241
Plaintiff,)	
	)	AFFIDAVIT OF
vs.	)	G. SCOTT GATEWOOD
)	
SALLAZ & GATEWOOD, CHTD.,)	
DENNIS SALLAZ and SCOTT GATEWOOD,)	
)	
Defendants.)	

STATE OF IDAHO)
 : ss
 County of Ada)

G. SCOTT GATEWOOD, Being first duly sworn upon oath, deposes and states:

1. That on or about August 5, 2004, I was the attorney of record for Pamela Katherine Stephen in her divorce proceedings in front of the Honorable Judge Day in Ada County, Idaho.
2. That prior to our hearing date I was aware and had information that Ms. Stephens and her husband had been involved in formal settlement negotiations with Steve Beer and had been able to resolve a significant number of issues regarding property settlement.
3. On or about August 5, 2004, I met with Ms. Stephens, opposing counsel and her husband Gary

2

Stephens at the Ada County Courthouse at a time prior to the time set for hearing in their case.

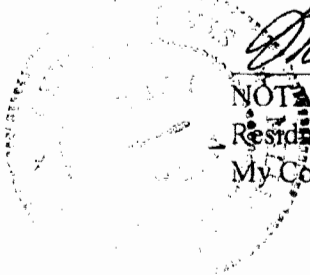
During these meetings the parties were able to come to an agreement regarding the issues pending in their divorce.

4. Ms. Stephens was an active participant in the meeting and discussion and was in agreement to the decisions reached.
5. Upon agreeing to the terms of settlement in the divorce, the parties and their respective counsel were present in the Courtroom of the Honorable Judge Day, where in front of Judge Day we placed our agreement on the record.
6. I was present when Judge Day inquired of each party as to whether they agreed to the terms of the agreement and I witnessed and heard Ms. Stephens when she verbally agreed, in open court and on the record, to the terms of the divorce decree.
7. Near the end of the proceedings, Ms. Stephens then whispered to me and indicated that she wanted me to add her request to have her legal name changed back to her maiden name. I asked the Court to add this additional request to the divorce decree, and without objection from the opposing side, Ms. Stephen stated her maiden name and spelled it for the record.
8. I have listened to a recording of the hearing in front of Judge Day and read the transcript of the same and have personal knowledge that they reflect accurately that Ms. Stephens agreed to the terms of the divorce decree in open court in front of Judge Day.

DATED This 5 day of May, 2008.


G. SCOTT GATEWOOD

SUBSCRIBED AND SWORN To before me this 5 day of May, 2008.



Melinda Anderson

NOTARY PUBLIC FOR IDAHO

Residing at Boise, Idaho

My Commission Expires: 4/23/2013

NO. _____
MAY 27 2008 4:13 PM

MAY 27 2008

J. DAVID NAVARRO, Clerk
By J. EARLE
DEPUTY

Eric R. Clark, ISB# 4697
THE REAL ESTATE LAW GROUP
P.O. Box 2504
Eagle, ID 83616
Tel: (208) 830-8084
Fax: (208) 939-7136

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN)
)
)
 Plaintiff,)
)
 v.)
)
 SALLAZ & GATEWOOD, CHTD.,)
 and SCOTT GATEWOOD,)
)
 Defendants.)

Case No.: CV OC 0614241

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT
GATEWOOD'S MOTION FOR
SUMMARY JUDGMENT**

COMES NOW the Plaintiff, by and through her attorney of record, and files this memorandum in Opposition to Defendant Gatewood's Motion for Summary Judgment.

STANDARD FOR SUMMARY JUDGMENT.

Contrary to Mr. Gatewood's argument, he bears the burden of establishing that no genuine issue of material fact exists, before Ms. Stephen has to respond.

When faced with an appeal from a lower court's grant of a summary judgment motion, this Court reviews the lower court's ruling by employing the same standard properly applied by the lower court when originally ruling on the motion. Summary judgment shall be rendered "if the pleadings, depositions, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court liberally construes the record in favor of the party opposing the motion and draws all reasonable inferences and conclusions in that party's favor. If reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence, summary judgment must be denied. However, if the evidence reveals no disputed issues of material fact, then summary judgment should be granted.

The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. In order to meet its burden, *the moving party must challenge in its motion and establish through evidence the absence of any genuine issue of material fact on an element of the nonmoving party's case. If the moving party fails to challenge an element or fails to present evidence establishing the absence of a genuine issue of material fact on that element, the burden does not shift to the nonmoving party, and the non-moving party is not required to respond with supporting evidence.*

Idaho Schools for Equal Educational Opportunity v. State, 132 Idaho 559, 564 – 565 ; 976 P.2d 913, citing *Orthman v. Idaho Power Co.*, 130 Idaho 597, 600, 944 P.2d 1360, 1363 (1997), (quoting from *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 718-19, 918 P.2d 583, 587-88 (1996) (emphasis added) (citations omitted)). (Emphasis in original).

ARGUMENT

A. Mr. Gatewood has failed in his burden to establish he is entitled to judicial estoppel.

1. First, the Court should deny the Motion on this issue outright as Gatewood failed to provide the Court with the transcript of the August 5, 2004 hearing. While Gatewood cites *McKay v. Owen*, 130 Idaho 148, 937 P.2d 1222, (1997), in which the Idaho Supreme Court obviously had the benefit of the Court transcript because the Court quoted from it in the Court's decision, Gatewood failed to provide this Court with a copy of the relevant transcript.

(Gatewood not only has a copy of the transcript, but the audio recording as well, as he contends in paragraph 8 of his Affidavit.) All Gatewood provided to the Court was a self-serving statement in his affidavit that he had reviewed the transcript and contends that Ms. Stephen agreed to the settlement.

Without the transcript, this Court has no way of knowing what actually transpired on the record. Consequently, as it is Gatewood's burden to provide the transcript in support of this affirmative defense and Gatewood failed to provide the requisite transcript, the Court must deny summary judgment on this issue.

2. The application of judicial estoppel is not absolute. The Supreme Court in *McKay* also discussed criteria that would preclude the application of judicial estoppel under the appropriate circumstances.

This decision does not mean that attorneys will never be accountable for their negligence whenever there has been a settlement in the underlying transaction. If a client does not learn of the grounds for, or facts giving rise to, legal malpractice until after the settlement has been approved, the policies behind judicial estoppel will not be furthered, and the doctrine should not be employed. **For guidance purposes and to avoid misapplication of judicial estoppel, it should be made clear that the concept should only be applied when the party maintaining the inconsistent position either did have, or was chargeable with, full knowledge of the attendant facts prior to adopting the initial position. Stated another way, the concept of judicial estoppel takes into account not only what a party states under oath in open court, but also what that party knew, or should have known, at the time the original position was adopted.** Thus, the knowledge that the party possesses, or should have possessed, at the time the statement is made is determinative as to whether that person is "playing fast and loose" with the court.

The situation would also be different, for example, if an attorney committed malpractice by neglecting to include a defendant in the complaint. In that case, assuming that the client was not aware of the malpractice before agreeing to the

settlement, the client may have a legal malpractice claim. The conduct giving rise to the legal malpractice claim, while potentially affecting the amount of the final settlement agreement, is not part and parcel of the settlement agreement. The client could still agree to the settlement while retaining the right to file a legal malpractice action.

McKay v. Owen, 130 Idaho at 155.

a. Guardian. Ms. Stephen has provided the Court with an affidavit from her expert witness Attorney Cathy Naugle, and in Ms. Naugle's opinion, as Ms. Stephen had disclosed certain medical conditions to Gatewood during their initial meeting (which Gatewood confirms in his memorandum), Gatewood had a duty to investigate the circumstances of these disclosed conditions with Ms. Stephen's medical care providers and to determine whether or not Ms. Stephen needed a guardian to act on her behalf during her divorce proceedings. If Gatewood failed to investigate Ms. Stephen's medical conditions or contact her medical providers, then Ms. Naugle believes that Gatewood's conduct fell below the standard of care.¹

Under the circumstances, to prevail at summary judgment, Gatewood has the burden to prove that Ms. Stephen did not need a guardian and that she was able to fully understand the proceedings. While Gatewood acknowledges that Ms. Stephen disclosed her medical conditions to him and disclosed that she was undergoing treatment for these conditions during her divorce,² Gatewood offers no testimony that he ever investigated these conditions or contacted any of Ms. Stephen's medical care providers. All that Gatewood offers is his lay opinion that he believed Ms. Stephen understood the proceedings.

¹ Naugle Aff. Page 2, paras. 7 and 8.

² Gatewood Memorandum, page 2, para. 1, and page 2-3, para. 3.

If Ms. Stephen needed a guardian, and all facts before the Court indicate she did, then judicial estoppel cannot apply as Ms. Stephen was not “chargeable” with “full knowledge” of the facts.

b. Spousal Maintenance. Notwithstanding that failing seek a guardian under the circumstances precludes the application of judicial estoppel; there are other examples of Gatewood’s negligence that address the second paragraph of the *McKay* decision quoted above. Ms. Stephen understands the *McKay* decision does not act as a bar to legal malpractice claims just because there was a settlement or judgment. As a relevant example, if Gatewood advised Ms. Stephen to agree to a settlement that did not include maintenance, but he thought it had, then his negligence would preclude the application of this principle.

Gatewood stated a claim for spousal maintenance for Ms. Stephen in her Answer and Counterclaim,³ and during the divorce proceeding, Gatewood filed a Motion for Temporary Maintenance along with an Affidavit of Pamela Stephen in Support of Motion for Temporary Maintenance.⁴ Curiously, however, the final decree⁵ does not address spousal maintenance?

The divorce decree indicates that because of the disparity of the division of community property, Gary Stephen was required to pay Ms. Stephen \$2,000.00 per month for 24 months as an “equalization” payment. Mr. Stephen owed Ms. Stephen \$48,000.00 and was required to pay this amount back to Ms. Stephen over 24 months. This payment was not spousal maintenance, either temporary or long term, but a repayment to “equalize” the community property settlement.

3 Affidavit of Counsel, Exhibit A.

4 Affidavit of Counsel, Exhibit B.

5 Affidavit of Counsel, Exhibit C.

In response to discovery Ms. Stephen propounded to Gatewood in this case, Gatewood responded that he believed Ms. Stephen sued him "...only after her *temporary maintenance* ended."⁶ Additionally, Mr. Stephen testified in his affidavit that Gatewood called him late last year and said the same thing.⁷ Two years after the divorce decree was entered and Gatewood thinks that Ms. Stephen was awarded "temporary maintenance"? While we don't have the benefit of the transcript, as Gatewood failed to file a copy in support of this motion, and therefore we don't know whether or not Judge Day discussed spousal maintenance on the record, it is clear that Gatewood thinks that Ms. Stephen received maintenance, although she did not. If a parties' attorney does not understand what transpired regarding a settlement, how in the world would a client have "full knowledge of the attendant facts" – the requisite standard for application of judicial estoppel?

B. Mr. Gatewood has failed in his burden to establish he is entitled to "judgmental immunity."

Gatewood cites to *Sun Valley Potatoes, Inc. v. Rosholt, Roberston & Tucker*, 133 Idaho L. 981 P.2d 236 (1999), a case in which this Court is intimately familiar, and argues that he is entitled to summary judgment based on application of "judgmental immunity." This was a case of first impression in Idaho for application of this principle and the Supreme Court articulated its understanding of the requisite elements.

The "rule" as applied in other jurisdictions has been articulated in different ways.(fn1) Most commonly it appears that the courts have simply ruled that in

6 Affidavit of Counsel, Exhibit D, Answer to Interrogatory No. 6.

7 Affidavit of Gary Stephen, pages 2-3, paragraphs 15-17.

certain circumstances an attorney is not liable "as a matter of law" and thus, the issue need not be submitted to a jury for decision. All courts acknowledge the standard of care with which all attorneys must comply and that is: they are held to that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer. The courts have then held as a matter of law that an attorney cannot be held liable for failing to correctly anticipate the ultimate resolution of an unsettled legal principal. *See, e.g., Halvorsen v. Ferguson*, 46 Wash.App. 708, 735 P.2d 675, 681 (1986).

Other courts have stated that, in the context of litigation, an attorney will not be held liable for a mere error in judgment or trial tactics if the attorney acted in good faith and upon an informed judgment. *See, e.g., Simko v. Blake*, 448 Mich. 648, 532 N.W.2d 842, 847 (1995). The "non-liability" rule in both situations, however, is conditioned upon the attorney acting in good faith and upon an informed judgment after undertaking reasonable research of the relevant legal principals and facts of the given case. *See, e.g., Smith v. Lewis*, 13 Cal.3d 349, 118 Cal.Rptr. 621, 530 P.2d 589, 595 (1975). **In other words, an attorney must act with that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer.**

Sun Valley Potatoes, Inc. v. Rosholt, Roberston & Tucker, 133 Idaho at 4-5. (Emphasis added.)

Although Gatewood cites to the *Sun Valley Potato* case, he fails to provide the Court with any substantiating facts to support the application of judgmental immunity to this case. The Defendants have identified a number of standard of care experts in discovery, yet Gatewood offers nothing to support his contention he acted with "that degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable and prudent lawyer."

Based on the documents and affidavits filed, Gatewood does not even meet his burden at summary judgment that would necessitate Ms. Stephen's response. However, Ms. Stephen has filed an affidavit of her standard of care expert, Cathy Naugle, who

testifies in her opinion the Defendants' conduct fell below the requisite standard of care in many respects. Because Ms. Stephen has raised genuine issues of material fact with her expert witness regarding the Defendants' conduct, the Defendants are not entitled to summary judgment on this defense.

C. Ms. Stephen's damages are not speculative.

Finally, Gatewood claims that Ms. Stephen cannot prove that his conduct *proximately caused* her damages, but really doesn't argue proximate cause at all. The argument actually is based on the *defense* that the damages alleged are speculative and therefore the plaintiff is not entitled to recover. Because a claim that damages are speculative is a defense, Gatewood bears the burden at summary judgment of establishing this defense before the plaintiff is required to respond. And, once again, Gatewood has failed in his burden.

Gatewood cites to *O'Neil v. Vasseur*, 118 Idaho 257, 796 P.2d 134 (Ct. App. 1990), to support his "proximate cause" argument, but misunderstands or misstates the actual standard the Court applied. This is the excerpt of the opinion that Gatewood cites to in his Memorandum.

We are thus presented with the question of whether the district court properly dismissed O'Neil's claim by granting Vasseur and Gissel's summary judgment motion. Because the invasion of privacy suit is still unresolved, the damages that may be awarded therein are speculative, conjectural and unliquidated. Furthermore, it has not been established that Vasseur and Gissel's delay is responsible for a diminution of that possible award. To prove this contested fact, O'Neil would have to prove the amount a jury would have awarded absent the delay. We agree with the district court that any evidence tending to shed light on this question would be inadmissible due to its speculative nature. In negligence

cases, summary judgment is appropriate in only the most clear situations. *Jarman v. Hale*, 112 Idaho 270, 273, 731 P.2d 813, 816 (Ct.App.1986). Negligence issues are jury questions "unless the proof is so clear that different minds cannot reasonably draw different conclusions or where all reasonable minds would construe the facts and circumstances of the case in only one way." *Annau v. Schutte*, 96 Idaho 704, 707, 535 P.2d 1095, 1098 (1975). Customarily, a claim of negligence presents questions of fact for the jury to resolve. Contested facts may not be resolved at the summary judgment stage. *Jarman, supra*; *Fajen v. Allstate Insurance Co.*, 96 Idaho 886, 538 P.2d 1190 (1975); *Johnson v. Stanger*, 95 Idaho 408, 510 P.2d 303 (1973). See also *State of Idaho v. Bunker Hill Co.*, 662 F.Supp. 725 (D.Idaho 1987). We will now consider the issues in the light of these standards.

O'Neil v. Vasseur, 118 Idaho at 261.

It is clear the Court of Appeals in *O'Neil* is limiting its conclusion that the alleged damages are "speculative" to the narrow issue of the damages caused by any alleged delay in bringing the case to the jury. *O'Neil* does not stand for the broad application that any potential jury award is speculative as Gatewood argues.

Had the Stephen divorce case proceeded to trial, presumably the parties would have had experts render opinions regarding the value of the respective community property (real estate) and presented evidence to support an award of spousal maintenance. These amounts are readily ascertainable with the proper evidence, which again would have been presented – or will be presented at trial. Ms. Stephen's damages are therefore not "speculative" to the level warranting the application of this defense.

Ms. Stephen, although not conceding that Gatewood has met his burden on this issue, has provided the expert opinion from Ms. Naugle regarding her damages that Ms. Naugle believes were proximately caused by the Defendants' negligence.⁸ Gatewood's defense therefore fails.

ATTORNEY FEES

Ms. Stephen respectfully requests that the Court award attorney fees to her as this motion was brought frivolously and without foundation. In light of the record Gatewood presented: no admissible evidence and no transcript, the Court could not have awarded Gatewood any relief even if Ms. Stephen had not responded.

CONCLUSION

Gatewood has failed to establish his burden that no genuine issue of material fact exists as to each element of his affirmative defenses, and he is therefore not entitled to summary judgment. The Plaintiff therefore respectfully requests that the Court DENY this motion in its entirety.

RESPECTFULLY SUBMITTED this 27th day of May, 2008.

THE REAL ESTATE LAW GROUP



Eric R. Clark, for the Plaintiff

⁸ Naugle Aff., page 4, para. 20.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of May, 2008, I caused to be served in the manner indicated a true and correct copy of the foregoing to the following:

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
16 12th Avenue South, Suite 113
Nampa, Idaho 83651

Via Fax (208) 465-9834

CHARLES C. CRAFT
CRAFTS LAW, INC
410 S. Orchard, Ste. 120
Boise, ID 83705

Via Fax (208) 389-2109



Eric R. Clark

4:13
MAY 27 2008
J. DAVID NAVARRO, Clerk
By J. EARLE
DEPUTY

Eric R. Clark, ISB# 4697
THE REAL ESTATE LAW GROUP
P.O. Box 2504
Eagle, ID 83616
Tel: (208) 830-8084
Fax: (208) 939-7136

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN)	
)	
Plaintiff,	)	Case No.: CV OC 0614241
)	
v.	)	AFFIDAVIT OF COUNSEL FILED IN
	)	OPPOSITION TO DEFENDANT
SALLAZ & GATEWOOD, CHTD.,	)	GATEWOOD'S MOTION FOR
and SCOTT GATEWOOD,	)	SUMMARY JUDGMENT
)	
Defendants.)	
)	
)	
)	

STATE OF IDAHO)
) ss.
County of Ada)

ERIC R. CLARK, being first duly sworn on oath, says:

- I am over eighteen years of age, and I have personal knowledge of the facts discussed below.
- I am the attorney for the Plaintiff in this case.

1

3. Exhibit A is a true and correct copy of the Answer and Counterclaim attached as filed by the Defendants in the underlying divorce case.

4. Exhibit B contains true and correct copies of the Motion for Temporary maintenance and Affidavit of Pamela Stephen filed by the Defendants in the underlying divorce case.

5. Exhibit C is true and correct copy of the Judgment and Decree of Divorce of record in the divorce case.

6. Exhibit D is a true and correct copy of excerpts of the Defendant Gatewood's response to Ms. Stephen's discovery requests in this case.

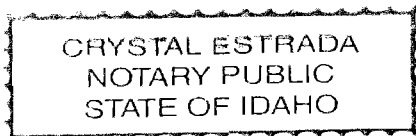
I declare under penalty of perjury under the laws of the State of Idaho and the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief.

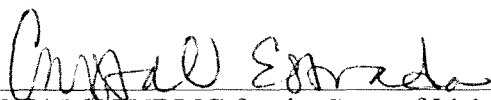
DATED this 27th day of May 2008.



Eric R. Clark

SUBSCRIBED AND SWORN to before me this 27th day of May 2008.




NOTARY PUBLIC for the State of Idaho
Residing at: Meridian, ID
My Commission expires: 7-5-13

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on the 27th day of May, 2008, I caused to be served in the manner indicated a true and correct copy of the foregoing to the following:

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
16 12th Avenue South, Suite 113
Nampa, Idaho 83651

Via Fax (208) 465-9834

CHARLES C. CRAFT
CRAFTS LAW, INC
410 S. Orchard, Ste. 120
Boise, ID 83705

Via Fax (208) 389-2109



Eric R. Clark

DENNIS J. SALLAZ, ISB No. 1053
G. SCOTT GATEWOOD, ISB No. 5982
SALLAZ & GATEWOOD, CHTD.
Attorneys at Law
P.O. Box 8956
Boise, Idaho 83707
Telephone: (208) 336-1145
Facsimile: (208) 336-1263

NO. _____
A.M. _____ P.M. _____
COPY

JUN 20 2003

J. DAVID NAVARRO, Clerk
By BJ KNAPP
DEPUTY

Attorney for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GARY ALLEN STEPHEN,)	
	)	Case No. CV DR 0301151 D
Plaintiff/Counterdefendant,)	
	)	A N S W E R
vs.	)	AND
	)	COUNTERCLAIM
)	
PAMELA KATHERINE STEPHEN,)	
)	
Defendant/Counterclaimant.)	
_____)	

ANSWER

COMES NOW, Defendant, by and through her attorney, Sallaz & Gatewood, Chtd., and in answer to Plaintiff's Complaint filed herein, admits, denies and avers as follows:

1. Defendant denies each and every allegation of Plaintiff's Complaint not specifically admitted herein.
2. Defendant admits the allegations as stated in Paragraphs 1, 2, 3, 4, 5, and 6 of Plaintiff's Complaint.

ANSWER AND COUNTERCLAIM, P. 1

EXHIBIT A COPY

3. Defendant denies the allegation in paragraph 7 of Plaintiff's Complaint, and affirmatively alleges that Plaintiff has been forced to retain the firm of Sallaz & Gatewood, Chtd. to protect her interests herein and that Plaintiff should be ordered to pay Defendant's reasonable attorney's fees and costs incurred.

COUNTERCLAIM

As and for a counterclaim against Plaintiff, Defendant alleges as follows:

1. The parties were married to one another on the 17th day of December, 1976, at Boise, Ada County, Idaho, and have been, and now are husband and wife. The parties resided together as husband and wife in Idaho.
 2. There has been one (1) child born as issue of the marriage who is now an adult.
 3. That during the marriage of the parties, they have accumulated community property which should be equitably divided between the parties.
 4. That during the marriage of the parties, they have incurred certain community debts which should be equitably divided between the parties.
 5. That Defendant/Counterclaimant lacks sufficient property to provide for her reasonable needs and due to physical and emotional limitations is unable to support herself through employment.
 6. That there is a substantial disparity of the incomes of the parties and that Plaintiff/Counterdefendant should be ordered to pay to Defendant/Counterclaimant, monthly maintenance to meet the reasonable needs of the Defendant/Counterclaimant.
 7. That Defendant is without funds to retain an attorney to prosecute this action; that
- ANSWER AND COUNTERCLAIM, P. 2

she has employed Sallaz & Gatewood, Chtd. and Plaintiff should be ordered to pay to Defendant, as and for her attorney fees herein, the sum of \$1200.00, plus costs, should this action be uncontested and such sum as the Court may deem reasonable if said action is contested.

WHEREFORE, Defendant prays for Judgment against the Plaintiff as follows:

A. That the bonds of matrimony heretofore and now existing between the parties hereto be dissolved and forever set aside and that Defendant be granted an absolute Decree of Divorce from Plaintiff herein on the grounds of irreconcilable differences.

B. That the Court order an equitable division of the community property of the parties hereto.

C. That the parties' community debts should be equitably divided between them.

D. That Plaintiff be ordered to pay to Defendant, as and for maintenance support, the sum of \$2,500 per month in addition to an amount reasonable for Defendant's mortgage. for a period of the Defendant's life from the date hereof.

E. That Plaintiff be ordered to pay to Defendant, as and for her attorney fees herein, the sum of \$1200.00, plus costs, should this action be uncontested and such sum as the Court may deem reasonable if said action is contested; and

F. For such other and further relief as the Court deems just.

DATED This 20 day of June, 2003.

SALLAZ & GATEWOOD, CHTD.

Walter Gatewood

CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of June, 2003., I caused to be served a true and correct copy of the above and forgoing document by the method indicated below, and addressed to the following.

Ann K. Shepard
Shepard Law Offices, PLLC
200 N. Front Street, Suite 302
Boise, ID 83702

U.S. Mail
 Hand Delivered
 Via Fax: (208) 429-1100

Walter Gatewood
Sallaz Law, Chtd.

VERIFICATION

STATE OF IDAHO)
 : ss
County of Ada)

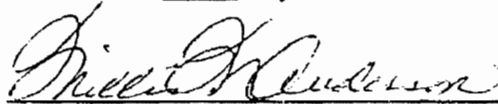
PAMELA STEPHEN, after being first duly sworn, deposes and says that she is the Defendant in the foregoing action, that she has read the Answers and Responses and believes the facts stated therein are true based upon her own information and belief.

IN WITNESS WHEREOF, Defendant has set her hand and seal the day and year first above written.


PAMELA STEPHEN

SUBSCRIBED AND SWORN To before me this 20 day of June, 2003.




Notary Public for Idaho
Residing at Boise, Idaho
Commission expires: 4/22/2007

DENNIS J. SALLAZ, ISB NO. 1053
G. SCOTT GATEWOOD, ISB No. 5982
SALLAZ & GATEWOOD, CHTD.
Attorneys at Law
P.O. Box 8956
Boise, Idaho 83707
Telephone: (208) 336-1145
Facsimile: (208) 336-1263
Attorney for Defendant

J. DAVID HARRIS, CLERK
CLERK OF DISTRICT COURT

FOURTH JUDICIAL DISTRICT OF IN THE DISTRICT COURT OF THE
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GARY ALLEN STEPHEN,	)	CASE NO. CV DR 0301151
)	
Plaintiff,	)	MOTION FOR TEMPORARY
	)	MAINTENANCE
-vs-)	
)	
PAMELA KATHERINE STEPHEN,)	
)	
Defendant.)	
_____)	

COMES NOW, Defendant, Pamela Stephen, by and through her attorneys of record, Sallaz & Gatewood, Chtd., and hereby moves this Honorable Court for an Order requiring Plaintiff to pay Defendant temporary maintenance and support pursuant to Idaho Code, Section 32-704, 32-705.

