

2-17-2011

Bennett v. Patrick Clerk's Record v. 1 Dckt. 38138

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Vnt. 1 of 11

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

Mathew R. Bennett and

Benjamin L. Walton

Plaintiffs-Appellants

vs

LAW CLERK

Nancy Patrick

Defendant-Respondent

Hon. David C. Nye District Judge

Appealed from the District Court of the Sixth
Judicial District of the State of Idaho, in and for
Bannock County.

Charles Johnson

JOHNSON OLSON CHARTERED

Attorney X For Appellant X

Brendon C. Taylor

MERRILL & MERRILL, CHARTERED

Attorney X For Respondent X

Filed this FILED - COPY day of _____

2008

FEB 17 2011

Clerk

Deputy

Supreme Court Court of Appeals

38138

July

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT AND)
BENJAMIN L. WALTON,)
)
Plaintiffs- Appellants,)
)
)
)
)
vs.)
)
NANCY PATRICK,)
)
)
Defendant-Respondent,)
)
)
)
_____)

Supreme Court No. 38138-2010

Volume I

CLERK'S RECORD

Appeal from the District Court of the Sixth Judicial District of the State of
Idaho, in and for the County of Bannock.

Before **HONORABLE David C. Nye** District Judge.

For Appellant:

Charles Johnson
JOHNSON OLSON CHARTERED
P.O. Box 1725
Pocatello, Idaho 83204-1725

For Respondent:

Brendon C. Taylor
MERRILL & MERRILL, CHARTERED
P.O. Box 991
Pocatello, Idaho 83204-0991

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VOLUME III

Mathew R. Bennett, Benjamin Lloyd Walton vs. Nancy Patrick

Date	Code	User		Judge
11/6/2008	LOCT	MARLEA	Clerk's Vault	David C Nye
	NCPI	MARLEA	New Case Filed-Personal Injury	David C Nye
	SMIS	MARLEA	Summons issued to : Nancy Patrick	David C Nye
	COMP	MARLEA	Complaint Filed	David C Nye
		MARLEA	Filing: A - Civil Complaint for more than \$1,000.00 Paid by: johnson olson Receipt number: 0041697 Dated: 11/6/2008 Amount: \$88.00 (Check) For:	David C Nye
	ATTR	CAMILLE	Plaintiff: Bennett, Mathew R. Attorney Retained L Charles Johnson	David C Nye
	ATTR	AMYW	Plaintiff: Walton, Benjamin Lloyd Attorney Retained L Charles Johnson	David C Nye
11/20/2008		CAMILLE	Return of Service - srvd on Nancy Patrick o n 11-13-08	David C Nye
11/28/2008		MARLEA	Filing: 17 - All Other Cases Paid by: merrill and merrill Receipt number: 0044418 Dated: 11/28/2008 Amount: \$58.00 (Check) For: Patrick, Nancy (defendant)	David C Nye
	NOAP	CAMILLE	Notice Of Appearance; aty Brendon Taylor for Def.	David C Nye
	ATTR	CAMILLE	Defendant: Patrick, Nancy Attorney Retained Brendon C Taylor	David C Nye
12/4/2008	ANSW	CAMILLE	Answer and Demand for Jury Trial; aty Brendon Taylor for Def.	David C Nye
	NOTC	CAMILLE	Notice of service - Defs First set of Interrog. and Request for Production of Documents to Plntfs; aty Brendon Taylor for defs	David C Nye
12/22/2008	HRSC	CAMILLE	Hearing Scheduled (Scheduling Conference 01/26/2009 09:15 AM)	David C Nye
1/23/2009	NOTC	CAMILLE	Notice of service - Plntfs First set of Interrog Req for Production of documents and Req for Admissions to Def : aty C/Johnson	David C Nye
1/26/2009	INHD	AMYW	Hearing result for Scheduling Conference held on 01/26/2009 09:15 AM: Interim Hearing Held	David C Nye
2/11/2009	ORDR	DCANO	Order Setting Pre-Trial and Order Setting Jury Trial; s/J. Nye on 2-11-09. Cert. Mailed to Counsel on 2-11-09. s/A.Wegner on 2-11-09.	David C Nye
	HRSC	DCANO	Hearing Scheduled (Pretrial Conference 05/17/2010 11:00 AM)	David C Nye
	HRSC	DCANO	Hearing Scheduled (Jury Pretrial 06/02/2010 09:00 AM)	David C Nye
2/20/2009	NOTC	CAMILLE	Notice of service - Defs Answers and responses toPlntfs ; aty Brendon Taylor for def	David C Nye

Mathew R. Bennett, Benjamin Lloyd Walton vs. Nancy Patrick

Date	Code	User		Judge
2/25/2009	NOTC	CAMILLE	Notice of service - Plaintiff Bennetts Answers to Defendants First set of Interrog and Requests for Production of Documents to Plaintiffs and the original Plaintiff Waltons Answers to Defs First set of Interrog and req for Production of documents to plntfs : aty Charles Johnson	David C Nye
4/13/2009		CAMILLE	Motion for Summary Judgment; aty Charles Johnson	David C Nye
		CAMILLE	Motion to compel; aty Charles Johnson	David C Nye
		CAMILLE	Notice of hearing; on Motion to Compel on 5-11-09 @ 10am: a ty Charles Johnson	David C Nye
4/14/2009		CAMILLE	Notice of hearing; on Motion for Summary Judgment, set for 5-11-09 @ 10am: aty Charles Johnson	David C Nye
4/27/2009		CAMILLE	Defendants Response and Memorandum in Opposition to Plntfs Motin for Summary Judgment; aty Brendon Taylor for def	David C Nye
		CAMILLE	Affidavit of Nancy Patrick ; aty BrendonTaylor	David C Nye
		CAMILLE	Affidavit of Brendon Taylor for def.	David C Nye
		CAMILLE	Notice of service - Defs First Supplemental Answers and Responses to Plntfs first set of Interrog. , req for Production and requests for Admission and this notice; aty Brendon Taylor for def	David C Nye
5/4/2009		CAMILLE	Def's Response and Memorandum in Opposition to Plntfs Motion to Compel; aty Brendon Taylor for def	David C Nye
		CAMILLE	Affidavit of Jared A Steadman; aty Brendon Taylor for def	David C Nye
5/6/2009		CAMILLE	Response in Support of Plntfs Motin for Summary Judgment; aty C/ Johnson for plntf	David C Nye
5/11/2009		CAMILLE	Plaintiffs Reply to Defs Response and Memorandum in Opposition to Plntfs Motin for Compel; aty Charles Johnson for plntf	David C Nye
6/19/2009		CAMILLE	Notice of Deposition of Defendant Nancy Patrick on 7-15-09 @ 9am: aty Charles Johnson for plntf	David C Nye
		CAMILLE	Minute Entry and Order; court DENIED without prej Plntfs Motin for Summary Judgment; J Nye 6-19-09	David C Nye
9/22/2009		CAMILLE	Notice of Depo of Nancy Patrick on 9-24-09 @ 9am: aty Charles Johnson for plntfs	David C Nye
11/19/2009		CAMILLE	Motion for Expedited Trial setting, small lawsuit resolution act proceedings, and Mediation; aty Charles Johnson for plntf	David C Nye
		CAMILLE	First Amended and Renewed Motion for Summary Judgment; aty Charles Johnson	David C Nye

Mathew R. Bennett, Benjamin Lloyd Walton vs. Nancy Patrick

Date	Code	User	Judge
11/19/2009	NOTC	DCANO	Notice of Hearing on Motion for Summary Judgement; December 21, 2009 at 10:00 AM.
12/21/2009		CAMILLE	Affidavit of Brendon Taylor; aty Brendon Taylor for def.
		CAMILLE	Order for Mediation; J Nye 12-21-09
1/4/2010		CAMILLE	Order granting Plaintiffs Motion for Summary Judgment on Liability; J Nye 1-4-2010
1/6/2010		CAMILLE	Motion for costs and attys fees on summary Judgment as to Liability; atyCharles Johnson
		CAMILLE	Memorandum of Costs and Affidavit of Charles Johnson in support of Motion for costs and fees; aty Charles Johnson for plntf
1/12/2010		MEGAN	Miscellaneous Payment: Copies Paid by: Lloyd Jones Receipt number: 0001299 Dated: 1/12/2010 Amount: \$20.00 (Credit card)
		MEGAN	Miscellaneous Payment: Technology Cost - CC Paid by: Lloyd Jones Receipt number: 0001299 Dated: 1/12/2010 Amount: \$3.00 (Credit card)
1/15/2010		CAMILLE	Defendant objectijon to Plntfs Motion for Costs and Attys Fees on Summary Judgment as to Liability; aty Brendon Taylor for def
2/4/2010		CAMILLE	Plaintiffs Disclosure of Fact and Expert Witnesses; aty Charles Johnson
		CAMILLE	Notice of hearing; on Plntfs Motion for Costs and ATtys Fees set for 2-16-2010 @ 10:30am: aty Charles Johnson for plntf
	HRSC	AMYW	Hearing Scheduled (Motion 02/16/2010 10:30 AM)
2/12/2010		AMYW	Plaintiff's Response to Defendant's Objection to Plaintiffs' Motion for Costs and Attorney Fees on Summary Judgment as to Liability; /s/ Charles Johnson, atty for Plaintiffs
	NOTC	AMYW	Notice of Service; Plaintiff's Second Set fo Interrogatories, Requests for Production of Documents and Requests for Admissions; /s/ Charles Johnson, atty for Plaintiffs
2/16/2010	DCHH	AMYW	Hearing result for Motion held on 02/16/2010 10:30 AM: District Court Hearing Held Court Reporter: Waived Number of Transcript Pages for this hearing estimated: Less than 100 pages.
2/22/2010	MEOR	AMYW	Minute Entry and Order; parties came for hearing on Plaintiff's Motion for Costs and Attorney Fees; court denied the plaintiff's motion under Rules 56 & 11, the court took the matter under advisement as to Rule 36 and will issue a decision within 30 days; /s/ J Nye, 2-22-10
3/4/2010		CAMILLE	Defendants disclosure of Lay and Expert Witnesses; aty Brendon Taylor

Mathew R. Bennett, Benjamin Lloyd Walton vs. Nancy Patrick

Date	Code	User	Judge
3/12/2010		CAMILLE	Decision on Costs and ATorney Fees; (Plaintiffs Motion for Costs and Attorney Fees on Summary Judgment is DENIED, without prej: J Nye 3-12-2010 David C Nye
3/17/2010		CAMILLE	Notice of Service - Defendants Answers and Rspnses to Plaintiffs Second set of Interrog, Requests for Production and Requests for Admission; and this Notice; atyBrendon Taylor for Defendants David C Nye
4/22/2010	MOTN	AMYW	Motion to Compel; /s/ Charles Johnson David C Nye
	NOTC	AMYW	Notice of Hearing on Plaintiffs' Motion to Compel; /s/ Charles Johnson, atty for Plaintiff David C Nye
	HRSC	AMYW	Hearing Scheduled (Motion to Compel 05/05/2010 01:30 PM) David C Nye
	NOTC	AMYW	Notice of Mediation; /s/ J Brown David C Nye
4/27/2010		CAMILLE	Notice of Deposition of Dr. Evan Holmstead Recorded by Audio Video Means; on 4-30-2010 @ 11:30 am atyCharles Johnson for plntf David C Nye
		CAMILLE	Notice of Deposition of Dr. Richard Maynard Recorded by Audio Video Means on 5-7-2010 @ 11:30 am: David C Nye
4/29/2010		CAMILLE	Notice of Deposition of Dr. Matthew Williamson Recorded by Audio Video Means: aty Charles Johnson for plntf David C Nye
4/30/2010		CAMILLE	Notice of Service - Defendants Third Supplemental Answers and Responses to Plaintiffs First set of Interrog Requests for Production and Requests for Admission: and this Notice of service : aty Brendon Taylor David C Nye
5/3/2010	HRVC	AMYW	Hearing result for Motion to Compel held on 05/05/2010 01:30 PM: Hearing Vacated David C Nye
5/11/2010		CAMILLE	Motion in Limine; atyCharles JOhnson for plntfs David C Nye
	NOTC	AMYW	Notice of Hearing on Plaintiffs' Motion in Limine; hrg set for 5/17 at 11:00 am; /s/ Charles Johnson, atty for plaintiffs David C Nye
5/14/2010	MEMO	AMYW	Stipulated Joint Pre-trial Memorandum David C Nye
5/17/2010		CAMILLE	Motion in Limine; aty Brendon Taylor for Def. David C Nye
		CAMILLE	Defendants Response to Plaintiffs Motion in Limine; aty Brendon Taylor for def David C Nye
	DCHH	AMYW	Hearing result for Pretrial Conference held on 05/17/2010 11:00 AM: District Court Hearing Held Court Reporter: Stephanie Morse Number of Transcript Pages for this hearing estimated: Less than 100 pages. David C Nye
5/24/2010		AMYW	Plaintiffs' Objection to Defendant's Requested Jury Instructions; /s/ Charles Johnson, atty for Plaintiffs David C Nye

Mathew R. Bennett, Benjamin Lloyd Walton vs. Nancy Patrick

Date	Code	User	Judge
5/24/2010	RESP	AMYW	Response and Opposition to Defendant's Motion in Limine; /s/ Charles Johnson, atty for Plaintiffs
		AMYW	Plaintiffs' Objection and Response to Defendant's Exhibits; /s/ Charles Johnson, atty for Plaintiffs
	ORDR	AMYW	Order Granting Motion in Limine as to Dr. Henry West; no mention how plaintiffs were referred to Dr. West at trial; /s/ J Nye, 5-24-10
5/26/2010		AMYW	Plaintiffs' Requested Jury Instructions; /s/ Charles Johnson, atty for Plaintiffs
		AMYW	Plaintiffs' Proposed Voir Dire Questions; /s/ Charles Johnson, atty for Plaintiffs
		AMYW	Defendant's Proposed Jury Instructions; /s/ Brendon Taylor, atty for Def
6/1/2010		CAMILLE	Objection to Plaintiffs Jury Instructions; aty Brendon Taylor for Defendants
		AMYW	Portneuf Medical Center's Ex Parte Motion to Shorten Time for Hearing on Portneuf Medical Center's Motion to Quash Subpoena and Motion for Proective Order; /s/ Jennifer Brizee, atty for PMC
		AMYW	Defendant Portneuf Medical Center's Motion to Quash Plaintiff's Subpoena, and INTial Memorandum in Support Thereof; /s/ Jennifer Brizee, atty for PMC
6/2/2010		CAMILLE	Notice of Hearing on Portneuf Medical Centers Motion to quash plntfs subpoena and Portneuf Medical Centers Motion for Protective Order; aty Jenmifer Brizee for Portneuf
	DCHH	AMYW	Hearing result for Jury Trial held on 06/02/2010 09:00 AM: District Court Hearing Held Court Reporter: Stephanie Morse Number of Transcript Pages for this hearing estimated: Over 500 pages.
	JTST	CINDYBF	Jury Trial Started
6/3/2010		CAMILLE	Portneuf Medical Centers Motion for Protective Order and Memorandum in support; aty Jennifer Brizee for Portneuf Med
		CAMILLE	Affidavit of Jennifer K Brizee; aty Jennifer Brizee for Portneuf Med
	AFFD	AMYW	Affidavit of Brendon Taylor; /s/ Brendon Taylor, atty for Def
	SUBR	DCANO	Subpoena Returned; Joann Hayward, Holly Parkinson or Stephanie Evans; Charles Johnson, Atty for Plntfs.
6/4/2010		AMYW	Special Verdict

Mathew R. Bennett, Benjamin Lloyd Walton vs. Nancy Patrick

Date	Code	User	Judge
6/7/2010	MEOR	AMYW	Minute Entry and Order; parties appeared for trial on 6/2/10, jury selected, witnesses testified, special verdict form the jury answered No to Questions 1 & 2; /s/ J Nye, 6-7-10
	JDMT	AMYW	Judgment on Verdict; judgment in favor of Plaintiff Matthew Bennett in amount of \$3978.47 and Benjamin Walton in the amount of \$10,030.92; /s/ J Nye, 6-7-10
		AMYW	Pre-Empty Challenges for Qualification to Hear Jury Trial
		AMYW	Jurors Selected for Voir Dire Questioning and Pre-Empty Challenges for Qualification to Hear Jury Trial
		AMYW	Jurors Selected for Trial
	EXLT	AMYW	Exhibit List
6/18/2010		CAMILLE	Motion to Alter and Amend Judgment and for Additur; and Motion for Pre Judgment Interest; aty C/Johnson for plntf
		CAMILLE	Motion for Costs and Attorneys fees of the Prevailing Party on Jury Verdict and Judgment on the Verdict; aty C/Johnson for plntf
	MEMO	AMYW	Memorandum of Costs and Affidavit of Charles Johnson in Support of Motion for Costs and Fees; /s/ Charles Johnson, aty for Plaintiffs
	MEMO	AMYW	Memorandum & Brief in Support of Motion for Costs and Attorney's Fees to Plaintiffs Bennett & Walton; /s/ Charles Johnson, aty for Plaintiffs
6/21/2010		CAMILLE	Defendant's Motion for Costs; aty Brendon Taylor for Def.
		CAMILLE	Defendants Memorandum for Costs; aty Brendon Taylor for Def.
		CAMILLE	Defendants Motion for Reduction to Judgment; aty Brendon Taylor for def
		CAMILLE	Affidavit of Brendon C. Taylor; aty Brendon Taylor for Def.
6/24/2010		CAMILLE	Notice of hearing on Plaintiffs Motion for Costs and Attorneys Fees of the Prevailing party on the Jury Verdict and Judgment on the Verdict; and Motion to Amend Judgment and for additur; and motion for pre judgment interest; aty Charles Johnson for plntf
	HRSC	AMYW	Hearing Scheduled (Motion 07/26/2010 09:30 AM)
7/6/2010		CAMILLE	Plaintiffs Opposition to Defendants Motion for Reduction to Judgment; aty Charles Johnson for plntf
		CAMILLE	Plaintiffs Objection to Defendants Motinfor Costs; aty Charles Johnson

Mathew R. Bennett, Benjamin Lloyd Walton vs. Nancy Patrick

Date	Code	User	Judge
7/7/2010		CAMILLE	Defendants Objection to Plaintiffs Post Trial Motions for Additur, interest, costs and attorneys fees; aty Brendon Taylor for def
7/21/2010		CAMILLE	Plaintiffs Objection and REsponse to Defs Objection to Plntfs Post Trial Motions for Additur, Interest Costs and Attorneys Fees; aty Charles Johnson
7/22/2010		AMYW	Supplement to Defendant's Post-Trial Motions and Responsive Pleadings; /s/ Brendon Taylor, atty for Def
	AFFD	AMYW	Affidavit in Support of Post-Trial Supplement; /s/ Brendon Taylor, atty for Def
7/26/2010	DCHH	AMYW	Hearing result for Motion held on 07/26/2010 09:30 AM: District Court Hearing Held Court Reporter: Stephanie Morse Number of Transcript Pages for this hearing estimated: Less than 100 pages.
		AMYW	Plaintiffs' Objection to Supplement to Defendant's Post-Trial Motions and Responsive Pleadings; /s/ Charles Johnson, atty for Plaintiffs
		AMYW	Plaintiffs' Supplemental Objection to Defendant's Motion for Costs; /s/ Charles Johnson, atty for Plaintiffs
7/30/2010		CAMILLE	Supplemental Authority on Attorneys Fees; aty Charles Johnson
		AMYW	Defendant's Post-Hearing Brief; /s/ Brendon Taylor, atty for Defendant
	AFFD	AMYW	Affidavit Brendon Taylor Regarding Bankruptcy Order and Stipulation; /s/ Brendon Taylor, atty for Def
8/5/2010		CAMILLE	Response and Objection to Defs Post-Hearing Brief and Affidavit on Bankruptcy Stipulation; aty Charles Johnson
8/25/2010	JDMT	AMYW	Amended Judgment on Verdict; amended to reflect Matthew Bennett received verdict in the amount of \$5,065.11, which includes costs in the matter of \$728.49, Ben Walton verdict in the amount of \$10,671.63, which includes costs in the amount of \$789.70, no attorney fees award to either party; /s/ J Nye, 8-25-10
		AMYW	Decision on Post-Judgment Motions; Motion for Additur is DENIED, pre-judgment interest awarded to each plaintiff, Walton \$851.01, Bennett \$530.15, Motion for Remittitur is GRANTED, Walton's verdict is reduced by \$1,000 and Bennett's verdict is reduced by \$172, Plaintiff Bennett and Walton are the prevailing parties against Patrick, Motion for Costs is GRANTED in part and DENIED in part, Attorney fees are not awarded to any party, amended judgment entered; /s/ J Nye, 8-25-10

Mathew R. Bennett, Benjamin Lloyd Walton vs. Nancy Patrick

Date	Code	User	Judge
9/7/2010		CAMILLE	Motion for relief and reconsideration of decision on Post Judgment Motions Denying Attys Fees; aty Charles Johnson for plntf
		CAMILLE	Motion to Amend Complaint to Conform to Evidence: aty Charles Johnson for plntf
	HRSC	AMYW	Hearing Scheduled (Motion 09/27/2010 09:30 AM)
	NOTC	AMYW	Notice of Hearing on Plaintiffs' Motion to Amend and Motion for Relief; hrg set for 9/27/10 at 9:30 am; /s/ Charles Johnson, atty for Plaintiffs
9/20/2010		CAMILLE	Defendants Objection and Brief in Opposition to Plntfs Motion for relief and reconsideration of Post Judgment Motions denying attys fees and plntfs Motion to Amend Complaint to Conform to evidence under IRCP 15b: aty Brendon Taylor for def
9/24/2010		AMYW	Plaintiffs' Response to Defendant's Objection to Costs and Attorney's Fees and Supplementation of the Record; /s/ Charles Johnson, atty for Plaintiffs
9/27/2010	DCHH	AMYW	Hearing result for Motion held on 09/27/2010 09:30 AM: District Court Hearing Held Court Reporter: Stephanie Morse Number of Transcript Pages for this hearing estimated: Court Reporter
9/28/2010		CAMILLE	Minute Entry and Order; Motion to Amend to Conform to Evidence was filed timely but is DENIED, the Motion for Relief and Reconsideration of Decision on Post Judgment Motions Denying Attorney Fees is also DENIED: s/ Judge Nye 9-28-2010
	CSTS	CAMILLE	Case Status Changed: Closed
10/4/2010		NOELIA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Johnson, L Charles (attorney for Bennett, Mathew R.) Receipt number: 0034561 Dated: 10/5/2010 Amount: \$101.00 (Check) For: Patrick, Nancy (defendant)
	APSC	DCANO	Appealed To The Supreme Court
	NOTC	DCANO	NOTICE OF APPEAL; Charles Johnson, Atty for Plnfts/Appellants
10/6/2010	MISC	DCANO	CLERK'S CERTIFICATE OF APPEAL; Signed and Mailed to SC on 10-6-10.
10/15/2010	MISC	DCANO	IDAHO SUPREME COURT; Notice of Appeal received in SC on 10-12-10. Docket Number 38138-2010. Clerk's Record and-Reporter's Transcripts Due in SC on 1-12-11. (12-8-10 5 weeks prior). The following Transcripts shall be lodged: Jury Trial 6-2-10 thur 6-7-10 and Motion Hearing held 7-26-10.

Mathew R. Bennett, Benjamin Lloyd Walton vs. Nancy Patrick

Date	Code	User	Judge
10/15/2010	MISC	DCANO	IDAHO SUPREME COURT; Clerk's Certificate Recieved in SC on 10-12-10.
10/28/2010	STJD	CAMILLE	Satisfaction Of Judgment
10/29/2010	STIP	DCANO	Stipulation Notice of Request for Additional Records and Transcripts; Brendon C. Taylor, Atty for Dfdt.
12/7/2010	MISC	DCANO	REPORTER'S TRANSCRIPT received in Court Records from Stephanie Morse for t he following hearings: Jury TriaI held 6-2-10, Motion held 7-26-10 and Motions held 9-27-10.
1/4/2011	MISC	DCANO	CLERK'S RECORD RECEIVED IN court records on 1-4-11.

Charles Johnson
JOHNSON OLSON CHARTERED
 419 West Benton
 P.O. Box 1725
 Pocatello, Idaho 83204-1725
 Telephone: (208) 232-7926
 Facsimile: (208) 232-9161
 ISB No. 2464
 E-Mail: cjlaw@allidaho.com
 Attorney for Plaintiffs

2008-05-19
 CW
 10:19

DAVID C. NYE

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and	)	Case No. CW 08 4528 PI
BENJAMIN L. WALTON,)	
	)	Filing Fee Category A1 \$88.00
Plaintiffs,)	
	)	VERIFIED COMPLAINT FOR
vs.	)	PERSONAL INJURY DAMAGES
	)	IN AUTOMOBILE COLLISION AND
NANCY PATRICK,	)	DEMAND FOR JURY TRIAL
)	
Defendant.)	
_____)	

The plaintiffs, Mathew R. Bennett and Benjamin L. Walton, individually and through their counsel of record, hereby file this VERIFIED COMPLAINT FOR PERSONAL INJURY DAMAGES IN AUTOMOBILE COLLISION AND DEMAND FOR JURY TRIAL against the defendant, Nancy Patrick, and complains, pleads, and alleges as follows.

A. PARTIES

1. The plaintiff, Mathew R. Bennett, at all times material hereto, was a resident of Pocatello, Bannock County, Idaho.

2. The plaintiff, Benjamin L. Walton, at all times material hereto, was a resident of Pocatello, Bannock County, Idaho.

5

3. The defendant, Nancy Patrick, is the owner and driver of the vehicle in this case; and was a resident of Pocatello, Bannock County, Idaho at the time of the collision in this case.

4. This Court has subject matter and personal jurisdiction over the defendant and venue is proper in this Court.

B. FACTS AND CONDUCT OF THE PARTIES

5. On or about October 18, 2007, the plaintiff Benjamin L. Walton and his passenger, Mathew R. Bennett, were driving with the flow of traffic through a construction zone on East Center Street near Tuscany Hills Plaza at about 11:30 a.m. in the morning. There were several vehicles in front of the plaintiff Walton, behind him, and traffic in the opposite lane, since only two lanes of traffic were open because of the road construction.

6. The defendant Nancy Patrick then exited from the freeway on the northbound ramp of I-15, and turned right in the area of dirt that was being prepared for blacktop. This area was marked as a restricted construction zone with no vehicles being allowed. The defendant Patrick then passed a parked steamroller striking the plaintiff Walton's vehicle from the left blind side near the passenger seat in a sudden, unexpected and violent collision. The plaintiff Walton's truck eventually came to a stop straddling the lane of oncoming traffic.

7. The plaintiff Walton could not go forward, backwards or sideways because of other traffic in his lane and traffic in the

opposing lane. There was absolutely no way the plaintiff Walton could have avoided the collision that took place in this case which was the total fault of the defendant Nancy Patrick.

8. A true and correct copy of the Idaho Vehicle Collision Report in this case is attached as Exhibit 1. The only contributing circumstance noted was the inattentive driving by the defendant Nancy Patrick. Moreover, there were no contributing circumstances listed by the plaintiff Benjamin Walton. In addition, the plaintiff Mathew R. Bennett has no comparative fault since he was a passenger in the vehicle.

9. The plaintiffs Walton and Bennett suffered injuries and pain, and drove to the Portneuf Medical Center emergency room immediately after the accident.

C. LEGAL CLAIMS AGAINST DEFENDANT

10. The conduct of the defendant Nancy Patrick was negligent, and negligent per se, in the following particulars:

- a. Failure to use due care under Idaho Code § 49-615.
- b. Failure to yield to a vehicle entering the roadway under Idaho Code § 49-642.
- c. Failure to turn properly under Idaho Code § 49-644.
- d. Failure to turn properly under Idaho Code § 49-808(1).
- e. Reckless, grossly negligent and inattentive driving under Idaho Code § 49-1401.

11. The defendant Patrick had a duty at common law to be reasonable and prudent and to avoid acts that may injure others, violated that duty, and caused damages to the plaintiffs Bennett and Walton. The defendant Patrick was negligent under common law in this case and her negligence was the primary legal and proximate cause of the accident in this case.

12. There is no proof of any comparative fault on the part of the plaintiff Walton as driver of the vehicle or the plaintiff Bennett as a passenger in the vehicle. The defendant Nancy Patrick is solely and completely at fault in this case.

D. PLAINTIFFS' INJURIES, LOSSES AND DAMAGES

13. The plaintiff **Matthew Bennett** was seen at the Portneuf Medical Center emergency room immediately after the motor vehicle collision. He complained of neck and back pain. The plaintiff Bennett was treated by Dr. Robert Beckstead and was diagnosed with a lumber back strain from the motor vehicle collision. He was given medications for pain and inflammation.

14. Dr. Evan Holmstead then saw Mathew Bennett on October 30, 2007 for his complaints of low back pain from the motor vehicle collision. He had limited range of motion with objective paraspinous muscle spasm and was prescribed pain medication and muscle relaxers, and considered for physical therapy.

15. Mat Bennett continued to have back pain but he also continued to work. His back pain flared and increased markedly in November of 2007 while he was bending over.

16. On November 20, 2007 Mat Bennett was again seen at the Portneuf Medical Center emergency room for low back pain from this motor vehicle collision. He was then prescribed pain medication, muscle relaxers and physical therapy. He then received physical therapy at Portneuf Physical Therapy for about three weeks. He improved slowly and had some progress from this treatment, but still had flare ups in his pain.

17. Mat Bennett was unable to work for about another week after this flare up in his symptoms and was excused from work by Dr. Evan Homlstead. This doctor again found lumbar muscle spasm with low back pain and continued him on physical therapy and light duty work, and continued his prescription of Flexoral and other pain relievers. He has worked in pain for the last several months.

18. The plaintiff Bennett then sought further chiropractic treatment from Dr. Henry G. West, Jr., of West Chiropractic Clinic for his injuries. His tests were positive for several objective problems. He then received chiropractic treatment, including DMT spinal, electro-stimulation, and ultrasound. He has substantially recovered after his treatment from physical therapy and treatment from Dr. West, but he still uses over-the-counter pain medications. However, his condition has improved and is now medically stable to work.

19. The plaintiff Bennett has lost wages from this accident in the amount of about \$2,600.00.

20. The plaintiff **Benjamin Walton** was seen at the emergency room immediately after the motor vehicle collision. The plaintiff Walton was treated by Dr. Robert Beckstead at that time and diagnosed him with cervical spine strain and lumbar spine strain. He had numbness and tingling in his extremities and had severe neck pain and complained of being nauseated. The plaintiff Walton was diagnosed with Cervical Spine Strain and Lumbar Spine Strain. He was instructed to wear a soft collar for a week, do no lifting, and then follow up with his physician if his condition did not improve. He was released (excused) from work, and advised to get bed rest. The x-rays at the hospital showed a mild straightening of the lumbar spine associated with muscle spasm.

21. The plaintiff Walton then made an appointment with his treating physician Dr. Richard Maynard for Friday, October 26, 2007 for continuing problems. Dr. Maynard examined him and prescribed muscle relaxers and told him to follow up in two weeks.

22. The plaintiff Walton then followed up with Dr. Maynard on Friday, November 9, 2007 since he was still in pain. He was advised to see a chiropractor and get some back massages, and follow up with Dr. Maynard if his fingers and hands kept tingling, because that could indicate a major problem, and in this case he may need to get an MRI.

23. Benjamin Walton had not recovered from his collision and has obtained chiropractic care and treatment from Dr. Henry G. West, Jr., of West Chiropractic Clinic. The medical records of Dr.

Henry West were positive for several tests with limited range of motion and pain in his cervical spine, foraminal compression tests, shoulder depressant tests, Bickele's test, the Sitting root tests and bilateral leg raise. The cervical spine x-rays show a significant injury at C-7.

24. Therefore, Dr. Henry West then referred the plaintiff Walton to have an MRI at Idaho Medical Imaging. The cervical spine MRI shows minor posterior broad-based disc bulges at C4-5 and C5-6 from the motor vehicle collision. Dr. Henry West diagnosed Benjamin Walton with acute traumatic side lash cervical sprain/strain, brachial radiculopathy, and mid-level intersigmental dysfunction characterized by akinesis and acute lumbar strain and limitations in the range of motion in the cervical and lumbar spine.

25. However, the plaintiff Walton's injuries significantly improved from the chiropractic treatment administered by Dr. Henry West. He advises that at this point he still has only minimal residual pain and stiffness in his neck and some headaches that he treats with over-the-counter medication.

26. The plaintiff Walton also has lost wages from this collision in the amount of about \$1,200.00.

E. PRAYER FOR RELIEF

WHEREFORE, plaintiffs, Mathew R. Bennett and Benjamin L. Walton, pray for judgments against defendant, Nancy Patrick, as vehicle owner, responsible party and negligent driver as follows:


A. Special damages for plaintiff Mat Bennett's past medical bills of \$1,937.71, future medical bills for over the counter pain medication, and lost wages of \$2,600.00; and general damages for pain and suffering in an amount in excess of \$10,000.00, or such other amounts as may be proven to a jury at trial, but less than \$25,000.00 at this time;

B. Special damages for plaintiff Ben Walton's medical bills of \$2,992.92, future medical bills for over the counter pain medication, lost wages of \$1,200.00, and general damages for pain and suffering in an amount in excess of \$10,000.00, or such other amounts as may be proven to a jury at trial, but less than \$25,000.00 at this time;

C. For attorney's fees and costs in bringing this action, in the amount of \$2,000.00 if by default and future attorney's fees under Idaho Code § 12-120(4); and

D. For such other and further relief as this Court deems just and equitable under the premises for plaintiff.

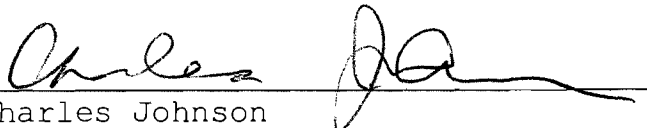
DATED this 28th day of October 2008.



Charles Johnson

JURY DEMAND

Plaintiffs demand a jury trial on all claims in the complaint.



Charles Johnson

VERIFICATION OF COMPLAINT

STATE OF IDAHO)
 : ss
County of Bannock)

Mathew R. Bennett and Benjamin L. Walton, deposes and states that they are the plaintiffs in the above referenced matter, that they have read the foregoing complaint, and that the facts therein stated are true as they verily believe to the best of their information and belief.



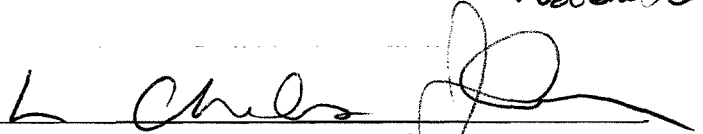
Mathew R. Bennett, Plaintiff



Benjamin L. Walton, Plaintiff

SUBSCRIBED AND SWORN TO before me, a Notary Public, by Mathew R. Bennett and Benjamin L. Walton on this 3rd day of ~~October~~ November 2008.

(SEAL) CHARLES JOHNSON III
NOTARY PUBLIC
STATE OF IDAHO



NOTARY PUBLIC FOR IDAHO
Residing at: Regard, Idaho
My Commission Expires: Nov 2012

Idaho Vehicle Collision Report

ITD-90 8-96M 27-010500-0 Revised 11/29/98 Agency Code **0305** Officer # **5112** Report District **12** Case No. **07-P22586** Page 1

Date of Collision	Day of Collision	Time	Police Dispatched	Police Arrived	EMS Dispatched	EMS Arrived	Location	City or Town	
10/18/2007	Thursday (5)	11:42	11:43	11:51			Miles <input type="checkbox"/> N <input type="checkbox"/> E <input checked="" type="checkbox"/> IN <input type="checkbox"/> W <input type="checkbox"/> OF	Pocatello	
Intersection of 2 streets	Complete Box #	Name of Street		<input type="checkbox"/> On Private Property	# of Lanes	Posted Speed	County	Interchange #	
1, 2	1, 2	ON E. Center St			2	25	Bannock		
Intersection of Street and: Parking Lot / Driveway / Alley	1, 2, 3	In the Intersection with:			Posted Speed	R. R. Crossing #	Latitude (GPS)		
1, 2, 3	1, 2, 3	Outside an Intersection		Name of Cross Street or # of Ref. Mile Post Marker		Collision Log Mile Point	Longitude (GPS)		
1, 2	1, 2	400 <input checked="" type="checkbox"/> Feet <input type="checkbox"/> Miles <input type="checkbox"/> N <input type="checkbox"/> S <input type="checkbox"/> E <input type="checkbox"/> W <input type="checkbox"/> OF		Northbound On Ramp I-15 Ave					

UNIT 1	<input checked="" type="checkbox"/> Vehicle	<input type="checkbox"/> Pedestrian	<input type="checkbox"/> Pedalcyclist	Vehicle Owner	Last	First	M.I.	Unit Type	
Driver	Last	First	M.I.	<input checked="" type="checkbox"/> Same as Driver	Patrick	Nancy	D	6	
<input type="checkbox"/> Hit & Run	Patrick	Nancy	D	Address	1002 Samuel #102 Pocatello, ID 83201			Unit Use	
Street Address	Home Phone	Vehicle Year	Make (Dodge-Chev.)	Model (Dart-Nova)	Style (2 Dr.)	0			
1002 Samuel #102	236-7370	1997	Buick	Skylark	4 Door	Attach 1			
City	State	Zip Code	Work Phone	Vehicle Color	License Plate No.	State	0		
Pocatello	ID	83201		Blue	1B2425	ID	Attach 2		
Driver's License No.	State	Idaho Code # / Violation	<input type="checkbox"/> Cited	Vehicle Identification No.	Est. Cost of Damage	0			
DA129295B	ID			1G4NJ52T4VC406369	2500				

Sex	Date of Birth	Prot. Dev.	Injury	Ejection	Trapped	Transported	Insurance	Carrier Name	Policy Number	
		7	C	1	1	5	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	All State	00700665912/13	
Passenger Names and Addresses (Unit 1 only, additional passengers on page 3)										
Same Address as Driver			Seating	Sex	Date of Birth	Prot. Dev.	Injury	Ejection	Trapped	Transported

UNIT 2	<input checked="" type="checkbox"/> Vehicle	<input type="checkbox"/> Pedestrian	<input type="checkbox"/> Pedalcyclist	Vehicle Owner	Last	First	M.I.	Unit Type	
Driver	Last	First	M.I.	<input type="checkbox"/> Same as Driver	Carroll	Charles		7	
<input type="checkbox"/> Hit & Run	Walton	Benjamin	L	Address	641 S Shilling Blackfoot, ID 83221			Unit Use	
Street Address	Home Phone	Vehicle Year	Make (Dodge-Chev.)	Model (Dart-Nova)	Style (2 Dr.)	0			
1771 S 2nd	478-9114	1993	Toyota	Tundra	Pickup	Attach 1			
City	State	Zip Code	Work Phone	Vehicle Color	License Plate No.	State	0		
Pocatello	ID	83201		Maroon	4BC4445	ID	Attach 2		
Driver's License No.	State	Idaho Code # / Violation	<input type="checkbox"/> Cited	Vehicle Identification No.	Est. Cost of Damage	0			
	ID			JT4VD20C4P0003350	1800				

Sex	Date of Birth	Prot. Dev.	Injury	Ejection	Trapped	Transported	Insurance	Carrier Name	Policy Number	
		3	O	1	1	5	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	All State	60752489209/09	
Passenger Names and Addresses (Unit 2 only, additional passengers on page 3)										
Same Address as Driver			Seating	Sex	Date of Birth	Prot. Dev.	Injury	Ejection	Trapped	Transported
			3	M		3	O	1	1	5

Injured Transported To: By: No EMS Provider Dispatched

<table border="1"> <tr><th>Front</th><th>Seating</th><th>Front</th></tr> <tr><td>1</td><td>2</td><td>3</td></tr> <tr><td>4</td><td>5</td><td>6</td></tr> <tr><td>7</td><td>8</td><td>10</td></tr> </table> <p>14 Trailing Unit 16 Pedestrian 17 Pedalcycle</p> <p>18 Equestrian 99 Other U Unknown</p> <p>Passenger Codes - Non Trailing Unit 11 Sleeper Sect. (Truck Cab) 12 Other enclosed Passngr./Cargo area 13 Unenclosed Passngr./Cargo area 15 Riding on Vehicle Exterior</p>	Front	Seating	Front	1	2	3	4	5	6	7	8	10	<p>Protective Devices</p> <p>0 None 1 Shoulder Belt Only 2 Lap Belt Only 3 Shoulder & Lap 4 Child Safety Seat 5 Helmet Used 6 Nonmotorist 7 Non-Activated Air Bag, Belts in Use 8 Non-Activated Air Bag, No Belts in Use 10 Air Bag Activated, Belts in Use 11 Air Bag Activated, No Belts in Use</p> <p>Ejection</p> <p>1 Not Ejected 2 Totally Ejected 3 Partially Ejected T Thrown from cycle etc.</p> <p>Trapped</p> <p>1 Not Trapped 2 Trapped / Extrication unit used 3 Trapped / other extrication method</p>	<p>Injury</p> <p>K Dead A Incapacitating B Non-Incapacitating C Possible 0 None Evident U Unknown</p> <p>Medical Care By</p> <p>1 Ambulance 2 Police Car 3 Helicopter 4 Private Vehicle 5 Not Transported</p>	<p>Unit Type</p> <p>1 Pedestrian 2 Pedalcycle 3 Motorcycle 4 Moped 6 Car 8 Pickup with Camper 7 Pickup / Van / Panel / Sport Utility Vehicle 12 Equestrian 30 Farm Equipment (List) 40 Construction Equip. (List)</p> <p>Commercial</p> <p>15 Bus 21 Single Unit Truck - 2 axle 6 Tires 22 Single Unit Truck - 3 axle 23 Truck with Trailer</p> <p>24 Bobtail 25 Tractor w/Semi Trailer 26 Tractor w/Double Trailer 27 Tractor w/Triple Trailer</p>	<p>Attachments</p> <p>1 Boat Trailer 2 Utility Trailer 3 Tractor 4 Tow</p> <p>5 Mobile Home 6 Other</p>
Front	Seating	Front														
1	2	3														
4	5	6														
7	8	10														