This Motion is made for the following reasons:

1. Defendant has been married to the Plaintiff for approximately twenty six (26) years.
2. During the substantial parts of this marriage, Defendant has remained a stay at home spouse and does not possess marketable skills for gainful employment.
3. Defendant is totally without resources, funds or income, and is unable to support

EXHIBIT **B** COPY

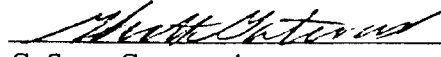
- herself or provide for her basic needs and to maintain the community assets;
4. Since the filing of this action, the Plaintiff has moved out of the community residence located at 3309 Crescent Rim, Boise, Idaho.
 5. During the months of June and July Plaintiff has deposited approximately \$2,000 into the community checking account.
 6. Other than the deposits stated in paragraph three (3) above, Plaintiff has willfully and intentionally deprived Defendant of access to community resources, funds and income.
 7. A number of community bills are currently going unpaid and are subject to potential collection actions, the community residence has a leak in the roof, a large window in the front of the house has damaged glass and general maintenance that is not being taken care of and that greatly exceed the total money Plaintiff has deposited into the community account.
 8. Defendant has prescription medications which are necessary to her well being and health and she does not have sufficient means with which to procure these medications.
 9. Defendant will suffer irreparable harm and injury if she is not granted relief and access to community resources, funds and income, as more fully set out in Defendant's affidavit filed concurrently herewith.

For the above and foregoing reasons, Defendant respectfully requests the Court enter an Order requiring Plaintiff to pay Defendant temporary maintenance and support in this matter.

Oral argument is hereby requested.

DATED This 4~~th~~ day of July, 2003.

SALLAZ & GATEWOOD, CHTD.




G. Scott Gatewood

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 4~~th~~ day of July, 2003, I caused to be served a true and correct copy of the foregoing to the following in the manner described:

- MAILED
- FAXED
- HAND DELIVERY
- OVERNIGHT DELIVERY

Ann K. Shepard
Shepard Law Offices, PLLC
200 N. Front Street, Suite 302
Boise, ID 83702



Sallaz & Gatewood, Chtd.

AUG 04 2003

WARREN, Clerk

DENNIS J. SALLAZ, ISB NO. 1053
G. SCOTT GATEWOOD, ISB NO. 5982
SALLAZ & GATEWOOD, CHTD.
Attorneys at Law
P.O. Box 8956
Boise, Idaho 83707
Telephone: (208) 336-1145
Facsimile: (208) 336-1263

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GARY ALLEN STEPHEN,	)	CASE NO. CV DR 0301151
)	
Plaintiff,	)	AFFIDAVIT OF PAMELA STEPHEN
	)	IN SUPPORT OF MOTION FOR
-vs-	)	TEMPORARY MAINTENANCE
)	
PAMELA KATHERINE STEPHEN,)	
)	
Defendant.)	
_____)	

State of Idaho)
) ss.
County of Ada)

COMES NOW, Pamela Stephen, Defendant, after being first duly sworn upon oath, and based upon her own information and belief, deposes and states as follows:

1. I, Pamela Stephen have been married to Gary Allen Stephen since December 17, 1976.
2. During approximately the first five years of our marriage, Gary's employment required that we relocate our place of residence often.
3. In the second year of our marriage I gave birth to our daughter, Jennifer.

AFFIDAVIT OF PAMELA STEPHEN
IN SUPPORT OF MOTION FOR
TEMPORARY MAINTENANCE - 1

COPY

4. Due to our regular change in residences and my need to care for our daughter we agreed that during our daughter's early years that I would remain in the home and not seek outside employment.
5. After our daughter started school in Boise, I then began working part time doing clerical work at the Casey Family Program, a private foster care agency.
6. The rest of my married life I have remained a stay at home spouse.
7. Other than self development classes, I do not have marketable skills for use in obtaining gainful employment.
8. Approximately three (3) years ago, I was diagnosed as bi-polar and as suffering with post traumatic stress over the suicidal death of my daughter's boyfriend who was living in our residence at the time.
9. As a result of my physical and mental and emotional limitations, I am not able to secure gainful employment to support myself.
10. Due to our pending divorce, and current separation, I have been left without the ability to financially maintain the community residence, meet my basic needs, pay on community debts that are due and owing and otherwise enjoy a life-style in the same manner as accustomed prior to my separation from Gary.

DATED this 31ST day of July, 2003.

Pamela Stephen
Pamela Stephen

31 day of July, 2003. SUBSCRIBED AND SWORN TO before me, the undersigned Notary Public, this



Millis M. Anderson
NOTARY PUBLIC- STATE OF IDAHO
Residing at Boise, Idaho
My Commission Expires: 4/23/2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 4th day of July, 2003, I caused to be served a true and correct copy of the foregoing to the following in the manner described:

- MAILED
- FAXED
- HAND DELIVERY
- OVERNIGHT DELIVERY

Ann K. Shepard
Shepard Law Offices, PLLC
200 N. Front Street, Suite 302
Boise, ID 83702

Kevin M. Watts
Sallaz & Gatewood, Chtd.

COPY

Ann K. Shepard
SHEPARD LAW OFFICES, PLLC
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Telephone: (208) 342-3881
Facsimile: (208) 429-1100
Idaho State Bar No. 4042

Attorneys for Plaintiff

COPY
NO. _____ FILED _____
AM. _____ P.M. _____
AUG 09 2004
J. DAVID NAVARRO, Clerk
By KATHY J. BIEHL
Deputy

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GARY ALLEN STEPHEN,)
)
 Plaintiff,) Case No. CV DR 03-01151D
)
 vs.) JUDGMENT AND DECREE OF
) DIVORCE
)
 PAMELA KATHERINE STEPHEN,)
)
 Defendant.)
)
 _____)

The above-entitled matter was before the Court for trial on August 5, 2004. Plaintiff was present with his attorney of record, Ann K. Shepard of Shepard Law Offices, PLLC, and Defendant was present with her attorney of record, G. Scott Gatewood of Sallaz and Gatewood, Chartered. The parties reached an agreement and placed their stipulation on the record. Based on the stipulation of the parties, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff and Defendant are granted a divorce from each other on the grounds of irreconcilable differences. Each is restored to the status of a single person.
2. Plaintiff is awarded the real property located at 3309 Crescent Rim, Boise, Idaho, subject to the first and second mortgage thereon. Defendant shall execute a quitclaim deed,

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EXHIBIT **C**

conveying her interest in the property located at 3309 Crescent Rim, Boise, Idaho, to the Plaintiff, within ten (10) days of the date of entry of this Judgment and Decree of Divorce. Defendant shall vacate the premises located at 3309 Crescent Rim, Boise, Idaho, on or before September 15, 2004, and shall remove all personal property assigned to her under this Judgment and Decree of Divorce on or before September 15, 2004.

3. Plaintiff is awarded the real property located at 527 S. Beach Street, Boise, Idaho (hereinafter "Beach Street residence"), subject to the mortgage thereon. Defendant shall execute a quitclaim deed, conveying any interest she may have in the property located at 527 S. Beach Street, Boise, Idaho, to the Plaintiff, within ten (10) days of the date of entry of this Judgment and Decree of Divorce. Defendant shall be allowed to reside in the Beach Street residence for a period of twenty-four (24) months beginning September 15, 2004. Defendant shall be allowed to move into the Beach Street residence on or before September 15, 2004. Defendant's right to occupy the Beach Street residence is contingent upon Defendant's agreement that no person residing at or visiting the Beach Street residence shall engage in any illegal conduct. In the event that any illegal conduct or behavior takes place at the Beach Street residence, Defendant's right to occupy the Beach Street residence is terminated and Defendant shall immediately vacate the premises. So long as Defendant resides at the Beach Street residence, Defendant shall be responsible for the payment of one-half of the mortgage, in the amount of \$430 per month. Said \$430 per month payment shall be deducted from Plaintiff's monthly obligation to the Defendant, for the equalization payment specified in Paragraph 4, below.

4. In order to equalize the division of the community property and debt, commencing September 1, 2004, Plaintiff shall pay to the Defendant \$2,000 per month (less \$430 per month so long as Defendant resides in the Beach Street residence) for a period of twenty-four (24) months. In the event Defendant vacates the Beach Street residence,

voluntarily or involuntarily, prior to the expiration of twenty-four (24) months, Plaintiff will pay to the Defendant the full \$2,000 payment.

5. The Plaintiff's UPS retirement and 401(k) retirement shall be divided equally between the parties up through the date of the entry of this Judgment and Decree of Divorce. Defendant's share of the retirement shall be transferred to her pursuant to a qualified domestic relations order.

6. The property and debt of the parties shall be divided in accordance with Exhibit "A," attached hereto and incorporated herein by this reference.

7. Both parties will be responsible for any debts, not otherwise listed on Exhibit "A," that they have incurred. The parties will indemnify and hold the other party harmless for all debts assigned to that party.

8. On or before September 15, 2004, the parties will transfer possession of the vehicles, to the party to which each vehicle is awarded, in accordance with Exhibit "A," attached hereto. On or before September 15, 2004, Plaintiff will be responsible to insure, register, and title in his name only, the vehicles awarded to him. On or before September 15, 2004, Defendant will be responsible to insure, register, and title in her name only, the vehicles awarded to her.

9. The parties will file separate income tax returns for tax year 2004. Plaintiff shall hire an accountant to prepare both parties' 2004 tax returns, and shall be responsible for the payment of the tax preparer's fees for preparing both returns. The parties will share equally the community income, deductions and credits up through the date of entry of this Judgment and Decree of Divorce, and following the entry of this Judgment and Decree of Divorce the parties will each report their own income, deductions and credits separately on their respective returns.

10. Both parties will execute any and all documents necessary to effectuate the terms of this Judgment and Decree of Divorce.

11. Defendant is restored to her former name of **PAMELA CATHERINE
JOERGER.**

DATED this 9th day of August, 2004.

DAVID E. DAY

DAVID E. DAY, Magistrate

EXHIBIT "A"
PROPERTY/DEBT
DIVISION

Gary Stephen v. Pamela Stephen							
ASSET/DEBT/EQUALIZATION CHART		All Property	Community	Property	Separate	Property	Comments
ASSETS		Fair Market Value	Gary	Pam	Gary	Pam	
1	Real Properties						
2	3309 Crescent Rim	385500	385500				
3	527 S. Beach Street	105000	105000				
4	Financial Accounts						
5	401 (k)	67000	ONE HALF	ONE HALF			
6	UPS Retirement	428000	ONE HALF	ONE HALF			
7							
8	House						
9	Main Entry						
10	Large mirror and frame					x	
11							
12	Dining Room						
13	Oak Table with 4 leafs & 6 chairs					x	
14	Large area rug					x	
15	Candle Stick Lamp with silk shade					x	
16	Christmas plates side plates cups saucers	Gift to Jennifer					
17							
18	Living Room						
19	Chair and-a-Half sofa & Ottoman	Gift to Jennifer					
20	12 inch round table			x			
21	Brass floor lamp with shade (4 foot)			x			
22	Grand father clock			x			
23	"L" shaped 6 cousin white Sectional Ethan Allen			x			
24	Oval Glass and iron 36 inch coffee table			x			
25	Crystal ashtray					x	
26	Oval 5 foot glass and iron sofa table			x			
27	Table lamp with black silk shade			x			
28	Mendoza art and frame					x	
29	Commissioned hand made bowl					x	
30	Earthen Vase			x			
31	30 x 36 ceramic vase tree planter					x	
32							
33	Front Bedroom / Office						
34	Combination Floor safe			x			

EXHIBIT "A"
PROPERTY/DEBT
DIVISION

Gary Stephen v. Pamela Stephen ASSET/DEBT/EQUALIZATION CHART		All Property	Community	Property	Separate	Property	Comments
ASSETS		Fair Market Value	Gary	Pam	Gary	Pam	
35	3 drawer lateral metal file cabinet		one	two			
36							
37	Oak office desk & 2 swivel chairs		x				
38	Swing Arm Desk Lamp		x				
39	Micron computer and Monitor			x			
40	Flat screen Monitor		x				
41	Oak 12 x 96 floor cabinet credenza		x				
42	Scanner			x			
43	Small wall clock			x			
44	Picture Portrait of Jennifer			x			
45	Table lamp Urn style (brass)		x				
46	Large Area Rug			x			
47	Grandmother Stephen music box		x				
48	Oak strait back Chairs (School teacher)			x			
49	Stationary Supplies		Half	Half			
50							
51	Family Room						
52	Shaker oak drop leaf side table			x			
53	Candle stick Lamps (2)			x			
54	30 inch black wall clock		x				
55	12 x 36 inch oval glass and iron sofa table		x				
56	5 x 12 Area rug			x			
57	Fire place tools			x			
58	10 inch round iron side table			x			
59	floor up lamp (6 foot)			x			
60	2 leather lounge chairs and ottoman		x				
61	Chair and a half			x			
62	High back arm chair (Beckett style)	Gift to Jennifer					
63	small decorative trunk		x				
64	Ethan Allen Cherry projection video cabinet		x				
65	Big screen projection TV		x				
66	CD's 100 plus some collectors editions			x			
67	4 foot tall x 3 foot wide earthen vase/planter		x				
68	Stereo Equipment		x				

EXHIBIT "A"
PROPERTY/DEBT
DIVISION

Gary Stephen v. Pamela Stephen						
ASSET/DEBT/EQUALIZATION CHART		All Property	Community	Property	Separate	Property
ASSETS		Fair Market Value	Gary	Pam	Gary	Pam
69	Amplifier (surround sound)		x			
70	Tuner AM/FM Stereo		x			
71	Equalizer		x			
72	Duel tape deck		x			
73	100 plus CD player			x		
74	Sony VCR		x			
75	Surround Sound speakers		x			
76						
77	Kitchen					
78	Sony under cabinet TV			x		
79	Coffee / Espresso maker			x		
80	High back swivel stools (4)		x			
81	Dishes Glasses & Flatware					
82	White dishes side plates cups and saucers			x		
83	Multi-color dishes side dishes mugs bowls		x			
84	Fostoria crystal plates and serving dishes	Gift to Jennifer				
85	Red Mikasa Crystal wine glasses (8)			x		
86	Assorted glasses water tumbler wine		x			
87	Sterling Silver setting for 12 plus serving pieces	Gift to Jennifer				
88	Every day flatware		Half	Half		
89	Corning ware cooking / serving dishes			x		
90						
91	Henckle knife set			x		
92	Kitchen Utensils		Half	Half		
93						
94	Pantry					
95						
96	Calphalon cooking pans					x
97	Toaster oven					x
98	Cuisenart with extra blades					x
99	Assorted bowls		Half	Half		
100						
101	Pool Changing Room / Mud Room					
102	Plastic yellow outside plates and cups (8)		Sell/Divide	Sell/Divide		

EXHIBIT "A"
PROPERTY/DEBT
DIVISION

Gary Stephen v. Pamela Stephen ASSET/DEBT/EQUALIZATION CHART		All Property	Community	Property	Separate	Property	Comments
		Fair Market Value	Gary	Pam	Gary	Pam	
ASSETS							
103	Plastic assorted colors glasses (12)		Sell/Divide	Sell/Divide			
104	Pre-recorded & recorded VCR tapes (80)		Half	Half			
105							
106							
107							
108	Upstairs						
109							
110	Upstairs guest bedroom / sitting room						
111	Sofa sleeper / double bed with Ottoman			x			
112	Swivel barrel chair (Flexsteal)			x			
113	Oak sofa table (Lane)		x				
114	Table Lamp Urn style (Brass)		x				
115	Swing Arm Floor Lamp			x			
116	Area rug		x				
117	Small color TV (black)		x				
118							
119	Sitting Area						
120	Antique Trunk			x			
121	Telescope		x				
122	Cello and Bow			x			
123	Multi-colored chair			x			
124	Green table			x			
125	Master Bedroom						
126	King bed and Oak Mission Bed Frame		x				
127	Oak night side tables (2)		x				
128	Wall mounted lamps (2)		x				
129	Floor Lamp		x				
130	AM/FM CD mini-component stereo			x			
131	VCR		x				
132	Color TV		x				
133	High back arm chair (Beckett style)		Sell/Divide	Sell/Divide			
134	Oak Armoire			x			
135	Oak 4 drawer dresser (Gary's closet)		x				
136	3 drawer white wicker Armoire (Pam's closet)			x			

EXHIBIT "A"
PROPERTY/DEBT
DIVISION

Gary Stephen v. Pamela Stephen ASSET/DEBT/EQUALIZATION CHART		All Property	Community	Property	Separate	Property	Comments
ASSETS		Fair Market Value	Gary	Pam	Gary	Pam	
137	Pam's Clothes in closet			x			
138	Gary's Clothes in closet		x				
139	2 Teak Wood Trunks		one	one			
140	Navajo rug Gray Hills		x				
141							
142	Master Bathroom						
143	Towel Rack Stand			x			
144	TV (White)			x			
145	Scales			x			
146							
147	Linens & Towels		Half	Half			
148	Quilts & Blankets		Half	Half			
149							
150	Basement						
151	Utility room						
152	Washer & Dryer		x				
153	Adjustable Freestanding Metal Shelves			x			
154	Vacuum Cleaner			x			
155	2 Irons		one	one			
156	Rug Shampooer			x			
157	Beach Street washer/dryer			x			
158	Family Area						
159							
160	Oak Bar Tables (2) 48 inches high		Sell/Divide	Sell/Divide			
161	Director chairs (4) folding		Sell/Divide	Sell/Divide			
162							
163	Component Stereo System (Amp/Tuner, Dual tape, CD)		x				
164	Board Games			x			
165							
166	Down Stairs Bedroom						
167	Wicker Armoire (Wicker & Wood)			x			
168	Swivel Barrel Chair and Ottoman		Sell/Divide	Sell/Divide			
169							
170	Garage						

EXHIBIT "A"
PROPERTY/DEBT
DIVISION

Gary Stephen v. Pamela Stephen						
ASSET/DEBT/EQUALIZATION CHART		All Property	Community	Property	Separate	Property
ASSETS		Fair Market Value	Gary	Pam	Gary	Pam
171	Table Saw		x			
172	Air Compressor & Hose 25 feet		x			
173	Tool Box (roll-around)		x			
174	Sawsall saw		x			
175	Circular Hand Saw		x			
176	Router & Bits		x			
177	25 pound bottle refrigerant 12		x			
178	Freon evacuation compressor		x			
179	Emergency Road Kit		x			
180	Gorilla Rack Metal shelving		x			
181	Tread Mill			x		
182	Ladder 24 inch (2)		x			
183	Ladder 4 foot		x			
184	Ladder 6 foot		x			
185	Ladder folding		x			
186	Floor jack		x			
187	Jack Stands		x			
188	Car Ramps		x			
189	Shop Vacuum		x			
190	Work Bench Craftsman		x			
191	High Pressure Washer		x			
192	Chain Saw			x		
193	Pam's tool box and tools			x		
194	Extension Cords (5+)		Half	Half		
195	Two Wheel Hand Cart		x			
196	Lawn Mower			x		
197						
198	Garden Tools (shovels rakes hand tools)		Half	Half		
199	Two Door 8 foot metal Cabinet			x		
200	Metal Storage Cabinet (3 x 2 x 4)			x		
201	Wheel Barrow		x			
202	Garden Hoses		Half	Half		
203						
204	Outside Patio					

EXHIBIT "A"
PROPERTY/DEBT
DIVISION

Gary Stephen v. Pamela Stephen						
ASSET/DEBT/EQUALIZATION CHART		All Property	Community	Property	Separate	Property
ASSETS		Fair Market Value	Gary	Pam	Gary	Pam
205	White Patio Furniture Square Table and 4 Chairs (2 sets)		Half	Half		
206	Large Umbrella & Stand (8 foot)			x		
207	White Park Benches (2)		Half	Half		
208	Wood Park Benches (2)		Sell/Divide	Sell/Divide		
209	2 Umbrella and Stand (6 foot)		Half	Half		
210	Redwood Patio Furniture Table and 4 Chairs		Sell/Divide	Sell/Divide		
211	White Patio Furniture Recliners (2)		Half	Half		
212	White Patio Low table & Serving trolley		table	trolley		
213	Propane Grill (Stainless steal)		x			
214	White 4 foot Round Plastic Oval Table		x			
215	Flower Pots		Half	Half		
216						
217	Miscellaneous					
218	Smith & Wesson 9MM Semi-Automatic Pistol	Gift to Jennifer				
219	Gary's Guns		x			
220	Pam's Laptop Computer			x		
221	Gary's Laptop Computer		x			
222	Gary's Bicycle		x			
223	Pam's 2 Bicycles			x		
224	Video Cameras (2)		x			
225	Dolls in Attic			x		
226	Christmas Decorations		Half	Half		
227	Steinbach Nutcrackers (7)			x		
228						
229	Cars					
230	1999 Lincoln Navigator	19300	19300			
231	1996 318i BMW	11400		11400		
232	1990 Chevy PU C1500 4WD	1695		1695		
233	1987 Camero	800	800			
234	Honda 750 SS 4 cylinder	800	800			
235	1989 Corvette (salvage title)	5100	5100			
236						
237	ASSETS TOTAL	639095	516500	13095		
238						

EXHIBIT "A"
PROPERTY/DEBT
DIVISION

Gary Stephen v. Pamela Stephen							
ASSET/DEBT/EQUALIZATION CHART							
		All Property	Community	Property	Separate	Property	Comments
		Fair Market Value	Gary	Pam	Gary	Pam	
	ASSETS						
239	DEBTS						
240	Crescent Rim debt	256767	256767				
241	Crescent Rim 2nd debt	15156	15156				
242	Beach debt	84975	84975				
243	1999 Lincoln	14383	14383				
244	1996 BMW	10396	10396				
245	Visa	1900	1900				
246	Discover	14000	14000				
247	Sears	0	0				
248	Home Depot	1000	1000				
249	Capitol One	3000	3000				
250	Chase	3500	3500				
251	Lowe's	900	900				
252	Target	1400	1400				
253	Shell	30	30				
254	Pier One	128	128				
255	Crescent Rim suit	28000	28000				
256							
257							
258	DEBT TOTAL	435535	435535	0			
259							
260	ASSETS AND DEBTS DIVISION						
261		Assets	Debts	Net Estate			
262	Gary	516500	435535	80965			
263	Pam	13095	0	13095			
264	Total	529595	435535				
265							
266							
268							

WILLIAM J. SCHWARTZ, ISB No. 3649

Attorney at Law

1000 S. Roosevelt

Boise, Idaho 83705

Telephone: (208) 426-9383

Facsimile: (208) 336-1263

Attorney for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN,)

Plaintiff,)

vs.)

SALLAZ & GATEWOOD, CHTD., and)
SCOTT GATEWOOD,)

Defendant.)

Case No. CV OC 0614241

**DEFENDANT'S ANSWERS TO
PLAINTIFF'S FIRST SET OF
DISCOVERY REQUESTS
TO DEFENDANTS**

INTERROGATORY NO. 1:

Identify each person answering or assisting in answering these Interrogatories, also providing social security number, driver's license number, date of birth, address and telephone number of said person(s).

ANSWER NO. 1: G. Scott Gatewood, Dennis J. Sallaz, 1000 S. Roosevelt, Boise, Idaho 83705; (208) 336-1145.

INTERROGATORY NO. 2:

Please provide the name, address, and telephone number of each witness in which you intend to utilize at trial, including witnesses you intend to utilize for impeachment or rebuttal purposes.

ANSWER NO. 2: G. Scott Gatewood, Dennis J. Sallaz, 1000 S. Roosevelt, Boise, Idaho 83705; (208) 336-1145; any staff members who may be privy to direct communications with Plaintiff; Ann Shepard, Attorney, 200 N. 4th Street, Suite 302, Boise, Idaho, 83702, (208) 342-3881; Gary Stephens, address unknown at this time. This Answer may be supplemented.

INTERROGATORY NO. 3:

Please state the period of time during which you rendered legal services to Plaintiff.

DEFENDANT'S ANSWERS TO PLAINTIFF'S FIRST SET OF DISCOVERY
REQUESTS TO DEFENDANTS - 1

EXHIBIT

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ANSWER NO. 3: The Plaintiff's file was opened June 18, 2003; Decree of Divorce entered August 9, 2004; filed Notice of Withdrawal of Counsel 7-6-2005.

INTERROGATORY NO. 4:

Identify your employers, partners, partnerships, associates, and/or associations engaged in the practice of law at all times during the period of time you rendered legal services to Plaintiff.

ANSWER NO. 4: See answer No. 1 above.

INTERROGATORY NO. 5

Identify all attorneys, law clerks, legal assistants, investigators, and researchers who assisted you in rendering legal services to Plaintiff.

ANSWER NO. 5: See Answer No. 1 and 2 above. Staff: Millis Anderson, Legal Assistant; Marge Davidson, Legal Assistant; Kelli Walts, Secretary.

INTERROGATORY NO. 6:

Generally state all facts upon which you contend support any defense that you have or may claim in this case.

ANSWER NO. 6: Telephone conferences, in office conferences, correspondence were engaged to communicate with Plaintiff and she always indicated she understood and knew exactly what was going on in her case and in fact, was most adamant about what she wanted to achieve in the divorce. There was never a question about her ability to understand and assist in reaching her goal in the divorce. Contact and discussions with Plaintiff subsequent to the entry of the decree regarding her truck and the Qualified Domestic Relations Order indicated she clearly understood the procedure, decisions, and events related to the case. Contacts with Plaintiff subsequent to entry of the Decree involving her acceptance of the payments per the Decree Agreement. The fact this lawsuit was filed only after her temporary maintenance ended.

INTERROGATORY NO. 7:

State succinctly what matters of law relevant to the claims made against you in this cause of action that you contend are not or should not be in dispute.

ANSWER NO. 7: Objection; this request tends to discovery of work product; without waiving objection Defendant disputes this entire claim of action.

INTERROGATORY NO. 8:

Did you act as a fiduciary to Plaintiff during the attorney/client relationship? If not, state succinctly all facts upon which you rely to deny responsibility as a fiduciary.

ANSWER NO. 8: Our responsibility as fiduciary includes those required in an attorney-client relationship. Defendant denies any breach of any fiduciary responsibility therein.

REQUEST FOR PRODUCTION NO. 9:

A copy of all letters, correspondence or any other form of written document which in any way refers, pertains or relates to any communication made by you to any liability or malpractice insurance carrier concerning any of the matters made the basis of this suit, including but not limited to all notices of claim or proofs of claim.

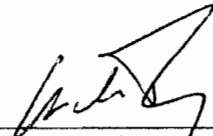
RESPONSE NO. 9: None.

REQUEST FOR PRODUCTION NO. 10:

A copy of your (Mr. Gatewood) current curriculum vitae and/or firm brochure (Sallaz & Gatewood) or firm marketing material.

RESPONSE NO. 1: None.

DATED this 14 day of February, 2007.



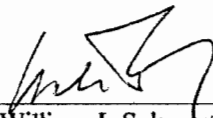
William J. Schwartz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14 day of February, 2007, I caused to be served in the manner indicated a true and correct copy of the foregoing to the following:

Eric R. Clark
Clark Law Office
P.O. Box 2504
Eagle, ID 83616

U.S. Mail
 Personal Delivery
 Fax: (208) 939-7136



William J. Schwartz

NO. _____ FILED 4:13
A.M. _____ P.M.

MAY 27 2008

J. DAVID NAVAHHO, Clerk
By J. EARLE
DEPUTY

Eric R. Clark, ISB# 4697
CLARK LAW OFFICE
P.O. Box 2504
Eagle, ID 83616
Tel: (208) 830-8084
Fax: (208) 939-7136

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN)

Plaintiff,)

v.)

SALLAZ & GATEWOOD, CHTD.,)
and SCOTT GATEWOOD,)

Defendants.)

Case No.: CV OC 0614241

AFFIDAVIT OF
GARY STEPHEN

STATE OF IDAHO)
County of Ada) ss.

Gary Stephen, first being duly sworn on oath as provided by law, states as follows:

1. When I decided to divorce Pamela, I instructed my attorney Ann Shepard to file based on irreconcilable differences, because I did not believe there was any basis for any other type of divorce.
2. My attorney never advised me that she believed there was a basis for any "fault" type divorce proceeding, and we proceeded as filed and pursued a divorce based upon irreconcilable differences.

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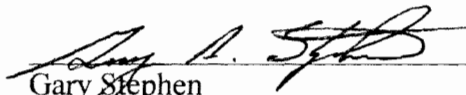
3. Even if there had been a basis for a "fault" type of divorce, I would not have pursued that course.
4. Based on the length of our marriage, my income compared with Pamela's, Pamela's disabilities, and Pamela's lack of education, training and experience, I believed I would have to pay Pamela some type of ongoing support, even though I was filing, which Pam ultimately sought in her Answer and Counterclaim.
5. We attended mediation with Mr. Beers just days before the trial date. During the mediation, I observed that Pam was lethargic and watched her rest her head on the table several times. When Pam was sitting upright, she would rock back and forth in her chair and appeared incoherent at times. I even offered to drive Pam home after the mediation, because I was concerned about her ability to drive.
6. About a year later, Pam told me that she had been in St. Al's about a week prior to the mediation and the trial and that she was prescribed medications that made her lethargic and very tired.
7. Pam also told me she had contacted her counsel and asked to postpone the trial because she had recently been hospitalized, but that he had refused to attempt to move the trial date.
8. Had I known Pam had been hospitalized, I would have agreed to postpone the trial until she was mentally and physically better.
9. At the divorce trial, my counsel and I met with Scott Gatewood, Pamela's counsel and discussed the property settlement agreement. When the property was split according to this document, I owed approximately \$48,000.00 to Pamela.
10. As I understood that the parties were supposed to divide the assets equitably, I believed that I would have to pay Pamela this money.
11. Ann Shepard suggested to Mr. Gatewood that I be allowed to pay Pamela \$2,000.00 per month for 24 months as an "equalization" payment to equalize the division of property.
12. Mr. Gatewood responded that he believed this was appropriate as he felt that if Pamela receiving a large lump sum of money at one time "she would probably go out and blow it."
13. At the trial, when Pamela stated that she agreed to receive \$2,000.00 per month (minus rent), which I understood to be the "equalization" payment for the division of property.
14. I was surprised when Mr. Gatewood never pursued Pamela's claim for spousal maintenance.
15. Last fall, I received a call from Scott Gatewood. Mr. Gatewood identified himself to me on the phone, and I recognized his voice on the phone because we had spoken at several court hearings.

16. Mr. Gatewood asked me several questions during the conversation. When we discussed my observation of Pam at the mediation, Mr. Gatewood stated he did not like my answers.

17. Mr. Gatewood told me during this conversation that he believed Pam only sued him after her *temporary maintenance* had run out. I am sure he said "temporary maintenance," because I did not recall that the Court had awarded any maintenance, nor did I understand that I was paying Pamela maintenance.

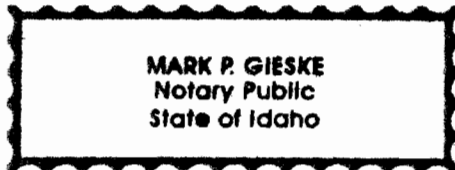
I declare under penalty of perjury under the laws of the State of Idaho and the laws of the United States, that the foregoing is true and correct to the best of my knowledge and belief.

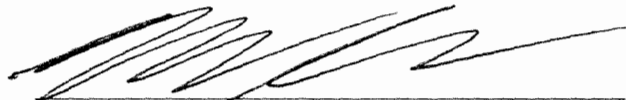
DATED this 31st day of March 2008.



Gary Stephen

SUBSCRIBED AND SWORN to before me this 31st day of March 2008.





NOTARY PUBLIC for the State of Idaho
Residing at: Boise, ID
My Commission expires: 3/23/2013

CERTIFICATE OF SERVICE

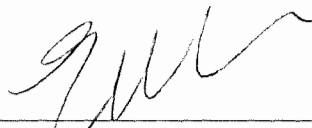
I HEREBY CERTIFY that on the 27th day of May 2008, I caused to be served in the manner indicated a true and correct copy of the foregoing to the following:

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
16 12th Avenue South, Suite 113
Nampa, Idaho 83651
Attorney for Sallaz & Gatewood, CHTD.,
And Scott Gatewood

Via Fax (208) 465-9834

CHARLES C. CRAFT
CRAFTS LAW, INC
410 S. Orchard, Ste. 120
Boise, ID 83705
Attorney for Dennis Sallaz.

Via Fax (208) 389-2109



Eric R. Clark

ORIGINAL

NO. 8:30 FILED
A.M. 8:30 P.M.

MAY 2 2008
J. DAVID NAVARRO, Clerk
BY KATHY J. DIEHL
DEPUTY

Eric R. Clark, ISB# 4697

P.O. Box 2504
Eagle, ID 83616
Tel: (208) 830-8084
Fax: (208) 939-7136

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN

Plaintiff,

v.

SALLAZ & GATEWOOD, CHTD.,
and SCOTT GATEWOOD,

Defendants.

Case No.: CV OC 0614241

AFFIDAVIT OF
CATHY L. NAUGLE, ESQ.

STATE OF IDAHO)
) ss.
County of Ada)

Cathy Naugle, first being duly sworn on oath as provided by law, states as follows:

1. At the request of the Plaintiff's Counsel, I have agreed to act as a standard of care and conduct expert witness in this case.
2. I graduated from University of Idaho School of Law in 1980 with a juris doctorate. I am a member in good standing of the Idaho State Bar. I was an Ada County, Idaho magistrate judge hearing, among others, family law cases between 1988 and December 1992. From 1994 through the present I have been an Idaho attorney practicing almost exclusively in the area of family law.

3. I am currently licensed to practice law in Idaho, and I am a former Ada County Magistrate Judge.
4. I have reviewed the Defendants' divorce file and Court file in this case. I have also reviewed the audio recording of the April 5, 2004 divorce proceeding.
5. My opinions stated herein are based on what I believe was the standard of care and conduct for an attorney in Idaho during the relevant years 2003-2006, when the Defendants represented Ms. Stephen in her divorce proceedings.
6. I am assuming certain facts as true when providing my opinion, and I am in no way asserting that I have personal knowledge of any facts of consequence in the case. As an expert witness, however, I believe I can provide my opinions based on certain assumptions that the Plaintiff must prove at trial.
7. I have reviewed both the 2003 and 2004 versions of IRPC 1.14. They specifically provide guidance for an attorney when that attorney is representing a person with a "disability" or with "diminished capacity." (The Idaho Rules of Professional Conduct were amended in July 2004, and Rule 1.14 addressing this issue was changed.)
8. If Ms. Stephen disclosed at any time to the Defendants certain psychological conditions including that she was bi-polar and was taking medications for psychosis, the standard of care and conduct for an attorney would be to investigate these conditions with Ms. Stephen's medical providers at the earliest opportunity after the disclosure to determine the nature and extent of Ms. Stephen's conditions and to determine whether Ms. Stephen needed a guardian.
9. After such disclosures, if the Defendants did not investigate Ms. Stephen's conditions with the relevant medical care providers, the Defendants' conduct fell below the standard of care.
10. I have read the Answer and Counterclaim these Defendants filed on Ms. Stephen's behalf, which indicates the Defendants were seeking spousal maintenance based on Idaho Code 32-704 and 32-705. Seeking maintenance under these statutes requires the attorney to investigate facts establishing the factors set out in Idaho Codes Sections 32-704 and 32-705. Failure to investigate these facts would constitute a breach of the Attorney's duty of diligence.
11. In my opinion, this divorce presented complex issues based on the extent of the parties' real and personal property and the request for spousal maintenance. The issue of the Plaintiff's disclosed mental health history made this divorce more complicated. Attorneys pursuing this case therefore should have had experience, legal knowledge and skill necessary to represent a potentially mentally impaired client in a divorce proceeding that involved a community estate of approximately \$1,000,000.00. An attorney representing Ms. Stephen in this case who lacked such experience, legal knowledge and

skill would have violated his duty of competency to Ms. Stephen and such conduct would fall below the standard of care and competence.

12. One of the criteria stated in Idaho Code 32-705 for a Court to consider when deciding whether or not to order spousal maintenance is "fault." The Court is required consider the "fault" of either party and compare fault if there are allegations constituting fault raised by both parties. In my experience as a magistrate and family law attorney, however, infidelity in and of itself is not considered sufficient grounds for denying spousal support, and if considered at all is to be considered by the court only in determining the amount and duration of spousal support. I cannot recall any specific cases in which I have been directly involved as a magistrate or attorney that involved each party claiming that the other's infidelity established "fault" grounds under Idaho Code Section 32-705. However, based on my knowledge and experience, such a situation would most likely be considered a "wash."
13. In my professional opinion allegations of illegal drug use on behalf of the party requesting spousal support would not preclude an award of such support without additional evidence of other disqualifying factors under Idaho Codes 32-705, such as, for instance, the financial hardship of the requesting spouse having been caused by the expenditure of significant income and resources on the acquisition of drugs.
14. If Ms. Stephen was unemployed and had no means to provide payment to the Defendants for legal fees, and if her spouse was employed and earning in excess of \$250,000.00 per year, the standard of care and conduct would be to seek pre-judgment payment of at least a portion of Ms. Stephen's attorney fees according to Idaho Code 32-704(3). If the Defendants did not pursue pre-judgment payment of their Client's attorney fees, that conduct fell below the requisite standard of care.
15. If in 2003 and 2004 (a) there had not been an appraisal of the Crescent Rim home since 1999 (b) the home had not recently been on the market, and if the Defendants failed to advise Ms. Stephen that it would be prudent to obtain at least a Comparative Market Analysis, if not a formal appraisal, before agreeing to the value of this property, that conduct fell below the standard of care.
16. The court file indicates that notwithstanding the primary asset in this divorce was Mr. Stephen's UPS retirement account, the Defendants failed to obtain a plan summary prior to settlement and failed to obtain valid QDRO before they withdrew nearly a full year after the decree was entered. Such conduct would fall below the standard of care and conduct.
17. I have reviewed the Defendants' divorce file and there appeared to be minimal discovery propounded to or obtained from Mr. Stephen. Again, in a complex divorce case such as this, the fact that these Defendants did not even obtain Mr. Stephen's tax records indicates a lack of diligence.

- 18. Based on the length of the Stephen's marriage, Mr. Stephen's income compared with Ms. Stephen's lack of income, Ms. Stephen's unemployment at the time of the divorce, Ms. Stephen's documented mental conditions, and Ms. Stephen's lack of education, training and experience, and I believe the Court would have awarded Ms. Stephen spousal post-judgment spousal support. Depending upon the extent of Ms. Stephen's access to community funds during the divorce and/or the extent to which Mr. Stephens was paying community expenses during that same period of time, I believe that Ms. Stephens might also have been awarded pre-judgment (temporary) spousal support.
- 19. If Ms. Stephen had been involuntarily committed for mental issues until approximately a week before the divorce trial on August 5, 2004 and was taking medication that may have affected her ability to understand and comprehend the proceedings, the standard of care would have been to seek a short postponement of the trial until her mental stability could be confirmed by a medical provider. Failing to seek a short postponement and telling a client that the attorney would *not* seek a postponement unless the client got a "note" from a doctor, under the circumstances, is a breach of the standard of care and conduct.
- 20. In my opinion the Defendants' conduct fell below the standard of care in the ways identified above and as a result of this conduct Ms. Stephen suffered damages, including a reasonable amount of spousal support per month, at least post-judgment but possibly pre-judgment also; a higher share of the community equity in the Crescent Rim property; and a credit of approximately \$15,000.00 for payment of the judgment against the Crescent Rim property that was paid from community funds, but Mr. Stephens was credited (\$30,000.00) as a debt to the community.

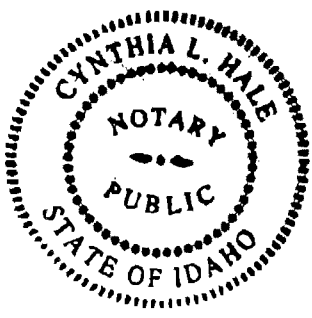
I declare under penalty of perjury under the laws of the State of Idaho and the laws of the United States, that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 27th day of May 2008.

Cathy Naugle
Cathy L. Naugle

SUBSCRIBED AND SWORN to before me this 27th day of ^{May}~~April~~ 2008.

Cynthia R. Hale
NOTARY PUBLIC for the State of Idaho
Residing at: Bose Idaho
My Commission expires: 12/14/2012



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of May 2008, I caused to be served in the manner indicated a true and correct copy of the foregoing to the following:

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
16 12th Avenue South, Suite 113
Nampa, Idaho 83651
Attorney for Sallaz & Gatewood, CHTD.,
And Scott Gatewood

Via Fax (208) 465-9834

CHARLES C. CRAFT
CRAFTS LAW, INC
410 S. Orchard, Ste. 120
Boise, ID 83705
Attorney for Dennis Sallaz.

Via Fax (208) 389-2109



Eric R. Clark

JUN 02 2008

J. DAVID NAVARRO, CLERK
By L. AMES
DEPUTY

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
ISB #5344
16 12th Avenue S., Suite 113
Nampa, ID 83651
(208) 465-9839
Fax (208) 465-9834

Attorney for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION

PAMELA K. JOERGER STEPHEN,	)	CASE NO. CV OC 0614241
)	
Plaintiff,)	
)	
vs.	)	DEFENDANT'S REPLY
	)	MEMORANDUM IN SUPPORT
	)	OF SUMMARY JUDGMENT
SALLAZ & GATWOOD, CHTD.,)	
DENNIS SALLAZ and SCOTT)	
GATEWOOD,)	
)	
Defendant.)	
)	

COMES NOW Defendant Scott Gatewood by and through his counsel of record John Prior and submits this reply brief in support of Defendant Gatewood's Motion for Summary Judgment.

ARGUMENT

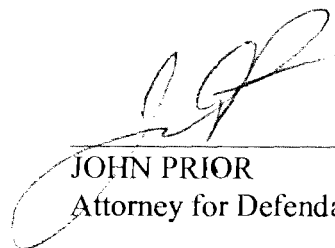
In **Heinze. V. Bauer 2008 IDSCCI 33579-012508**, the court was presented with a substantially similar case arising out of the 4th Judicial District. In the Heinze case, the court granted summary judgment to Mr. Bauer, the Defendant in that case. In the Heinze case, it should be noted that Mr. Heinze at the time of the original divorce settlement expressed concerns regarding the sufficiency of the settlement. In the present case, Ms. Stephens never expressed concerns regarding the settlement of her case until well after any time to set aside her divorce. In the Heinze decision the court noted “ that Judicial estoppel is applied when a litigant obtains a judgment, advantage, or consideration from one party, through means of sworn statements, and subsequently adopts inconsistent and contrary allegations or testimony to obtain a recovery or a right against another party, arising out of the same transaction or subject matter. *Loomis*, 76 Idaho at 93-94, 277 P.2d at 565. “ Heinze p.2 Both the present case and the Heinze case are remarkably similar with the only exception being that Ms Stephens is alleging that she suffered from some disability at the time of her agreement in the divorce case. In her affidavit which was provided in opposition to this summary judgment motion she alleges that she was bipolar at the time of the pendency of this divorce. In her complaint in this case, she alleges this disability prevented her from understanding the nature of the divorce proceedings. The Plaintiff has never submitted any medical documentation in the form of an affidavit by a medical professional that confirms this medical condition. The Plaintiff has the burden of establishing that this medical condition was present at the time of the entry of the Judgment and Decree of Divorce and that the medical condition prevented her from understanding the nature of the proceedings. The Plaintiff has failed to provide any medical expert testimony to support this position. In addition, the Plaintiff cannot decide subsequent to a stipulated Judgment of Decree

of Divorce being entered that she did not like the benefit of the bargain she received This is consistent with the findings by the court in the Heinze case.

CONCLUSION

Plaintiff is judicially estopped from asserting that the divorce settlement was unfair. Further, Mr. Gatewood's recommendation to settle was an informed decision based on the relevant law and facts of this case and therefore Mr. Gatewood was not negligent. Finally, Plaintiff cannot prove that, had things been done differently, she would have obtained a better settlement. Plaintiff cannot prove that the advice caused her damages. Further Plaintiff provided no medical evidence to support her claim that her disability if any prevented her from understanding the nature of the divorce proceedings. Accordingly, Plaintiff's claim cannot succeed and, as a matter of law, Mr. Gatewood's motion for summary judgment should be granted.

DATED this 2 day of June 2008.



JOHN PRIOR
Attorney for Defendant

CERTIFICATE OF SERVICE

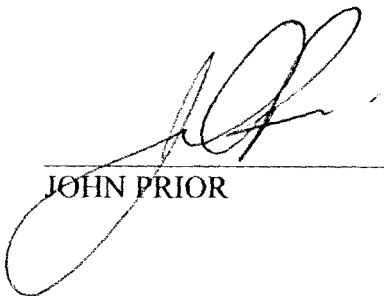
I HEREBY CERTIFY that on the 2nd day of June 2008, I caused a true copy of the foregoing Reply Memorandum In Support of Motion for Summary Judgment to be served by the method indicated below, and addressed to the following:

Eric R. Clark
THE REAL ESTATE LAW GROUP
P.O. Box 2504
Eagle, ID 83616
Fax: (208) 939-7136

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile

Charles Crafts
Attorney at Law
410 S. Orchard St., Suite 120
Boise, ID 83705
Fax: (208) 389-2109

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile



JOHN PRIOR

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

PAMELA K. JEORGER STEPHEN,)
)
 Plaintiff,)
)
 vs.)
)
 SALLAZ & GATEWOOD, CHTD., and)
 SCOTT GATEWOOD,)
)
 Defendant.)
 _____)

CASE NO. CV OC 06-14241
 AFFIDAVIT OF ANN K.
 SHEPARD

STATE OF IDAHO)
 : ss.
 County of Ada)

COMES NOW Ann Shepard, after being first duly sworn upon oath and deposes and states as follows:

1. That I am an attorney licensed to practice law in the State of Idaho
2. That my law practice is mainly focused in the area of family law, including divorce cases.
3. That I represented Gary Stephen, in his divorce, with his ex-wife Pam Stephen, Case No. CV DR 0301151D, which was settled by stipulation on August 5, 2004.
4. That on the 5th day of August, 2004, I met with Scott Gatewood and Pam Stephen, along with my client Gary Stephen and negotiated a settlement in their pending divorce case. I observed Pam Stephen both during our final negotiations as well as during the time the agreement was placed on the record in front of Judge Day.

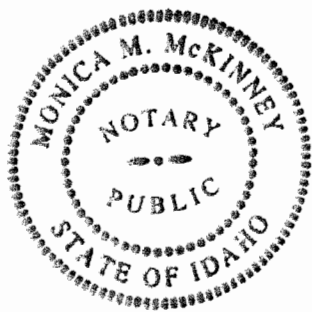
5. That my observation of Pam Stephen on August 5, 2004 was that she understood the negotiations, participated in the negotiations and made the decision as to her agreement to the final settlement. Mrs. Stephen appeared to be lucid and articulate.
6. That on August 5, 2004, my client, Gary Stephen, remarked that Mrs. Stephen appeared to be clear headed and appeared to be un-medicated.
7. That as the attorney for Gary Stephen, I counseled my client that the ultimate settlement was generous on his part, and that we may well get a more favorable outcome if we were to proceed to trial. My client was, and is, a kind person who wanted to be fair to his wife, even under the difficult circumstances of the divorce. On the instruction of my client, I settled the case on what I considered to be very favorable terms for Mrs. Stephen.
8. That I am familiar with the property distribution between Pam and Gary Stephen as outlined in their final divorce decree, Case No. CV DR 0301151D. There was ultimately an unequal division of the community property in favor of Pam Stephen, and there are additional other factors that made the settlement even more favorable to Mrs. Stephen. First, there was a very good chance that the property on Beach Street would have been awarded to my client as his separate property. In addition, my client assumed all of the costs necessary to repair both the Beach Street and the Crescent Rim residences, which had been damaged and neglected by Mrs. Stephen and her boyfriend and friends. Also, many of the outstanding debts were incurred by Mrs. Stephen and her boyfriend for improper purposes while the divorce action was pending.
9. That I advised my client that spousal support was not warranted in the divorce action because Mrs. Stephen's behavior was clearly the cause of the divorce, and that Mrs.

Stephen was at fault. I was prepared to produce evidence that the underlying cause for the divorce was that while the parties were still married, Mrs. Stephen moved her boyfriend into the parties' residence and both were financially supported by my client for nearly two years. Mrs. Stephen's boyfriend physically threatened my client and forced him from his own home.

Further your affiant sayeth naught.

Ann K Shepard
ANN SHEPARD

SUBSCRIBED AND SWORN To before me this 23rd day of July, 2007.



Monica McKinney
Notary Public for Idaho
Residing at: Boise
Commission Expires: 2/24/11

JOHN PRIOR

Law Office of John Prior

16 12th Avenue S., Suite 113

Nampa, ID 83651

Telephone: (208) 465-9839

Facsimile: (208) 465-9834

Attorney for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN,	)	Case No. CV OC 06-14241
)	
Plaintiff,)	
	)	AFFIDAVIT OF MILLIS
vs.	)	M. ANDERSON
)	
SALLAZ & GATEWOOD, CHTD., and)	
SCOTT GATEWOOD,)	
)	
Defendant.)	
_____)		

STATE OF IDAHO)
: ss.
County of Ada)

COMES NOW Millis M. Anderson, being first duly sworn upon oath, deposes and says as follows:

1. I am a legal assistant for the law offices of Sallaz & Gatewood, Chtd., and have been in that capacity for more than 6 years.
2. I worked on the Pam Stephens divorce matter on a regular basis during the time she was represented by this office. In that capacity I had many contacts with Ms. Stephens in the course of her case, including in-person visits at the office and telephone calls.

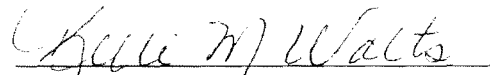
3. At no time was I ever concerned about Ms. Stephens' ability to understand or respond to anything going on in her case or communications with this office.
4. She was certainly articulate and well able to understand any communication with her and respond appropriately with questions or answers, depending on the occasion and the material to be communicated.
5. As a matter of fact, she did not hesitate to comment on exactly what she wanted, and what she expected.

Further your affiant sayeth naught.



Millis M. Anderson

SUBSCRIBED AND SWORN To before me this 25th day of June, 2007.



NOTARY PUBLIC FOR IDAHO

Residing at Boise, Idaho

My Commission Expires: 10-21-2010



JOHN PRIOR

Law Office of John Prior

16 12th Avenue S., Suite 113

Nampa, ID 83651

Telephone: (208) 465-9839

Facsimile: (208) 465-9834

Attorney for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN,	)	Case No. CV OC 06-14241
)	
Plaintiff,)	
	)	AFFIDAVIT OF KELLI
vs.	)	M. WALTS
)	
SALLAZ & GATEWOOD, CHTD., and)	
SCOTT GATEWOOD,)	
)	
Defendant.)	
_____)	

STATE OF IDAHO)
 : ss.
County of Ada)

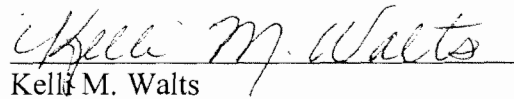
COMES NOW Kelli M. Walts being first duly sworn upon oath, deposes and says as follows:

1. I am the Receptionist and Billing Clerk for the law offices of Sallaz & Gatewood, Chtd., and have been in that capacity for more than 8 years.
2. As the Receptionist I spoke with Pam Stephens on her divorce matter on a regular basis during the time she was represented by this office and saw her when she came into the office.
3. I do not recall any instance either in person or over the phone when Ms. Stephens did not seem to understand any communication with this office. She was able to

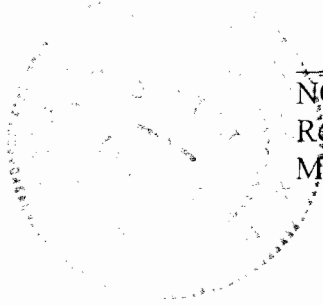
articulate questions regarding the progress on her case and what contact or information she wanted from the attorney handling her case. Although she was often impatient, at no time was I ever concerned about Ms. Stephens' ability to understand or respond to anything going on in her case or communications with this office.


4. Ms. Stephens was well able to understand any communication with her and respond appropriately with questions or answers, depending on the occasion and the material to be communicated.
5. I saw her bring in papers and documentation and she seemed to know exactly what she was bringing in and what those documents meant.

Further your affiant sayeth naught.


Kelli M. Walts

SUBSCRIBED AND SWORN To before me this 35 day of July, 2007.




NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires: 7/23/2013

NO. _____ FILED 4/14
A.M. _____ P.M. _____

JUN 24 2008

J. DAVID NAVARRO, Clerk
By J. EARLE
DEPUTY

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
ISB#5344
16 12th Avenue S., Suite 113
Nampa, Idaho 83651
Telephone (208) 465-9839
Facsimile (208) 465-9834

Attorney for Defendant

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

PAMELA K. JOERGER STEPHEN,)
)
 Plaintiff,)
)
)
 vs.)
)
 SALLAZ & GATEWOOD, CHTD, and)
 SCOTT GATEWOOD,)
)
 Defendant.)
 _____)

CASE NO. CV 0C 0614241

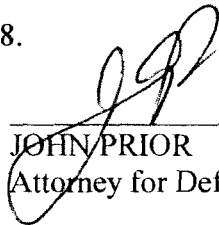
MOTION TO RECONSIDER

COMES NOW, the above named Defendant, SCOTT GATEWOOD, by and through his attorney, JOHN PRIOR, and hereby presents this Motion to Reconsider pursuant to I.R.C.P. 11 (a)(2)(B) and respectfully requests this court reconsider its prior ruling denying Defendant's Motion for Summary Judgment on June 10, 2008. This motion is supported by the Affidavit submitted herewith. The basis for the motion is that the Plaintiff has not provided nor has the Plaintiff provided any medical expert that has made a determination that the Plaintiff was incompetent and thus unable to understand the legal proceedings in the divorce in Stephens v.

1

Stephens. That discovery responses attached herewith confirm Plaintiff presently has no medical expert that can aid Plaintiff in establishing her claim of incompetence.

DATED this 24th day of June, 2008.



JOHN PRIOR
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of June, 2008, a true and correct copy of the foregoing Motion to Continue was delivered by the method indicated below and addressed to the following:

Erik Clark
Attorney at Law
PO Box 2504
Eagle, ID 83616
Fax: (208) 939-7136

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile

Charles Crafts
Attorney at Law
410 S. Orchard St., Suite 120
Boise, ID 83705
Fax: (208) 389-2109

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile



John Prior

CHARLES C. CRAFTS ISB # 7070
CRAFTS LAW INC.
Attorney at Law
410 S. Orchard, Ste. 120
Boise, ID 83705
Phone: (208) 367-1749
Facsimile: (208) 389-2109

NO. _____ FILED 4/11/08
A.M. _____ P.M.

JUN 24 2008
J. DAVID NAVARRO, Clerk
By J. EARLE
DEPUTY

Attorney for Defendant: **Dennis J. Sallaz**

**IN THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF ADA**

PAMELA K. JOERGER STEPHEN,

Plaintiff,

vs.

SALLAZ & GATEWOOD, CHTD.;
DENNIS SALLAZ and
SCOTT GATEWOOD

Defendant.

Case No. CV OC 06-14241

**AFFIDAVIT OF CHARLES C.
CRAFTS IN SUPPORT OF MOTION
TO RECONSIDER**

STATE OF IDAHO)
) ss.
County of Ada)

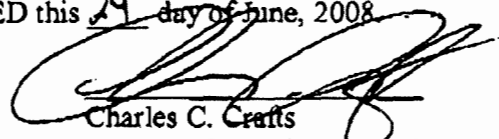
Charles C. Crafts, being first duly sworn upon oath, deposes and says:

1. That I am the attorney for Defendant Dennis Sallaz in the above-entitled action.
2. That during the discovery process, I propounded requests for admissions on the Plaintiff.
3. That in my Request for Admission No 10, I propounded the following Request and received the following response from the Plaintiff:
 - a. **REQUEST FOR ADMISSION NO. 10:** Please admit that you have never been diagnosed by a medical professional as incompetent to understand legal proceedings.
 - b. **RESPONSE TO REQUEST FOR ADMISSION NO. 10:** Objection, relevance.

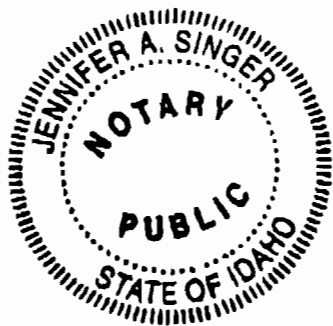
R


4. That this request was answered on December 4th, 2007, and that the Plaintiff has not filed any supplemental discovery, or provided a reason why this request is irrelevant.
5. That allegations 14 and 15 of the Plaintiff's Amended Complaint specifically state that the Plaintiff was incompetent during the period of time that she entered into her divorce.
6. That I have included a true and correct copy of the discovery responses I received.
7. That I have read the same and know the contents thereof and that the same are true as I verily believe.

DATED this 24 day of June, 2008


 Charles C. Crafts
 Attorney for Defendant Sallaz

SUBSCRIBED AND SWORN TO before me this 24 day of June, 2008.




 NOTARY PUBLIC FOR IDAHO
 Residing in: Boise, Idaho
 Commission expires: 2/8/2011

Eric R. Clark, ISB# 4697
THE REAL ESTATE LAW GROUP
P.O. Box 2504
Eagle, ID 83616
Tel: (208) 830-8084
Fax: (208) 939-7136

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN)	
)	
Plaintiff,	)	Case No.: CV OC 0614241
)	
v.	)	PLAINTIFF'S RESPONSE TO
	)	DEFENDANT SALLAZ' FIRST
	)	REQUEST FOR ADMISSIONS
SALLAZ & GATEWOOD, CHTD.,)	
DENNIS SALLAZ and SCOTT)	
GATEWOOD,)	
)	
Defendants.)	

COMES NOW the Plaintiff and according to Rules 36(a), IRCP hereby provides the following objections responses to Defendant Sallaz' First Request for Admissions to the Plaintiff.

RESPONSE TO REQUEST FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1: Please admit that you have not filed a motion to set aside the Judgment and Decree of Divorce in Case No. CV DR 03-0115 ID.

RESPONSE TO REQUEST FOR ADMISSION NO. 1: Objection. Relevance. While the Plaintiff admits the factual allegation that the Plaintiff has not filed a motion to set aside the

Judgment and Decree of Divorce in Case No. CV DR 03-01151D, the Plaintiff objects to this Request as irrelevant to the subject matter involved in the pending action, and as not being reasonably calculated to lead to the discovery of admissible evidence. No

REQUEST FOR ADMISSION NO. 2: Please admit that you have failed to fully mitigate your damages, if any, by not filing a motion to set aside the Judgment and Decree of Divorce in Case No. CV DR 03-01151D.

RESPONSE TO REQUEST FOR ADMISSION NO. 2: Deny.

REQUEST FOR ADMISSION NO. 3: Please admit that you have not filed a motion to modify the Judgment and Decree of Divorce in Case No. CV DR 03-01151D.

RESPONSE TO REQUEST FOR ADMISSION NO. 3: Objection. Relevance. While the Plaintiff admits the factual allegation that the Plaintiff has not filed a motion to modify the Judgment and Decree of Divorce in Case No. CV DR 03-01151D, the Plaintiff objects to this Request as irrelevant to the subject matter involved in the pending action, and as not being reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 4: Please admit that you have failed to fully mitigate your damages, if any, by not filing a motion to modify the Judgment and Decree of Divorce in Case No. CV DR 03-01151 D.

RESPONSE TO REQUEST FOR ADMISSION NO. 4: Deny.

REQUEST FOR ADMISSION NO. 5: Please admit that you were present in the courtroom on August 5, 2004, when the Judgment and Decree of Divorce was entered Case No. CV DR 03-01151 D.

RESPONSE TO REQUEST FOR ADMISSION NO. 5: Admit the allegation that the Plaintiff was in court on August 5, 2004, but denies the judgment or decree was "entered" at that time.

REQUEST FOR ADMISSION NO. 6: Please admit that you were placed under oath by Judge Day on August 5, 2004 in Case No. CV DR 03-01151 D.

RESPONSE TO REQUEST FOR ADMISSION NO. 6: Admit.

REQUEST FOR ADMISSION NO. 7: Please admit that once you were under oath, you informed Judge Day that you had reviewed the terms of the divorce decree in Case No. CV DR 03-01151D with your attorney, and that you did not have any questions regarding the terms of the divorce.

RESPONSE TO REQUEST FOR ADMISSION NO. 7: The Plaintiff objection to this request to the extent that it suggests or implies that the Plaintiff initiated any conversation with Judge Day. The Plaintiff will admit that she responded affirmatively to Judge Day's questions, as instructed by her counsel prior to the hearing.

REQUEST FOR ADMISSION NO. 8: Please admit that you produced, in your own handwriting, the documents attached herein as Exhibits A & B.

RESPONSE TO REQUEST FOR ADMISSION NO. 8: Exhibit A, Admit. Exhibit B, Objection, relevance. Additionally, without waiving this objection, the Plaintiff does not recall drafting this note and therefore denies its authenticity.

REQUEST FOR ADMISSION NO. 9: Please admit that Dennis Sallaz did not assist, or consult you in any manner in Case No. CV DR 03-01151D.

RESPONSE TO REQUEST FOR ADMISSION NO. 9: Deny. *Admit*

REQUEST FOR ADMISSION NO. 10: Please admit that you have never been diagnosed by a medical professional as incompetent to understand legal proceedings.

RESPONSE TO REQUEST FOR ADMISSION NO. 10: Objection, relevance.

REQUEST FOR ADMISSION NO. 11: Please admit that you waited nearly two years from the time your cause of action accrued to file this lawsuit.

RESPONSE TO REQUEST FOR ADMISSION NO. 11: Objection: Relevance. Without waiving the objection, the Plaintiff filed this action within 13 months after the Defendants withdrew from representing her in Case No. CV DR 03-01151D, and therefore denies the factual allegation as well.

REQUEST FOR ADMISSION NO. 12: Please admit that, initially, you filed this lawsuit *pro se*, or without an attorney.

RESPONSE TO REQUEST FOR ADMISSION NO. 12: Objection: Relevance.

REQUEST FOR ADMISSION NO. 13: Please admit that any amount of money you receive in this case, if any, may be community property.

RESPONSE TO REQUEST FOR ADMISSION NO. 13: Deny.

REQUEST FOR ADMISSION NO. 14: Please admit that Gary Stephen may be entitled to a portion of the proceeds, if any, if you were successful in this case.

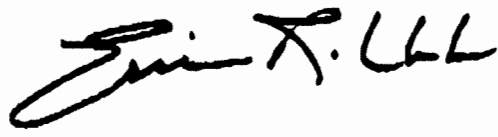
RESPONSE TO REQUEST FOR ADMISSION NO. 14: Deny.

REQUEST FOR ADMISSION NO. 15: Please admit that Dennis Sallaz was not the senior attorney responsible for supervising Defendant Scott Gatewood during the time of your divorce in Case No. CV DR 03-01151 D.

RESPONSE TO REQUEST FOR ADMISSION NO. 15: Deny.

DATED this 4th day of December, 2007.

THE REAL ESTATE LAW GROUP



ERIC R. CLARK, ISB #4697
Attorney for Plaintiff

CERTIFICATE OF SERVICE

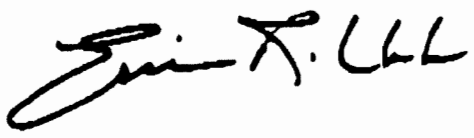
I HEREBY CERTIFY that on the 4th day of December 2007, I caused to be served in the manner indicated a true and correct copy of the foregoing to the following:

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
16 12th Avenue South, Suite 113
Nampa, Idaho 83651
Attorney for Sallaz & Gatewood, CHTD.,
And Scott Gatewood

Via Fax (208) 465-9834

CHARLES C. CRAFT
CRAFTS LAW, INC
410 S. Orchard, Ste. 120
Boise, ID 83705
Attorney for Dennis Sallaz.

Via Fax (208) 389-2109



Eric R. Clark

NO. _____
FILED P.M. 1:05
A.M. _____

ORIGINAL

JUL 28 2008

J. DAVID NAVARRO, Clerk
By KATHY J. BIEHL
DEPUTY

Eric R. Clark, ISB# 4697
THE REAL ESTATE LAW GROUP
P.O. Box 2504
Eagle, ID 83616
Tel: (208) 830-8084
Fax: (208) 939-7136

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN)

Plaintiff,)

v.)

SALLAZ & GATEWOOD, CHTD.,)
and SCOTT GATEWOOD,)

Defendants.)

Case No.: CV OC 0614241

PLAINTIFF'S PRE-TRIAL
MEMORANDUM

COMES NOW the Plaintiff, by and through her attorney of record, and files her pre-trial memorandum.

I. ELEMENTS OF THE PLAINTIFF'S CASE.

a. Legal Malpractice (Negligence).

a. Duty

b. Breach

20

- c. Causation
- d. Damages
- b. Breach of Contract.
 - a. Existence of a contractual relationship
 - b. Breach
 - c. Damages

II. CONTESTED FACTS

- a. Whether the Defendants' conduct constituted legal malpractice.
- b. Whether the Plaintiff suffered damages and if so, the nature and extent of these damages.

III. CONTESTED ISSUES OF LAW

Whether a judge or Jury should decide issues relevant to the divorce case as a judge not a jury would have decided those issues in the underlying divorce action.

- a. The amount and duration of spousal maintenance.
- b. The equitable division of property.

IV. EVIDENTIARY ISSUES.

- a. The admission of medical records. Based on the discovery proceedings, the Plaintiff believes the Defendants will attempt to introduce medical records by asking the Plaintiff to authenticate these documents. As the Plaintiff did not create the documents and has no knowledge as to whether the medical information contained therein is accurate, the Plaintiff

cannot authenticate these records and the Defendants are required to present the custodians or the doctors who created the documents for proper authentication.

V. AGREED OR STIPULATED FACTS.

- a. None.

VI. MEMORANDUM OF POINTS OF AUTHORITIES ON ISSUES OF LAW.

The circumstances of this case require the determination as to whether the Court or jury should consider and decide issues raised in the divorce proceedings.

1. Spousal Maintenance. A court, not a jury, appears to have sole authority to consider and grant spousal maintenance according to Idaho Code 32-705.

Idaho Code 32-705 MAINTENANCE.

1. Where a divorce is decreed, **the court may grant a maintenance order** if it finds that the spouse seeking maintenance:

(a) Lacks sufficient property to provide for his or her reasonable needs; and

(b) Is unable to support himself or herself through employment.

2. **The maintenance order shall be in such amounts and for such periods of time that the court deems just, after considering all relevant factors which may include:**

(a) The financial resources of the spouse seeking maintenance, including the marital property apportioned to said spouse, and said spouse's ability to meet his or her needs independently;

(b) The time necessary to acquire sufficient education and training to enable the spouse seeking maintenance to find employment;

(c) The duration of the marriage;

(d) The age and the physical and emotional condition of the spouse seeking maintenance;

(e) The ability of the spouse from whom maintenance is sought to meet his or her needs while meeting those of the spouse seeking maintenance;

(f) The tax consequences to each spouse;

(g) The fault of either party.

The Plaintiff believes that during the trial, she is entitled to present evidence to support her claim for spousal maintenance to the Court without the jury present. If the Court rules that the Plaintiff is entitled to maintenance, the Court would then instruct the Jury that it has decided the amount and duration of spousal maintenance in accordance with the criteria listed in Idaho Code 32-705. The Court would then instruct the Jury that it is their duty to determine whether or not the Defendants' failure to obtain spousal maintenance constituted legal malpractice. Alternatively, if the Court rules that the Plaintiff is not entitled to maintenance, then that issue is resolved.

2. Community property distribution. The same issue arises regarding the distribution of the community property.

32-712 COMMUNITY PROPERTY AND HOMESTEAD -- DISPOSITION.

In case of divorce by the decree of a court of competent jurisdiction, the community property and the homestead must be assigned as follows:

1. The community property **must be assigned by the court in such proportions as the court, from all the facts of the case and the condition of the parties, deems just**, with due consideration of the following factors:

(a) Unless there are compelling reasons otherwise, there shall be a substantially equal division in value, considering debts, between the spouses.

(b) Factors which may bear upon whether a division shall be equal, or the manner of division, include, but are not limited to:

(1) Duration of the marriage;

(2) Any antenuptial agreement of the parties; provided, however, that the court shall have no authority to amend or rescind any such agreement;

(3) The age, health, occupation, amount and source of income, vocational skills, employability, and liabilities of each spouse;

(4) The needs of each spouse;

(5) Whether the apportionment is in lieu of or in addition to maintenance;

(6) The present and potential earning capability of each party; and

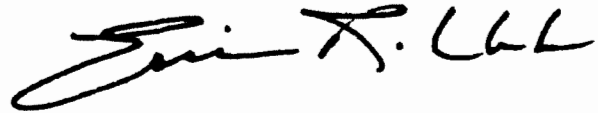
(7) Retirement benefits, including, but not limited to, social security, civil service, military and railroad retirement benefits.

* * *

Again, the Plaintiff believes that the Court should consider and resolve all issues relating to the distribution of community property, and if that figure is different than the figure used in the divorce proceedings to value the property, the Court would instruct the Jury that it has calculated what it believes is the proper distribution and if that figure indicates the Plaintiff was entitled to receive more value in community property than she actually received when represented by the Defendants, then the Court would instruct the jury that it is their duty to determine if the Defendants' conduct resulted in the Plaintiff receiving less of the value of community property than she was entitled.

RESPECTFULLY SUBMITTED this 28th day of July, 2008.

THE REAL ESTATE LAW GROUP



Eric R. Clark, for the Plaintiff

CERTIFICATE OF SERVICE

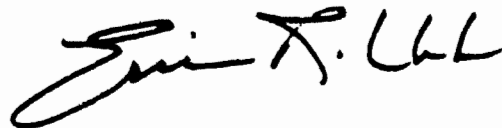
I HEREBY CERTIFY that on the 28th day of July, 2008, I caused to be served in the manner indicated a true and correct copy of the foregoing to the following:

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
16 12th Avenue South, Suite 113
Nampa, Idaho 83651

Via Fax (208) 465-9834

CHARLES C. CRAFT
CRAFTS LAW, INC.
410 S. Orchard, Ste. 120
Boise, ID 83705

Via Fax (208) 389-2109



Eric R. Clark

NO. _____ FILED 4:10
A.M. P.M.

AUG 01 2008

J. DAVID MALCOLM, CLERK
By _____

Eric R. Clark, ISB# 4697
THE REAL ESTATE LAW GROUP
P.O. Box 2504
Eagle, ID 83616
Tel: (208) 830-8084
Fax: (208) 939-7136

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN)	
)	
Plaintiff,	)	Case No.: CV OC 0614241
)	
v.	)	PLAINTIFF'S SUPPLEMENTAL PRE-
	)	TRIAL MEMORANDUM
)	
SALLAZ & GATEWOOD, CHTD.,)	
and SCOTT GATEWOOD,)	
)	
Defendants.)	
)	
)	

COMES NOW the Plaintiff, by and through her attorney of record, and files her pre-trial memorandum.

- I. ELEMENTS OF THE PLAINTIFF'S CASE.
 - a. Legal Malpractice (Negligence).
 - a. Duty
 - b. Breach

- c. Causation
- d. Damages
- b. Breach of Contract.
 - a. Existence of a contractual relationship
 - b. Breach
 - c. Damages

II. CONTESTED FACTS

- a. Whether the Defendants' conduct constituted legal malpractice.
- b. Whether the Defendants breached their contract with the Plaintiff.
- c. Whether the Plaintiff suffered damages and if so, the nature and extent of these damages.

III. CONTESTED ISSUES OF LAW

Whether a judge or Jury should decide issues relevant to the divorce case as a judge not a jury would have decided those issues in the underlying divorce action.

- a. The amount and duration of spousal maintenance.
- b. The equitable division of property.

IV. EVIDENTIARY ISSUES.

- a. The admission of medical records. Based on the discovery proceedings, the Plaintiff believes the Defendants will attempt to introduce medical records by asking the Plaintiff to authenticate these documents. As the Plaintiff did not create the documents and has no knowledge as to

whether the medical information contained therein is accurate, the Plaintiff cannot authenticate these records and the Defendants are required to present the custodians or the doctors who created the documents for proper authentication.

V. AGREED OR STIPULATED FACTS.

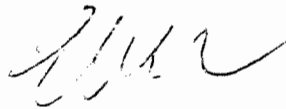
a. None.

VI. MEMORANDUM OF POINTS OF AUTHORITIES ON ISSUES OF LAW.

Due to the Court's ruling on July 29, 2008 in which the Court stated the trier of fact would decide all issues presented at the trial, regardless of whether the Court would have decided certain issues in the divorce proceedings, the Plaintiff withdraws this argument.

RESPECTFULLY SUBMITTED this 1st day of August, 2008.

THE REAL ESTATE LAW GROUP



Eric R. Clark, for the Plaintiff

CERTIFICATE OF SERVICE

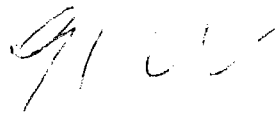
I HEREBY CERTIFY that on the 1st day of August, 2008, I caused to be served in the manner indicated a true and correct copy of the foregoing to the following:

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LAW OFFICES OF JOHN PRIOR
16 12th Avenue South, Suite 113
Nampa, Idaho 83651

Via Fax (208) 465-9834

CHARLES C. CRAFT
CRAFTS LAW, INC.
410 S. Orchard, Ste. 120
Boise, ID 83705

Via Fax (208) 389-2109



Eric R. Clark

ID _____
AM _____ 4:05
AUG 18 2008
J. DAVID [unclear] [unclear]
BY LANCES
[unclear]

Eric R. Clark, ISB# 4697
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Fax: (208) 939-7136

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN)	
)	
Plaintiff,	)	Case No.: CV OC 0614241
)	
v.	)	PLAINTIFF'S MOTION IN LIMINE
	)	RE: EVIDENCE OF ILLEGAL
	)	CONDUCT
SALLAZ & GATEWOOD, CHTD.,)	
DENNIS SALLAZ and SCOTT)	
GATEWOOD,)	
)	
Defendants.)	
)	
)	

COMES NOW the Plaintiff, by and through her attorney of record, and files this Motion in Limine to exclude evidence at trial.

ARGUMENT

During the discovery phase of this case the Defendants have made it abundantly clear they intend to employ character assignation as a prominent strategy in their

2

defense. The Plaintiff objects to this tactic and seeks to exclude any evidence of illegal activity as that evidence is not relevant, and if it is relevant, its prejudicial effect outweighs its relevance.

1. Relevance.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

This case involves a “case within a case” and the underlying case was a divorce proceeding. Neither party sought a “fault” type divorce, and each pled they were seeking a divorce bases on “irreconcilable differences.” Evidence of any illegal conduct by either party to the divorce would therefore be irrelevant. As any alleged illegal conduct would have been irrelevant in the divorce proceeding, it is equally irrelevant in t his case.

2. Undue Prejudice. "Even if relevant to a permissible purpose, evidence of uncharged misconduct is subject to exclusion under I.R.E. 403 if its probative value is substantially outweighed by the danger of unfair prejudice." "The determination of whether the risk of unfair prejudice substantially outweighs the probative value of the evidence is within the discretion of the trial court." *Thorn Springs Ranch, Inc. v. Smith*, 137 Idaho 480, 486, 50 P.3d 975 (2002) (Internal cites omitted) (Emphasis added).

In this case, the Defendant will attempt to introduce evidence of the Plaintiff's alleged use of illegal substances. While the Plaintiff contends such evidence is clearly

irrelevant, it is also extremely prejudicial. That prejudice clearly outweighs any minimal relevance and should therefore be excluded.

CONCLUSION

The Plaintiff respectfully requests the Court GRANT this motion in its entirety and Order the exclusion of any evidence of the Plaintiff's alleged use of illegal substances.

RESPECTFULLY SUBMITTED this 6th day of August, 2008.

THE REAL ESTATE LAW GROUP



Eric R. Clark, for the Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of August, 2008, I caused to be served in the manner indicated a true and correct copy of the foregoing to the following:

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
16 12th Avenue South, Suite 113
Nampa, Idaho 83651

Via Fax (208) 465-9834

CHARLES C. CRAFT
CRAFTS LAW, INC.
410 S. Orchard, Ste. 120
Boise, ID 83705

Via Fax (208) 389-2109



Eric R. Clark

ORIGINAL

CHARLES C. CRAFTS ISB # 7070
CRAFTS LAW INC.
Attorney at Law
410 S. Orchard, Ste. 120
Boise, ID 83705
Phone: (208) 367-1749
Facsimile: (208) 389-2109

8:30
July 7
Dennis Sallaz

Attorney for Defendant: **Dennis J. Sallaz**

IN THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO

IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN,

Plaintiff,

vs.

SALLAZ & GATEWOOD, CHTD.;
DENNIS SALLAZ and
SCOTT GATEWOOD

Defendant.

Case No. CV OC 06-14241

**MOTION TO REMOVE BOB
WALLACE AS GUARDIAN
AND/OR NOT REFER TO HIM AS
GUARDIAN DURING TRIAL**

COMES NOW the Defendants, DENNIS SALLAZ, by and through his counsel of record, CHARLES CRAFTS, and pursuant to I.C. 66-322 and I.R.C.P. 17 hereby moves this Court for an Order removing Bob Wallace as the Guardian in this case. In the alternative, the Defendants seek an Order In Limine to keep the Plaintiff from referring to Bob Wallace as her guardian during trial.

Respectfully submitted this 6 day of August, 2008.



Charles Crafts
Attorney for Defendant Dennis Sallaz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6 day of August, 2008, I served a true and correct copy of the foregoing document by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Eric R. Clark	<input type="checkbox"/>	U.S. Mail, postage prepaid
THE REAL ESTATE LAW GROUP	<input type="checkbox"/>	Hand-Delivered
P.O. Box 2504	<input type="checkbox"/>	Overnight Mail
Eagle, ID 83616	<input checked="" type="checkbox"/>	Facsimile
Tel: (208) 830-8084	<input type="checkbox"/>	CM/ECF
Fax: (208) 939-7136		
<i>Attorney for Plaintiff</i>		

John Prior	<input type="checkbox"/>	U.S. Mail, postage prepaid
Law Offices of John Prior	<input type="checkbox"/>	Hand-Delivered
16 12 th Avenue South, Suite 113	<input type="checkbox"/>	Overnight Mail
Nampa, Idaho 83651	<input checked="" type="checkbox"/>	Facsimile
<i>Attorney for Sallaz & Gatewood, CHTD.</i>	<input type="checkbox"/>	CM/ECF
<i>And Scott Gatewood</i>		



Charles C. Crafts
Attorney for Defendant Dennis J. Sallaz

ORIGINAL

NO. _____
A.M. 8:30 FILED P.M. _____

AUG 7 6 2008

J. DAVID NAVARRO, Clerk
By KATHY J. BIEHL
DEPUTY

CHARLES C. CRAFTS ISB # 7070
CRAFTS LAW INC.
Attorney at Law
410 S. Orchard, Ste. 120
Boise, ID 83705
Phone: (208) 367-1749
Facsimile: (208) 389-2109

Attorney for Defendant: Dennis J. Sallaz

IN THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO

IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN,

Plaintiff,

vs.