EXHIBIT

Note: -U indicates Unknown

5112071113135047150632V200

Received Time Nov. 14 11:40AM

Locality

1 Business/Commercial 3 School/Playground 5 Agricultural 7 Residential
 2 Industrial/Manufacturing 4 Recreational Area 6 Undeveloped

Light Conditions

1 Day 3 Dark - Street Lights On 5 Dark - No Street Lights
 2 Dawn/Dusk 4 Dark - Street Lights Off

Weather Conditions - Two Selections Possible

1 Clear 3 Rain 5 Sleet/Hail 7 Blowing Dust/Sand A Smoke/Smog
 2 Cloudy 4 Snow 8 Fog 8 Severe Cross Wlnds

Road Surface Conditions

1 Dry 3 Slush 5 Snow 7 Water
 2 Wet 4 Ice 6 Mud 9 Other

Other Road Conditions

0 None 4 High/Low Shoulder 8 Flooded
 1 Ruts/Bumps/Holes 5 Loose Gravel/Seal Coat A Poor Pavement
 2 Slick Asphalt (Bleeding) 8 Under Construction Markings
 3 Washboard 7 Lane Closed 8 Other

Officer # **5112** Case No. **07-P22586**

Road Type

1 2-Way & Raised/Depressed Dvlder 5 Ramp
 2 2-Way & 2-Way Left Turn Lane Dvlder 6 Alley
 3 One-Way 7 Rest Area
 4 2-Way & No Dvlder 8 Port of Entry
 A 2-Way & 2 Double Yellow Painted Dvlder 9 Other

Road Surface Type

1 Concrete 2 Paved (Asphalt/Brick) 3 Gravel/Stone 4 Dirt

Roadway Geometrics

1 Straight 2 Curve
 1 Upgrade/Downgrade 3 Hillcrest 5 Level

Traffic Control

0 None 4 Flashing Beacon 8 Officer/Flagger
 1 Stop Sign 5 Traffic Signal-Pad. Only A School Bus Signal
 2 Yield 6 R. R. Gates/Signal B No-Pass Barrier Line
 3 Traffic Signal 7 R. R. Flashing Beacon C Construction Signling

SPECIFY 1 Functioning 2 Not Functioning 3 Removed

UNIT # 1 CONTRIBUTING CIRCUMSTANCES - 3 Possible UNIT # 2

99 22 0 14

0 None 5 Improper Lane Change 11 Improper Turn 17 Wheel Defect 22 Inattention 28 Improperly Parked
 1 Exceeded Posted Speed 6 Following Too Close 12 Failed to Signal 18 Light Defect 23 Vision Obstruction 31 Previous Accident
 2 Speed Too Fast for Conditions 7 Drove Left of Center 13 Failed to Yield 19 Other Vehicle Defect 24 Asleep/Drowsy 32 Distraction In/on Vehicle (List)
 3 Too Slow for Traffic 8 Off Roadway / Over Corrected 14 Passed Stop Sign 20 Defect 25 Sick 26 Fatigued 35 Improper use of Turn Lane
 4 Improper Overtaking 10 Improper Backing 16 Tire Defect 21 Alcohol Impaired 27 Physical Impairment 98 Other

VISION OBSTRUCTION

0 None 3 Roadway Slope/Snowbank 7 Bright Headlights 12 Splash/Spray from Other Vehicle 15 Traffic Sign
 1 Curve in Road 4 Trees/Crop/Brush 8 Weather Conditions 18 Vehicle Stopped on Roadway 16 Billboard/Fence
 2 Hill Crest 5 Reflection from Surface 10 Rain/Snow/Ice on Windows 13 Moving Vehicle 17 Building
 6 Bright Sunlight 11 Cracked/Dirty Windows 14 Parked Vehicle 98 Other

POINT OF IMPACT

INITIAL Point of Impact 2
 PRINCIPLE Point of Impact 2

Auto / Motorcycle / Tractor with Semi Trailer. 13 Top & Windows 14 Undercarriage
 Trailing Unit #1 33 Top 34 Undercarriage
 Trailing Unit #2 53 Top 54 Undercarriage

EXTENT OF DEFORMITY

0 None 1 Very Minor 2 Minor 3 Minor/Moderate 4 Moderate 5 Moderate/Severe 6 Severe 7 Very Severe

Towed Due to Damage Yes No
 Towed By: **Best**
 Towed By: **Not Towed**
 Towed Due to Damage Yes No

Driver of UNIT # 1 ALCOHOL / DRUG INVOLVEMENT Driver of UNIT # 2

1 1 1
 1 Neither Alcohol or Drugs Detected 2 Yes - Alcohol 3 Yes - Drugs 4 Yes - Both
 Alcohol / Drug Test
 1 None Given 2 Test Refused 3 Blood Test 4 Urine Test 5 Breath Test 6 Field Test

BAC Test Results: Drug Used (if known): Drug Test Results BAC Test Results: Drug Used (if known): Drug Test Results

UNIT # 1 COMMERCIAL VEHICLE UNIT # 2
 Refer to Instruction Sheet before completing

Cargo Body

1 Bus 2 Van/Enclosed Box 3 Cargo Tank 4 Flatbed 5 Dump 6 Concrete Mixer 7 Auto Transporter 8 Garbage/Refuse 9 Other 10 Pickup Bed

Axles GVWR-Power GVWR-All Trailers ICC # For Load DOT # For Load
 Hazardous Material Placed: Yes No Spilled: Yes No Haz-Mat #

Carrier Name & ICC# or DOT# for Load obtained from...
 1 Shipping Papers 2 Vehicle Side 3 Driver 4 Log Book 9 Other

(If Carrier different from Vehicle Owner) Carrier Name Address City State Zip

Event	Unit # of Units Involved	Event Location
52	1 2	1

EVENTS - List events for ALL units in the order they occurred

Case No. **07-P22586** Page

- | | | | |
|-------------------------|-------------------------|------------------------------|-----------------------|
| 1 Overrun | 14 Pedestrian | 24 Bridge Rail | 41 Culvert |
| 2 Separation of Units | 15 Pedalcycle | 25 Overpass | 42 Curb |
| 3 Cargo Load Shift | 16 Railroad Train | 26 Guardrail Face | 43 Ditch |
| 4 Jack-Knife | 17 Domestic Animal | 27 Guardrail End | 44 Embankment |
| 5 Run off Road | 18 Wild Animal | 28 Median Barrier | 45 Fanco |
| 6 Down Hill Runaway | 19 Other Object | 30 Highway Traffic Sign Post | 46 Mailbox |
| 7 Fire/Explosion | 20 Parked Vehicle | 31 Overhead Sign Support | 47 Tree |
| 8 Gas/Inhalation | 21 Impact Attenuator | 32 Street Light Support | 48 Building Wall |
| 9 Other Noncollision | 22 Bridge/Pier/Abutment | 33 Utility Pole | 49 Other Fixed Object |
| 10 Loss of Control | 23 Bridge Parapet End | 38 Other Pole | |
| 11 Pushed/Jumped | | 40 Delineator Post | |
| 12 Non-Collision Injury | | | |
| 13 Immersion | | | |
| 71 Cause Back on Road | | | |
| 72 Drove LR of Center | | | |

Sidewiped Same 52

Sidewiped Opposite 53

Angle 54

Turning Events

Head-On 54

Angle 59

Rear-End 56

Same Dir 62

50 Head-On
51 Rear-End
60 Backed In
61 Parked Vehicle
99 Other

THE EVENT LOCATION

1 On Roadway	4 Roadside (Includes Sidewalk)	7 Median	A In Parking Lot
2 Left Shoulder	5 Outside Right of Way	8 Gore	B Parking Lot Access Road
3 Right Shoulder	6 Off Roadway - Loc Unknown	9 Other	F Private Property

FIRST EVENT RELATIONSHIP TO JUNCTION

UNIT # 1 ← 0 → UNIT # 2

0 Non/Junction	2 Intersection Related	4 Driveway/Alley Related	6 Ramp Related	8 Railroad Crossing Related
1 In Intersection	3 At Driveway/Alley	5 On Ramp	7 At Railroad Crossing	9 Other

GENERAL DIRECTION OF TRAVEL (If turning, select direction before turning)

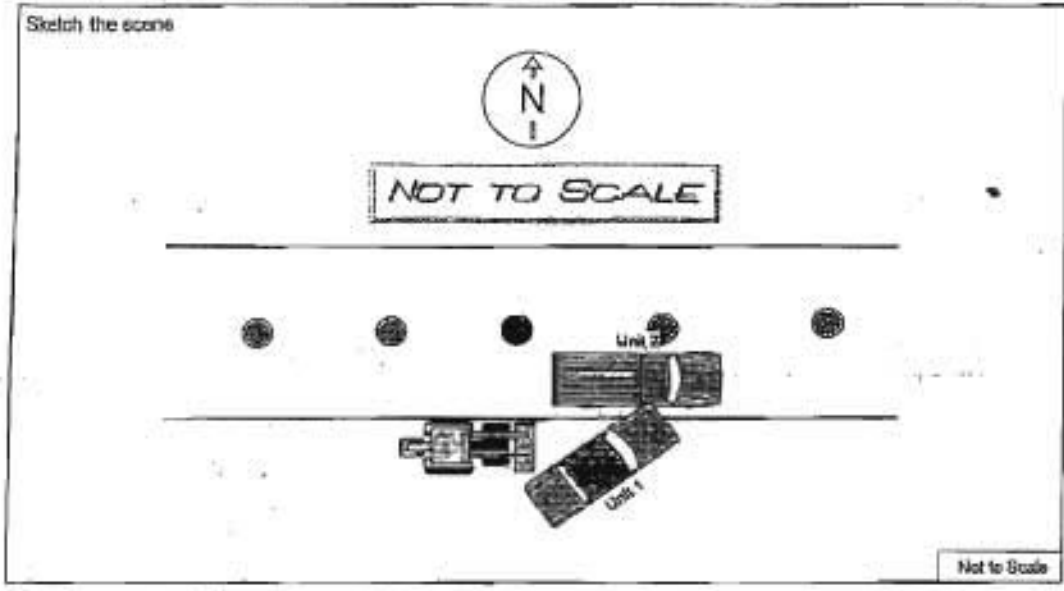
General Direction of Street	Unit Direction	General Direction of Street	Unit Direction
<input type="checkbox"/> South / North	<input type="checkbox"/> North <input type="checkbox"/> South	<input type="checkbox"/> South / North	<input type="checkbox"/> North <input type="checkbox"/> South
<input checked="" type="checkbox"/> West / East	<input checked="" type="checkbox"/> East <input type="checkbox"/> West	<input checked="" type="checkbox"/> West / East	<input checked="" type="checkbox"/> East <input type="checkbox"/> West

On Street: **E Center St**

FIRST Harmful Event: **52**

MOST Harmful Event: **52**

Driver / Ped Action: **1**



- Driver Actions**
- Going Straight
 - Turning Right
 - Right Turn on Red
 - Turning Left
 - Left Turn on Red
 - U-Turn
 - Merging
 - Changing Lanes
 - Passing
 - Negotiating Curve
 - Stopped in Traffic
 - Slowing in Traffic
 - Starting in Traffic
 - Parking
 - Entering Driveway/Alley
 - Leaving Driveway/Alley
 - Backing
 - Avoiding Obstacle
 - Avoiding Veh./Ped.
 - Pursuing Vehicle
 - Pleading Pursuit
 - Racing
 - Parked Vehicle
 - Driverless Vehicle in Motion
- Pedestrian/Pedalcycle Actions**
- Crossing at Painted Intersection
 - Crossing at Unpainted Intersection
 - Crossing at Non-Intersection X-walk
 - Crossing Not at Intersection
 - Walk/Ride with Traffic in Bike Lane
 - Walk/Ride with Traffic No Bike Lane
 - Walk/Ride Facing Traffic in Bike Lane
 - Walk/Ride Facing Traffic No Bike Lane
 - Standing on Roadway
 - Playing on Roadway
 - Working on Roadway
 - Enter/Leave School Bus
 - Not on Roadway
 - Other

Property Damage	(Name of Object Struck - Owner Name and Address)	Estimated Damage
None		\$

Narrative / Additional Information / Additional Passengers (indicate unit # and all information for additional passengers)

NOTE: See addendum page for crash narrative.

WITNESSES Name	Address	Home Phone	Work Phone

Investigating Officer's Name and #	Date of Report	Photos	Approved By	Date
X Ofc. C. Goss 5112	11/13/2007	Y <input type="checkbox"/> N <input checked="" type="checkbox"/>	It. S. Marchand	11 | 14 | 2007

Send ORIGINAL to: Office of Highway Safety, P. O. Box 7129, Boise, Idaho 83707-1129

Note: -U indicates Unknown

Idaho Vehicle Collision Report

Page 4

Narrative / Additional Information / Additional Passengers:

Case No. 07-P22586

001 Vehicle #2 was eastbound on Center traveling through the construction zone.
002 Vehicle #1 had exited the northbound off ramp off I-15, and turned right into
003 the area of dirt that was being prepared for black top. The driver of vehicle
004 #1 stated that she did not see any sign until she noticed a sign with an arrow
005 pointing for her to merge into the left lane. Believing that she was where she
006 was supposed to be in the construction zone, as she passed a parked steam
007 roller, she merged striking vehicle #2. The driver of vehicle #1 had a nose
008 bleed related to stress, and was taken to the hospital by family.

009 Approximate P.O.I. 400' east of the east curb of the northbound on ramp to
010 I-15.

011 40' south of the north road edge of Center.

Brendon C. Taylor
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Idaho State Bar #6078

2008 DEC -4 PM 4:58
CW
DEPT. OF CLERK

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and BENJAMIN L. WALTON,)	
)	
Plaintiffs,	)	Case No. CV-08-4528-PI
)	
vs.	)	ANSWER AND DEMAND FOR JURY TRIAL
)	
NANCY PATRICK,)	
)	
Defendant.)	

COMES NOW the above named Defendant, Nancy Patrick, by and through her attorneys, Merrill & Merrill, Chartered, and hereby answers the allegations of the Plaintiffs' Verified Complaint for Personal Injury Damages in Automobile Collision and Demand for Jury Trial (hereinafter referred to as "Complaint") and makes her demand for trial by jury.

FIRST DEFENSE

This Defendant denies all allegations of Plaintiffs' Complaint not specifically and expressly admitted herein.

SECOND DEFENSE

This Defendant answers the specific allegations of Plaintiffs' Complaint as follows, using the same enumeration as is in Plaintiffs' Complaint.

1. In response to Paragraph 1 of Plaintiffs' Complaint, Defendant is without sufficient information or knowledge regarding Plaintiff Mathew R. Bennett's residence to admit or deny the allegations set forth therein and therefore denies the same.
2. In response to Paragraph 2 of Plaintiffs' Complaint, Defendant is without sufficient information or knowledge regarding Plaintiff Benjamin L. Walton's residence to admit or deny the allegations set forth therein and therefore denies the same.
3. Defendant admits the allegations set forth in Paragraph 3 of Plaintiffs' Complaint.
4. Defendant admits the allegations set forth in Paragraph 4 of Plaintiffs' Complaint.

5. In response to Paragraph 5 of Plaintiffs' Complaint, Defendant admits that on or about October 18, 2007, Plaintiff Benjamin L Walton was driving, with Plaintiff Mathew R. Bennett as his passenger, through a construction zone on East Center Street near Tuscan Hills Plaza at about 11:30 a.m. in the morning. Defendant denies the description of the amount of traffic and the other remaining allegations in Paragraph 5 of Plaintiffs' Complaint.
6. In response to Paragraph 6 of Plaintiffs' Complaint, Defendant admits she (Nancy Patrick) exited from the freeway on the northbound ramp of I-15, and turned right into the area of dirt that was being prepared for blacktop; Defendant further admits that after she passed a parked steamroller that a collision between her vehicle and Plaintiffs' vehicle occurred. Defendant is without sufficient information or knowledge to admit or deny where exactly Plaintiff Walton's truck eventually came to a rest, and therefor denies those allegations. Defendant denies the characterization of the accident by Plaintiffs and further denies the remaining allegations in Paragraph 6 of Plaintiffs' Complaint.
7. Defendant denies the allegations set forth in Paragraph 7 of Plaintiffs' Complaint.
8. In response to Paragraph 8 of Plaintiffs' Complaint, Defendant admits that a copy of the Idaho Vehicle Collision Report on this case was attached as Exhibit 1 to Plaintiffs' Complaint. Defendant further admits that the report listed a contributing circumstance by Nancy Patrick of inattentive driving and no contributing circumstances attributed to Benjamin Walton were listed in that report. Defendant is without sufficient information or knowledge to admit or deny that, "the plaintiff Mathew R. Bennett has no comparative fault since he was a passenger in the vehicle," and therefore denies that allegation and denies the other remaining allegations in Paragraph 8 of Plaintiffs' Complaint.
9. In response to Paragraph 9 of Plaintiffs' Complaint, Defendant admits that after the accident Plaintiffs Walton and Bennett were at the Portneuf Medical Center emergency room. Defendant is without sufficient information or knowledge to admit or deny any allegation regarding injuries and pain Plaintiffs may have suffered and therefore denies any and all such allegations.
10. Defendant denies the allegations set forth in Paragraph 10 of Plaintiffs' Complaint.
11. Defendant denies the allegations set forth in Paragraph 11 of Plaintiffs' Complaint.
12. In response to Paragraph 12 of Plaintiffs' Complaint, Defendant is without sufficient information or knowledge to admit or deny whether Mathew R. Bennett has no comparative fault and therefore denies that allegation and denies the other remaining allegations in Paragraph 12 of Plaintiffs' Complaint.

13. In response to Paragraph 13 of Plaintiffs' Complaint, Defendant admits to receiving records that indicate after the accident Plaintiff Mathew Bennett was treated at the Portneuf Medical Center emergency room; however, Defendant is without sufficient information or knowledge to admit or deny any allegation regarding specific injuries and pain Plaintiff may have suffered and whether such injuries or treatment were related to the motor vehicle accident at issue in this lawsuit and therefore denies any and all such allegations together with any remaining allegations set forth in Paragraph 13 of Plaintiffs' Complaint.
14. In response to Paragraph 14 of Plaintiffs' Complaint, Defendant admits to receiving records that indicate Plaintiff Mathew Bennett was treated by Dr. Evan Holmstead; however, Defendant is without sufficient information or knowledge to admit or deny any allegation regarding specific injuries and pain Plaintiff may have suffered and whether such injuries or treatment were related to the motor vehicle accident at issue in this lawsuit and therefore denies any and all such allegations together with any remaining allegations set forth in Paragraph 14 of Plaintiffs' Complaint.
15. In response to Paragraph 15 of Plaintiffs' Complaint, Defendant admits that Plaintiff Bennett continued to work and that he experienced back pain while bending over in November of 2007. Defendant is without sufficient information or knowledge to admit that Plaintiff had suffered continued back pain or that the pain he experienced in November was a flared or increased back pain as opposed to a new back pain, and therefore denies those and any other remaining allegations set forth in Paragraph 15 of Plaintiffs' Complaint.
16. In response to Paragraph 16 of Plaintiffs' Complaint, Defendant admits to receiving records that indicate Plaintiff Mathew Bennett was treated at the Portneuf Medical Center on November 20, 2007 and later received physical therapy at Portneuf Physical Therapy; however, Defendant is without sufficient information or knowledge to admit or deny any allegation regarding specific injuries and pain Plaintiff may have suffered and whether such injuries or treatment were related to the motor vehicle accident at issue in this lawsuit and therefore denies any and all such allegations together with any remaining allegations set forth in Paragraph 16 of Plaintiffs' Complaint.
17. In response to Paragraph 17 of Plaintiffs' Complaint, Defendant admits to receiving records that indicate Dr. Evan Holmstead signed a work excuse for Plaintiff Mathew Bennett in late November of 2007, after Mathew Bennett reported that he "injured it at work," (referring to his low back). Defendant is without sufficient information or knowledge to admit or deny any allegation regarding specific injuries, treatment, pain or missed work that Plaintiff may have suffered or incurred and whether such

- injuries, treatment, pain or missed work were related to the motor vehicle accident at issue in this lawsuit and therefore denies any and all such allegations together with any remaining allegations set forth in Paragraph 17 of Plaintiffs' Complaint.
18. In response to Paragraph 18 of Plaintiffs' Complaint, Defendant admits to receiving records that indicate Plaintiff Mathew Bennett was seen by Dr. Henry G. West, Jr. of West Chiropractic; however, Defendant is without sufficient information or knowledge to admit or deny any allegation regarding specific injuries and pain Plaintiff may have suffered and whether such injuries or treatment were related to the motor vehicle accident at issue in this lawsuit and therefore denies any and all such allegations together with any remaining allegations set forth in Paragraph 18 of Plaintiffs' Complaint.
 19. Defendant is without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 19 of Plaintiffs' Complaint and therefore denies the same.
 20. In response to Paragraph 20 of Plaintiffs' Complaint, Defendant admits to receiving records that indicate after the accident Plaintiff Benjamin Walton was seen at the Portneuf Medical Center emergency room and treated by Dr. Robert Beckstead; however, Defendant is without sufficient information or knowledge to admit or deny any allegation regarding specific injuries and pain Plaintiff may have suffered and whether such injuries or treatment were related to the motor vehicle accident at issue in this lawsuit and therefore denies any and all such allegations together with any remaining allegations set forth in Paragraph 13 of Plaintiffs' Complaint.
 21. In response to Paragraph 21 of Plaintiffs' Complaint, Defendant admits to receiving records that indicate Plaintiff Walton was treated by Dr. Richard Maynard on or about October 26, 2007; however, Defendant is without sufficient information or knowledge to admit or deny any allegation regarding specific injuries and pain Plaintiff may have suffered and whether such injuries or treatment were related to the motor vehicle accident at issue in this lawsuit and therefore denies any and all such allegations together with any remaining allegations set forth in Paragraph 21 of Plaintiffs' Complaint.
 22. In response to Paragraph 21 of Plaintiffs' Complaint, Defendant admits to receiving records that indicate Plaintiff Walton was treated by Dr. Richard Maynard on or about November 9, 2007; however, Defendant is without sufficient information or knowledge to admit or deny any allegation regarding specific injuries and pain Plaintiff may have suffered and whether such injuries or treatment were related to the motor vehicle accident at issue in this lawsuit and therefore denies any and all such

allegations together with any remaining allegations set forth in Paragraph 21 of Plaintiffs' Complaint.

23. In response to Paragraph 23 of Plaintiffs' Complaint, Defendant admits to receiving records that indicate Plaintiff Benjamin Walton was seen by Dr. Henry G. West, Jr. of West Chiropractic; however, Defendant is without sufficient information or knowledge to admit or deny any allegation regarding specific injuries and pain Plaintiff may have suffered and whether such injuries or treatment were related to the motor vehicle accident at issue in this lawsuit and therefore denies any and all such allegations together with any remaining allegations set forth in Paragraph 23 of Plaintiffs' Complaint.
24. In response to Paragraph 24 of Plaintiffs' Complaint, Defendant admits to receiving records that indicate Plaintiff Benjamin Walton underwent an MRI based upon the recommendation of Dr. Henry West, and that the report for the MRI noted "minor posterior broad-based disc bulges at C4-5 and C5-6 but no lateralizing disc protrusion." Defendant is without sufficient information or knowledge to admit or deny any allegation regarding specific diagnoses, injuries and pain Plaintiff may have suffered and whether such injuries or treatment were related to the motor vehicle accident at issue in this lawsuit and therefore denies any and all such allegations together with any remaining allegations set forth in Paragraph 24 of Plaintiffs' Complaint.
25. Defendant is without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 25 of Plaintiffs' Complaint and therefore denies the same.
26. Defendant is without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 26 of Plaintiffs' Complaint and therefore denies the same.

AFFIRMATIVE DEFENSES

I.

Plaintiffs' Complaint fails to state a claim against this Defendant upon which relief may be granted.

II.

Without admitting any allegation in the Complaint, this Defendant states and alleges that any amounts of Plaintiffs' recovery, must be reduced and set off by the compensation received by either Plaintiff from or on behalf of any other party responsible for the events alleged in the Complaint or otherwise responsible for payment for the damages Plaintiff alleges to have sustained.

III.

Without admitting any allegation in the Plaintiffs' Complaint not previously admitted herein, this Defendant alleges that the negligence of the parties and other individuals must be compared pursuant to I.C. § 6-801 et seq.

IV.

One or more of Plaintiff's injuries and damages, if any, may have been proximately caused by the negligent and careless misconduct and acts of other persons with and for whom Defendant has no legal relationship or responsibility.

V.

One or more of the Plaintiff's injuries and damages, if any, were caused by a superceding or intervening action, not attributable to Defendant.

VI.

To the extent that one or more Plaintiff, by his conduct, have failed to mitigate his damages and losses, if any, as alleged in the Complaint, such failure to mitigate such damages completely bars or reduces the damages claimed against the Defendant.

VII.

Without admitting any allegation in the Plaintiffs' Complaint not previously admitted herein, this Defendant alleges that Plaintiffs have failed to join an indispensable party to the action.

VIII.

Plaintiffs are barred from recovery by Defendant's filing for relief under the Bankruptcy laws in the United States District Court in Idaho (Pocatello).

IX.

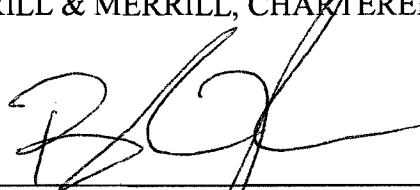
This Defendant reserves the right to assert additional defenses after the discovery has been concluded in this matter.

WHEREFORE, this Defendant prays that Plaintiffs take nothing by way of their Complaint, that the Complaint be dismissed with prejudice, and that Defendant be awarded her costs and attorney fees, and such other and further relief as the Court deems just.

DATED this 4th day of December, 2008.

MERRILL & MERRILL, CHARTERED

By: _____

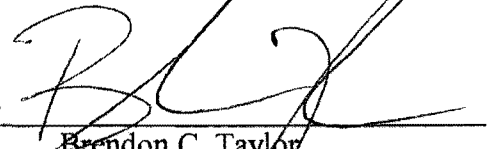

Brendon C. Taylor
Attorneys for Defendant

DEMAND FOR JURY TRIAL

Pursuant to IRCP Rule 38(b), Defendant demands trial by jury in the above-referenced matter.

DATED this 4th day of December, 2008.

MERRILL & MERRILL, CHARTERED

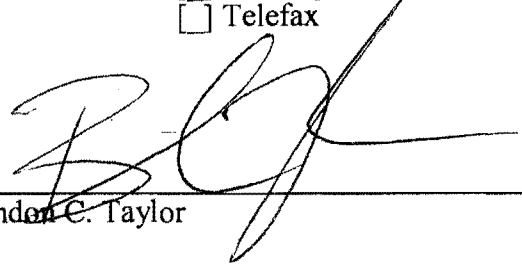
By 
Brendon C. Taylor
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Brendon C. Taylor, the undersigned, one of the attorneys for the Defendant, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing Notice of Appearance was this 4th day of December, 2008, served upon the following in the manner indicated below:

Charles Johnson
JOHNSON OLSON, CHARTERED
P.O. Box 1725
Pocatello, Idaho 83204-1725

- U.S. Mail
- Hand Delivery
- Overnight Delivery
- Telefax


Brendon C. Taylor

8

Charles Johnson
JOHNSON OLSON CHARTERED
 419 West Benton
 P.O. Box 1725
 Pocatello, Idaho 83204-1725
 Telephone: (208) 232-7926
 Facsimile: (208) 232-9161
 ISB No. 2464
 E-Mail: cjlaw@allidaho.com
 Attorney for Plaintiffs

FILED
 BANNOCK COUNTY
 CLERK OF THE COURT
 2009 APR 13 AM 10:12
 BY: *[Signature]*
 DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

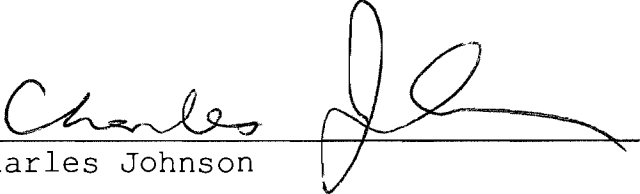
MATHEW R. BENNETT and	)	Case No. CV-08-4528-OC
BENJAMIN L. WALTON,)	
)	
Plaintiffs,	)	MOTION FOR SUMMARY JUDGMENT
)	
vs.)	
)	
NANCY PATRICK,)	
)	
Defendant.)	
_____)	

The plaintiffs, Mathew R. Bennett and Benjamin L. Walton, through counsel of record, hereby files this motion for summary judgment in this case. This motion for summary judgment is based on the pleadings and documents on file in this matter, including the verified complaint (which acts as an affidavit for purposes of summary judgment), the attached AFFIDAVIT OF JASON WALTON, and the DEFENDANT'S ANSWERS AND RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSION filed with the Motion to Compel in this case. This motion for summary judgment is filed pursuant to the Idaho Rules of Civil Procedure, including Idaho Rule of Civil Procedure 56 and otherwise at law.

The plaintiffs would show the Court that there is no genuine issue of any material fact in dispute in this case as to the liability of defendant Nancy Patrick. Nancy Patrick exited a freeway in a construction site and failed to yield the right of way causing the collision in this case; see defendant's ANSWER TO INTERROGATORY NO. 1. There is no statement anywhere in the record of any action by Benjamin Walton that violated any standard of care or could be construed as negligence or comparative fault.

WHEREFORE, the plaintiffs move for summary judgment on liability in this case. The case should proceed to trial on damages only against the defendant Nancy Patrick.

DATED this 10th day of April 2009.

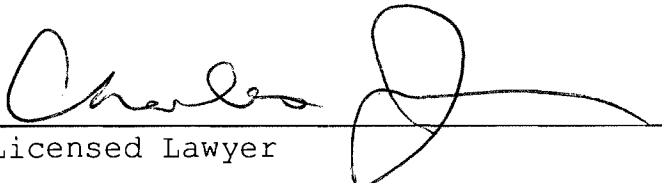

Charles Johnson

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing document by placing the same in the United States mail, postage prepaid, addressed as follows:

Jared A. Steadman
Brendon C. Taylor
MERRILL & MERRILL, CHARTERED
P.O. Box 991
Pocatello, Idaho 83204-0991

on this 10th day of April 2009.


Licensed Lawyer

Charles Johnson
JOHNSON OLSON CHARTERED
 419 West Benton
 P.O. Box 1725
 Pocatello, Idaho 83204-1725
 Telephone: (208) 232-7926
 Facsimile: (208) 232-9161
 ISB No. 2464

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

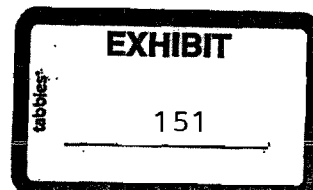
MATHEW R. BENNETT and	)	Case No. CV-08-4528-OC
BENJAMIN L. WALTON,)	
	)	AFFIDAVIT OF JASON WALTON
Plaintiffs,)	
)	
vs.)	
)	
NANCY PATRICK,)	
)	
Defendant.)	
_____)	

STATE OF IDAHO)
 : ss
 County of Bannock)

Jason Walton, after first being duly sworn under oath, does hereby depose and state under penalty of perjury, as follows:

1. My name is Jason Walton. I make this affidavit based on my own knowledge and information.
2. I am the brother of Benjamin L. Walton.
3. I was following Benjamin Walton and his passenger, Mathew Bennett, as they were driving through a construction zone on East Center Street with the flow of traffic at about 11:30 a.m. on October 18, 2007. There were several vehicles in front of Ben

AFFIDAVIT



1

Walton, behind him, and traffic in the opposite lane, since only two lanes of traffic were open because of road construction.

4. A car driven by a woman later identified as Nancy Patrick, then exited from the freeway, on the northbound ramp of I-15, and turned right in the area of dirt that was being prepared for blacktop, passed the parked steamroller, striking Ben Walton, in a collision. This area was marked as a restricted construction zone with no vehicles being allowed. Nancy Patrick had passed a parked steamroller striking the Walton vehicle from the left blind side near the passenger seat in a sudden, unexpected and violent collision. The Walton truck eventually came to a stop straddling the lane of oncoming traffic.

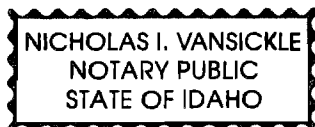
5. Benjamin Walton could not go forward, backwards or sideways because of other traffic in his lane and traffic in the opposing lane. There was absolutely no way he could have avoided the collision that took place in this case which was the total fault of the driver Nancy Patrick.

6. The accident was caused by Nancy Patrick. Moreover, there was no contributing fault by Benjamin Walton.

DATED this 23rd day of February 2009.

Jason L. Walton
Jason Walton, Affiant

SUBSCRIBED AND SWORN TO before me by Jason Walton on this 23rd day of February 2009.



(SEAL)

Nicholas I. Vansickle
NOTARY PUBLIC FOR IDAHO
Residing at Pocatello
My commission expires: 10/14/2010

AFFIDAVIT

Charles Johnson
JOHNSON OLSON CHARTERED
 419 West Benton
 P.O. Box 1725
 Pocatello, Idaho 83204-1725
 Telephone: (208) 232-7926
 Facsimile: (208) 232-9161
 ISB No. 2464
 E-Mail: cjlaw@allidaho.com
 Attorney for Plaintiffs

FILED
 BANNOCK COUNTY
 CLERK OF THE COURT
 2008 APR 13 AM 10:11
 BY
 DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and	)	Case No. CV-08-4528-OC
BENJAMIN L. WALTON,)	
)	
Plaintiffs,	)	MOTION TO COMPEL
)	
vs.)	
)	
NANCY PATRICK,)	
)	
Defendant.)	
_____)	

The plaintiffs, Mathew R. Bennett and Benjamin L. Walton, through counsel of record, hereby file this motion to compel full and complete responses to the PLAINTIFFS' FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSIONS TO DEFENDANT in this case. This motion is based on the pleadings and documents on file in this matter, including the DEFENDANT'S ANSWERS AND RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSION and the *meet and confer* letters of the parties attached as Exhibits. This motion is filed pursuant to the Idaho Rules of Civil Procedure, including IRCP 37(a).

The plaintiffs would show the Court that they filed discovery requests, including contention interrogatories on the factual and legal basis for the defendant's affirmative defenses. The defendant's responses state that they cannot state any such basis, but as discovery progresses they will supplement the answers. The plaintiffs would show the Court the defendants must be compelled to provide full and complete responses at this time as follows.

A. FACTS

1. The plaintiffs filed their verified complaint under oath in this case on October 28, 2008, over six months ago. The plaintiffs then served the defendant Nancy Patrick, and an Answer and Demand for Jury Trial was filed on December 4, 2008. There was a short period of time when stay relief was obtained from the Bankruptcy Court to allow these proceedings to continue against defendant Nancy Patrick's insurance carrier only.

2. The plaintiffs filed their PLAINTIFFS' FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS, AND REQUESTS FOR ADMISSIONS TO DEFENDANT on January 22, 2009.

3. The DEFENDANT'S ANSWERS AND RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSION was filed on February 20, 2009. A true and correct copy of these responses is attached as Exhibit A.

4. The plaintiffs Bennett and Walton, through counsel, then wrote a *meet and confer* letter to the defendant on the inadequacy of the discovery responses under IRCP 37. A true and correct copy of this letter is attached as Exhibit B.

5. The defendant responded to the *meet and confer* letter by letter dated April 7, 2009. A true and correct copy of this response letter is attached as Exhibit C.

B. THE DEFENDANT'S INTERROGATORY REPLIES PROVIDE NO ANSWERS

6. First, Answer to Interrogatory No. 1 does not provide any basis for not paying the claim. There was really no answer or reply to Interrogatory Nos. 3 through 11 or 13, but instead a statement that "At this early stage in the discovery process, Defendant cannot yet state with certainty her factual and legal basis for the above claim. As discovery proceeds and further investigations are made, Defendant will supplement this answer."

7. Further, in this case, the defendant states in her *meet and confer* letter (Exhibit C) that they need depositions of the plaintiffs to respond to the discovery requests. They claim they have not had the opportunity to obtain the plaintiffs' version of the facts.

8. However, as noted in the defendant's discovery responses (Exhibit A on page 6 in response to request for production number 1) and the *meet and confer* letter dated April 7, 2009 (Exhibit C on page 2), the defendant Nancy Patrick has tape recorded the plaintiff Benjamin Walton's statement. Therefore, the defendant Nancy Patrick and her representatives have had the opportunity to take the plaintiff Walton's statement, and there is no further claim of what a deposition would disclose. Furthermore, the plaintiffs have provided a full and complete version of what happened in this case in their verified complaint and answer to the defendant's discovery

requests which are under oath in this case.

9. The plaintiffs' meet and confer letter (Exhibit B) also requested deposition dates for the defendant. However, in the response (Exhibit C) no dates were provided for any depositions.

10. There is no basis for the claim that a party need not provide answers to written discovery requests based on the alleged need for a further or second statement or deposition under oath. Idaho Rule of Civil Procedure 33(a)(1) provides that discovery requests can be served with the Summons and complaint. Idaho Rule of Civil Procedure 33(a)(2) provides that the defendant must provide an answer or objection and cannot claim lack of knowledge as a basis for failure to respond to the discovery. Idaho Rule of Civil Procedure 33(b) provides that the Court may order further responses to discovery.

C. THE DEFENDANT'S INSURANCE POLICY WAS NOT PRODUCED

11. There was no production of the defendant's insurance policy that was in effect as expressly and clearly required by Idaho Rule of Civil Procedure 26(b)(2). In this case the defendant has not produced the Nancy Patrick insurance policy despite a prior written request, a formal written discovery request, a *meet and confer* letter; and the lapse of several months. This insurance policy is crucial in this case since Nancy Patrick has filed bankruptcy and the only avenue for recovery will be the benefits she has available through her insurance carrier; supplemented by underinsured benefits available to the plaintiffs Bennett and Walton. There are also issues of the validity of the denial of

medical payments coverage under the applicable policies.

12. The Court should note that the failure to produce the insurance policy in this case is crucial and has resulted in further proceedings and appeals in other civil cases. See e.g., *Marcie Rae Hill v. American Family Insurance Company dba American Family Insurance*; Bannock County Case No. CV 08 3527 OC and Idaho Supreme Court Docket No. 36311-2009.

13. There is no good faith reason stated by the defendant for failure to produce this insurance policy. The Court should order and compel its production within ten (10) days immediately in this case.

D. INADEQUATE RESPONSES TO REQUESTS FOR ADMISSION

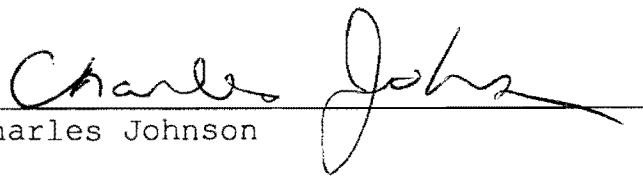
14. The responses to Requests for Admissions are incomplete and inadequate as follows: 1, 2 (especially since Walton is also insured by defendant's insurance company), 7, 9, 12, and 13 through 26. Rather, there was a statement made that "At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer".

15. The Court should note that there is no Idaho case that allows a party to defer responses to discovery until after depositions. The Court should also note that if there is actually no factual or legal basis for the defendant's affirmative defenses then the Answer was filed in violation of the requirements of Idaho

Rule of Civil Procedure 11(a)(1) which requires "that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation."

WHEREFORE, the plaintiffs in this case request that the Court order the defendant to either provide full and complete answers to the discovery before the taking of depositions or to strike the defendant's affirmative defenses and enter a judgment against the defendant for liability with damages to be established at the jury trial scheduled in this case.

DATED this 10th day of April 2009.

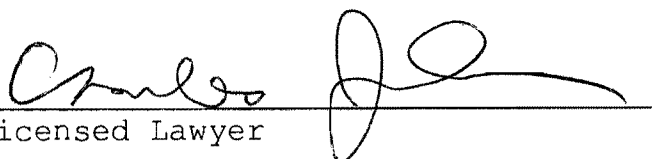

Charles Johnson

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing document by placing the same in the United States mail, postage prepaid, addressed as follows:

Jared A. Steadman
Brendon C. Taylor
MERRILL & MERRILL, CHARTERED
P.O. Box 991
Pocatello, Idaho 83204-0991

on this 10th day of April 2009.