SALLAZ & GATEWOOD, CHTD.;
DENNIS SALLAZ and
SCOTT GATEWOOD

Defendant.

Case No. CV OC 06-14241

**MEMORANDUM IN SUPPORT OF
MOTION TO REMOVE BOB
WALLACE AS GUARDIAN
AND/OR NOT REFER TO HIM AS
GUARDIAN DURING TRIAL**

COMES NOW the Defendants, DENNIS SALLAZ, by and through his counsel of record, CHARLES CRAFTS, and hereby submits the following Memorandum in Support of Motion to Remove Bob Wallace as Guardian.

1.

**I.C. § 66-322 SETS OUT CERTAIN FACTORS THAT ARE INSTRUCTIVE AS TO
WHETHER OR NOT A GUARDIAN SHOULD BE APPOINTED**

Idaho Code § 66-322 addresses the issue of appointing a guardian for purposes of medical treatment, and it lays out very specific standards for the appointment of a Guardian. It states in pertinent part:

MEMORANDUM IN SUPPORT OF MOTION TO REMOVE BOB WALLACE AS GUARDIAN AND/OR NOT REFER TO HIM AS GUARDIAN DURING TRIAL - 1

(a) Proceedings for the appointment of a guardian of a mentally ill person may be commenced by the filing of a written petition with a court of competent jurisdiction by a friend, relative, spouse or guardian of the proposed patient, by a licensed physician, licensed clinical psychologist, prosecuting attorney, or other public official of a municipality, county or of the state of Idaho, or by the director of any facility in which such patient may be.

(b) The petition shall state the name and last known address of the proposed patient; the name and address of either the spouse, next of kin or friend of the proposed patient; whether a guardian of the proposed patient has been previously appointed under the laws of this or any other state and, if so, the name and address of the guardian and the circumstances of such appointment; and a precise statement showing that the proposed patient is mentally ill, that treatment is available for such illness, and that the proposed patient lacks capacity to make informed decisions about treatment.

(c) Any such petition shall be accompanied by a certificate of a licensed physician or licensed clinical psychologist stating that the physician or psychologist has personally examined the proposed patient within the last fourteen (14) days and is of the opinion: (i) that the proposed patient is mentally ill, (ii) that in the absence of treatment the immediate prognosis is for major distress of the proposed patient which will result in serious mental or physical deterioration of the proposed patient, (iii) that treatment is available which is likely to avoid serious mental or physical deterioration of the proposed patient, and (iv) that the proposed patient lacks capacity to make informed decisions about treatment; or by a written statement by the physician or psychologist that the proposed patient has refused to submit to an examination.

(d) Upon receipt of a petition, the court shall within forty-eight (48) hours appoint another licensed physician or licensed clinical psychologist to make a personal examination of the proposed patient, or if the proposed patient has not been examined, the court shall appoint two (2) licensed physicians or licensed clinical psychologists to make individual personal examinations of the proposed patient and may order the proposed patient to submit to an immediate examination. Within seventy-two (72) hours, the physician or psychologist shall file with the court certificates described in subparagraph (c) above, if necessary.

(e) Upon receipt of such petition and certificates, the court shall appoint a time and place for hearing not more than seven (7) days from receipt of such certificates and thereupon give written notice to the proposed patient. The notice shall include a copy of the petition and certificates and notice of the proposed patient's right to be represented by an attorney, or if indigent, to be represented by a court-appointed attorney. Notice of the time and place of the hearing shall also be given to the petitioner. *Emphasis Added.*

The Statute is instructive as to when a guardian may be appointed, but the following factors seem to be the most important:

- (i) that the proposed patient is mentally ill,
- (ii) that in the absence of treatment the immediate prognosis is for major distress of the proposed patient which will result in serious mental or physical deterioration of the proposed patient,
- (iii) that treatment is available which is likely to avoid serious mental or physical deterioration of the proposed patient, and
- (iv) that the proposed patient lacks capacity to make informed decisions about treatment...

Obviously, none of this information was provided to the Court, so the appointment of a guardian was inappropriate. Additionally, we have testimony from an expert stating that a person who is involuntarily committed to a mental hospital because of suicidal thoughts should not be presumed to be incompetent to understand legal proceedings. In fact, suicidal thoughts are quite common – especially during times of high stress.

2.

THE PLAINTIFF NOW ADMITS THAT SHE IS MENTALLY COMPETENT TO UNDERSTAND LEGAL PROCEEDINGS.

The following excerpts are taken from Ms. Stephen's discovery responses filed on July 7, 2008:

- a. Pam will confirm that no medical care providers have been retained or paid for an opinion that Pam lacked "mental competency to understand legal proceedings."
- b. Pam pled that she was taking prescribed medication on August 5, 2004 that she believed impaired her judgment and ability to comprehend the legal proceedings. Pam has not

asserted as this Interrogatory suggests that she suffered some diagnosed condition that impaired her "mental competency."

Apparently, the only reason why Ms. Stephen's mental capacity is even at issue is because the Plaintiff now claims that she should have been given a higher award of spousal maintenance. Consequently, her mental condition does not impair her ability to understand the legal proceedings, so a guardian is unnecessary.

3.

**ROBERT WALLACE IS INAPPROPRIATE AS A GUARDIAN BECAUSE HE WAS
ORIGINALLY HIRED AS AN EXPERT WITNESS FOR THE PLAINTIFF**

On April 16, 2007, Robert Wallace was listed as an expert witness for the Plaintiff. After his review of the case, Mr. Wallace made the following findings:

- A. Opinion: Mr. Wallace will testify that the conduct of the Defendants fell below the standard of care and conduct as follows:
 - 1. The Defendants failed to recognize or appreciate the need to obtain a guardian to protect Pam Stephen's interests in the divorce after her disclosure of her mental conditions.
 - 2. The Defendants failed to investigate the disclosed mental conditions or contact any treating physician to determine what effect these mental conditions had on Pam Stephen's ability to understand and comprehend legal proceedings.

Thereafter, on January 1, 2007, Mr. Wallace filed an affidavit with this court stating that he could serve as the guardian in this case, and he was appointed. There does not appear to be any case law on point regarding this issue, but it seems improper that someone hired to work as an expert witness is later entrusted with the position of guardian. On its face, there are several potential conflicts of interest.

- A. A guardian should make informed decisions on behalf of their ward, regardless of what the potential consequences may be. Because Mr. Wallace was retained as an expert witness, his view of the facts may be different than a neutral detached guardian.

- B. A guardian hired as an expert witness may be more willing to favor the opinion and viewpoints of the side that initially hired him.
- C. Mr. Wallace has already stated his opinion of the case, so it may be difficult for defense counsel to deal with him at arm's length.
- D. As a guardian, Mr. Wallace literally steps into the shoes of Ms. Stephen as the Plaintiff in this case. Necessarily, it may be in Ms. Stephen's best interest to have a guardian who was not previously retained as an expert in her own case. Once again, someone looking at this case without any preconceived notions may have a very different outlook than someone who was originally hired to testify on behalf of one party.

In making this argument, the defense is not asserting that Mr. Wallace or Mr. Clark have done anything improper in this case. Rather, we are stating that there is a potential conflict of interest in having Mr. Wallace as the guardian.

4.

IF MR. WALLACE CONTINUES AS THE GUARDIAN IN THIS CASE, THE PLAINTIFF SHOULD NOT BE ALLOWED TO REFER TO HIM AS HER GUARDIAN

Admitting evidence of that Mr. Wallace is the guardian in this case is irrelevant. "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *I.R.E. 401*. Obviously, the Plaintiff will assert at trial that the Defendants should have had a guardian appointed on behalf of Ms. Stephen. If Mr. Wallace is introduced as Ms. Stephen's guardian, a jury may infer that the Defendants should have requested a guardian simply because one was appointed in this case.

Next, even if the presence of a guardian is relevant, the probative value of such evidence is substantially outweighed by the prejudicial effect it would have on the Defendant. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations


of undue delay, waste of time, or needless presentation of cumulative evidence. *I.R.E. 403*. Once again, introducing Mr. Wallace as the guardian is extremely prejudicial to the defense, and has absolutely no probative value whatsoever for the Plaintiff.

4.

CONCLUSION

For the foregoing reasons, we would respectfully request that Mr. Wallace be removed as the guardian in this case, or in the alternative, that he not be introduced as the guardian for Ms. Stephen during trial.

Respectfully submitted this 6 day of August, 2008.



Charles Crafts
Attorney for Defendant Dennis Sallaz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6 day of August, 2008, I served a true and correct copy of the foregoing document by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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Fax: (208) 939-7136		
<i>Attorney for Plaintiff</i>		

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Nampa, Idaho 83651	[<input checked="" type="checkbox"/>]	Facsimile
<i>Attorney for Sallaz & Gatewood, CHTD.</i>	[]	CM/ECF
<i>And Scott Gatewood</i>		



Charles C. Crafts
Attorney for Defendant Dennis J. Sallaz

AUG 14 2008
Kusumkaran

Eric R. Clark, ISB# 4697
THE REAL ESTATE LAW GROUP
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Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN)	
)	
Plaintiff,	)	Case No.: CV OC 0614241
)	
v.	)	PLAINTIFF'S BENCH BRIEF
	)	RE: RELEVANT EVIDENCE
	)	AND
SALLAZ & GATEWOOD, CHTD.,	)	REQUEST FOR CONTINUING
DENNIS SALLAZ and SCOTT	)	OBJECTION
GATEWOOD,)	
)	
Defendants.)	
)	
)	

ARGUMENT

In an effort to get the train back on the tracks, the Plaintiff files this Memorandum of Law concerning the scope of relevant evidence at trial.

The Plaintiff sought to narrow the relevant issues at trial to 1) the Defendants' conduct regarding the valuation of the Crescent Rim home, and 2) the Defendants' failure to account for payment of the judgment from community funds. The only relevant

evidence thereafter would address the calculation and value of the community estate in light of these two factors.

Despite these seeming limited issues, the Defendants are attempting to conduct a divorce trial and to introduce evidence that the Plaintiff is somehow at fault and therefore the Court would have allocated her less than she deserved when the community estate was divided. This contention however, that fault is a relevant factor in determining the "equitable division" of community, is not supported by statute or case law.

"Unless there are compelling reasons to do otherwise, the court in a divorce action is required to make a substantially equal division in value, considering debts, of the community property between the spouses." *Larson v. Larson*, 139 Idaho 970, 971-2, 88 P.3d 1210 (2004). *Maslen v. Maslen*, 121 Idaho 85, 822 P.2d 982 (1991); IDAHO CODE § 32-712(1)(a) (1996). (Emphasis added).

Additionally, "Idaho Code § 32-712 specifically addresses how community property is to be divided. This section calls for an equal division of community property unless there are "compelling reasons" to do otherwise. The section lists a number of factors that the court may consider in determining the property division:

- (1) Duration of the marriage;
- (2) Any antenuptial agreement of the parties; provided, however, that the court shall have no authority to amend or rescind any such agreement;
- (3) The age, health, occupation, amount and source of income, vocational skills, employability, and liabilities of each spouse;
- (4) The needs of each spouse;
- (5) Whether the apportionment is in lieu of or in addition to maintenance;

(6) The present and potential earning capability of each party; and

(7) Retirement benefits, including, but not limited to, social security, civil service, military and railroad retirement benefits.

Under this statute, the trial court has the discretion to fashion a just division of the community property.” *Tisdale v. Tisdale*, 127 Idaho 331, 333, 900 P.2d 807 (1995), citing *Ross v. Ross*, 117 Idaho 548, 554, 789 P.2d 1139, 1145 (1990); and *Shurtliff v. Shurtliff*, 112 Idaho 1031, 1034, 739 P.2d 330, 333 (1987).

During this trial, the Court overruled the Plaintiff's relevance objection to testimony regarding the Plaintiff's alleged “boyfriend.” The Plaintiff renews this objection as “fault” is not a relevant criterion when considering the statutory distribution of community assets.

Additionally, while the Defendants' argue that if the Plaintiff was somehow “wasting” community property, then the Court could fashion some type of relief in the form of an inequitable distribution, that contention is also irrelevant in light of the limited issues presented for trial. If the Plaintiff prevails, the value of the community estate will change in relation to the increased value of the Crescent Rim home and based on the proper accounting for the pre-decree payment of a \$28,000.00 judgment from community funds. It does not get much simpler than that.

When the Plaintiff provided the Court with her estimation of the length of the trial, she did so intending to present evidence to support her limited claims. However, if these Defendants want to retry the entire divorce proceeding, which they apparently are pursuing, then this trial is going to take much longer and involve the introduction of a substantial amount of otherwise irrelevant evidence.

RESPECTFULLY SUBMITTED this 14th day of August, 2008.

THE REAL ESTATE LAW GROUP



Eric R. Clark, for the Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of August, 2008, I caused to be served in the manner indicated a true and correct copy of the foregoing to the following:

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LAW OFFICES OF JOHN PRIOR
16 12th Avenue South, Suite 113
Nampa, Idaho 83651

Hand Delivered

CHARLES C. CRAFT
CRAFTS LAW, INC.
410 S. Orchard, Ste. 120
Boise, ID 83705

Hand Delivered



Eric R. Clark

OCT 17 2008

J. DAVID NAVARRO, Clerk
By A. LYKE
DEPUTY

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
ISB#5344
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Telephone (208) 465-9839
Facsimile (208) 465-9834

Attorney for Defendant

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

PAMELA K. JOERGER STEPHEN,)
)
 Plaintiff,)
)
)
 vs.)
)
 SALLAZ & GATEWOOD, CHTD, and)
 SCOTT GATEWOOD,)
)
 Defendant.)
 _____)

CASE NO. CV 0C 0614241

**MOTION TO RECONSIDER
PURSUANT TO IRCP 11(a)(2) B**

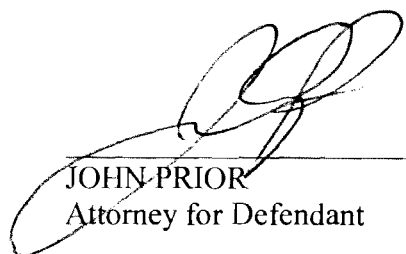
COMES NOW, the above named Defendant, SCOTT GATEWOOD, by and through his attorney, JOHN PRIOR, and hereby presents this Motion to Reconsider pursuant to I.R.C.P. 11 (a)(2)B and respectfully requests this court reconsider its prior ruling. A Memorandum in Support of Motion supports this Motion for Reconsideration submitted herewith and as follows:

1. The court did not reduce the damages assessed against Scott Gatewood in the amount of \$10,000 for the separate property of Mr. Stephens for the Beach Street residence.

B

2. The court should not include the \$28,000 indebtedness for the lien was paid prior to the divorce against Mr. Gatewood in determining damages.
3. The Defendant represents that it is his belief that the appraisal experts for the defense determined the Crescent Rim Property to be valued at between \$375,000 to \$400,000. That the court should take the testimony of defense witnesses as to value of the property. Further that the court in its Findings of Fact and Conclusions of Law noted a range of \$275,000 to \$400,000 as opposed to what defense believes was a range of \$375,000 to \$400,000.
4. That the court reconsiders its prior ruling regarding the applicability of **Heinz v. Bauer** 2008 ID R0128.004 based upon its Findings of Fact that Ms Stephens was not incompetent.

DATED this 17th day of October, 2008.



JOHN PRIOR
Attorney for Defendant

CERTIFICATE OF SERVICE

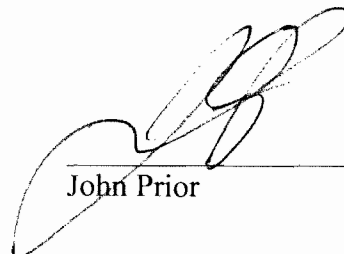
I HEREBY CERTIFY that on the 17th day of October, 2008, a true and correct copy of the foregoing Motion for Reconsideration was delivered by the method indicated below and addressed to the following:

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John Prior

OCT 17 2008

J. DAVID NAVARRO, Clerk
By A. LYKE
DEPUTY

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Attorney for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAGISTRATE DIVISION

PAMELA K. JOERGER STEPHEN,	)	CASE NO. CV OC 0614241
)	
Plaintiff,)	
)	
vs.	)	MEMORANDUM IN SUPPORT OF
	)	MOTION FOR RECONSIDERATION
	)	PURSUANT TO IRCP 11 (a)(2)B
SALLAZ & GATWOOD, CHTD.,)	
DENNIS SALLAZ and SCOTT)	
GATEWOOD,)	
)	
Defendant.)	
_____)	

COMES NOW, the above named Defendant, SCOTT GATEWOOD, by and through his attorney, JOHN PRIOR, and hereby presents this Memorandum in Support of Motion For Reconsideration pursuant to I.R.C.P. 11 (a)(2)B.

In the court's Findings of Fact, Conclusions of Law and Judgment, Defendant respectfully requests that the court reconsider its decision and its factual findings as follows:

7

1. That the court consider reducing the damages assessed against Scott Gatewood in the amount of \$10,000 for the separate property of Mr. Stephens for the Beach Street residence. This request is based upon the decision in *Bliss v. Bliss* 127 Idaho 170, 898 P.2d 1081 (1995). In *Bliss, Id*, the court noted that a conveyance by one party to another such as in the present case creates a separate property interest. That it is then the burden of the party objecting to that separate property characterization to present evidence to overcome that presumption. *Bliss* states in pertinent part;

“Because the deed was in writing, signed by the grantor, and included the name and address of the grantee, it constituted a valid conveyance of legal title to real property. I.C. § 55-601;(fn1) *see, e.g., Erb v. Kohnke*, _____, 337, 824 P.2d 903, 912 (Ct. App. 1992). In cases such as this, I.C. § 32-906(2) creates a presumption that the conveyed property is separate:

(2) Property conveyed by one spouse to the other shall be presumed to be the sole and separate estate of the grantee and only the grantor spouse need execute and acknowledge the deed or other instrument of conveyance notwithstanding the provisions of section 32-912, Idaho Code;....

Under this statute, the forty-eight acres is presumed to be Althea's sole and separate property. Pursuant to Rule 301 of the Idaho Rules of Evidence, Gordon then had the burden of going forward with evidence to rebut or meet the presumption, although it remained Althea's burden of persuasion to demonstrate that the forty-eight acres was separate. The effect of the statutory presumption under Rule 301 is that the party in whose favor the presumption operates is relieved from having to adduce further evidence of the presumed fact until the opponent introduces substantial evidence of the nonexistence of the fact. *Bongiovi v. Jamison*, _____, 738, 718 P.2d 1172, 1176 (1986)”.*Bliss* pg 174.

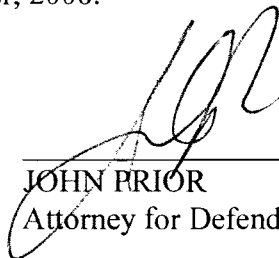
Ms. Stephens, Ann Shepard and Scott Gatewood all testified that it was Gary Stephens separate property. At no time was there testimony that would overcome the presumption of the Beach Street property as separate property. Counsel for the Defendant has a recollection that the court examined the Quit Claim deed during the trial. If the court is going to allow Plaintiff to re-characterize a debt from community to separate as in the case of the \$28,000 debt, Defendant would request that the court consider that the Beach Street property be characterized as a

separate property and that Ms. Stephens award be reduced by \$10,000 which represents an increase in the overall property equalization in which she was not entitled to. The Bliss case was precedent at the time of the divorce.

2. That the court reconsider its ruling that the \$8,000 debt paid prior to the divorce was a separate debt. There was no testimony in the present case that determined the source of the funds that paid that \$28,000 debt. Mr. Stephens did not come forward and testify the source of funds in paying off that debt. There was no witness that testified to what source of funds were used to satisfy that debt. The court cannot speculate to a source. Further, the court should consider Mr. Gatewood's testimony and we would respectfully request that the court reconsider that divorce settlements do not always allow for an equal distribution or equal determination of what is separate and what is community assets. This would require the court to examine the mind set of all parties back in 2004. The very fact that there is a dispute as to characterization and that the court had to recalculate the settlement in terms of characterization of property and amount due should suggest to the court that divorce settlements are by their nature an exercise in speculation as to how to distribute property. As such we would respectfully request that the court reconsider its prior determination and reclassify this \$28,000 debt as community debt.
3. The Defendant represents that it is his belief that the appraisal experts for the defense determined the Crescent Rim Property to be valued at between \$375,000 to \$400,000. That the court should take the testimony of defense witnesses as to value of the property. That the fact that Mr. Stephens placed the value at \$500,000 and the

In conclusion Defendant respectfully request that this court reconsider its ruling that Ms. Stephens was damaged by action of Mr. Gatewood. Further, Defendant respectfully request that this court reevaluate its determination of damages based upon the argument presented herein.

DATED this 17th day of October, 2008.



JOHN PRIOR
Attorney for Defendant

CERTIFICATE OF SERVICE

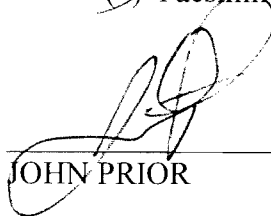
I HEREBY CERTIFY that on the 17th day of October, 2008, I caused a true copy of the foregoing Memorandum In Support of Motion for Reconsideration to be served by the method indicated below, and addressed to the following:

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JOHN PRIOR

10:58

11/1/2013

Eric R. Clark, Clerk

Eric R. Clark, ISB# 4697
CLARK & ASSOCIATES, ATTORNEYS
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Fax: (208) 939-7136

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN

Plaintiff,

v.

SALLAZ & GATEWOOD, CHTD.,
and SCOTT GATEWOOD,

Defendants.

Case No.: CV OC 0614241

PLAINTIFF'S MEMORANDUM IN
RESPONSE TO DEFENDANT
GATEWOOD'S MOTION
TO RECONSIDER

COMES NOW the Plaintiff, by and through her attorney of record, and hereby responds to Defendant Gatewood's Motion to Reconsider.

ARGUMENT

1. The Court Correctly Ruled the Beach Street Home Was Community

Property. As the Court noted in its Findings of Facts, the parties in the divorce considered the Beach Street property as community property, notwithstanding the existence of any deed. In

Plaintiff's Exhibit 105, Ms. Stephen presented Mr. Stephen's *verified* discovery responses in the divorce case in which Mr. Stephen, when asked to identify all "Community Real Property," identified both the Crescent Rim home and the Beach Street property, and when asked in the same discovery whether Mr. Stephen claimed any separate real property, Mr. Stephen replied "None."

Additionally, Ms. Shepard, Mr. Stephen's divorce attorney, testified at trial that she believed the parties had settled their personal property division issues at mediation, but that the real property division was still in contention on August 5, 2004, the date scheduled for the divorce trial. Ultimately, the parties agreed that both the Beach Street and Crescent Rim homes were community property, despite the existence of any quit-claim deed ("2001 deed") concerning the Beach Street home, and memorialized this agreement and their respective understandings in the divorce decree.

In his Motion to Reconsider, Mr. Gatewood directs the Court to *Bliss v. Bliss*, 127 Idaho 170, 898 P.2d 1081 (1995), and asserts the Court must consider the Beach Street home as Mr. Stephen's separate property. This contention however ignores the facts in *Bliss* and the clear wording of Idaho Code § 32-906(2).

In this case, the 2001 deed purports to convey property to Mr. Stephens, the Grantee, but Mr. Stephens although having knowledge of the deed, either conceded the 2001 deed was incorrect or agreed that notwithstanding the 2001 deed, the Beach Street home was community property. Ms. Stephen under the circumstances, as Grantor, stands in the same shoes as Gordon Bliss, who in the *Bliss* case sought to invalidate his deed conveying acreage to Mrs. Bliss. Had

Mrs. Bliss, as the Grantee, agreed that the property was community, despite the deed, as Mr. Stephen had done, the validity of the deed in *Bliss* would have been in question, just like it was in this case. Consequently, to have prevailed on this issue in the trial, the Defendants would have had to present Mr. Stephen's testimony that he believed the 2001 deed was valid and enforceable. However, Ms. Stephen presented evidence at trial that Mr. Stephens believed and understood the Beach Street home was community property and ultimately even after Mr. Stephens was aware of the 2001 deed agreed to divide the Beach Street home as if it were still community property.

Moreover, Judge Day was clear and unequivocal in the Decree and directed Ms. Stephen to quit-claim her community interest in the Beach Street home to Mr. Stephen (Decree, page 2. para. 3). If Mr. Stephen or his Counsel Ms. Shepard believed the decree was not accurate, they should have petitioned the Court for a correction. While *Bliss* may apply when the Grantee asserts an entitlement to the deed, it is not controlling when the Grantee concedes the deed was either erroneous or that the real property remained community property despite the deed.

Mr. Gatewood also argues that the Court should grant this motion because the Court "re-characterized a debt from community to separate as in the case of the \$28,000.00 debt." Once again, Mr. Gatewood is incorrect. The record confirmed that Mr. Stephen paid the \$28,000.00 community debt from community funds while the parties were married (Plaintiff's Exhibit 117). It was error for Mr. Stephen to deduct the \$28,000.00 community debt from the community equity, when that debt no longer existed. The Court correctly increased the value of the community estate by \$28,000.00 to reflect the fact the \$28,000.00 debit that Mr. Stephens

received for a community debt that no longer existed was error. The Court did not, as Mr. Gatewood contends, somehow “re-classify” the judgment debt from community to separate.

Finally, if the Court were to reverse and rule the 2001 deed as valid, the Beach Street home would have been Mr. Stephen’s separate property from August 24, 2001. Assuming this was correct; the Decree indicates the mortgage on the Beach Street home was \$860.00 per month, and there was no evidence presented that Mr. Stephen had any separate property funds to pay this mortgage. The community would therefore be entitled to reimbursement for the community funds paid for the mortgage of \$30,100.00 (\$860.00 x 35 months). Mr. Stephen would owe Ms. Stephen half of this amount, and based on the Defendant’s estimate of a \$10,000 shortfall, the Defendants would actually now owe Ms. Stephen an additional \$5,000.00. Ms. Stephen however did not assert the 2001 deed was valid and enforceable, despite that she would have been entitled to reimbursement, because the facts clearly establish that neither party to the 2001 deed considered it valid and to reverse would be clear error.

2. The Court Properly Ruled Mr. Stephen Was Not Entitled To *Debit* The Judgment Lien. Defendant Gatewood asks the Court to reverse its ruling “that the \$[2]8,000 debt paid prior to the divorce was a separate debt.”¹ This contention, however, ignores the actual ruling. Ms. Stephen argued that Mr. Stephen was not entitled to debit the judgment lien that was paid before the decree was entered and therefore, as the Court correctly ruled, the amount of community estate equity increased by the amount of this deduction. Once this debt was paid, it should not have been listed on the property settlement agreement and to have given Mr. Stephen

1. Gatewood’s Memo. In support of Motion for Reconsideration – Page 3.

a \$28,000 deduction was error.