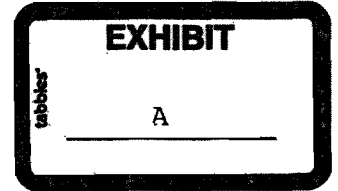

Licensed Lawyer

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 Jared A. Steadman
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RECEIVED

FEB 20 2009

JOHNSON OLSON, CHTD



Attorneys for Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and BENJAMIN L. WALTON,)	
	)	Case No. CV-08-4528-PI
)	
Plaintiffs,	)	DEFENDANT'S ANSWERS AND
	)	RESPONSES TO PLAINTIFFS' FIRST
vs.	)	SET OF INTERROGATORIES,
	)	REQUESTS FOR PRODUCTION AND
NANCY PATRICK,	)	REQUESTS FOR ADMISSION
)	
Defendant.)	
_____)	

COMES NOW the Defendant, by and through his counsel of record, Brendon C. Taylor of Merrill & Merrill, Chartered and hereby responds to Plaintiffs' First Set of Interrogatories, Request for Production of Documents and Request for Admissions to Defendant as follows:

INTERROGATORIES

INTERROGATORY NO.1: Describe fully and completely:

(a) defendant Patrick's version of what happened at the dates, times and places of the incident and collision that is the subject matter of this litigation;

(b) where defendant Patrick was going at the time of the collision;

(c) everything the defendant Patrick can recall that was said by any party about the collision in this case; and

(d) any and all reasons defendant Patrick may allege that she was not at fault, or does not have to pay the plaintiffs' claims set out in the complaint in this case.

ANSWER TO INTERROGATORY NO. 1: Defendant was traveling to fuel up her

vehicle at Maverick on October 18, 2007. She pulled off the freeway and followed the arrows in the direction of Maverick. As she was waiting for a car to go by from up the hill, she released the brake some and rolled out too far and struck a pickup truck. Defendant can only recall speaking with Officer Goss and an Idaho Department of Transportation employee and the substance of the conversation consisted only of what is already provided in this answer. At this early stage in the discovery process, Defendant cannot set out the reasons she would not have to pay Plaintiffs' claims in this matter. As discovery proceeds and depositions are taken, Defendant will be able to set out with certainty her defenses.

INTERROGATORY NO.2: Set out the name, address, telephone number, occupation, and relationship of each and every individual known to defendant Patrick who have knowledge of, or who purports to have knowledge of, any of the facts of this litigation, and/or discoverable matters involved in this litigation;

(a) state the substance of all information or knowledge about the matters of this litigation known to each such person, and whether or not any such person gave any statement or account (orally or in writing) of his or her knowledge of this litigation, and if so, give the date and substance of the same, or attach a copy to defendant's answer to these interrogatories; and

(b) please state if defendant Patrick expects to call this person as a witness in this action.

ANSWER TO INTERROGATORY NO. 2:

Objection. To the extent this interrogatory calls for information protected by the attorney-client privilege or the attorney work product doctrine, Defendant objects to the same. Without waiving such objection, Defendant states as follows:

- 1) Plaintiff Benjamin Walton. Plaintiff Walton was operating the vehicle at the time of the accident and would be able to testify as to the occurrence itself. Plaintiff gave a statement orally, which is attached hereto.
- 2) Plaintiff Mathew Bennett. Plaintiff Bennett was a passenger in Plaintiff Walton's vehicle at the time of the accident and would be able to similarly testify.
- 3) Officer Goss. Officer Goss can testify as to his investigation of the accident scene.
- 4) Plaintiffs' medical care providers. Plaintiffs have presumably sought medical attention for their alleged injuries. Such providers would be able to testify as to Plaintiffs' medical condition.
- 5) Defendant. Defendant would be able to testify as to the facts leading up to the

accident. Defendant gave a statement to her insured about the accident on October 22, 2007.

Defendant has not yet made final decisions regarding whom she will call as witnesses in this matter. Defendant anticipates she may call any of the above as witnesses and that more witnesses may come to light at a later time. Defendant reserves the right to amend or supplement this answer.

INTERROGATORY NO.3: Identify each person whom defendant Patrick expects to call as an expert witness at trial and give the home and business address of each one identified, and as to any expert witness:

- (a) state the subject matter on which each of the above witnesses is expected to testify;
- (b) state the substance of the facts on which the expert is expected to testify;
- (c) state the opinions to which the expert is expected to testify; and
- (d) state the name and address of any school or university where the individual received education or training, the dates when they attended each school or university and the name or description of each degree the individual received, including the date when each was received, and the name of the school from which received.

ANSWER TO INTERROGATORY NO. 3: Defendant has not yet made final decisions regarding whom she will call as expert witnesses in this trial. As such decisions are made, Defendant will supplement this response.

INTERROGATORY NO.4: Please describe and state with particularity each and every document, photograph, or object which defendant Patrick intends to offer as an exhibit at the trial of this matter, and provide a general description thereof, whether defendant has a copy thereof, the present location thereof, and the name and address of the person, firm, or entity who has possession thereof.

ANSWER TO INTERROGATORY NO. 4: Defendant has not yet made final decisions regarding what she intends to produce as exhibits at trial. As such decisions are made, Defendant will supplement this answer. Defendant anticipate she may use any of the documents or items attached hereto or attached to Plaintiffs' discovery responses.

INTERROGATORY NO.5: Please state the factual and legal basis for defendant Patrick's first defense that the plaintiff's claim fails to state a cause of action against the defendant Patrick upon which relief can be granted.

ANSWER TO INTERROGATORY NO. 5: At this early stage in the discovery

process, Defendant cannot yet state with certainty her factual and legal bases for the above claim. As discovery proceeds and further investigations are made, Defendant will supplement this answer.

INTERROGATORY NO.6: Please state the factual and legal basis for defendant Patrick's second affirmative defense that alleges that any amounts of plaintiff's recovery, must be reduced and set off by the compensation received by either plaintiff from or on behalf of any party responsible for the events alleged in the complaint or otherwise responsible for payment for the damages plaintiff alleges to have sustained.

ANSWER TO INTERROGATORY NO. 6: At this early stage in the discovery process, Defendant cannot yet state with certainty her factual and legal bases for the above claim. As discovery proceeds and further investigations are made, Defendant will supplement this answer.

INTERROGATORY NO.7: Please state the factual and legal basis for defendant Patrick's third affirmative defense that this defendant alleges that the negligence of the parties and other individuals must be compared pursuant to I.C. 6-801, et seq.

ANSWER TO INTERROGATORY NO. 7: At this early stage in the discovery process, Defendant cannot yet state with certainty her factual and legal bases for the above claim. As discovery proceeds and further investigations are made, Defendant will supplement this answer.

INTERROGATORY NO.8: Please state the factual and legal basis for defendant Patrick's fourth affirmative defense that one or more of plaintiff's injuries and damages, if any, may have been proximately caused by the negligent and careless misconduct and acts of other persons with and for whom defendant has no legal relationship or responsibility.

ANSWER TO INTERROGATORY NO. 8: At this early stage in the discovery process, Defendant cannot yet state with certainty her factual and legal bases for the above claim. As discovery proceeds and further investigations are made, Defendant will supplement this answer.

INTERROGATORY NO.9: Please state the factual and legal basis for defendant Patrick's fifth affirmative defense that one or more of the plaintiff's injuries and damages, if any, were caused by a superseding or intervening action, not attributable to defendant.

ANSWER TO INTERROGATORY NO. 9: At this early stage in the discovery process, Defendant cannot yet state with certainty her factual and legal bases for the above

claim. As discovery proceeds and further investigations are made, Defendant will supplement this answer.

INTERROGATORY NO. 10: Please state the factual and legal basis for defendant Patrick's sixth affirmative defense that to the extent that one or more plaintiff, by his conduct, have failed to mitigate his damages and losses, if any, as alleged In the complaint, such failure to mitigate such damages completely bars or reduces the damages claimed against the defendant.

ANSWER TO INTERROGATORY NO. 10: At this early stage in the discovery process, Defendant cannot yet state with certainty her factual and legal bases for the above claim. As discovery proceeds and further investigations are made, Defendant will supplement this answer.

INTERROGATORY NO. 11: Please state the factual and legal basis for defendant Patrick's seventh affirmative defense that this defendant alleges that plaintiffs have failed to join an indispensable party to this action.

ANSWER TO INTERROGATORY NO. 11: At this early stage in the discovery process, Defendant cannot yet state with certainty her factual and legal bases for the above claim. As discovery proceeds and further investigations are made, Defendant will supplement this answer.

INTERROGATORY NO. 12: Please state the factual and legal basis for defendant Patrick's eighth affirmative defense that plaintiffs are barred from recovery by defendant's filing for relief under the Bankruptcy laws in the United States District Court of Idaho (Pocatello), in light of the stay relief order entered in that case that allows that action to continue; or state that this defense has been withdrawn.

ANSWER TO INTERROGATORY NO. 12: Plaintiffs continue to be barred from recovery from Defendant personally by virtue of the automatic stay or Defendant's discharge in bankruptcy. Defendant does not withdraw such defense, but does acknowledge that to the extent Plaintiff's insurance provider is liable for Defendant's alleged damages, such liability is not barred on the basis of the bankruptcy filing.

INTERROGATORY NO.13: Please state the factual and legal basis for defendant Patrick's ninth affirmative defense that this defendant reserves the right to assert additional defenses after the discovery has been concluded in this matter.

ANSWER TO INTERROGATORY NO. 13: More affirmative defenses may arise during the course of discovery and litigation. As such matters come to light, Defendant will

supplement this answer.

REQUESTS FOR PRODUCTION

GENERAL OBJECTION

Defendant objects to Plaintiffs' definition of the word "document" for purposes of these requests for production, specifically to the extent Plaintiffs cite the definition to the Idaho Rules of Civil Procedure. Notwithstanding this objection, Defendant responds to Plaintiffs' requests as follows.

REQUEST FOR PRODUCTION NO.1: All witness statements, accounts or reports of the incident or occurrence that is the subject of this litigation.

ANSWER TO REQUEST FOR PRODUCTION NO. 1: Objection. To the extent this request calls for the production of documents protected by the attorney-client privilege or the attorney work product doctrine, Defendant objects to the same. Without waiving this objection, Defendant refers Plaintiffs to Ben Walton's statement to Defendant's insurer attached hereto as Exhibit A.

REQUEST FOR PRODUCTION NO.2: All photographs, drawings, or other reproductions of the accident scene, vehicles, or any other photos that are relevant to the incident or occurrence that is the subject of this litigation.

ANSWER TO REQUEST FOR PRODUCTION NO. 2: See police report attached hereto as Exhibit B.

REQUEST FOR PRODUCTION NO.3: All documents in the possession and control of defendant Patrick that discuss in any way the facts or claims in this case.

ANSWER TO REQUEST FOR PRODUCTION NO. 3: Objection. Defendant objects to this request to the extent it calls for the production of documents protected by the attorney-client privilege or the attorney work product doctrine and to the extent it is overbroad. Without waiving this objection, Defendant refers Plaintiff to all the documents already hereto attached along with the policy of insurance which will be produced at a later time.

REQUEST FOR PRODUCTION NO.4: All documents that discuss any insurance agreement, or other document that discuss in any way the existence and contents of any insurance agreement, under which any person on insurance business may be liable to satisfy part or all of the judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; as discussed in Idaho Rule of Civil Procedure 26 (b) (2). This includes automobile and excess or umbrella policies.

ANSWER TO REQUEST FOR PRODUCTION NO. 4: Objection. To the extent this request for production calls for information protected by the attorney-client privilege or the attorney work product doctrine, Defendant objects to the same. Without waiving this objection, Defendant answers that she is in possession of no such non-objectionable documents not already hereto attached. The declaration sheet of Defendant's insurance policy has been requested and this response will be supplemented when the policy arrives.

REQUEST FOR PRODUCTION NO.5: All documents defendant Patrick intends to introduce into evidence at the trial in response to the above requests.

ANSWER TO REQUEST FOR PRODUCTION NO. 5: Defendant has not yet made her final decisions regarding which documents she will produce at trial as exhibits. As such decisions are made, Defendant will supplement this response. Defendant answers further that she may use any documents hereto attached or any documents produced by Plaintiffs.

REQUEST FOR PRODUCTION NO.6: All documents relevant to the incident that is the subject matter of this litigation not produced in response to the above requests.

ANSWER TO REQUEST FOR PRODUCTION NO. 6: Objection. Defendant objects to this request to the extent it calls for documents or items protected by the attorney-client privilege to the attorney work product doctrine and to the extent it is overbroad and unduly burdensome. Without waiving this objection, Defendant answers that she is in possession of some limited documentation from Dr. Henry West, but such information was provided by Plaintiff's counsel. Defendant is also in possession of surveillance of Plaintiffs. The surveillance is attached hereto as Exhibit C. Defendant is in possession of no other non-objectionable documents or items.

REQUESTS FOR ADMISSIONS

REQUEST FOR ADMISSION NO.1: Please admit that the plaintiff, Mathew R. Bennett, at all times material hereto, was a resident of Pocatello, Bannock County, Idaho.

ANSWER TO REQUEST FOR ADMISSION NO. 1: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO.2: Please admit that the plaintiff, Benjamin L. Walton, at all times material hereto, was a resident of Pocatello, Bannock County, Idaho.

ANSWER TO REQUEST FOR ADMISSION NO. 2: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO.3: Please admit that on or about October 18, 2007, the plaintiff Benjamin L. Walton and his passenger, Mathew R. Bennett, were driving with the flow of traffic through a construction zone on East Center Street near Tuscany Hills Plaza at about 11:30 a.m. in the morning. There were several vehicles in front of the plaintiff Walton, behind him, and traffic in the opposite lane, since only two lanes of traffic were open because of the road construction.

ANSWER TO REQUEST FOR ADMISSION NO. 3: Defendant admits that the accident took place on or about October 18, 2007, that the location was East Center Street near Tuscany Hills Plaza, and that the accident took place in or near a construction zone. Defendant denies the remainder of this request.

REQUEST FOR ADMISSION NO.4: Please admit that the defendant Nancy Patrick then exited from the freeway on the northbound ramp of 115, and turned right in the area of dirt that was being prepared for blacktop. This area was marked as a restricted construction zone with no vehicles being allowed. The defendant Patrick then passed a parked steamroller striking the plaintiff Walton's vehicle from the left blind side near the passenger seat in a sudden, unexpected and violent collision. The plaintiff Walton's truck eventually came to a stop straddling the lane of oncoming traffic.

ANSWER TO REQUEST FOR ADMISSION NO. 4: Defendant admits she exited from the freeway. She denies she traveled anywhere illegal or anywhere not directed by the road signs. Defendant denies Plaintiffs' characterization of the collision.

REQUEST FOR ADMISSION NO.5: Please admit that the plaintiff Walton could not go forward, backwards or sideways because of other traffic in his lane and traffic in the opposing lane. There was absolutely no way the plaintiff Walton could have avoided the collision that took place in this case which was the total fault of the defendant Nancy Patrick.

ANSWER TO REQUEST FOR ADMISSION NO. 5: Denied.

REQUEST FOR ADMISSION NO.6: Please admit that the defendant's representatives had earlier admitted and agreed that collision that took place in this case which was the total

fault of the defendant Nancy Patrick.

ANSWER TO REQUEST FOR ADMISSION NO. 6: Objection. To the extent this request for admission is not reasonably calculated to lead to the discovery of admissible evidence, Defendant objects to the same. Without waiving this objection, Defendant has no recollection of such an admission and therefore denies the same.

REQUEST FOR ADMISSION NO.7: Please admit that there is no factual or legal basis for any claim of comparative fault on the part of the plaintiff in this case.

ANSWER TO REQUEST FOR ADMISSION NO. 7: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO.8: Please admit that a true and correct copy of the Idaho Vehicle Collision Report in this case is attached as Exhibit 1 to the complaint. The only contributing circumstance noted was the inattentive driving by the defendant Nancy Patrick. Moreover, there were no contributing circumstances listed by the plaintiff Benjamin Walton. In addition, the plaintiff Mathew R. Bennett has no comparative fault since he was a passenger in the vehicle.

ANSWER TO REQUEST FOR ADMISSION NO. 8: Defendant admits that a copy of the police report was attached to the complaint. Defendant, however, denies any mention in the report of "inattentive driving" on her part. Defendant is unclear as to Plaintiff's meaning with regard to "contributing circumstances" and therefore denies the same. As to the comparative fault of Plaintiff Bennett, Defendant, at this early stage, cannot admit or deny a lack of comparative fault.

REQUEST FOR ADMISSION NO.9: Please admit that the plaintiffs Walton and Bennett suffered injuries and pain, and drove to the Portneuf Medical Center emergency room immediately after the accident.

ANSWER TO REQUEST FOR ADMISSION NO. 9: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO.10: Please admit that the conduct of the defendant Nancy Patrick was negligent, and negligent per se, in the following particulars:

- a. Failure to use due care under Idaho Code 49-615.
- b. Failure to yield to a vehicle entering the roadway under Idaho Code 49-642.
- c. Failure to turn properly under Idaho Code 49-644.
- d. Failure to turn properly under Idaho Code 49-808(1).
- e. Reckless, grossly negligent and inattentive driving under Idaho Code 49-1401.

ANSWER TO REQUEST FOR ADMISSION NO. 10: Denied.

REQUEST FOR ADMISSION NO. 11: Please admit that the defendant Patrick had a duty at common law to be reasonable and prudent and to avoid acts that may injure others, violated that duty, and caused damages to the plaintiffs Bennett and Walton. The defendant Patrick was negligent under common law in this case and her negligence was the primary legal and proximate cause of the accident in this case.

ANSWER TO REQUEST FOR ADMISSION NO. 11: Denied. Defendant denies the above as her duty under common law. Defendant cannot admit or deny the truth of the remainder of the above request at this early stage in the discovery process.

REQUEST FOR ADMISSION NO. 12: Please admit that there is no proof of any comparative fault on the part of the plaintiff Walton as driver of the vehicle or the plaintiff Bennett as a passenger in the vehicle. The defendant Nancy Patrick is solely and completely at fault in this case.

ANSWER TO REQUEST FOR ADMISSION NO. 12: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO. 13: Please admit that the plaintiff Matthew Bennett was seen at the Portneuf Medical Center emergency room immediately after the motor vehicle collision. He complained of neck and back pain. The plaintiff Bennett was treated by Dr. Robert Beckstead and was diagnosed with a lumber back strain from the motor vehicle collision. He was given medications for pain and inflammation.

ANSWER TO REQUEST FOR ADMISSION NO. 13: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have

been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO. 14: Please admit that Dr. Evan Holmstead then saw Mathew Bennett on October 30, 2007 for his complaints of low back pain from the motor vehicle collision. He had limited range of motion with objective paraspinous muscle spasm and was prescribed pain medication and muscle relaxers, and considered for physical therapy.

ANSWER TO REQUEST FOR ADMISSION NO. 14: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO. 15: Please admit that Mat Bennett continued to have back pain but he also continued to work. His back pain flared and increased markedly in November of 2007 while he was bending over.

ANSWER TO REQUEST FOR ADMISSION NO. 15 At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO. 16: Please admit that on November 20, 2007 Mat Bennett was again seen at the Portneuf Medical Center emergency room for low back pain from this motor vehicle collision. He was then prescribed pain medication, muscle relaxers and physical therapy. He then received physical therapy at Portneuf Physical Therapy for about three weeks. He improved slowly and had some progress from this treatment, but still had flare ups in his pain.

ANSWER TO REQUEST FOR ADMISSION NO. 16: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO. 17: Please admit that Mat Bennett was unable to

work for about another week after this flare up in his symptoms and was excused from work by Dr. Evan Homlstead. This doctor again found lumbar muscle spasm with low back pain and continued him on physical therapy and light duty work, and continued his prescription of Flexoral and other pain relievers. He has worked in pain for the last several months.

ANSWER TO REQUEST FOR ADMISSION NO. 17: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO. 18: Please admit that the plaintiff Bennett then sought further chiropractic treatment from Dr. Henry G. West, Jr., of West Chiropractic Clinic for his injuries. His tests were positive for several objective problems. He then received chiropractic treatment, including DMT spinal, electrostimulation, and ultrasound. He has substantially recovered after his treatment from physical therapy and treatment from Dr. West, but he still uses over-the-counter pain medications. However, his condition has improved and is now medically stable to work.

ANSWER TO REQUEST FOR ADMISSION NO. 18: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO. 19: Please admit that the plaintiff Bennett has lost wages from this accident in the amount of about \$2,600.00.

ANSWER TO REQUEST FOR ADMISSION NO. 19: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO. 20: Please admit that the plaintiff Benjamin Walton was seen at the emergency room immediately after the motor vehicle collision. The plaintiff Walton was treated by Dr. Robert Beckstead at that time and diagnosed him with cervical spine strain and lumbar spine strain. He had numbness and tingling in his extremities and had severe

neck pain and complained of being nauseated. The plaintiff Walton was diagnosed with Cervical Spine Strain and Lumbar Spine Strain. He was instructed to wear a soft collar for a week, do no lifting, and then follow up with his physician if his condition did not improve. He was released (excused) from work, and advised to get bed rest. The x-rays at the hospital showed a mild straightening of the lumbar spine associated with muscle spasm.

ANSWER TO REQUEST FOR ADMISSION NO 20: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO. 21: Please admit that the plaintiff Walton then made an appointment with his treating physician Dr. Richard Maynard for Friday, October 26, 2007 for continuing problems. Dr. Maynard examined him and prescribed muscle relaxers and told him to follow up in two weeks.

ANSWER TO REQUEST FOR ADMISSION NO. 21: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO. 22: Please admit that the plaintiff Walton then followed up with Dr. Maynard on Friday, November 9, 2007 since he was still in pain. He was advised to see a chiropractor and get some back massages, and follow up with Dr. Maynard if his fingers and hands kept tingling, because that could indicate a major problem, and in this case he may need to get an MRI.

ANSWER TO REQUEST FOR ADMISSION NO. 22: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO. 23: Please admit that Benjamin Walton had not recovered from his collision and has obtained chiropractic care and treatment from Dr. Henry G. West, Jr., of West Chiropractic Clinic. The medical records of Dr. Henry West were positive for

several tests with limited range of motion and pain in his cervical spine, foraminal compression tests, shoulder depressant tests, Bickele's test, the Sitting root tests and bilateral leg raise. The cervical spine x-rays show a significant injury at C-7.

ANSWER TO REQUEST FOR ADMISSION NO. 23: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO. 24: Please admit that Dr. Henry West then referred the plaintiff Walton to have an MRI at Idaho Medical Imaging. The cervical spine MRI shows minor posterior broad-based disc bulges at C4-5 and C5-6 from the motor vehicle collision. Dr. Henry West diagnosed Benjamin Walton with acute traumatic side lash cervical sprain/strain, brachial radiculopathy, and mid-level inter-sigmental dysfunction characterized by akinesis and acute lumbar strain and limitations in the range of motion in the cervical and lumbar spine.

ANSWER TO REQUEST FOR ADMISSION NO. 24: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO. 25: Please admit that the plaintiff Walton's injuries significantly improved from the chiropractic treatment administered by Dr. Henry West. He advises that at this point he still has only minimal residual pain and stiffness in his neck and some headaches that he treats with over-the-counter medication.

ANSWER TO REQUEST FOR ADMISSION NO. 25: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO. 26: Please admit that the plaintiff Walton also has lost wages from this collision in the amount of about \$1,200.00.

ANSWER TO REQUEST FOR ADMISSION NO. 26: At this early stage in the discovery process, Defendant cannot admit or deny the above request for admission. There have

been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

REQUEST FOR ADMISSION NO. 27: Please admit that the plaintiffs, Mathew R. Bennett and Benjamin L. Walton, are entitled to judgments against defendant, Nancy Patrick, as vehicle owner, responsible party and negligent driver as follows:

A. Special damages for plaintiff Mat Bennett's past medical bills of \$1,937.71, future medical bills for over the counter pain medication, and lost wages of \$2,600.00; and general damages for pain and suffering in an amount in excess of \$10,000.00, or such other amounts as may be proven to a jury at trial, but less than \$25,000.00 at this time;

B. Special damages for plaintiff Ben Walton's medical bills of \$2,992.92, future medical bills for over the counter pain medication, lost wages of \$1,200.00, and general damages for pain and suffering in an amount in excess of \$10,000.00, or such other amounts as may be proven to a jury at trial, but less than \$25,000.00 at this time;

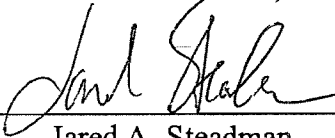
C. For attorney's fees and costs in bringing this action, in the amount of \$2,000.00 if by default and future attorney's fees under Idaho Code 12-120(4); and

D. For such other and further relief as this Court deems just and equitable under the premises for plaintiff.

ANSWER TO REQUEST FOR ADMISSION NO. 27: Denied. Defendant cannot respond to the special damages listed above at this early stage in the discovery process. Defendant denies the amounts listed as general damages.

DATED this 20 day of February, 2009.

MERRILL & MERRILL, CHARTERED

By 

Jared A. Steadman
Attorneys for Defendant

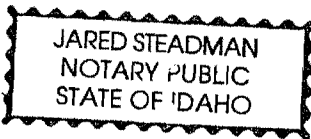
DATED this 20 day of February, 2009.

Nancy Patrick
Nancy Patrick

STATE OF IDAHO)
County of Bannock :SS

SUBSCRIBED AND SWORN to before me by Nancy Patrick on this 20 day of February, 2009.

Jared Steadman
NOTARY PUBLIC FOR IDAHO
Residing at: Pocatello, ID
Commission expires: 11-6-2013

(SEAL) 

CERTIFICATE OF SERVICE

I, Jared A. Steadman, the undersigned, one of the attorneys for the Defendant, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing Defendant's Answers and Responses to Plaintiffs' First Set of Interrogatories Requests for Production and Requests for Admission to Defendant was this 20 day of February, 2009, served upon the following in the manner indicated below:

Charles Johnson
JOHNSON OLSON CHARTERED
P.O. Box 1725
Pocatello, ID 83204

- U.S. Mail
- Hand Delivery
- Overnight Delivery
- Telefax

Jared Steadman
Jared A. Steadman

Exhibit
A

Brendon C. Taylor
Jared A. Steadman
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Idaho State Bar #6078

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and BENJAMIN)
L. WALTON,)
)
Plaintiff,)

Case No. CV-08-4528-PI

vs.)

NOTICE OF SERVICE

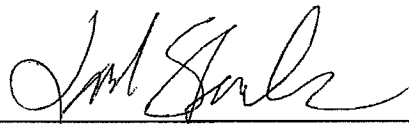
NANCY PATRICK,)
)
Defendant.)

NOTICE IS HEREBY GIVEN that on the 20 day of February, 2009, the original copy of **DEFENDANT'S ANSWERS AND RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION, AND REQUESTS FOR ADMISSION** and a copy of this **NOTICE OF SERVICE** were served, by hand delivery upon the following attorneys at the addresses shown below:

Charles Johnson
JOHNSON OLSON CHTD.
419 W. Benton St.
Pocatello, ID 83204

DATED this 20 day of February, 2009.

MERRILL & MERRILL, CHARTERED

By: 
Jared A. Steadman

CERTIFICATE OF SERVICE

I, Jared A. Steadman, the undersigned, one of the attorneys for the Defendant, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing Notice of Service was this 20 day of February, 2009, served upon the following in the manner indicated below:

Charles Johnson
JOHNSON OLSON CHARTERED
P.O. Box 1725
Pocatello, ID 83204

- U.S. Mail
- Hand Delivery
- Overnight Delivery
- Telefax



Jared A. Steadman

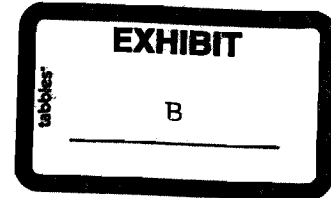
JOHNSON OLSON, CHARTERED
P.O. BOX 1725
POCATELLO, IDAHO 83204-1725

L. CHARLES JOHNSON, III
TELEPHONE: (208) 232-7926
FACSIMILE: (208) 232-9161
EMAIL: cilaw@allidaho.com

March 13, 2009

USE P.O. BOX FOR MAIL
PHYSICAL STREET ADDRESS
419 WEST BENTON
POCATELLO, IDAHO 83204-1725

Jared A. Steadman
Brendon C. Taylor
MERRILL & MERRILL, CHARTERED
P.O. Box 991
Pocatello, Idaho 83204-0991



Re: Mathew R. Bennett and Benjamin L. Walton v. Nancy
Patrick; Case No. CV 08 4528 PI

Dear Gentlemen:

This acknowledges receipt of your letter dated March 3, 2009 regarding the case of Mathew R. Bennett and Benjamin L. Walton v. Nancy Patrick. I am enclosing the MEDICAL RELEASE & AUTHORIZATION FOR USE AND DISCLOSURE OF PROTECTED HEALTH INFORMATION you forwarded to our office signed by Mat Bennett. I also enclose Mat Bennett's 2008 tax return. In answer to your question, Mat Bennett was seen at Ammon Medical & Urgent Care, 3456 East 17th Street, Suite 125, Idaho Falls, Idaho by Dr. Amiel who allegedly took over for Dr. Guyer at that office.

Second, this acknowledges receipt of the DEFENDANT'S ANSWERS AND RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSION in this case. The answers were incomplete and seemed evasive in many respects.

This letter is written to you as a "meet and confer" letter under Idaho Rule of Civil Procedure 37(a)(2) which provides that a motion to compel discovery requests may be filed, but there must prior to that time be a certification that the moving party has conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure requirement without court action. Please consider this to be a meet and confer letter on the failure to provide these discovery responses.

First, Answer to Interrogatory No. 1 does not provide any basis for not paying the claim. There was really no answer or reply to Interrogatory Nos. 3 through 11 or 13, but instead a statement that "At this early stage in the discovery process, Defendant cannot yet state with certainty her factual and legal basis for the above claim. As discovery proceeds and further investigations are made, Defendant will supplement this answer."

Second, there was no production of the plaintiff's insurance policy that was in effect as expressly and clearly required by Idaho Rule of Civil Procedure 26(b)(2). Further, there was no production of any Exhibit A documents, but only production of a

Finally, the responses to Requests for Admissions are incomplete and inadequate as follows: 1, 2 (and we note that Ben Walton is one of your insured), 7, 9, 12, and 13 through 26. Rather, there was a statement made that "At this early state in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiffs' responses to her discovery requests. As such information becomes available, Defendant will supplement this answer".

I am enclosing a copy of Idaho Rule of Civil Procedure 36(a) on requests for admissions. As I am sure you are probably aware this provides for the admission of any matters within the scope of Rule 26(b), including ones that "relate to statements of opinions or opinions of fact or the application of law to fact, including the genuineness of any documents described in the request." Further, "the answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires the party qualify the answer or deny only a part of the matter which the admissions requested, the party shall specify so much of it as true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as the reason for failure to admit or deny unless the party states that the party has made a reasonable inquiry and that the information known or readily available by the party is insufficient to enable the party to admit or deny."

In conclusion, please advise if you will voluntarily agree to supplement the discovery responses within twenty (20) days. Please advise if you will provide an unequivocal admission or denial to the requests for admissions, admit the part that is true and deny the parts that are untrue, and specify which parts are based on a lack knowledge for their admission or denial as required by the rules. Please further advise if you wish to discuss this matter further by phone after consulting with your client. If you will not agree to file amended or supplemental responses to the discovery requests then the matter will be placed before the District Judge for a determination of the sufficiency of admissions or denials and other relief as may be appropriate.

Finally, depending on these discovery replies, please advise as to deposition dates for your client after April 26, 2009. Please also advise if your office is available for her deposition.

If you have any questions or comments, please call or write.

Sincerely,


Charles Johnson

CJ/nv

Enclosure

c: Clients

DAVE R. GALLAFENT
KENT L. HAWKINS*
THOMAS W. CLARK
THOMAS J. LYONS
BRENDON C. TAYLOR
KENT A. HIGGINS*
IAN C. JOHNSON
JARED A. STEADMAN
R. WILLIAM HANCOCK ♦

* ALSO ADMITTED IN UTAH
♦ ALSO ADMITTED IN IOWA

MERRILL & MERRILL
CHARTERED
COUNSELORS AND ATTORNEYS AT LAW
109 N. ARTHUR - 5TH FLOOR
P.O. BOX 991
POCATELLO, IDAHO 83204-0991

A.L. MERRILL (1886-1961)
R.D. MERRILL (1893-1972)
W.F. MERRILL (1919-2005)

TELEPHONE: 208-232-2286
FAX: 208-232-2499

FOUNDED IN 1913

April 7, 2009

Charles Johnson
JOHNSON OLSON, CHARTERED
P.O. Box 1725
Pocatello, Idaho 83204-1725

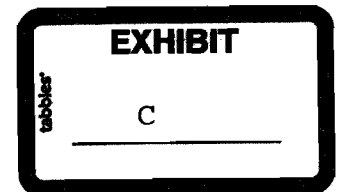
RE: *Bennett v. Patrick*

Dear Mr. Johnson:

I write this letter in response to your letter dated March 13, 2009. As an initial response, we thank you for agreeing to allow us to get a full picture of your clients' medical status so that we can accurately assess their claims. In response to your inquiries regarding our discovery responses, I will speak to each concern and I hope that this letter will adequately address them.

As a general response, we answered a number of your interrogatories by indicating that we cannot, at this early stage, adequately address the question asked. As you well know, we have not yet been able to conduct any depositions in this matter. We have not yet heard from either of your clients and you have not yet heard from ours. Indeed, at the time we responded to your discovery requests, you had not yet responded to ours. On those occasions, where we responded that we have not yet been able to obtain the information to adequately address your interrogatory or request, that is because we have not yet had the opportunity to speak with your clients or other witnesses about the accident and their injuries. The only information we had from your clients at the time was the Complaint. Surely, you cannot expect us to rely on the assertions made by your clients in their Complaint. Before our client can admit anything that might result in her being fully liable for your clients' alleged injuries, we must have the opportunity to investigate the matter completely, which clearly must include the deposition of your clients. This should serve as a response to your inquiries regarding interrogatories 1 and 3-11. You may rest assured that once we have fully investigated the matter and we are preparing for trial, we will supplement our responses and fully answer all the interrogatories.

As to your objections to our responses to your requests for production, if you are implying



Charles Johnson
April 7, 2009
Page 2

As to your objections to our responses to your requests for production, if you are implying that we have a transcribed copy of your client's statement, which we have not provided, that is not the case. The audio cassette tape is the only version of the statement in our possession. I must apologize for the insurance policy. Allstate has not yet provided it to us. I will see to it that they do so soon. Hopefully, it will suffice for the moment for me to provide you with the policy limits, which are \$25,000/\$50,000.

The bulk of your objection appears to be with regard to your requests for admission. As stated above, and especially with regard to requests for admission, we cannot admit anything unless we are certain it is true. We cannot have that certainty without a full investigation and we cannot complete a full investigation without the deposition of your clients. You will note that the rule says "the answer shall deny the matter *or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter*" (italics added). We would assert that the fact that we have not yet held depositions is a sufficiently detailed reason why we cannot admit those facts we did not admit.

I hope this letter satisfies your concerns regarding our responses. We will, as earlier stated, supplement these answers when we are in the position to do so. Additionally, we will provide you with the insurance policy as soon as we have it in our possession. If you have any questions, please feel free to contact us at any time.

Sincerely,

Merrill and Merrill, Chartered



Jared A. Steadman
JAS/gp/7783

RECEIVED

APR -7 2009

JOHNSON OLSON, CHTD

FILED
BANNOCK COUNTY
CLERK OF DISTRICT COURT
2009 APR 27 PM 4:32
BY
DEPUTY CLERK

Brendon C. Taylor
Jared A. Steadman
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
ISB #6078 (BCT), #7804 (JAS)

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and BENJAMIN L. WALTON,)	
)	
Plaintiffs,	)	Case No. CV-08-4528-OC
)	
vs.	)	DEFENDANT'S RESPONSE AND
	)	MEMORANDUM IN OPPOSITION TO
NANCY PATRICK,	)	PLAINTIFF'S MOTION FOR
	)	SUMMARY JUDGMENT
Defendant.)	
)	

COMES NOW the Defendant, Nancy Patrick, by and through her attorneys of record, Merrill & Merrill, Chartered, and files Defendant's Response and Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment. In support of this Response and Memorandum, Defendants file herewith the Affidavit of Nancy Patrick and the Affidavit of Brendon C. Taylor.

INTRODUCTION

This is a civil lawsuit regarding an automobile accident that occurred between the parties when Defendant's vehicle was leaving a construction zone near an I-15 off-ramp. Plaintiffs, via their motion, seek Summary Judgment on the issue of liability. Defendant opposes their motion upon the basis that the negligence of the Plaintiff and others create an issue of fact that should be determined by a jury.

MATERIAL FACTS

On October 18, 2007, Defendant was exiting Interstate 15 at the Clark Street exit in Pocatello, Idaho. As she exited, she attempted to follow the signs in a construction zone, but ended up on the part of the road that was under construction. Defendant pulled around a large piece of construction equipment and attempted to merge into traffic. As she attempted to merge, her vehicle and Plaintiff's vehicle collided. Plaintiff took no evasive action. He did not brake nor attempt to swerve. Additionally, as stated in Defendant's affidavit, she believes Plaintiff was exceeding the speed limit.

ARGUMENT

STANDARD OF REVIEW

On a motion for summary judgment, there can be no genuine issues of material facts and the moving party must be entitled to judgment as a matter of law. IRCP 56(c); *Lockheed Martin Corp. v. Idaho State Tax Com'n*, 142 Idaho 790, 793 (2006). All disputed facts are to be construed liberally in favor of the nonmoving party and all reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party. *Infanger v. City of Salmon*, 137 Idaho 45, 47 (2002); *Lockheed Martin* 142 Idaho at 793. If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment motion must be denied. *Huyett v. Idaho State University*, 140 Idaho 904, 907 (2004). In ruling on a motion for summary judgment, the Court is not permitted to weigh the evidence or to resolve controverted factual issues. *Meyers v. Lott*, 133 Idaho 846, 849 (2000). The Court is to look at the "pleadings, depositions, and admissions on file, together with the affidavits" in order to make the summary judgment determination. *Lockheed Martin*, 142 Idaho at 793.

I.

Mr. Walton was to some extent Comparatively Negligent

There are a number of facts that are both material and in dispute in this case. As above discussed and as evidenced by the Affidavit of Nancy Patrick, Defendant believes that Plaintiff was exceeding the speed limit when the accident occurred. Certainly, if Plaintiff was speeding, his reaction time would be reduced and hazards in the roadway that he ordinarily would have been able to avoid would become unavoidable.

It is unquestionable that a jury might assign some liability in such a situation. Even if Plaintiff denies that he was speeding, which he has not yet done (only indicating that he was

traveling “with the flow of traffic”), there is still a material issue of fact as to whether or not Plaintiff was speeding. Such an issue would surely be material. Very few accidents have circumstances where the speed of the complaining party is not a material issue for possible comparative negligence. Traveling in excess of the speed limit is in nearly every situation going to be a factor in considering the liability of the parties. Indeed, if a plaintiff’s speeding could reasonably result in his being held 1% liable, it is a material fact and summary judgment is inappropriate. Here, a jury could quite reasonably find Plaintiff liable to some extent.

Assuming, as the Court is required to do in this summary judgment proceeding, that Defendant correctly perceived Plaintiff to be speeding, summary judgment is inappropriate. Had Plaintiff not been speeding, he may have been provided with the additional time necessary to take appropriate evasive action. He may have been able to brake, swerve, honk to alert Defendant, or perform some other action to avoid the accident or diminish the amount of damage resulting therefrom. Possibly due to his speed, he was not able to react appropriately, and is, therefore, to some extent liable. And as cited above a court must construe the facts liberally in favor of the non-moving party. *Infanger*, 137 Idaho at 47.

As above stated, it is not just Plaintiff’s speed, which might subject him to some comparative fault, but also the fact that he took no evasive action. The Affidavit of Nancy Patrick states that Plaintiff did not brake, swerve, or otherwise attempt to avoid the accident. Defendant has not yet been able to depose Plaintiff or his passenger, and thus, Defendant has been unable to fully uncover the facts in this matter. However, considering the facts in the light most favorable to Defendant, her testimony that Plaintiff took no such evasive action, a juror may conclude Plaintiff to be comparatively negligent to some degree. A jury could easily conclude a reasonable person in Plaintiff’s position would not exceed the speed limit, would have attempted to brake or swerve, or otherwise would take some evasive action to avoid the accident. If something rolls out into the roadway or an animal darts out, reaction compels one to swerve or brake. Plaintiff did neither. If Plaintiff had been keeping a proper lookout, surely he would have seen Defendant’s vehicle and reacted somehow. However, without having deposed Plaintiff, Defendant is limited to speculating whether Defendant was talking on his cellular phone or changing a radio station or the passenger in the vehicle was providing some sort of distraction. Defendant does not need to speculate that the basic premise that Plaintiff took no evasive action is true. Further investigation may explain why Plaintiff failed to take evasive action, but for the purposes of summary judgment, the Court should

find that Plaintiff took no evasive action, which is a material fact that a jury should consider in determining liability for this accident.