Regarding the “source of funds” argument, contrary to Defendant Gatewood’s claim, the evidence presented at trial indicates the judgment lien was a lien against a community real property asset, arose from a construction dispute regarding this community real property asset, occurred during the marriage, and was ultimately paid for from community funds. We know it was paid for from community funds because Mr. Stephen indicated in his discovery responses that he did not have any separate property sources of income.

Finally, at trial the Defendants effectively stood in the shoes of Mr. Stephen in the divorce proceedings. Consequently, the burden of proof and production in this case remained the same as in the divorce action. It is the party asserting a certain classification as separate or community to produce evidence in support of that contention. If Defendant Gatewood believed Mr. Stephens paid the judgment lien from separate property funds as he contends, it was his burden to support and prove this contention at trial. Mr. Gatewood, however, did not meet his burden.

3. The Court’s Determination of the Value of the Crescent Rim Property

Should Stand. Mr. Gatewood appears to argue nothing more than the Court should believe his appraisers and not Mr. Schultz and relies on allegations he had every opportunity to prove in Court but failed. As the Court remembers, Ms. Shepard and Mr. Gatewood both conceded on cross-examination that then had absolutely no evidence that Ms. Stephen was the cause of or responsible for any alleged damage to either property, yet Mr. Gatewood now argues “Mr. Stephens had to repair two residences damaged by Ms. Stephen and her guests.”

The Court undeniably determined that Mr. Schultz' appraisal was more compelling, perhaps because Mr. Schulz, unlike the Defense appraisers, actually entered the Crescent Rim home and viewed the inside of the residence when performing his appraisal. The Defendants had every opportunity to seek access to this property so their appraisers could perform a similar appraisal, but never pursued this avenue. Instead, Mr. Gatewood's appraisers conducted a limited appraisal from the curb. As the Court's decision regarding the value of the Crescent Rim home is supported by substantial evidence, the Court's ruling should stand.

4. *Heinze v. Bauer* does not require a finding the Plaintiff was incompetent.

Once again, Mr. Gatewood's interpretation the application of judicial estoppel is incorrect. As the Court cited in its denial of the Defendant's motions for summary judgment and again when the Court denied the Defendants' motion for directed verdict, competence or incompetence is not the standard – it is what the person “charged” with knowledge actually knew.

Notwithstanding proof that Ms. Stephen was taking medications that likely affected her cognitive functions, and her Attorney was aware of this situation, the record is clear that Mr. Stephen believed the Crescent Rim home was worth \$500,000.00 and that Mr. Gatewood did not provide that information to Ms. Stephen. Moreover, Ms. Stephen did not know that Mr. Stephen had paid the Crescent Rim judgment from community funds before the divorce was finalized. Consequently, regardless of any “incompetence” issues, judicial estoppel should not apply because Ms. Stephen simply did not know relevant and material facts when she agreed to the property settlement. “Stated another way, the concept of judicial estoppel takes into account not only what a party states under oath in open court, but also what that party knew, or should have

known, at the time the original position was adopted.” *McKay v. Owens*, 130 Idaho 148, 155, 937 P.2d 1222 (1997). There is no disputed evidence that Ms. Stephen knew or should have know of Mr. Stephen’s opinion of the value of the Crescent Rim home or that she knew or should have know that Mr. Stephen paid the Crescent Rim judgment. As the evidence established she did not know these facts, judicial estoppel cannot apply, and the Court has been correct in its rulings for two years.

CONCLUSION

The Plaintiff respectfully requests the Court DENY the Defendant’s Motion to reconsider.

RESPECTFULLY SUBMITTED this 12th day of November, 2008.

CLARK & ASSOCIATES, ATTORNEYS



Eric R. Clark, for the Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of November 2008, I caused to be served in the manner indicated a true and correct copy of the foregoing to the following:

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
16 12th Avenue South, Suite 113
Nampa, Idaho 83651

Via Fax (208) 465-9834

CHARLES C. CRAFT
CRAFTS LAW, INC.
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Eric R. Clark

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Attorneys for the Defendants/Appellants

NO. _____ FILED _____
A.M. _____ P.M. 3:10

JUN 16 2009
J. DAVID NAVARRO, Clerk
By E. HOLMES
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN,)
) Civil No. CV OC 0614241
Plaintiff/Respondent/Cross-Appellant,)
)
vs.) **MOTION FOR STAY OF**
) **EXECUTION ON MONEY**
SALLAZ & GATEWOOD, CHTD.,) **JUDGMENT**
DENNIS SALLAZ and SCOTT GATEWOOD)
)
Defendants/Appellants/Cross-Respondents.)
_____)

COMES NOW Defendants/Appellants/Cross-Respondents, SALLAZ & GATEWOOD, CHTD., DENNIS SALLAZ, and SCOTT GATEWOOD, (hereinafter collectively referred to as, "the Appellants Sallaz & Gatewood"), by and through their attorney of record, William J. Schwartz, and pursuant to I.R.C.P. 7(b)(3), and I.A.R. 13(b)(15) file this MOTION FOR STAY OF EXECUTION ON MONEY JUDGMENT.

This motion is made for the reason that a stay of execution of the Amended Judgment entered in the above-entitled action on February 9, 2009, The Honorable Michael R. McLaughlin, District Judge, presiding, and all interlocutory or final judgments related to that Amended

Judgment, is necessary to preserve the status quo between the parties pending the outcome of the appeal that is now pending before the Idaho Supreme Court, Case No. 36322-2009. The Appellants Sallaz and Gatewood have posted a cash deposit as security for the issuance of a stay of execution, in the amount of \$53,604.06, (Cashier's Check No. 023230887) which includes the amount of the Amended Judgment plus 36% as required by rule.

Respectfully submitted this 16 day of June, 2009.



William J. Schwartz
Attorney for the Appellants
Sallaz & Gatewood, et al.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the attached document was mailed or delivered via facsimile and US Mail to the following named persons:

ERIC R. CLARK
Clark and Associates, Attorneys
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Telephone (208) 685-2320
Facsimile (208) 939-7136

Attorney for Plaintiff/Respondent/Cross-appellant

Date: June 16, 2009

By: Phillip M. Watts

In the Supreme Court of the State of Idaho

PAMELA K. JOERGER STEPHEN,)	
)	
Plaintiff-Respondent-Cross Appellant,	)	ORDER GRANTING MOTION TO
	)	AUGMENT THE RECORD
v.)	
	)	Supreme Court Docket No. 36322-2009
SALLAZ & GATEWOOD, CHTD., DENNIS	)	Ada County Docket No. 2006-14241
SALLAZ and SCOTT GATEWOOD,)	
)	
Defendants-Appellants-Cross)	
Respondents.)	

A MOTION TO AUGMENT THE RECORD AND STATEMENT IN SUPPORT THEREOF was filed by counsel for Appellants/Cross-Respondents on December 21, 2009. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellants/Cross-Respondents' MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion:

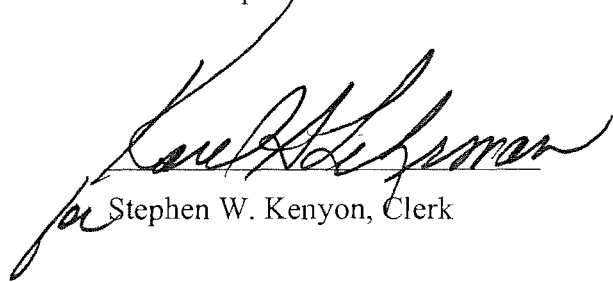
1. Stipulation to Allow Plaintiff's Motion to Amend Complaint, file-stamped June 25, 2007;
2. Order Granting Plaintiff's Motion to Amend Complaint, file-stamped June 26, 2007;
3. Amended Complaint and Demand for Jury Trial, file-stamped July 2, 2007;
4. Answer to Amended Complaint, file-stamped October 16, 2007;
5. Answer, file-stamped October 16, 2007;
6. Verification of Answer to Amended Complaint, file-stamped October 16, 2007;
7. Defendant Sallaz's Findings of Fact and Conclusions of Law, file-stamped September 8, 2008;
8. Findings of Fact, Conclusions of Law and Judgment, file-stamped October 3, 2008; and
9. Judgment, file-stamped December 1, 2008.

IT FURTHER IS ORDERED that the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion, as EXHIBITS:

1. Sallaz & Gatewood Fee Agreement, dated June 16, 2003; and
2. Letter to the DMV from Sallaz, dated June 16, 2003.

DATED this 28th day of December 2009.

For the Supreme Court


for Stephen W. Kenyon, Clerk

cc: Counsel of Record

JUN 25 2007

J. DAVID NAVARRO Clerk
By L. AMES
Deputy

Eric R. Clark, ISB# 4697
THE REAL ESTATE LAW GROUP
P.O. Box 2504
Eagle, ID 83616
Tel: (208) 830-8084
Fax: (208) 939-7136

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN)
)
)
 Plaintiff,)
)
 v.)
)
 SALLAZ & GATEWOOD, CHTD.,)
 and SCOTT GATEWOOD,)
)
 Defendants.)
)
)
)

Case No.: CV OC 0614241

**STIPULATION TO ALLOW
PLAINTIFF'S MOTION TO
AMEND COMPLAINT**

COME NOW the respective Parties and by and through their counsel of record and hereby agree and stipulate to allow the Plaintiff to amend her Complaint as set forth in the Plaintiff's Motion to Amend. Based on this stipulation, the Parties request that the Court approve and sign the Order granting Plaintiff's Motion to Amend Complaint filed contemporaneously herewith.

Jun 25 2007 9:50AM

Law Offices of John Prior 2084659834

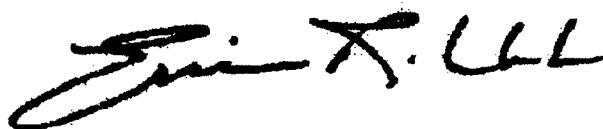
P. 3

From: Eric R. Clark To: John Prior

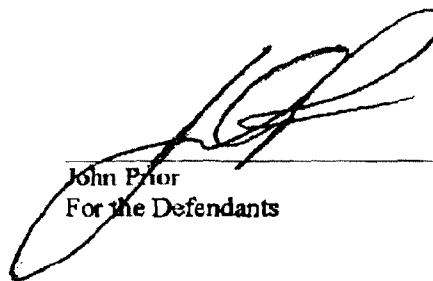
Date: 6/22/2007 Time: 11:03:14 AM

Page 5 of 5

RESPECTFULLY SUBMITTED this 22nd day of June 2007.



Eric R. Clark,
For the Plaintiff



John Prior
For the Defendants

STIPULATION TO ALLOW PLAINTIFF'S MOTION TO AMEND - 2

AM 11 P.M.
JUN 26 2007
KUBIN M. BIRD
CLERK

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN)
)
 Plaintiff,)
)
 v.)
)
 SALLAZ & GATEWOOD, CHTD.,)
 and SCOTT GATEWOOD,)
)
 Defendants.)
)
)
)

Case No.: CV OC 0614241

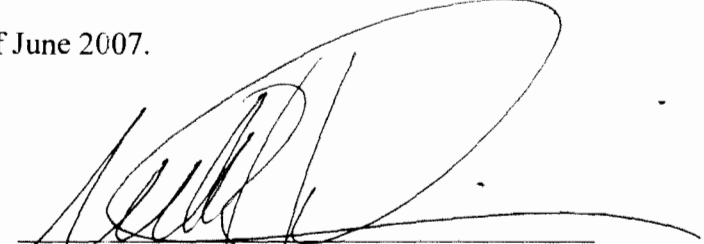
**ORDER GRANTING
PLAINTIFF'S MOTION TO
AMEND COMPLAINT**

THIS MATTER came before the Court on Plaintiff's Motion to Amend.

The Court understands that this is a matter in which it has discretion. In applying its discretion, the Court has reviewed the record; including the proposed pleading attached to the Plaintiff's Motion to Amend and including a stipulation signed by counsel for the parties in which the Defendants indicate they have no objection to the Motion.

NOW, THEREFORE, IT IS HEREBY ORDERED, the Plaintiff's Motion to Amend is GRANTED.

ENTERED THIS 26 day of June 2007.



Michael R. McLaughlin
District Judge

7

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of June, 2007, I caused to be served by U.S. Mail, postage prepaid a true and correct copy of the foregoing to the following:

John Prior
LAW OFFICES OF JOHN PRIOR
16 12th Avenue South, Suite 113
Nampa, Idaho 83651

Eric R. Clark
The Real Estate Law Group
P.O. Box 2504
Eagle, ID 83616


Clerk of the District Court

AM
 FILED
 AM
 JUL 02 2007
 J. DAVID NAVARRO, Clerk
 By J. EARLE
 DEPUTY

Eric R. Clark, ISB# 4697
 THE REAL ESTATE LAW GROUP
 P.O. Box 2504
 Eagle, ID 83616
 Tel: (208) 830-8084
 Fax: (208) 939-7136

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
 OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN)	
)	
Plaintiff,	)	Case No.: CV OC 0614241
)	
v.	)	AMENDED COMPLAINT AND
	)	DEMAND FOR JURY TRIAL
)	
SALLAZ & GATEWOOD, CHTD.,)	
DENNIS SALLAZ and SCOTT)	
GATEWOOD,)	
)	
Defendants.)	

As a complaint against Defendants Sallaz & Gatewood, Chtd., Dennis Sallaz and Scott Gatewood, plaintiff Pamela K. Joerger Stephen alleges:

1. Plaintiff Pamela K. Joerger Stephen ("Pamela") is a resident of Ada County, Idaho.
2. Defendant Sallaz & Gatewood, Chtd., is a professional corporation authorized to do business in the State of Idaho, with its principal place of business in Ada County, Idaho.

3. Defendants Dennis Sallaz and Scott Gatewood are residents of Ada County, Idaho and licensed by the Idaho State Bar to practice law in Idaho.

4. Pamela hired Defendants to represent her in a divorce action filed by her husband Gary Stephen in Case No. CV DR 03-01151 D in the Fourth Judicial District of the State of Idaho, in and for the County of Ada. The court scheduled this action for trial before the Honorable David E. Day on August 5, 2004.

5. During the initial interview with the Defendants, Pamela disclosed she believed she was "bi-polar" and suffered from Post Traumatic Stress Syndrome. She also disclosed that she had attempted suicide.

6. The Defendant required that Pamela review and sign an "Employment Agreement" in which they represented to Pamela she had hired the "the office to represent you." Thereafter, both Dennis Sallaz and G. Scott Gatewood were listed as Pamela's attorneys in pleadings filed in the divorce case. Additionally, Defendant Sallaz was the senior attorney and was responsible for supervising Defendant Gatewood.

7. Pamela was very concerned about the divorce. She was suffering from the disclosed mental conditions which required medical care and costly prescription medications to treat. Mr. Stephens was a pilot with UPS and as an employee benefit had great medical insurance that was paying for Pamela's medications and treatment, but Pam was unsure about the future coverage after the divorce.

8. Pamela was also concerned about future income. Pamela stayed at home to raise the couple's daughter and only worked part-time during the twenty-five year marriage. Pamela

believed she was entitled to spousal support due to her illness, age, limited education, and minimal experience and asked the Defendants to seek maintenance for her.

9. Initially, the Defendants drafted and filed a motion for temporary maintenance. However, nothing in the record in the divorce action indicates this motion proceeded to hearing and there is not an order indicating this motion was ever granted or denied. The Defendants told Pamela the motion had been denied.

10. Pamela's husband, Gary, earned approximately \$250,000.00 per year from his employment at UPS and maintained control over the couple's bank accounts. After he filed for divorce, Gary denied Pamela access to any of his income or bank accounts, and due to her illnesses and lack of employment, Pamela was in a dire financial situation. The Defendants, although they were aware of this situation, required that Pamela pay a large retainer and did not seek their compensation from Gary according to Idaho Code § 32-704.

11. The Court set a pre-trial conference for July 19, 2004 where the Defendants appeared and informed the Court the Defendants had not had contact with Pamela "in months."

12. On this same day, the Defendants filed a motion to withdraw stating that the Defendants did not think it was in Pamela's "best interest" for the Defendants to continue to represent her. However, although the Defendants filed this motion, there is no indication it was set for hearing and the Defendants continued to represent Pamela, despite their representation to the Court in their motion that doing so was not in her best interests.

13. Additionally, during the course of the divorce action, Pamela was hospitalized due to her mental illnesses and was released from the hospital shortly before August 5, 2004, the date of her trial.

14. Upon her release from the hospital in late July 2004, Pamela was prescribed numerous drugs for the purpose of controlling her illness, which she took as prescribed. One of the side-effects of the drugs was to render Pamela incompetent and unable to make intelligent decisions regarding her personal affairs.

15. Defendants were aware of Pamela's hospitalization and of the drugs that had been prescribed to her. They also knew or had reason to know that those drugs had rendered her incompetent and unable to make intelligent decisions regarding her personal affairs.

16. Pamela contacted the Defendants shortly before the trial date and requested they seek to postpone the trial due to Pamela's conditions. The Defendants however refused to seek to vacate and reschedule and told Pamela the judge would not appreciate her claim of mental illness.

17. The Defendants also did not request the appointment of a guardian *ad litem* for plaintiff or take any other action intended to inform the Court of Pamela's disability.

18. Prior to the trial, the Defendants conducted minimal discovery and no investigation regarding the parties' assets. The parties owned two homes; one they lived in and one as a rental. The Defendants failed to determine the value of these properties or request an appraisal. The Defendants advised Pamela to agree to a value of the Crescent Rim home that was approximately \$100,000 below the current value.

19. Pamela had contributed separate property funds to the purchase, maintenance, and improvements to the parties' real property that were readily traceable. The Defendants did not however seek credit for this separate property nor advise Pamela she was entitled to recover compensation for this separate property in the divorce

20. Gary also disclosed a judgment of approximately \$28,000.00 which he agreed to accept as part of the distribution of property. Consequently, the Defendants agreed with this figure and as Gary was taking this debt he was entitled to an offset from the total value of the community assets. However, this debt was paid several months prior to the trial date from community funds and should not have been credited to Gary.

21. Although Pamela had disclosed her mental conditions, the Defendants failed to obtain Pamela's medical records or contact her treating physicians during the Defendants representation or in any manner seek to inform themselves about these conditions.

22. As Gary's retirement plan was an asset in the divorce, a Qualified Domestic Relations Order ("QDRO") was necessary to order the division of the retirement account. The Defendants failed to obtain a valid QDRO before withdrawing. Pamela had to employ other counsel, Constance Norris, to complete the QDRO thereby ensuring Pamela would eventually receive funds from Gary's retirement account.

COUNT I. NEGLIGENCE.

23. Pamela hereby incorporates all facts and allegations previously stated as if set forth herein.

24. As Pamela's attorneys, the Defendants owed Pamela various duties including the duty of competency and the duty of diligence. They also had a heightened duty as Pamela had disclosed a disability that indicated she may have had diminished capacity.

25. The Defendants breached these duties.

26. The Defendants failure to seek a postponement of the trial, to seek the appointment of a guardian *ad litem* or to take other action to advise the court of Pamela's mental condition was negligence.

27. The Defendants failure to seek temporary or permanent maintenance and attorney fees from Gary to pay their fees was negligence.

28. The Defendants failure to investigate and determine the values of the parties' real property before advising Pamela to agree to the stated value was negligence.

29. The Defendants failure to investigate and determine the value of Pamela's separate property and to ensure she was compensated for this separate property was negligence.

30. The Defendants failure to investigate the existence and validity of the judgment against the marital estate was negligence.

31. The Defendants failure to obtain a valid QDRO before withdrawing was negligence.

32. As a direct and proximate result of the Defendants' negligence, Pamela has suffered damages in excess of \$10,000.00.

PRAYER FOR RELIEF

Therefore, Plaintiff Pamela K. Joerger Stephen requests the court to enter judgment against defendants Sallaz & Gatewood, Chtd., and Scott Gatewood and Dennis Sallaz, jointly and severally as follows:

1. Awarding plaintiff judgment for such damages as are proved at trial;
2. Awarding plaintiff her costs and attorney fees that she incurs in the course of this action; and

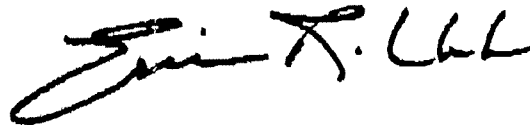
3. Granting plaintiff such other relief as the court deems just under the circumstances.

TRIAL BY JURY

Plaintiff demands a trial by a jury of 12 on all issues as to which she has that right.

DATED this 2nd day of July 2007.

THE REAL ESTATE LAW GROUP



ERIC R. CLARK, for the Plaintiff

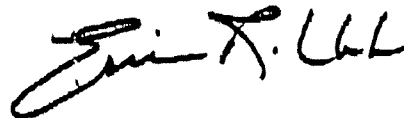
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of July 2007, I caused to be served in the manner indicated a true and correct copy of the foregoing to the following:

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
16 12th Avenue South, Suite 113
Nampa, Idaho 83651

Via Fax (208) 465-9834

Attorney for Defendants Gatewood and Sallaz and Gatewood, CHTD.



Eric R. Clark

CHARLES C. CRAFTS ISB # 7070
CRAFTS LAW INC.
Attorney at Law
410 S. Orchard, Ste. 120
Boise, ID 83705
Phone: (208) 367-1749
Facsimile: (208) 389-2109

NO. _____ FILED _____
A.M. _____ P.M. 3:42

OCT 16 2007

J. DAVID NAVARRO, Clerk
By J. EARLE
DEPUTY

ORIGINAL

Attorney for Defendant: **Dennis J. Sallaz**

IN THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN,
Plaintiff,

vs.

SALLAZ & GATEWOOD, CHTD.;
DENNIS SALLAZ and
SCOTT GATEWOOD
Defendant.

Case No. CV OC 06-14241

**ANSWER TO AMENDED
COMPLAINT**

COMES NOW the above-entitled Defendant, Dennis Sallaz, and answers
Plaintiff's Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a claim against this answering Defendant upon which
relief can be granted.

SECOND DEFENSE

1)

This answering Defendants denies each and every allegation of the Complaint not
herein expressly and specifically admitted.

2)

This answering Defendant admits the allegations contained in Paragraphs 1,2,3 and 4 of Plaintiff's Complaint.

3)

This answering Defendant is without sufficient information to either admit or deny the allegations set forth in paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32 and therefore denies the same.

THIRD DEFENSE

This Defendant has fully performed his duties under the agreement, and the Plaintiff has received the full consideration agreed upon, and that the transaction was carried out in full and in accordance with the agreement.

FOURTH DEFENSE

Plaintiff is not the real party in interest as respects all or a part of this claim, contrary to Rule 17, Idaho Rules of Civil Procedure.

FIFTH DEFENSE

Other third persons, not in this Defendant's control, were guilty of negligent and careless misconduct at the time of and in connection with the matters and damages alleged, which misconduct on their part proximately caused and/or contributed to said events and Plaintiff's resultant damages, if any.

SIXTH DEFENSE

Plaintiff has, and continues to have, the ability and opportunity to mitigate the damages alleged with respect to the subject matter of this action, and has failed to mitigate said damages, if any were in fact incurred.

SEVENTH DEFENSE

Plaintiff has waived, or by her conduct is estopped from asserting the causes of action contained in his Complaint.

EIGHTH DEFENSE

Plaintiff gave her express consent to Defendant and/or co-defendant to execute her divorce in the manner negotiated.

NINTH DEFENSE

That the plaintiff was guilty of laches and unreasonable delay in bringing this action and in asserting any cause of action against this Defendant, and that such laches and unreasonable delay were without good cause and substantially prejudiced this Defendant.

TENTH DEFENSE

There has been a novation between the parties resulting in accord and satisfaction and waiver thereby releasing any claim alleged by Plaintiff herein.

ELEVENTH DEFENSE

The Plaintiff ratified the Defendant's actions by accepting the full benefit of the divorce decree for nearly two years before bringing this lawsuit.

TWELFTH DEFENSE

That more than two (2) years have passed since Plaintiff's action for professional malpractice accrued against this Defendant, thus, Plaintiff's action is barred by the Statute of Limitations pursuant to Idaho Code § 5-219(4).

THIRTEENTH DEFENSE

Plaintiff has failed to join an indispensable party to this action.

FOURTEENTH DEFENSE

Plaintiff's alleged course of action fails because of accord and satisfaction and release. Plaintiff specifically maintained that she was capable of and understood the proceedings and demanded the settlement terms as agreed.

FIFTEENTH DEFENSE

Defendant reserves the right to assert any additional affirmative defenses and matters in avoidance that may be disclosed in the course of additional investigation and discovery, including without limitation, comparative negligence, statute of limitations, waiver/estoppel, superseding/intervening cause, negligence of a third-party not in Defendant's control and setoff.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays that Plaintiff take nothing by her Complaint, that the same be dismissed, and that Defendant be awarded his costs of suit and attorney fees, and such other and further relief as the Court deems just.

JURY DEMAND

DEFENDANT DEMANDS A TRIAL BY JURY.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16 day of October, 2007, I served a true and correct copy of the foregoing **ANSWER** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Eric R. Clark	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
THE REAL ESTATE LAW GROUP	<input type="checkbox"/>	Hand-Delivered
P.O. Box 2504	<input type="checkbox"/>	Overnight Mail
Eagle, ID 83616	<input type="checkbox"/>	Facsimile
Tel: (208) 830-8084	<input type="checkbox"/>	CM/ECF
Fax: (208) 939-7136		
<i>Attorney for Plaintiff</i>		

John Prior	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Law Offices of John Prior	<input type="checkbox"/>	Hand-Delivered
16 12 th Avenue South, Suite 113	<input type="checkbox"/>	Overnight Mail
Nampa, Idaho 83651	<input type="checkbox"/>	Facsimile
<i>Attorney for Sallaz & Gatewood, CHTD.</i>	<input type="checkbox"/>	CM/ECF
<i>And Scott Gatewood</i>		



Charles C. Crafts
Attorney for Defendant Dennis J. Sallaz

NO. _____
A.M. _____ P.M. _____

OCT 16 2007

J. DAVID NAVARRO, CLERK
By KATHY J. BUEHL
DEPUTY

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
ISB #5344
16 12th Avenue S., Suite 113
Nampa, ID 83651
(208) 465-9839 Telephone
(208) 465-9834 Facsimile

Attorney for Defendant Scott Gatewood

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

PAMELA K. JOERGER STEPHEN,)

CASE NO. CV OC 0614241

Plaintiff,

ANSWER

vs.