All of these points provide a number of issues of material fact and a number of reasons that a jury might find Plaintiff to some extent comparatively negligent and, therefore, liable for the injuries he and his passenger allegedly sustained. A tort case involving an automobile accident is, in its very nature, full of issues reserved for the finder of fact and summary judgment can rarely be appropriate. This case is certainly no exception. Plaintiffs' only tenable argument is that "there is no statement anywhere in the record of any action by Benjamin Walton that violated any standard of care or could be construed as negligence or comparative fault." Pl. Mot. Summ. J. 2. Even if that used to be the case, with the addition of Ms. Patrick's affidavit and this memorandum, it no longer is. Summary judgment is inappropriate in this instance.

II.

Other Parties may also have Contributed to the Accident

In addition to Mr. Walton, there may have been others at fault for the accident. A reasonable jury may be able to conclude that the Idaho Department of Transportation, which contracted the construction company performing the service and the company itself may have been, to some extent, responsible for the accident. Indeed, if the directions for detour had been clear, Ms. Patrick would never have ended up in the construction area and the accident would have never occurred. She would have waited at the light as may have been intended.

A jury could certainly find that the state should have had clearer directions and may assign some liability to the state or the construction company for the accident. As Defendant states in her affidavit, she believed she was carefully following the signs that were to be instructive about how to proceed through the construction at hand. The facts of whether the state or the construction company were negligent in marking or controlling the construction zone present another material issue regarding liability and should be presented to a jury.

III.

Defendant should be given a Chance to complete Discovery

This summary judgment motion is poorly timed. It asks the court to find that there is no fault on the part of Plaintiff when there has been no opportunity yet to depose him. It asks the court to find that no other third party could be responsible in any way for the accident without giving sufficient time to Defendant to investigate the issues. While it is true that this case was filed and

served some time ago, as the Affidavit of Brendon Taylor will attest, the bankruptcy issue caused a delay such that complete investigation of the matter at this point is an unreasonable expectation. Additionally, this case was stayed which meant that Plaintiffs did not have to respond to Defendant's discovery requests and that they were unavailable for depositions. Finally, the jury trial in this matter is set for June 2, 2010. There is plenty of time to conduct discovery and to evaluate the case. There is no need for a hasty summary judgment motion.

Surely, Defendant should be allowed the time necessary to determine liability before an end run motion for summary judgment can be taken seriously. At this point, a summary judgment is fully inappropriate both substantively and due to the fact that Defendant has not yet had time to fully investigate the merits of the case.

CONCLUSION

Idaho courts have held that "where the minds of reasonable men might differ, or where different conclusions might be reached by different minds, the questions as to the existence of negligence or contributory negligence are questions for the jury." *Foster v. Thomas*, 85 Idaho 565, 573 (1963); *See also Hubble v. Record*, 80 Idaho 403 (1958). Here it is clear, that reasonable minds could easily find Plaintiff or another party at least to some extent comparatively negligent. It is important to note that even if Defendant's level of negligence in this case is deemed by the court or a jury to be significant, if reasonable minds could find that Plaintiff was 1% liable in the fact that he was speeding or did not reasonably take evasive action, or that some other party would be 1% liable for negligently instructing traffic how to proceed, the court must allow the jury to make the determination.

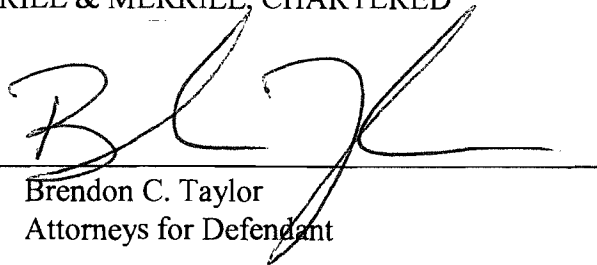
Additionally construing the facts liberally in favor of the non-moving party, as the court is required to do would result in the court deciding summary judgment for a party who was speeding, who saw Defendant's vehicle, and who failed to take any evasive action. It would result in allotting no liability to those assigned the task of effectively controlling traffic, but who laid signs so misleading, a competent driver ended up driving in the construction zone instead of around it.

For the reasons stated above, Plaintiff's Motion for Summary Judgment must be denied.

DATED this 27th day of April, 2009.

MERRILL & MERRILL, CHARTERED

By



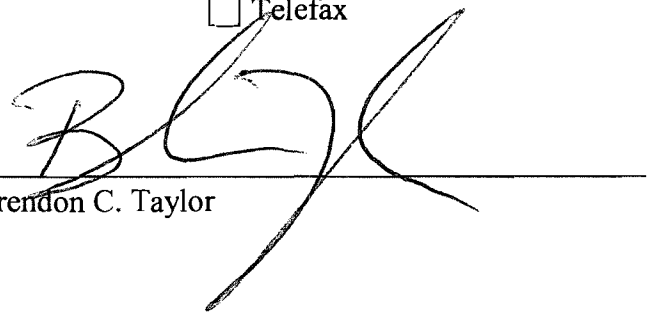
Brendon C. Taylor
Attorneys for Defendant

CERTIFICATE OF SERVICE

I, Brendon C. Taylor, the undersigned, one of the attorneys for the Defendants, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing document was this 27th day of April, 2009, served upon the following in the manner indicated below:

Charles Johnson
JOHNSON OLSON CHARTERED
PO Box 1725
Pocatello, Idaho 83204-1725

- U.S. Mail
- Hand Delivery
- Overnight Delivery
- Telefax



Brendon C. Taylor

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2009 APR 27 PM 4:32

Brendon C. Taylor
Jared A. Steadman
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
ISB #6078 (BCT), #7804 (JAS)

BY: *[Signature]*
DEPUTY CLERK

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and BENJAMIN
L. WALTON,

Plaintiffs,

vs.

NANCY PATRICK,

Defendant.

Case No. CV-08-4528-OC

AFFIDAVIT OF NANCY PATRICK

STATE OF OREGON)

:SS

County of Clatsop)

Nancy Patrick, being first duly sworn, deposes and states:

1. I am the Defendant in the above entitled action.
2. I was involved in an accident on October 18, 2007 with Plaintiff.
3. I was traveling to refuel my vehicle. I pulled off Interstate 15 at the Clark Street exit. I followed the arrows in the direction of the Maverick station. I entered a construction zone taking the path I believed to be correct. I was attempting to exit from the construction zone and merge into traffic.

Affidavit of Nancy Patrick
O:\77\7783\Pleadings\affidavit-Nancy Patrick.wpd

-Page 1

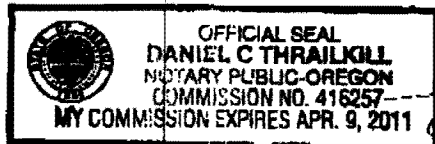
I had not yet accelerated into traffic when my vehicle rolled slightly and it and Plaintiff's vehicle collided.

- 4. From Plaintiff's vantage point, he should have been able to see me as he was driving up the street and a reasonably prudent driver would have attempted to take some evasive action. He could have braked, honked to alert me, swerved out of the way or taken some other evasive action. Plaintiff took none of those actions.
- 5. I perceived Plaintiff to be exceeding the speed limit when the collision occurred.
- 6. As a first hand witness in this accident, it is my opinion that as Plaintiff was speeding and failed to take any evasive action, that he should bear some degree of responsibility for the accident.
- 7. Further, your affiant saith naught.

DATED this 14 day of April, 2009.

Nancy J. Patrick
Nancy Patrick

SUBSCRIBED AND SWORN to this 16th day of April, 2009.



(SEAL)

[Signature]
NOTARY FOR OREGON
Residence: Clackamas
Commission expires: April 9th, 2011

CERTIFICATE OF SERVICE

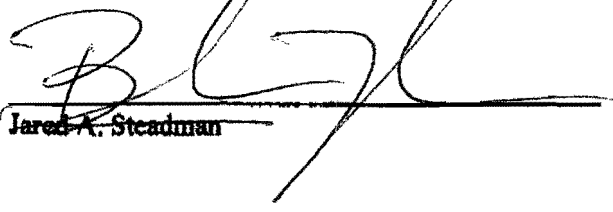
I, Brendon Taylor
I, Jared A. Steadman, the undersigned, one of the attorneys for the Defendants, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing document was this 16th day of April, 2009, served upon the following in the manner indicated below:

Charles Johnson
JOHNSON OLSON CHARTERED

U.S. Mail
 Hand Delivery

PO Box 1725
Pocatello, Idaho 83204-1725

Overnight Delivery
 Telefax

Brenclaw Taylor 
Jared A. Steadman

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FILED
 BANNOCK COUNTY
 CLERK OF THE COURT
 2009 MAY -4 PM 12:57
 BY: [Signature] DEPUTY CLERK

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and BENJAMIN L. WALTON,)	
)	
Plaintiffs,	)	Case No. CV-08-4528-OC
)	
vs.	)	DEFENDANT'S RESPONSE AND
	)	MEMORANDUM IN OPPOSITION TO
NANCY PATRICK,	)	PLAINTIFF'S MOTION TO COMPEL
)	
Defendant.)	
_____)	

COMES NOW the Defendant, Nancy Patrick, by and through her attorneys of record, Merrill & Merrill, Chartered, and files Defendant's Response and Memorandum in Opposition to Plaintiffs' Motion to Compel. In support of this Response and Memorandum, Defendants refer the court to Defendant's Response and Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, the Affidavit of Nancy Patrick and of Brendon C. Taylor already on file with the court and the accompanying Affidavit of Jared Steadman, which includes a true and correct copy of Defendant's First Supplemental Answers and Responses to Plaintiffs' First Set of Interrogatories, Requests for Production, and Requests for Admission attached thereto as Exhibit A.

INTRODUCTION

This is a civil lawsuit regarding an automobile accident that occurred between the parties when Defendant's vehicle was leaving a construction zone near an I-15 off-ramp. Plaintiffs, via their

motion, seek an order from the court compelling more complete responses to their discovery requests. Defendant believes this to be an unwarranted motion and has answered Plaintiffs' interrogatories and responded to their requests as completely as is possible before having the opportunity to depose Plaintiffs and conduct further investigation and discovery.

MATERIAL FACTS

On October 18, 2007, Defendant was exiting Interstate 15 at the Clark Street exit in Pocatello, Idaho. As she exited, she attempted to follow the signs in a construction zone, but ended up on the part of the road that was under construction. Defendant pulled around a large piece of construction equipment and attempted to merge into traffic. As she attempted to merge, her vehicle and Plaintiff's vehicle collided. Plaintiff took no evasive action. He did not brake nor attempt to swerve. Additionally, as stated in Defendant's affidavit, she believes Plaintiff was exceeding the speed limit.

As to the facts laid surrounding the propounding of discovery requests and the responses provided by Defendant, the facts laid out in Plaintiffs' motion are largely correct. The Complaint was filed in October, 2008 and the answer in December of the same year. However, Defendant had filed for bankruptcy prior to the Complaint being filed, which stayed the action. When Plaintiffs became aware of the fact that Defendant had filed for bankruptcy, nothing more was done on this lawsuit due to the automatic stay. After some negotiation, the automatic stay was lifted by stipulation and by order of Judge Pappas and discovery requests were sent to Defendant on January 22, 2009. Such requests were answered in a timely fashion, but apparently not to the approval of Plaintiffs.

Plaintiffs sent a letter complaining of what they saw as deficiencies and the letter was timely responded to. Plaintiffs filed this motion and, after Defendant received the insurance policy from her insurer, a supplemental discovery response was served on Plaintiffs hopefully alleviating a number of their concerns. Defendant now files this motion opposing a proposed order from the court compelling answers and responses Defendant cannot yet with certainty provide.

ARGUMENT

I. Interrogatories

Plaintiffs first complain that the answers provided to interrogatories number 1, 3-11, and 13 are not sufficient. As to interrogatory number one, Defendant has amended that in her supplemental

responses that were served on Plaintiffs' counsel on Monday, April 27, 2009. Additionally, Defendant's Response and Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment addresses the issue. Defendant believes that Plaintiff was exceeding the speed limit and therefore cannot simply pay what Plaintiffs have demanded. Defendant, if it was not previously the case, has certainly with the supplemental responses adequately addressed this interrogatory.

Interrogatory number three calls for information regarding expert witnesses. Defendant answered simply that she had not yet decided whether she would engage an expert or whom she would engage. Indeed, as this court well knows, rule 26(b)(4)(B) provides that an expert engaged or employed that is not expected to be called as a witness must not even be disclosed. Idaho R. Civ. P. 26(b)(4)(B). Defendant answered that she had not yet made final decisions, but when such decision were made, a supplemental response would be provided. Defendant truthfully has not yet decided how she would like to proceed with regard to experts. When she does, the answer will be fully provided. Until then, however, there is no information to compel.

Interrogatory number four calls for the exhibits to be presented at trial. Defendant answered that she had not made final decisions, but that she anticipated she may use any of the documents attached to her or Plaintiffs' responses. This is as complete a response as one could possibly expect this early in the trial preparation process.

Interrogatory number five calls for an explanation of why Defendant believes that the claim failed to state a cause of action for which relief can be granted. Defendant again responded that he has not yet had opportunity to fully investigate the claim and stands by that response. Defendant is simply preserving her right to pursue a dismissal based on a failure to state a claim if something to that effect arises in the discovery process. Similarly, Defendant stands by the reservation of her right to assert additional affirmative defenses as set out in her answer to interrogatory number 13.

Interrogatories number six through twelve similarly call for explanations of Defendant's affirmative defenses. While Defendant continues to assert that her initial responses were sufficient, she has supplemented all of the above responses and each is now surely sufficient to explain the legal and factual bases for the assertion of the defenses.

Finally, Plaintiffs assert that although they requested available deposition dates from Defendant, Defendant made no response to them in the return letter. Shortly thereafter, however, Defendant and Plaintiffs discussed potential dates for the depositions of the parties. In any case, such an accusation bears no relevance at all to the motion to compel in question. Its only purpose

can be inflammatory and waiting an extra week or two to respond is hardly so egregious as to warrant any judicial response. Plaintiffs additionally assert that “Idaho Rule of Civil Procedure 33(a)(2) provides that the defendant must provide an answer or objection and cannot claim lack of knowledge as a basis for failure to respond to the discovery.” Pl.’s Mot. Compel ¶ 10. The complete text of the actual rule is as follows:

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections may be signed by the attorney making them. The party upon whom the interrogatories have been served shall serve the original of the answers, and objections if any, within 30 days after the service of the interrogatories. The court may allow a shorter or longer time. The answers shall first set forth each interrogatory asked, followed by the answer or response of the party. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer any interrogatory.

Idaho R. Civ. P. 33(a)(2)

Clearly nothing in the rule, despite Plaintiffs’ assertions, requires that answers to interrogatories cannot claim lack of information. That statement is without foundation.

II. Requests for Production

The only objection Plaintiffs appear to have with regard to Defendant’s responses to their requests for production is that the insurance policy was not provided. At the time of the signing of the discovery responses, Defendant had not yet obtained the policy from her insurer. There was some delay and a lost request, but Defendant has provided a copy of the policy and Plaintiffs are currently in possession of such policy. Defendant was not attempting to circumvent the production of the document and provided Plaintiffs with the policy limits soon after discovery was sent. This should no longer be in issue, however, as Plaintiffs only requested that the court compel such production and it has already taken place.

III. Requests for Admission

Plaintiffs’ objections to Defendant’s responses to requests for admission are similar to those set out with regard to Defendant’s answers to interrogatories. Plaintiffs would have the Court compel an admission or a denial. The applicable rule, however, plainly provides for situations like this. It says that “the answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.” Idaho R. Civ. P. 36(a). Defendant

has done exactly that. Without having the opportunity to depose Plaintiffs and complete her discovery and investigation, she cannot truthfully admit or deny the requests.

Requests one and two call for an admission as to Plaintiffs' residences at all times material to the accident. Without a chance to depose Plaintiffs, there is no way to establish the truth of the request. Indeed how can anyone admit the residence of anyone else without a chance to depose them under oath.

In request number seven, Plaintiffs wanted Defendant to admit that there was no comparative fault on the part of the "plaintiff." Also, request number twelve calls similarly for an admission of complete fault and liability on the part of the Defendant. Surely, this requires a substantial investigation and early in the process, the fact that no depositions of Plaintiffs have yet taken place is sufficient reason that one cannot truthfully admit or deny the request. Defendant has indicated to her attorneys and now in the affidavit on file with the court that she believes Plaintiff was exceeding the speed limit. This allegation warrants a full investigation before truthfully admitting or denying lack of comparative fault. Furthermore, Defendant has asserted that she believed she was correctly following the construction zone signs when she left the off-ramp. Comparative liability of the State of Idaho and/or the Contractor performing the construction work is also at issue.

Similarly, request number nine calls for an admission or a denial of injuries and pain suffered and that they drove immediately to the emergency room. Defendant has no way of knowing the truth of that statement without some substantial discovery including a deposition. There are no pressing deadlines here. Surely Plaintiffs can wait for the depositions before lodging complaints of misconduct.

Requests 13 through 26 detail the history of the medical treatment Plaintiffs allegedly sought. Again, Defendant, before admitting the various treatments and diagnoses provided by the doctors and therapists, and the lost income claims, would have to be able to verify the truthfulness of them with the doctors and the patients through deposition. How can one admit that all of the treatment occurred as alleged in the request without time and means to verify it. The court will recall that this matter was delayed for a significant amount of time while Plaintiffs attempted to get relief from stay (when they could have simply waited a week for discharge). And now, instead of continuing on with discovery procedures, Defendant is forced to respond to unnecessary and premature motions to compel and for summary judgment. With all the unnecessary motions and arguments, Defendant has not been able to conduct discovery in as timely a fashion as would she would otherwise have

been able to do. Defendant abided by the rules, and when she has had a chance to depose the Plaintiffs, fully review all records and bills, review Plaintiffs' work history, and conduct an IME of Plaintiffs, these responses will be supplemented.

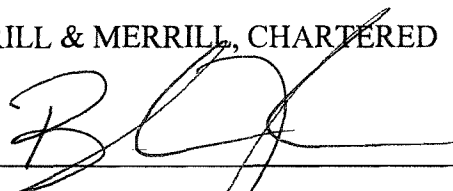
CONCLUSION

Defendant has adequately responded to all requests by Plaintiffs especially considering the supplemental responses attached hereto. Plaintiffs' motion to compel should be denied and Defendant should be awarded her attorney's fees incurred in defending this motion.

DATED this 4th day of May, 2009.

MERRILL & MERRILL, CHARTERED

By

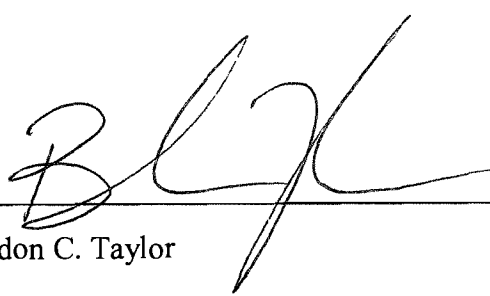

Brendon C. Taylor
Attorneys for Defendant

CERTIFICATE OF SERVICE

I, Brendon C. Taylor, the undersigned, one of the attorneys for the Defendants, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing document was this 4th day of May, 2009, served upon the following in the manner indicated below:

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 Attorney for Plaintiffs

FILED
 BANNOCK COUNTY
 DISTRICT COURT
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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and	)	Case No. CV-08-4528-PI
BENJAMIN L. WALTON,)	
	)	RESPONSE IN SUPPORT OF PLAINTIFFS'
Plaintiffs,	)	MOTION FOR SUMMARY JUDGMENT
)	
vs.)	
)	
NANCY PATRICK,)	
)	
Defendant.)	
_____)	

The plaintiffs, Mathew R. Bennett and Benjamin L. Walton, through counsel of record, hereby file their RESPONSE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT in this case. The defendant Nancy Patrick takes the position that the plaintiff Benjamin Walton was speeding, and failed to take any evasive action like braking, swerving or honking. She further claims that the Department of Transportation and State of Idaho might be partially at fault or have some responsibility based on her claim that the signs were unclear at the time of the accident.

However, these claims were never stated before and were or could have been known before (and did not need a deposition to prove). The response is based in large part on the defendant's opinion, speculation and conjecture rather than any facts that are

S

in the record. There is no statement or a claim as to any kind of negligence or breach of duty by the parties doing this construction, merely that the defendant was confused.

A. FACTS

The defendant states at one point that, "as she was waiting to go up from the hill she released the brake some and rolled out too far and struck the pickup truck." The defendant thereby admits that she pulled into the plaintiff's lane of traffic and probably should have waited at the light (Defendant's brief page 4). Further, the facts show that the plaintiff's vehicle was struck so suddenly and with such force that the vehicle was forced into the other lane of traffic.