SALLAZ & GATEWOOD, CHTD., and
SCOTT GATEWOOD,

Defendants.

COMES NOW, the above named Defendant, SCOTT GATEWOOD, by and through his counsel of record, JOHN PRIOR, and hereby answers the Amended Complaint filed by the Plaintiff, and admits, denies and alleges as follows.

I

Defendant denies each and every allegation contained in Plaintiff's Amended Complaint not specifically admitted herein.

ANSWER TO COMPLAINT - Page 1

COPY

II

The Defendant is without sufficient information to either admit or deny the allegations set forth in paragraph 1, therefore it is deemed denied.

III

Defendant admits the allegations set forth in paragraphs 2, 3 and 4.

IV

Defendant admits the allegation in paragraph 5 in part that the Plaintiff informed the Defendant that she believed she was bi-polar. Defendant denies the remaining portion of paragraph 5.

V

Defendant admits the allegation in paragraph 6 in part, that the firm represented the Plaintiff. Defendant denies the remaining portion of paragraph 6.

VI

Defendant denies the allegations in paragraph 7.

VII

Defendant admits the allegations in paragraph 8.

VIII

Defendant denies the allegations in paragraphs 9 and 10.

IX

Defendant admits the allegations in paragraph 11.

X

Defendant admits paragraph 12 in that a Motion to Withdraw was filed, however the Plaintiff called and we agree to continue to work her case.

ANSWER TO COMPLAINT - Page 2

XI

Defendant denies paragraphs 13, 14, 15 and 16.

XII

Defendant admits paragraph 17.

XIII

Defendant denies paragraphs 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32.

AFFIRMATIVE DEFENSES

Affirmative Defense No. 1: The Plaintiff fails to state a claim upon which relief can be granted.

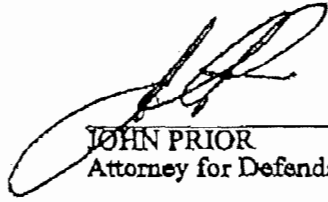
Affirmative Defense No. 2: The Plaintiff fails to mitigate her damages.

Affirmative Defense No. 3: Laches.

WHEREFORE, Defendant, having made an answer to the Amended Complaint filed herein against Defendant, prays as follows:

1. That the Plaintiff's Amended Complaint be dismissed and that the Plaintiff takes nothing thereby;
2. That the Defendant be awarded his reasonable attorneys fees and court costs incurred herein.
3. For such other and further relief as to the court may seem just and proper in the premises.

DATED this 16 day of October, 2007.



JOHN PRIOR
Attorney for Defendant

VERIFICATION

STATE OF IDAHO)
)ss.
County of Canyon)

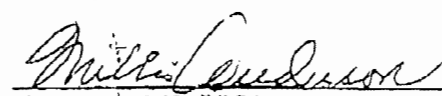
SCOTT GATEWOOD, being duly sworn upon oath, states as follows:

That he is the Defendant in the foregoing action; that he has read the foregoing document, and the facts therein stated are true to the best of his knowledge and belief.



SCOTT GATEWOOD

SUBSCRIBED AND SWORN to before me this 16 day of October, 2007.



NOTARY PUBLIC FOR IDAHO
Residing at: Boise ID
My commission expires: 4/23/2013

CERTIFICATE OF SERVICE

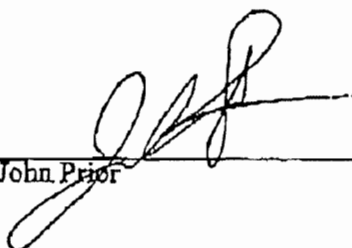
I HEREBY CERTIFY that on this 16 day of October, 2007, I caused a true and correct copy of the within and foregoing ANSWER to be delivered to the following and by the method indicated below:

Erik Clark
Attorney at Law
PO Box 2504
Eagle, ID 83616
Fax: (208) 939-7136

() U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
 Facsimile

Charles Crafts
Attorney at Law
410 S. Orchard St., Suite 120
Boise, ID 83705
Fax: (208) 389-2109

() U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
 Facsimile



John Prior

NO. _____
FILED _____
A.M. _____ P.M. 4:40

OCT 16 2007

J. DAVID NAVARRO, Clerk
By KATHY J. BISHOP, DEPUTY

CHARLES C. CRAFTS ISB # 7070
CRAFTS LAW INC.
Attorney at Law
410 S. Orchard, Ste. 120
Boise, ID 83705
Phone: (208) 367-1749
Facsimile: (208) 389-2109

Attorney for Defendant: **Dennis J. Sallaz**

IN THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN,

Plaintiff,

vs.

SALLAZ & GATEWOOD, CHTD.;
DENNIS SALLAZ and
SCOTT GATEWOOD

Defendant.

Case No. CV OC 06-14241

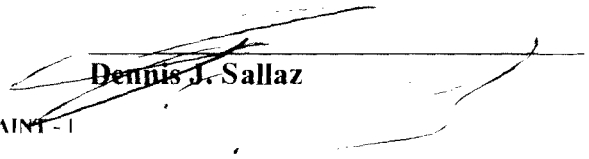
**VERIFICATION OF ANSWER TO
AMENDED COMPLAINT**

COMES NOW the above-entitled Defendant, and verifies the Answer to the Amended
Complaint as follows:

VERIFICATION

DENNIS J. SALLAZ, being duly sworn upon oath, states as follows:

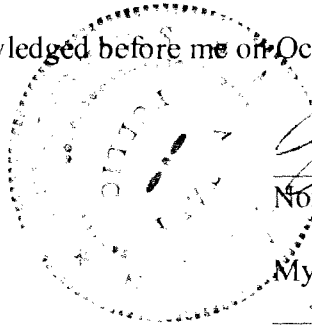
That he is the Defendant in the foregoing action; that he has read the Answer to the Amended Complaint, and that the facts therein stated are true to the best of his knowledge and belief.


Dennis J. Sallaz

STATE OF IDAHO
COUNTY OF ADA

This document was acknowledged before me on ~~the~~ October 16, 2007

Notary Seal, if any:



Melissa Anderson
Notary Public for the State of Idaho

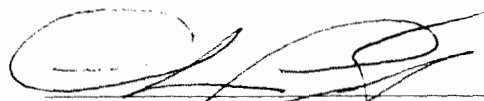
My commission expires:
4/23/2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16 day of October, 2007, I served a true and correct copy of the foregoing **VERIFICATION OF ANSWER TO AMENDED COMPLAINT** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Eric R. Clark	[]	U.S. Mail, postage prepaid
THE REAL ESTATE LAW GROUP	[]	Hand-Delivered
P.O. Box 2504	[]	Overnight Mail
Eagle, ID 83616	<input checked="" type="checkbox"/>	Facsimile
Tel: (208) 830-8084	[]	CM/ECF
Fax: (208) 939-7136		
<i>Attorney for Plaintiff</i>		

John Prior	[]	U.S. Mail, postage prepaid
Law Offices of John Prior	[]	Hand-Delivered
16 12 th Avenue South, Suite 113	[]	Overnight Mail
Nampa, Idaho 83651	<input checked="" type="checkbox"/>	Facsimile <i>465-9834</i>
<i>Attorney for Sallaz & Gatewood, CHTD.</i>	[]	CM/ECF
<i>And Scott Gatewood</i>		



Charles C. Crafts
Attorney for Defendant Dennis J. Sallaz

SEP 08 2008

J. DAVID NAVARRO, Clerk
By A. LYKE
DEPUTY

CHARLES C. CRAFTS ISB # 7070
CRAFTS LAW INC.
Attorney at Law
410 S. Orchard, Ste. 120
Boise, ID 83705
Phone: (208) 367-1749
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ORIGINAL

Attorney for Defendant: **Dennis J. Sallaz**

**IN THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF ADA**

PAMELA K. JOERGER STEPHEN,

Plaintiff,

vs.

SALLAZ & GATEWOOD, CHTD.;
DENNIS SALLAZ and
SCOTT GATEWOOD

Defendant.

Case No. CV OC 06-14241

**DEFENDANT SALLAZ'S FINDINGS
OF FACT AND CONCLUSIONS OF
LAW**

COMES NOW, Dennis Sallaz by and through his attorney, Charles C. Crafts, and presents the following proposed jury instructions.

FACTS

The attorney client relationship between Ms. Stephen and Sallaz and Gatewood began on June 16, 2003. *See Plaintiff's exhibit 100.* Sallaz and Gatewood CHTD., was formed on September 9, 2003. *See Plaintiff's exhibit 129.* Ms. Stephen stipulated to the terms of the divorce on August 5, 2004, and the Judgment and Decree of Divorce were entered on August 9,

2004. See Plaintiff's Exhibit 103. The Amended Complaint and Demand for Jury Trial in this case was filed on July 2, 2007; Dennis Sallaz, in his personal capacity, was not added as a Defendant until this date.

In her Amended Complaint, Ms. Stephen alleged that "Defendant Sallaz was the senior attorney and was responsible for supervising Defendant Gatewood." See Allegation 6, Amended Complaint. However, Ms. Stephen failed to provide any evidence at trial to support this allegation. In fact, both Defendants specifically stated that Mr. Sallaz was not supervising Mr. Gatewood at any point during this litigation. Finally, Ms. Stephen now claims that her Amended Complaint was also meant to include partnership liability, despite the fact that it was not pled in her Complaint – either factually or legally.

CONCLUSIONS OF LAW

EVEN IF DEFENDANT GATEWOOD WAS NEGLIGENT, THE PLAINTIFF FAILED TO SHOW THAT SHE WOULD HAVE OBTAINED A DIFFERENT RESULT BUT FOR THE NEGLIGENCE

'If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. (See Developments in the Law-Statute of Limitations (1950) 63 Harv.L.Rev. 1177, 1201.) The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm-not yet realized-does not suffice to create a cause of action for negligence. (Walker v. Pacific Indemnity Co. (1960) 183 Cal.App.2d 513, 517, 6 Cal.Rptr. 924; McGregor v. Wright (1931) 117 Cal.App. 186, 196-198, 3 P.2d 624.) *Ralphs v. City of Spirit Lake*, 98 Idaho 225, 560 P.2d 1315, (1977).

Essentially, the Plaintiff failed to take into account a number of factors that Gatewood negotiated on her behalf. So, even if Defendant Gatewood was negligent, Ms. Stephen failed to

show that, but for his negligence she would have achieved a more favorable result. A detailed discussion of these facts is presented later in this brief.

**ANY CAUSE OF ACTION THE PLAINTIFF MAY HAVE IN THIS CASE DID NOT
ACCRUE UNTIL AUGUST 5, 2004**

Under Idaho law, a cause of action generally accrues, and the statute of limitation begins to run, when a party may maintain a lawsuit against another. *Galbraith v. Vangas, Inc.*, 103 Idaho 912, 915, 655 P.2d 119, 122 (Ct.App.1982). *See also Spence v. Howell*, 126 Idaho 763, 770, 890 P.2d 714, 721 (1995) (The cause of action accrued upon the breach of the contract.); *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 88, 730 P.2d 1005, 1008 (1986) (Cause of action does not accrue until aggrieved party suffers damages.); *Stephens v. Stearns*, 106 Idaho 249, 254, 678 P.2d 41, 46 (1984) (A negligence cause of action accrued when the plaintiff sustained injuries.) *Western Corp. v. Vanek* 144 Idaho 150, 151, 158 P.3d 313, 314 Idaho App.,2006.

Assuming Ms. Stephen suffered any damages in this case, she could not have suffered those damages prior to August 5, 2004. At that time she was clearly represented by Sallaz & Gatewod CHTD., a professional corporation, where Dennis Sallaz was a director. Necessarily, we must examine Mr. Sallaz's liability from the aspect of a professional corporation.

Any officer, shareholder, agent or employee of a corporation organized under this act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional services on behalf of the corporation to the person for whom such professional services were being rendered. ***I.C. § 30-1306***

Once again, the Plaintiff failed to provide any information at trial showing that Mr. Sallaz was acting in a supervisory capacity over Mr. Gatewood. If we look at the entity Ms. Stephen was dealing with on the date her damages accrued, then Mr. Sallaz, in his personal capacity, should be dismissed from this litigation.

DURING THE TIME THAT THE RETAINER WAS SIGNED, BUT BEFORE THE PROFESSIONAL CORPORATION WAS FORMED, MR. SALLAZ DID NOT HAVE ANY LIABILITY TO MS. STEPHEN

Idaho Code § 30-1-204 deals with Liability for pre-incorporation transactions, and it reads as follows:

All persons purporting to act as or on behalf of a corporation, when there was no incorporation under this chapter, are jointly and severally liable for all liabilities created while so acting.

First of all, the Plaintiff did not aver that Defendant Sallaz was liable for any pre-incorporation transactions in her Complaint. Instead, this appears to be an allegation and strategy that was reserved specifically for trial. Due to the failure of the Plaintiff to properly plead this allegation it should not be considered by this Court.

Secondly, I.C. § 30-1-204 holds parties responsible for any liabilities that were created during the pre-incorporation process. Here, Ms. Stephen did not produce any evidence that she suffered any damages between the time that she retained the firm, and the time that the firm became incorporated. So, by reading the plain language of the statute, Mr. Sallaz did not incur any pre-incorporation liability to Ms. Stephen.

Finally, there does not appear to be any Idaho case law dealing specifically with I.C. § 30-1-204, but it only speaks to liabilities created during the pre-incorporation process, such as signing a lease agreement, or some negligent act that occurred during the pre-incorporation period. Here, assuming Ms. Stephen was somehow harmed by the firms actions, that injury did not occur during the pre-incorporation process.

THE STATUTE OF LIMITATIONS BARS ANY CLAIM AGAINST DENNIS SALLAZ IN HIS PERSONAL CAPACITY

I.C. § 5-219(4) provides that actions for professional malpractice must be brought within two years, and that “the cause of action shall be deemed to have accrued as of the time of the

occurrence, act, or omission complained of, and the limitation period shall not be extended by reason of any continuing consequences or damages resulting therefrom....”

Here, the alleged harm in this case accrued on August 5, 2004. Defendant Sallaz, in his personal capacity was added as a party in this case on July 2, 2007, nearly three years after Ms. Stephen’s cause of action had accrued. Defendant Sallaz alleged in his answer that this action was barred by the statute of limitations, so this Defendant would respectfully request this Court to enter an Order dismissing him from this action.

DEFENDANT SALLAZ SHOULD BE AWARDED ATTORNEY’S FEES AND COSTS

In considering a request for attorney fees under section 12-120(3), the trial court must first determine whether any litigant is the “prevailing party,” a decision that is committed to the discretion of the trial court. *Gilbert v. City of Caldwell*, 112 Idaho 386, 399, 732 P.2d 355, 368 (Ct.App.1987); *Chadderdon v. King*, 104 Idaho 406, 411-12, 659 P.2d 160, 165-66 (Ct.App.1983). The guiding rule for this determination is I.R.C.P. 54(d)(1)(B), which states:

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.

Thus, there are three principal factors a 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. *Daisy Mfg. Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 259, 261-62, 999 P.2d 914, 916-17 (Ct.App.2000); *Chadderdon*, 104

Idaho at 411, 659 P.2d at 165. If the court determines that a party has prevailed only in part, it may apportion the costs and attorney fees in a fair and equitable manner after considering all of the issues and claims involved in the action and the judgment or judgments obtained. *Id. See Prouse v. Ransom*, 117 Idaho 734, 739, 791 P.2d 1313, 1318 (Ct.App.1989). *Nguyen v. Bui* --- P.3d ----, 2008 WL 2789298 Idaho App.,2008.

Here, assuming that Defendant Sallaz is dismissed from the case, then he is a prevailing party and should be awarded attorney’s fees as well as his costs. However, if Mr. Sallaz is not dismissed he should he should still be awarded a significant majority of his fees and costs. When considering the three factors above, the Court should note that on July 14, 2008, the Plaintiff filed an Offer to Settle for \$450,000. At that time, the Plaintiff was seeking damages related to her spousal support, in addition to damages for the Defendant’s handling of her Qualified Domestic Relations Order.

Literally, the day before trial, the Defendants and this Court were notified that the Plaintiff would not be proceeding on her claim for spousal support or for the Q.D.R.O. Instead, the parties went to trial over the following amount:

Plaintiff's claim regarding Crescent Rim:	
Plaintiff's appraised value of the home:	\$458,000
Stipulated value of the home:	\$385,000
Difference:	\$73,000
Minus half for community property:	\$36,500
Claim:	\$36,500

Plaintiff's claim for judgment paid by Gary Stephen:	
Judgment paid prior to divorce:	\$28,000
Minus half for community property	\$14,000
Claim:	\$14,000

Total amount requested:	\$50,500
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As you can see, if Ms. Stephen were awarded the entire amount she is seeking then she would be entitled to \$50,500. This means that prior to trial the Defendants prevailed in defending \$399,500 worth of the Plaintiff's claim. In other words, if the Plaintiff were awarded her entire request, she would only prevail on 1/9th of her total claim, whereas the Defendant would be successful on 8/9th of their defense.

However, based upon the evidence provided at trial, the Plaintiff's award, if any, should be reduced significantly based on the following factors:

1. Value of the Beach Street home, which would have been Gary's property.
 - a. $\$105,000 - \$85,000 = \$20,000$
2. Excess value of equalization payment:
 - a. $\$80,965 - \$13,095 = \$67,870$
 - b. $\$67,870 / 2 = \$33,935$ (The amount Pam should have been awarded)
 - c. \$48,000 (The amount Pam was awarded in equalization)
 - d. $\$48,000 - \$33,935 = \$14,065$
3. These two figures alone equal a downward adjustment in the Plaintiff's request of \$34,065.
4. Therefore, $\$50,500 - \$34,065 = \$16,435$

The above adjustments can be mathematically calculated, but there are additional departures that should be counted against the Plaintiff's request for damages, they are:

1. **Community Waste:**
 - a. The Plaintiff admitted to using methamphetamines for a number of years leading up to the divorce, and tested positive for meth use approximately ten days prior to the date of the divorce.
 - b. The Plaintiff was living in the Crescent Rim home for at least one year prior to the entry of the divorce, and kept the home in terrible condition at least according to Ann Shepard.
 - c. The Plaintiff admitted that she was receiving rent from the Beach Street House, while her husband was paying the mortgage on that property.
2. **Failure to Mitigate Damages:**

- a. The Plaintiff filed this Complaint approximately three days before the Statute of Limitations would run against Defendant Gatewood.
- b. The Plaintiff received the benefit of her negotiated and stipulated divorce for two years.
- c. The Plaintiff received every equalization payment from Mr. Stephen before filing this Complaint.
- d. The Plaintiff never filed a Motion to Set Aside her Decree, which would have given the magistrate who heard this case an opportunity to determine whether Ms. Stephen's claims of mental incompetency had any merit.
- e. The Plaintiff never filed a Motion to Modify her Decree, which, once again, would have given Judge Day an opportunity to hear the merits of her case.

3. The Plaintiff's appraisal should be adjusted for the following:

- a. The appraiser specifically stated that he would need to re-visit his appraisal if he did not obtain the information regarding the condition of the home in August, 2004 from the person living in the home at that time.
- b. The appraiser testified that he obtained his information about the condition of the home from Mr. Stephen, but Ms. Stephen was living in the home in August 2004.
- c. The appraiser stated that if methamphetamines were being used in the home that lower the appraised value of the home. However, he stated he did not know of any illegal drug use in the home in August, 2004.
- d. The appraiser failed to take into account similar properties that were within a one mile radius of the Crescent Rim home, which he even admitted was a violation of Fannie Mae – Freddie Mac financing guidelines.
- e. The appraiser went specifically to the most expensive area in Boise (Warm Springs) to locate similar properties for the Crescent Rim home.

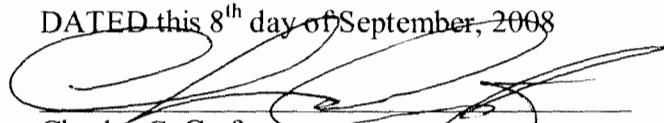
4. The Plaintiff failed to prove that the \$28,000 paid by Gary was paid with community funds:

- a. The Satisfaction of Judgment offered into evidence by the Plaintiff is for \$30,214.79.
- b. The debt that was paid by Gary Stephen prior to the divorce was \$28,000.
- c. There is no evidence in the record that this satisfaction of judgment is the bill paid by Gary in the divorce decree.

- d. The Plaintiff failed to prove that this debt was paid with community funds.
- e. It is highly likely that this debt was paid off with another debt because Gary's attorney Ann Shepard stated that during the divorce he was "strapped for cash."
- f. If Gary paid this debt with another loan, then that new loan would be community property, and Pam may be liable for an additional \$14,000.
- g. It is just as likely that Gary paid this debt with a new loan because there was a pending writ of execution.

Based upon the foregoing factors, the Plaintiff's claim should be reduced significantly or even eliminate the Plaintiff's claim entirely. Consequently, this Defendant believes an award of attorney's fees and costs is warranted.

DATED this 8th day of September, 2008



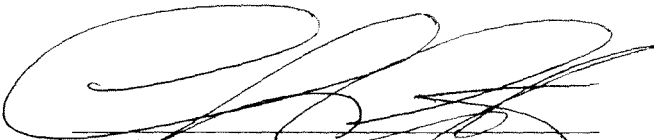
Charles C. Crafts
Attorney for Defendant Dennis J. Sallaz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of September, 2008, I served a true and correct copy of the foregoing **DEFENDANT SALLAZ'S FINDINGS OF FACT AND CONCLUSIONS OF LAW** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Eric R. Clark	[]	U.S. Mail, postage prepaid
THE REAL ESTATE LAW GROUP	[]	Hand-Delivered
P.O. Box 2504	[]	Overnight Mail
Eagle, ID 83616	[<input checked="" type="checkbox"/>]	Facsimile
Tel: (208) 830-8084	[]	CM/ECF
Fax: (208) 939-7136		
<i>Attorney for Plaintiff</i>		

John Prior	[]	U.S. Mail, postage prepaid
Law Offices of John Prior	[]	Hand-Delivered
16 12 th Avenue South, Suite 113	[]	Overnight Mail
Nampa, Idaho 83651	[<input checked="" type="checkbox"/>]	Facsimile
<i>Attorney for Sallaz & Gatewood, CHTD.</i>	[]	CM/ECF
<i>And Scott Gatewood</i>		


Charles C. Crafts
Attorney for Defendant Dennis J. Sallaz

OCT - 3 2008

By J. David Navarro, Clerk
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN,

Case No. CVOC06-14241

Plaintiff,

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND JUDGMENT

vs.

SALLAZ & GATEWOOD, CHTD. and
SCOTT GATEWOOD,

Defendant.

APPEARANCES

For Plaintiff: Eric Clark of The Real Estate Group
Robert Wallace, Guardian ad Litem for the Plaintiff, Pamela K. Stephen
For Defendant Scott Gatewood: John Prior of the Law Offices of John Prior
For Defendant Dennis Sallaz: Charles Crafts of Crafts Law, Inc.

This matter came on for court trial on August 11th, 12th, 14th and 18th, 2008. On August 18th, the Court took the matter under advisement and gave counsel the opportunity to submit proposed Findings of Fact and Conclusions of Law to be filed with the Court on or before September 8, 2008.

PROCEEDINGS

A Complaint was filed in this case asserting attorney malpractice on the part of Scott Gatewood, Dennis Sallaz, and Sallaz & Gatewood, Chartered. The parties waived their respective right to a jury trial and the matter was presented to the Court.

The Plaintiff asserts that the Defendants were negligent in their representation of her by failing to obtain an equal division of community assets in the divorce. The

1 Plaintiff asserts that she was suffering from a mental health condition that impaired her
2 understanding of the proceedings and that she did not receive information about the
3 divorce proceedings that would have allowed her to make knowing and intelligent
4 decisions about the settlement that was reached. Further, the Plaintiff asserts that the
5 Defendants failed to properly investigate the fair market value of the Crescent Rim
6 property and the correct amount of indebtedness owing against that property and thus,
7 she received a less than equitable share of the community real property as a result of
8 the failure of the Defendants to investigate those issues.

9 ISSUES

10 The issues that this Court must resolve in this case are as follows:

- 11 1. Was the Plaintiff impaired due to her bi-polar condition and the medications
12 she was taking during the course of the attorney-client relationship and at the
13 time of the entry of the Decree of Divorce and did the Defendant Gatewood
14 breach his duties as to an impaired client during his representation of the
15 Plaintiff? Did the Defendant Gatewood adequately communicate information
16 about the property issues in the divorce proceedings with the Plaintiff?
- 17 2. Did the Defendant Gatewood breach the duty to investigate the value and
18 debts of the community real property during his representation of the
19 Plaintiff?
- 20 3. Was this breach of duty the proximate cause of any damages to the Plaintiff?

21 LEGAL STANDARD

22 The elements of a legal malpractice action are: (a) the existence of an attorney-
23 client relationship; (b) the existence of a duty on the part of the lawyer; (c) failure to
24 perform the duty; and (d) the negligence of the lawyer must have been a proximate
25 cause of the damage to the client. *Harrigfeld v. Hancock*, 140 Idaho 134 (Idaho 2004).

1 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

2 The Plaintiff was served with a Complaint for Divorce in May of 2003 by her
3 husband, Gary Stephen (hereinafter referred to as Stephen) and retained Sallaz and
4 Gatewood Chartered to represent her in June of 2003. Scott Gatewood (hereinafter
5 referred to as Gatewood) was the lawyer who represented the Plaintiff on all legal
6 matters pertaining to this divorce case. The attorney representing Stephen was Ann
7 Shepard.

8 In this case there is no dispute that there was an attorney-client relationship
9 between Gatewood and the Plaintiff from the signing of the retainer agreement in June
10 of 2003 until after the judgment and divorce decree was entered in August of 2004 and
11 continuing into 2005.

12 There was no evidence presented to the Court that Dennis Sallaz provided any
13 legal services directly or indirectly to the Plaintiff nor did he act in a supervisory capacity
14 over Gatewood. Sallaz and Gatewood formed a professional service corporation in
15 September of 2003, known as SALLAZ & GATEWOOD, CHTD, and continue to the
16 present date in that business organization.

17 At the time of Gatewood's initial meeting with the Plaintiff, there were
18 discussions regarding the community property, spousal maintenance and other related
19 issues. In this case, the Plaintiff had been married to Mr. Stephen since 1976. Mr.
20 Stephen was a pilot for UPS and had income in excess of approximately \$171,000 per
21 year and the Plaintiff and Stephen had accumulated assets during the course of the
22 marriage that were not substantial but were certainly above the average community
23 property assets. (See Exhibit 105 and 106). The Plaintiff advised Gatewood that she
24 thought the value of the community residence located on 3309 Crescent Rim in Boise
25 was \$400,000.

1 The Plaintiff advised Gatewood that she suffered from a bi-polar mental health
2 disorder and Gatewood made such a notation in their initial May 3, 2003 appointment.
3 (See Exhibit 113) The Plaintiff's primary concern as testified to by Gatewood was
4 spousal maintenance because she had not been employed during the marriage. (See
5 Exhibit 108).¹

6 In August of 2003, Gatewood sought to obtain temporary spousal maintenance
7 for the Plaintiff. During this process he became concerned about pursuing temporary
8 spousal maintenance based upon several factors.

9 First, the Plaintiff was living in the community residence on Crescent Rim and
10 Stephen was paying the loan, utilities and other related costs and all of these could
11 have been an offset to any spousal maintenance. A further complicating issue was that
12 the Plaintiff was openly living with another man and allegedly supporting him. Finally,
13 the Plaintiff was receiving rental income from other rental property, the "beach house,"
14 and not paying the loan payments and other expenses on that property. Gatewood was
15 also advised by Stephan's attorney, Ann Shepard, that the Plaintiff was using
16 methamphetamine. Based upon these issues and concerns, Gatewood did not pursue
17 temporary spousal maintenance. Thus, Gatewood as early as September, was aware
18 of the Plaintiff's unstable living conditions.

19 In the next phase of the proceedings both of the attorneys for the Plaintiff and
20 Stephan exchanged discovery requests in the form of interrogatories and requests for
21 production of documents. Stephan, in response to the initial discovery request in
22 September of 2003 submitted by Gatewood on behalf of the Plaintiff, indicated in
23 Interrogatory No. 1, that the Crescent Rim property had a fair market value of \$500,000.

24
25 ¹ Exhibits 120-123 are notes of Gatewood that establish that he was aware of the Plaintiff's continuing and
26 worsening mental health issues during the fourteen month period of his representation of her, including
the Plaintiff's involuntary hospitalization five days prior to the divorce hearing on August 5, 2004.

1 The relationship between Gatewood and the Plaintiff was poor from the
2 standpoint of communication. The Plaintiff testified that she received very little
3 correspondence such as letters, court pleadings and discovery documents during the
4 course of her representation by Gatewood. The Plaintiff contends she did not receive
5 information from Gatewood that Stephen had placed a value on the Crescent Rim
6 property of \$500,000. Gatewood testified that he had no specific recollection that he
7 discussed this information with the Plaintiff but contends that general office policies
8 would have resulted in the Plaintiff receiving this information.

9 Gatewood testified that the office policy was to provide all of this type of
10 information to clients but he had no specific recollection as to what documents had
11 been provided to the Plaintiff and no cover letters or other evidence of what
12 documentation the Plaintiff had received during the two years that he represented the
13 Plaintiff was introduced into evidence. Gatewood testified that there were inconsistent
14 policies between the paralegals in his office as to providing information to clients.

15 Gatewood testified that there were periods of time when he did not have contact
16 with the Plaintiff despite repeated phone calls to the Plaintiff to contact him. Gatewood
17 testified that he went over to the Plaintiff's home on numerous occasions to try and
18 communicate with her as to ongoing issues in the divorce over the course his
19 representation of her. This is demonstrated in Gatewood's billing statement that
20 showed little or no activity from January 28 through April 30 of 2004. In January of
21 2004 during a phone call with the Plaintiff, Gatewood testified that the Plaintiff sounded
22 groggy, was not responsive, that she advised him that she had been in bed for 5 days
23 and a doctor wanted to hospitalize her.

24 In July of 2004 the relationship had reached the point that Gatewood filed a
25 motion to withdraw stating a complete breakdown in communications; however,
26

1 Gatewood withdrew the request. Gatewood testified that he was aware of the
2 involuntary hospitalization of the Plaintiff days before proceeding to a final hearing on
3 the divorce. In addition, Gatewood testified that he was of the opinion that the Plaintiff
4 was using methamphetamine during the time he represented her.

5 The Court will find that there were times when the Plaintiff was not provided with
6 documentation pertaining to the case because there was not in place any type of an
7 effective document policy in the law offices of Sallaz & Gatewood, Chtd. that would
8 demonstrate or verify that the Plaintiff was receiving correspondence in the form of
9 discovery responses and other pleadings in a case. No evidence in the form of
10 correspondence or testimony from the Defendants' paralegal staff was presented to the
11 Court as to what, if any, correspondence was provided to the Plaintiff, with the
12 exception of the affidavit in support of temporary spousal maintenance and the answers
13 to interrogatories and production of documents. The Court will find that the Plaintiff's
14 testimony that she did not receive these documents is the most credible testimony.

15 Plaintiff and Stephen did meet a few weeks prior to the divorce trial with a
16 mediator, Steve Beer, without counsel present, in an attempt to resolve some of the
17 issues in this case. No evidence was presented as to what observations, if any, Steve
18 Beer had as far as the Plaintiff's understanding of the issues during the mediation was
19 presented to the Court.

20 Approximately five days before the August 5, 2004 divorce trial date, the Plaintiff
21 was involuntarily committed to a local mental health hospital. The Plaintiff advised
22 Gatewood of this on July 27th. Gatewood did not inquire of the Plaintiff where she had
23 been hospitalized, for what reason or by what doctor.

24 The Plaintiff testified generally that during the course of the divorce proceedings,
25 she had very little memory of what was taking place because of her mental state and
26

1 the medications that she was taking. Sam Hoagland, who is both a licensed attorney
2 and pharmacist, testified that the "cocktail" of medications that the Plaintiff was taking
3 could have resulted in medication induced confusion on the part of the Plaintiff.

4 The Plaintiff testified specifically that due to this lack of communication with her
5 lawyer, her state of mind and her involuntary mental health hospitalization five days
6 prior to the court date in which the property settlement agreement was presented to
7 Judge Day, that she had little or no understanding of what was being presented to the
8 divorce court on these issues.

9 The parties on the day of the scheduled trial met, conversed and ultimately
10 appeared before Judge David Day with a proposed decree of divorce and property
11 settlement, listing assets and debts of the parties attached to that judgment and decree
12 of divorce as set out in Plaintiff's Exhibit No. 103.

13 During the course of the proceedings, Judge Day asked each of the parties, Mr.
14 Stephen, the plaintiff in that divorce proceeding and the Plaintiff, the defendant in that
15 divorce proceeding, under oath, if they understood the settlement agreement and were
16 they in agreement with the settlement. Mr. Stephen indicated he was. The Plaintiff
17 indicated she was also in agreement "as far as I know." The decree was submitted to
18 Judge Day and is Exhibit 103.

19 Gatewood testified that when he dealt with the Plaintiff on the day of the divorce
20 court appearance in which the property settlement agreement was reached that he
21 found the Plaintiff to be clear in her thoughts and understanding of the proceedings and
22 that he did not believe that she was impaired as a result of methamphetamine use
23 and/or mental health issues. He testified that she appeared to be angry at the time.

24 Although the Court cannot use the Code of Professional Conduct for attorneys
25 as a basis for civil liability, clearly the Rules of Professional Conduct can be utilized to
26

1 at least define duty.

2 Since the enactment of those rules on July 1, 2004, there have been added
3 provisions that pertain to impaired clients. Specifically, Rule 1.14 deals with clients with
4 diminished capacity. Subpart (b) sets out a lawyer who reasonably believes that a
5 client has diminished capacity and is at risk of substantial financial or other harm unless
6 action is taken and that client cannot adequately act in the client's own interest, a
7 lawyer may take reasonably necessary protective action including consulting with
8 individuals or entities that have the ability to take action to protect the client and in
9 appropriate cases, seek an appointment of guardian ad litem, conservator or guardian.
10 One of the comments in 1.14 discusses a reconsideration period to permit clarification
11 of improvement of circumstances and that a lawyer may seek guidance from an
12 appropriate diagnostician in determining the extent of client's diminished capacity.

13 In this case, Gatewood readily conceded that he believed the Plaintiff was
14 consuming methamphetamine and he knew that she had been hospitalized involuntarily
15 just days before the divorce hearing.

16 Cathy Naugle testified as the Plaintiff's expert as to the duty owed by an attorney
17 to a client during the applicable time frame of these proceedings. Ms. Naugle, a well
18 respected and experienced family law attorney and former magistrate judge who now
19 primarily handles domestic relations cases, testified that in her opinion as an expert on
20 this issue that there was a breach of that duty on the part of Gatewood by not seeking
21 additional information about her mental state or seeking a guardian ad litem
22 appointment for the Plaintiff when he became aware of the fact that the Plaintiff had
23 been involuntarily hospitalized just days prior to negotiating the property settlement
24 agreement. Considering that the standard for an involuntary mental hospitalization
25 requires a finding by a court that the patient is mentally ill, likely to injure herself or
26

1 others or is gravely disabled due to mental illness; and lacks capacity to make informed
2 decisions about treatment, the Court must concur with Ms. Naugle's opinion.

3 Granted, the Plaintiff had been released from the involuntary commitment which
4 can be an indication that the patient has been stabilized psychiatrically, that does not
5 equate to a client being capable of understanding a legal proceeding that deals with the
6 equitable division of property and the complexities of that process. Sam Hoagland's
7 testimony though insightful as to how psychotropic medications can create problems for
8 a patient, the Court cannot find that the Plaintiff was confused as a result of medication
9 issues alone. Though this Court cannot make a finding from the evidence presented in
10 this case that the Plaintiff was impaired to the point that she was incompetent, the Court
11 can find from the evidence the Plaintiff was not in a state of mind to comprehend all of
12 the issues she was facing in this litigation in a knowing and intelligent manner.

13 When a client has been involuntarily hospitalized and the client's attorney has
14 had to go to the client's home to communicate with that client on ten occasions, there is
15 obviously a problem that should have been addressed by Gatewood either through
16 contact with the Plaintiff's medical providers to determine her level of impairment or
17 appointment of a guardian ad litem. In the alternative, Gatewood should have advised
18 Judge Day of the recent hospitalization so that a continuance could have been granted
19 to give the Plaintiff additional time to process these issues or for the appointment of a
20 guardian ad litem. This is clearly allowed under the Rules of Professional Conduct and
21 not a violation of client confidences. Gatewood had more than ample information and
22 personal observations that should have alerted as to his duty to inquire further about
23 the Plaintiff's mental health status.

24 Other than Gatewood's testimony, no other lawyer expert testified for the
25 Defense on this issue of duty or for that matter any other aspect of the issue of
26

1 negligence.

2 Even assuming the Plaintiff was not impaired, the issue of the investigation by
3 Gatewood as to the valuation of the Crescent Rim property demonstrates an additional
4 breach of duty on the part of Gatewood.

5 Stephan initially placed a value of \$500,000 on the property and the Plaintiff
6 initially placed a value of \$400,000 on the property. This is a significant disparity as
7 testified to by Ms. Naugle.

8 The evidence establishes that the Plaintiff was not advised by Gatewood that
9 Stephan had placed a value of \$500,000 on the Crescent Rim property. The Plaintiff
10 was not aware of this even at the time of negotiations for the division of community real
11 property. This is vital information to a party to divorce litigation because the higher
12 value may have been the correct value for the property.

13 Ms. Naugle testified as an expert on behalf of the Plaintiff that Gatewood failed
14 to meet the applicable standard of care for an attorney practicing in 2003 and 2004 by
15 not seeking a comparative market analysis of the Crescent Rim property. Even if the
16 Plaintiff was short of funds, Ms. Naugle testified that a real estate agent, at little or no
17 expense, could have shed more objective light on this real property valuation issue. As
18 Ms. Naugle testified, this variance is too significant to rely on the client's information
19 alone.

20 What is of concern to the Court is that Stephen, who initially gave an opinion that
21 the property was worth \$500,000, was awarded the residence. Gatewood testified that
22 he had heard from Stephen's attorney, Ann Shepard, that the Plaintiff was very
23 knowledgeable about the fair market value of the residence. However, in light of the
24 fact that the Plaintiff was possibly impaired from methamphetamine use and was, by
25 Gatewoods's own notations in her file, showing signs of deterioration as to her mental
26

1 health, he breached the duty he owed to his client when he failed to investigate this
2 critical valuation issue in this case. The \$385,000 that the Plaintiff had subsequently
3 indicated the property value on the Crescent Rim property to be worth was the valuation
4 used in the calculation of the division of the community real property.

5 In divorce cases deliberate undervaluation by a party is not at all uncommon
6 especially when that party is requesting to be awarded that asset in the divorce action.
7 In the event the property is awarded to that party in the divorce they may sell or dispose
8 of that asset for the asset's actual higher value and gain a windfall.

9 Gatewood testified that it is not at all uncommon in divorce proceedings for the
10 parties to negotiate a property settlement based upon property values that they receive
11 from their clients. In this case Gatewood did have a 1999 appraisal of the property
12 provided to him by the Plaintiff. Cathy Naugle testified that this conduct by Gatewood
13 of solely relying upon property valuations from clients, especially where there is such a
14 disparity in valuation, fell below the standard or duty for an attorney in this type of
15 proceeding. The Court will find Cathy Naugle's testimony was credible and accurate in
16 this regard and therefore the Court will find that Gatewood breached the applicable
17 standard of care as a lawyer practicing in 2003 and 2004 by not investigating the value
18 of the real property when there was such a disparity in valuation by the parties.

19 The Court then will find that because of Gatewood's failure to properly
20 investigate the fair market value of the property along with the correct amount of
21 indebtedness owing against the property, coupled with the Plaintiff's questionable
22 mental health status, that the Plaintiff, as a proximate result of Gatewood's breach of
23 duty on all of these issues, did not receive an equitable award of community real
24 property.

25 The damages issue in this case is clouded in part due to the fact that only
26

1 portions of the property distribution in the divorce were addressed in the Plaintiff's
2 damage claims.

3 Gatewood contends that the settlement agreement was the best that the Plaintiff
4 could expect and that based upon the appraisal testimony by his experts the Plaintiff
5 suffered no damages.

6 Gatewood's first position is that the "beach house" was separate property of
7 Stephen and because this was included as community property, the Plaintiff received a
8 \$42,500 community share that she should not have received. The problem with this
9 position is that Stephen from the outset of this litigation listed the beach house as a
10 community asset. For this Court to award this as an offset against damages would go
11 against the clear evidence that this real property was in fact a community asset.
12 Gatewood also testified that there were concerns about not only the boyfriend, and not
13 only an inappropriate lifestyle, but there had been an ongoing waste of community
14 assets. Gatewood went on to testify that these were the balancing issues that took
15 place in this divorce settlement process and that the Plaintiff received a favorable
16 settlement in this case. Again, there was no credible evidence presented that
17 demonstrated that the Plaintiff wasted community assets and that this should be an
18 offset as to the real property division.

19 As to the issue of damages, the Plaintiff called William Schultz to testify that
20 based upon his appraisal of the premises, the premises was worth \$458,000 at the time
21 of the property settlement agreement in August of 2004 rather than the \$385,000 set
22 forth in the property settlement.

23 Gatewood called two appraisers who opined that the property had a value
24 between \$275,000 and \$400,000. The Court will find that the fair market value of the
25 residence at the time of the divorce in August of 2004 was \$440,000. The Court bases
26

1 this on fact that the Defense witnesses correctly pointed out that some of the
2 comparable properties utilized by William Schultz in his appraisal were not of like value
3 and location thus resulting in a higher valuation than established by accepted appraisal
4 standards.

5 There was testimony presented that in the course of the divorce there were
6 negotiations between the parties and that based upon the total assets and the total
7 debts, that Stephen received a net \$67,870 amount over and above what the Plaintiff
8 received as a result of the settlement agreement. However, Stephen paid \$2000 a
9 month to the Plaintiff for a course of 24 months or \$48,000 as an equalization payment
10 to the Plaintiff, which she has received.

11 There was a claim in this case that there was a \$28,000 judgment lien against
12 the Crescent Rim property that should not have been listed as a debt in the
13 presentation to Judge Day. Exhibit 117, the \$28,000 indebtedness against the Crescent
14 Rim property as set out in the decree of divorce had in fact been paid nearly two
15 months prior to the divorce trial. The Plaintiff indicated that she did not know the status
16 of this debt when she answered the request for discovery in Exhibit 108. Other than the
17 list of debts set forth in Exhibit A attached to the divorce decree and Stephan's answer
18 to Interrogatory No. 3, no other investigation was done by Gatewood to determine the
19 status of this debt. Gatewood should have obtained documentation as to this debt prior
20 to the settlement agreement.

21 In this case, the Court has found that there was an under-evaluation of the
22 Crescent Rim property in the amount of \$55,000 and in addition a \$28,000 debt that
23 should not have been included in the debt division in the decree. Thus the total amount
24 of the damages brought about by Gatewood's breach of duty was \$83,000. The
25 Plaintiff, being entitled to half of that, the gross damages total \$41,500.00
26

1 However, the Plaintiff received an offset that exceeded the original calculations
2 as set forth in the decree of divorce. The Plaintiff received payments of \$2,000 a month
3 for two years and this was in light of the difference between the net community assets
4 received by Mr. Stephen in the divorce proceeding versus those received by the Plaintiff
5 in the divorce proceeding. The actual equalization was \$33,935 (1/2 of \$67,870), when
6 in fact the Plaintiff received \$48,000 thus there was \$14,065 paid in excess of the
7 equalization. The Court will find that this is an offset against the \$41,500.00 in
8 damages. Thus the Plaintiff has established in this case that she was damaged in the
9 amount of \$27,435.00.

10 **JUDGMENT**

11 THEREFORE, the Court will find that Plaintiff has prevailed in these proceedings
12 and is entitled to a judgment in the amount of \$27,435.00. Counsel for the Plaintiff will
13 prepare a judgment reflecting the Court's findings. The judgment will reflect Scott
14 Gatewood and Sallaz and Gatewood Chartered as the Defendants that are responsible
15 for this judgment. Dennis Sallaz in his individual capacity will not be listed as a
16 defendant for purposes of the damage award.

17 DATED this 3 day of October, 2008.

18 
19 MICHAEL McLAUGHLIN
20 DISTRICT JUDGE
21
22
23
24
25
26

CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of October 2008, I mailed (served) a true

and correct copy of the within instrument to:

Eric R. Clark
THE REAL ESTATE LAW GROUP
PO Box 2504
Eagle, ID 83616

John Prior
ATTORNEY AT LAW
16 12th Ave S, Ste 113
Nampa, ID 83651-3962

J. DAVID NAVARRO
Clerk of the District Court

By: 
Deputy Clerk

FILED
AM. 11 P.M.

DEC 01 2008

DAVID NAVARRO, CLERK
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA

PAMELA K. JOERGER STEPHEN

Plaintiff,

v.

SALLAZ & GATEWOOD, CHTD.,
DENNIS SALLAZ and SCOTT
GATEWOOD,

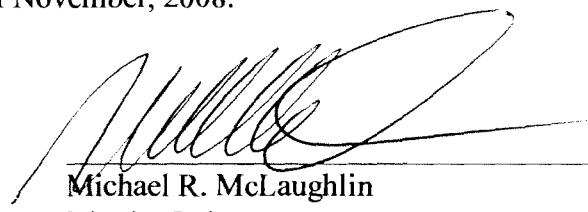
Defendants.

Case No.: CV OC 0614241

JUDGMENT

The Court issued its Findings of Fact, Conclusions of Law and Judgment on October 3, 2008, and therein directed the entry of Judgment for the Plaintiff. In accordance with the Court's decision on October 3, 2008, Judgment according to Rule 58(a), IRCP, is hereby entered for the Plaintiff Stephen and against Defendants Gatewood and Sallaz & Gatewood, CHTD, jointly and severally; and these Defendants alone, and not Defendant Dennis Sallaz individually, are responsible for the Plaintiff's damages of \$27,435.00.

DATED this 28 day of November, 2008.



Michael R. McLaughlin
District Judge

7

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1 day of ~~November~~ ^{December}, 2008, I caused to be served in the manner indicated a true and correct copy of the foregoing to the following:

JOHN PRIOR
LAW OFFICES OF JOHN PRIOR
16 12th Avenue South, Suite 113
Nampa, Idaho 83651

US Mail

CHARLES C. CRAFT
CRAFTS LAW, INC.
410 S. Orchard, Ste. 120
Boise, ID 83705

US Mail

ERIC CLARK
P.O. Box 2504
Eagle, Idaho 83616

US Mail


Clerk of the District Court

In the Supreme Court of the State of Idaho

PAMELA K. JOERGER STEPHEN,)
)
Plaintiff-Respondent-Cross Appellant,) ORDER GRANTING MOTION TO
) AUGMENT THE RECORD
v.)
) Supreme Court Docket No. 36322-2009
) Ada County Docket No. 2006-14241
SALLAZ & GATEWOOD, CHTD., DENNIS)
SALLAZ and SCOTT GATEWOOD,)
)
Defendants-Appellants-Cross)
Respondents.)

A MOTION TO AUGMENT THE RECORD AND STATEMENT IN SUPPORT THEREOF was filed by counsel for Respondent/Cross-Appellant on December 22, 2009. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Respondent/Cross-Appellant's MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the document listed below, file stamped copies of which accompanied this Motion:

1. Answer and Counterclaim (Plaintiff's Exhibit 102), file-stamped June 20, 2003.

IT FURTHER IS ORDERED that the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion, as EXHIBITS:

1. Motion for Appointment of Guardian *Ad Litem* for Plaintiff, file-stamped January 17, 2007;
2. Affidavit of Eric R. Clark, file-stamped January 17, 2007;
3. Affidavit of Robert A. Wallace, file-stamped January 17, 2007; and
4. Order Granting Motion for Appointment of Guardian *Ad Litem* for Plaintiff, file-stamped March 16, 2007.

DATED this 28th day of December 2009.

For the Supreme Court


for Stephen W. Kenyon, Clerk

cc: Counsel of Record

DENNIS J. SALLAZ, ISB No. 1053
 G. SCOTT GATEWOOD, ISB No. 5982
 SALLAZ & GATEWOOD, CHTD.
 Attorneys at Law
 P.O. Box 8956
 Boise, Idaho 83707
 Telephone: (208) 336-1145
 Facsimile: (208) 336-1263

NO. _____
 FILED _____
 A.M. _____ P.M. _____

JUN 20 2003

J. DAVID NAVARRO, Clerk
 By BJ KNAPP
 DEPUTY

Attorney for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GARY ALLEN STEPHEN,)	
	)	Case No. CV DR 0301151 D
Plaintiff/Counterdefendant,)	
	)	A N S W E R
vs.	)	AND
	)	COUNTERCLAIM
)	
PAMELA KATHERINE STEPHEN,)	
)	
Defendant/Counterclaimant.)	

ANSWER

COMES NOW, Defendant, by and through her attorney, Sallaz & Gatewood, Chtd., and in answer to Plaintiff's Complaint filed herein, admits, denies and avers as follows:

1. Defendant denies each and every allegation of Plaintiff's Complaint not specifically admitted herein.
2. Defendant admits the allegations as stated in Paragraphs 1, 2, 3, 4, 5, and 6 of Plaintiff's Complaint.

ANSWER AND COUNTERCLAIM, P. 1

PLAINTIFF'S
 EXHIBIT
 102

3. Defendant denies the allegation in paragraph 7 of Plaintiff's Complaint, and affirmatively alleges that Plaintiff has been forced to retain the firm of Sallaz & Gatewood, Chtd. to protect her interests herein and that Plaintiff should be ordered to pay Defendant's reasonable attorney's fees and costs incurred.

COUNTERCLAIM

As and for a counterclaim against Plaintiff, Defendant alleges as follows:

1. The parties were married to one another on the 17th day of December, 1976, at Boise, Ada County, Idaho, and have been, and now are husband and wife. The parties resided together as husband and wife in Idaho.
 2. There has been one (1) child born as issue of the marriage who is now an adult.
 3. That during the marriage of the parties, they have accumulated community property which should be equitably divided between the parties.
 4. That during the marriage of the parties, they have incurred certain community debts which should be equitably divided between the parties.
 5. That Defendant/Counterclaimant lacks sufficient property to provide for her reasonable needs and due to physical and emotional limitations is unable to support herself through employment.
 6. That there is a substantial disparity of the incomes of the parties and that Plaintiff/Counterdefendant should be ordered to pay to Defendant/Counterclaimant, monthly maintenance to meet the reasonable needs of the Defendant/Counterclaimant.
 7. That Defendant is without funds to retain an attorney to prosecute this action; that
- ANSWER AND COUNTERCLAIM, P. 2

she has employed Sallaz & Gatewood, Chtd. and Plaintiff should be ordered to pay to Defendant, as and for her attorney fees herein, the sum of \$1200.00, plus costs, should this action be uncontested and such sum as the Court may deem reasonable if said action is contested.

WHEREFORE, Defendant prays for Judgment against the Plaintiff as follows:

A. That the bonds of matrimony heretofore and now existing between the parties hereto be dissolved and forever set aside and that Defendant be granted an absolute Decree of Divorce from Plaintiff herein on the grounds of irreconcilable differences.

B. That the Court order an equitable division of the community property of the parties hereto.

C. That the parties' community debts should be equitably divided between them.

D. That Plaintiff be ordered to pay to Defendant, as and for maintenance support, the sum of \$2,500 per month in addition to an amount reasonable for Defendant's mortgage. for a period of the Defendant's life from the date hereof.

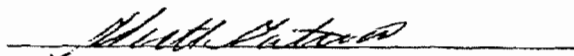
E. That Plaintiff be ordered to pay to Defendant, as and for her attorney fees herein, the sum of \$1200.00, plus costs, should this action be uncontested and such sum as the Court may deem reasonable if said action is contested; and

F. For such other and further relief as the Court deems just.

ANSWER AND COUNTERCLAIM, P. 3

DATED This 20 day of June, 2003.

SALLAZ & GATEWOOD, CHTD.




CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of June, 2003., I caused to be served a true and correct copy of the above and forgoing document by the method indicated below, and addressed to the following.

Ann K. Shepard
Shepard Law Offices, PLLC
200 N. Front Street, Suite 302
Boise, ID 83702

U.S. Mail
 Hand Delivered
 Via Fax: (208) 429-1100


Sallaz Law, Chtd.