The defendant then claims that she tried to pull around a large piece of construction equipment and merge into traffic. This equipment would have blocked the view of both the plaintiffs and the defendant of each other. This is why the plaintiff could not see the defendant's vehicle in time to take evasive measures and calls into question the defendant's alleged observations of the plaintiff's speed and other actions.

The plaintiff Walton could not brake or swerve because he did not see the defendant before the collision, and there was traffic on both sides, and the front and back of his vehicle. The plaintiff did not have time to break, honk or swerve. There were several vehicles in front of the plaintiff Walton, behind him, and traffic in the opposite lane, since only two lanes of traffic were open because of the road construction.

It is important to note that the investigating officer prepared an Idaho Vehicle Collision Report in this case; attached to the complaint as Exhibit 1. The only contributing circumstance noted was the inattentive driving by the defendant Nancy Patrick. Moreover, there were no contributing circumstances listed by the plaintiff Benjamin Walton, like speeding or otherwise, as contributing to the accident noted by the investigating officer.

The defendant "believes that plaintiff was exceeding the speed limit" (Defendant's brief page 2) and "possibly due to his speed he was not able to react appropriately" (Defendant's brief page 3). However, belief, speculation and conjecture are not a proper basis to oppose summary judgment. See *Tapper Chevrolet Company v. Hansen*, 95 Idaho 436, 439, 510 P.2d 1091 (1973). See also *Cates v. Albertson's Inc.*, 126 Idaho 1030, 1034, 895 P.2d 1223 (1995); and *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 271, 899 P.2d 977 (1995). Therefore, these opinions should be stricken from the record and not considered by the Court in this case.

Further, the defendant admits that her insurance agent admitted that she was 100% at fault. See amended Request for Admission No. 6; excerpt attached hereto and filed with the Defendant's response to their motion to compel.

In addition, the plaintiff Mathew R. Bennett has no comparative fault since he was a passenger in the vehicle. If there is an allegation of comparative fault by the defendant then the plaintiff is entitled to a defense to this claim from the insurance carrier for both the parties.

The alleged defense and claim that the Department of Transportation failed to mark the exit correctly is based on mere speculation and conjecture. There is no statement of any kind of duty, breach of duty, or any kind of liability under the Idaho Tort Claims Act (Idaho Code § 6-901 et seq). The defendant Nancy Patrick should be required to state a claim for negligence against the Idaho Department of Transportation or the Construction Company and join them as a party, or summary judgment should be granted on the defense of third party fault.

B. SUMMARY JUDGMENT STANDARD OF REVIEW

Rule 56(c) of the Idaho Rules of Civil Procedure allows that summary judgment "shall be rendered forthwith 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." See *Smith v. Meridian Joint School Dist. No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996) (quoting I.R.C.P. 56(c)); see also *Idaho Building Contractors Association v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326 (1995). If reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence, summary judgment must be denied. *Id.* (citing *Harris v. State, Department of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992)). However, if the evidence reveals no disputed issues of material fact, the summary judgment should be granted to the moving party. *Id.*, 128 Idaho at 718-719, 918 P.2d at 587-88 (citing *Loomis v. City of Hailey*, 119 Idaho 434 (1991)).

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If the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to come forward with sufficient evidence to create a genuine issue of fact. *Id.* (citing *Tingley*, 125 Idaho at 90, 867 P.2d at 964). Summary judgment is properly granted in favor of the moving party, when the nonmoving party fails to establish the existence of an element essential to that party's case upon which that party bears the burden of proof at trial. *Id.* (citing *Thomson*, 126 Idaho at 530-31, 887 P.2d at 1037-38; *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126 (1988)).

The party opposing the summary judgment motion "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *IRCP 56(e)*. The nonmoving party's case **must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact.** *Tuttle v. Sudenga Industries, Inc.*, 125 Idaho 145, 868 P.2d 473 (1994) (plaintiff who produces mere scintilla of evidence, or otherwise raises only slight doubt as to facts, will not withstand summary judgment); *R.G. Nelson, A.I.A v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). If the nonmoving party does not come forward as provided in the rule, then summary judgment should be entered against that party. *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 270, 899 P.2d 977, 980 (1995).

The Idaho Supreme Court has noted that "while a plaintiff's conduct affecting comparative responsibility is generally a question for the jury, where the undisputed facts lead to only one reasonable conclusion the court may rule as a matter of law." *Corbridge v. Clark Equipment Co.*, 112 Idaho 85, 86-87, 730 P.2d 1005 (1987); citing *Tuttle v. Sudenga Indus., Inc.*, 125 Idaho 145, 149, 868 P.2d 473, 477 (1994); and *Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 824, 979 P.2d 1174 (1999).

There is no proof of any comparative fault or negligence on the part of the plaintiffs. There is only speculation and allegations that the plaintiff Walton's evasive actions were somehow negligent. The defendant has produced at most a mere scintilla of evidence that does not even raise a slight doubt.

C. CASE LAW AFFIRMATIVE DEFENSES

The court in *Dewey v. Keller*, 86 Idaho 506, 518, 388 P.2d 988 (1964), after setting out the statutory law instructed the jury on the burden of proof. The court ruled the party that alleges speeding in a motor vehicle collision has the burden of proof on that issue, as follows:

"The provisions of this instruction declaring prima facie speed limitations shall not be construed to relieve a person claiming excessive speed on the part of another person from the burden of proving that such excessive speed was the proximate cause of the accident."

In time of imminent danger, a person is not necessarily negligent because he fails to take every precaution or adopt every means of safety that a careful calculation subsequently shows he might have taken or adopted. The Supreme Court of this state in

the case of *Stuart v. McVey*, 59 Idaho 740, 747, 87 P.2d 446 (1939) quoted the case of *Schneider v. Market Street Railway Co.*, 134 Cal. 482, 66 P. 734, 738, as follows:

"If the plaintiff is suddenly put into peril, without having sufficient time to consider all the circumstances, he is excusable for omitting some precautions, or making an unwise choice, under this disturbing influence, although, if his mind had been clear, he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault.' And of such a case it is said: 'even if, in bewilderment, he runs directly into the very danger which he fears, he is not in fault. The confusion of mind caused by such negligence is part of the injury inflicted by the negligent person.'

"...it would be absurd to hold that even an adult person, in time of imminent danger, is negligent, unless he takes every precaution that a careful calculation afterward will show he might have taken." (Power v. Crown Stage Co., 82 Cal. App. 660, 256 P. 457.) Citing *Stuart v. McVey*, 59 Idaho 740, 748, 87 P.2d 446 (1939)."

It is a well established rule that persons using a public highway which is in constant use, and when their attention has not been called to any obstructions or peril thereon, have a right to assume, and act upon the belief, that the way is reasonably safe for ordinary travel, whether they are traveling at night or in the daytime. Such persons are not bound to anticipate unusual dangers or the presence of unlawful obstructions when there is nothing to put them on guard or notice. Citing *Dewey v. Keller*, supra 86 Idaho at 517 (1964); numerous other citations omitted.

A motorist upon the public highways of this state has a right to assume that the road ahead of him is clear and it may be generally stated that any person responsible for the obstruction of a highway is under the duty to exercise proper care that

approaching motorists are warned of such obstruction. It was prejudicial error not to have given such instructions to the jury, outlining the principles of law discussed above. *Citing Dewey v. Keller*, supra 86 Idaho at 517 (1964); *Coughran v. Hickox*, 82 Idaho 18, 26, 348 P.2d 724 (1960).

An Idaho driver is entitled to rely upon the mandatory requirements of the law applicable to other drivers who can create dangers by violating the law. *Stucki v. Loveland*, 93 Idaho at 253 (1969) (failure to stop at a stop sign).

In *Potter v. Mulberry*, 100 Idaho 429, 430-31, 599 P.2d 1000, (1979) the court found that it is the duty of the driver approaching the stop sign to come to a halt and determine if it is safe to proceed across the highway. It is not the duty of the driver of the vehicle on the sign-protected through highway to assume drivers will violate such a mandatory statutory duty. Accord: *Coughran v. Hickox*, supra 82 Idaho at 18 (1960); *citing Stucki v. Loveland*, supra 93 Idaho 253, 257, 460 P.2d 388 (1969); *Foster v. Thomas*, 85 Idaho 565, 382 P.2d 792 (1963); *Roberts v. Reed and Transportation Department*, 121 Idaho 727, 735, 827 P.2d 1178, 1186 (Ct. App. 1991). *Dawson v. Olson and State Farm Mutual Automobile Insurance Co.*, 95 Idaho 295, 297, 507 P.2d 804 (1973); other citations omitted.

D. CONCLUSION

There is no genuine issue of material fact for trial on this issue. Summary judgment is proper and must be entered in this case against the defendant since she cannot prove any comparative fault

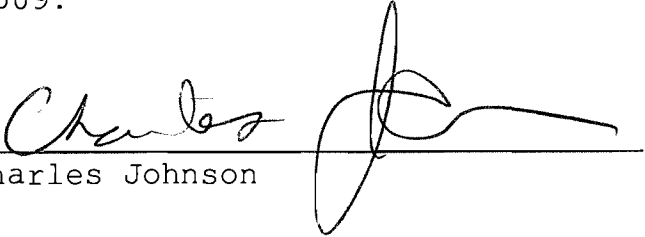
or negligence on the part of the plaintiff. She has merely speculation and conjecture of failure to take an evasive action which is not a viable legal defense in this case in Idaho.

The defendant's response to the plaintiffs' summary judgment motion seems to be a weak attempt to create at least one percent (1%) comparative fault on the plaintiff's part. The defendant makes claims that she never stated before and were or could have been known before (and did not need a deposition to prove) and the claims the defendant makes fail as a matter of law.

There is in fact no admissible evidence of any comparative fault by the State of Idaho or the Construction Company in this case. The plaintiff has produced no admissible evidence of any duty, breach of duty or standard of care or liability under the Idaho Tort Claims Act or common law.

WHEREFORE, the plaintiffs move for summary judgment on liability in this case. The case should proceed to trial on damages only against the defendant Nancy Patrick.

DATED this 5th day of May 2009.



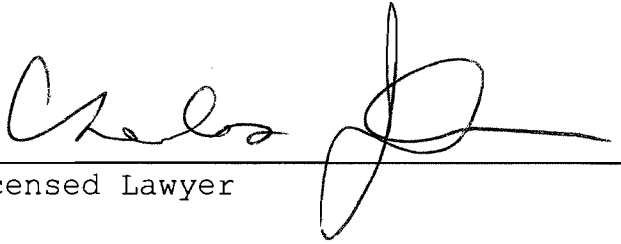
Charles Johnson

CERTIFICATE OF MAILING

I HEREBY CERTIFY that my secretary hand delivered a true and correct copy of the foregoing document, addressed as follows:

Jared A. Steadman
Brendon C. Taylor
MERRILL & MERRILL, CHARTERED
109 North Arthur Avenue - 5th Floor
Pocatello, Idaho 83204-0991

on this 5th day of May 2009.



Licensed Lawyer

attorney work product doctrine, Defendant objects to the same. Without waiving this objection, Defendant answers that she is in possession of no such non-objectionable documents not already hereto attached. Defendant refers Plaintiffs to her insurance policy attached hereto as Exhibit A.

REQUESTS FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 6: Please admit that the defendant's representatives had earlier admitted and agreed that collision that took place in this case which was the total fault of the defendant Nancy Patrick.

ANSWER TO REQUEST FOR ADMISSION NO. 6: Objection. To the extent this request for admission is not reasonably calculated to lead to the discovery of admissible evidence, Defendant objects to the same. Without waiving this objection, Defendant admits that her insurer wrote that at the time of the letter and subject to more information becoming available, Defendant was 100% liable. However, this was not made in the context of litigation and is not presently the position of Defendant.

DATED this 27th day of April, 2009.

MERRILL & MERRILL CHARTERED

By

[Signature]
Brendon C. Taylor
Attorneys for Defendant

DATED this 27 day of April, 2009.

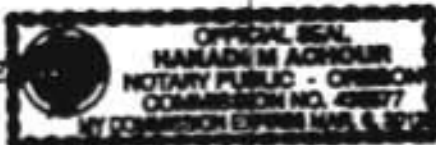
[Signature]
Nancy Patrick

STATE OF ^{Oregon} ~~IDAHO~~)

County of Washington

SUBSCRIBED AND SWORN to before me by Nancy Patrick on this 27th day of April, 2009.

[Signature]
NOTARY PUBLIC FOR Oregon
Residing at Lake Oswego, OR
Commission expires: March 6, 2013



FILED
BANNOCK COUNTY
CLERK

2009 JUN 19 PM 4:22

DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT IN AND
FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

MATHEW R. BENNETT and BENJAMIN
L. WALTON,

Plaintiffs,

vs.

NANCY PATRICK,

Defendant.

Case No: CV-2008-0004528-PI

MINUTE ENTRY & ORDER

THE PARTIES came before the Court on the 11th day of May, 2000 for a hearing on Plaintiffs' Motion to Compel and Plaintiffs' Motion for Summary Judgment. Charles Johnson appeared in person on behalf of the Plaintiffs. Brendon Taylor appeared in person on behalf of the Defendant. Stephanie Morse was the Court Reporter.

At the outset, the Court heard oral argument from the parties on Plaintiffs' Motion to Compel. The Court ruled that the answers to Plaintiffs' discovery requests are adequate for the time being. Answers to the discovery requests including any response relating to the negligence of any third party or plaintiffs will need to be supplemented if the Defendant intends to have these issues put before a jury.

Thereafter, the Court heard oral argument from the parties on Plaintiffs' Motion for

Summary Judgment. The Court then **DENIED WITHOUT PREJUDICE** Plaintiffs' Motion for Summary Judgment.

IT IS SO ORDERED.

DATED this 19th day of June, 2009.


DAVID C. NYE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ____ day of June, 2009, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

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Deputy Clerk

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 E-Mail: cjlaw@allidaho.com
 Attorney for Plaintiffs

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 BY *[Signature]*
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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and	)	Case No. CV-08-4528-OC
BENJAMIN L. WALTON,)	
	)	FIRST AMENDED AND RENEWED
Plaintiffs,	)	MOTION FOR SUMMARY JUDGMENT
)	
vs.)	
)	
NANCY PATRICK,)	
)	
Defendant.)	
_____)	

The plaintiffs, Mathew R. Bennett and Benjamin L. Walton, through counsel of record, hereby files this first amended and renewed motion for summary judgment in this case. This motion is based on the pleadings and documents on file in this matter, including the plaintiffs' prior reply brief in support of the plaintiffs' motion for summary judgment dated May 5, 2009 and Affidavit of Jason Walton. This motion is also based on the recently taken depositions of Nancy Patrick, Benjamin Walton and Mathew Bennett; see copies of depositions attached hereto. This motion is made pursuant to IRCP 56.

The plaintiffs both testified that they did not see Nancy Patrick's vehicle prior to the collision because she pulled out behind a steamroller at the construction site. See Walton

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deposition at page 15 and Bennett's deposition at page 14, copies attached. Therefore, she failed to yield the right of way and caused the collision. Id.

Further, Nancy Patrick testified at her deposition that she did not even see the Walton vehicle before the collision, see Nancy Patrick deposition, page 14. She was looking uphill and trying to go straight across the road so she did not see them at all prior to the collision. Id.

She pulled out into the lane of traffic without verifying if another vehicle was coming in the other direction. See Patrick deposition, page 15. She does not disagree that Walton and Bennett could not see her vehicle before the collision. See Patrick deposition, pages 15-16.

Nancy Patrick testified she did not know what the speed limit was on the road at the time. Further, she did not know how fast the Walton pick-up truck was going at all. See Patrick deposition, page 18. She testified that she would not have pulled out in front of a speeding vehicle. See Patrick deposition, page 19.

She testified she did not know what Mr. Walton could have done to prevent the accident. She had no facts to support the claim that he failed to take evasive action, should have honked his horn, should have swerved and should have braked. See Patrick deposition, page 19.

In fact, Nancy Patrick testified there were no facts to support the allegations made in paragraph 4 of her affidavit at all. See Patrick deposition, pages 19-20. She testified that she

did not claim that Walton was negligent at all. See Patrick deposition, page 20. There are no facts to support the claim of comparative fault by the plaintiff Walton, and she admitted she was at fault in this case. See Patrick deposition, pages 21 and 23.

She further testified that she had no proof that the State of Idaho or the construction company did anything wrong. See Patrick deposition, page 21. She does not intend to make a claim against them in this case. See Patrick deposition, page 21.

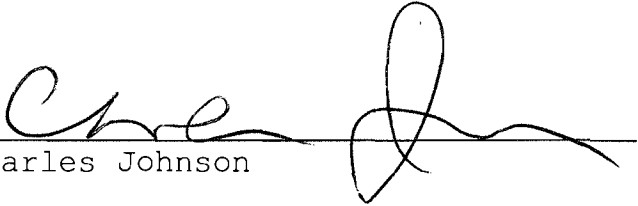
A letter was written to defense counsel to point out this fact and that the statute of limitations would run on October 18, 2009. There was no motion to join the State of Idaho or the construction company as a third party defendant in this case.

Patrick admitted that she pulled out into the Walton lane of traffic but this was accidental. She simply let off her brake and rolled out into the lane of traffic without making sure the way was clear. See Patrick deposition, pages 22-23.

In conclusion, the defendant Patrick has no facts to support her claim of comparative fault or negligence on the part of a third party. The Court should grant summary judgment to Bennett and Walton on liability in this case. The case should proceed to trial on damages only against the defendant Nancy Patrick. Further, the Court should award the plaintiffs their costs and attorney's fees or a summary judgment determination on liability pursuant to Idaho Rule of Civil Procedure 56(g) on summary judgment affidavits made in bad faith, IRCP 36 on denied requests for admissions, IRCP 11 on bad faith conduct, and Idaho Code § 12-120(4) on allowance of

attorney's fees on small personal injury claims.

DATED this 18th day of November 2009.



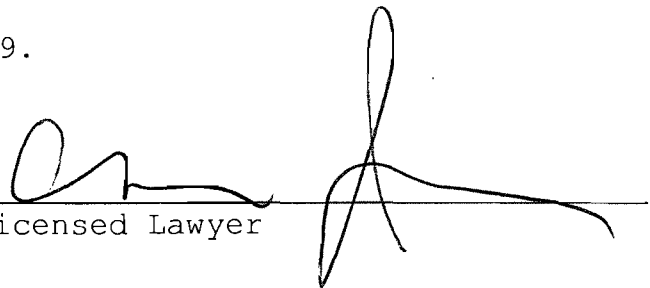
Charles Johnson

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing document by placing the same in the United States mail, postage prepaid, addressed as follows:

Jared A. Steadman
Brendon C. Taylor
MERRILL & MERRILL, CHARTERED
P.O. Box 991
Pocatello, Idaho 83204-0991

on this 18th day of November 2009.



Licensed Lawyer

DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and)
BENJAMIN L. WALTON,)
Plaintiffs,)

COPY

vs.) Case No. CV-08-4528-OC
NANCY PATRICK,)
Defendant.)

ORAL DEPOSITION OF MATHEW ROBERT BENNETT

Taken on September 24, 2009

REPORTED BY:

PAUL D. BUCHANAN, RPR, RMR,

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DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and BENJAMIN L. WALTON, Plaintiffs, vs. NANCY PATRICK, Defendant. Case No. CV-08-4528-OC

ORAL DEPOSITION OF MATHEW ROBERT BENNETT Taken on September 24, 2009

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PAUL D. BUCHANAN, RPR, RMR, CSR No. 7, and Notary Public

INDEX

Table with 2 columns: Line Number (1-25) and Page Number (4, 4). Includes entries for Examination By: Mr. Taylor, Exhibits: No. 1 - Bennett Diagram of Accident Scene.

1 APPEARANCES:

2 For the Plaintiff: CHARLES JOHNSON Johnson Olson Attorneys at Law P. O. Box 1725 Pocatello, Idaho
3 For the Defendant: BRENDON C. TAYLOR Merrill & Merrill Attorneys at Law P. O. Box 991 Pocatello, Idaho
4 Also Present: Benjamin L. Walton

1 BE IT REMEMBERED that on September 24, 2009, at the hour of 9:40 a.m. the deposition of MATHEW ROBERT BENNETT, produced as a witness at the instance of the defendant in the above-entitled action now pending in the above-named court, was taken before Paul D. Buchanan, CS #7, and notary public, State of Idaho, in the law offices of Merrill & Merrill, 109 North Arthur Avenue, Pocatello, Bannock County, Idaho.

10 WHEREUPON, the following proceedings were had:

12 MATHEW ROBERT BENNETT, called at the instance of the defendant, having been first duly sworn, was examined and testified as follows:

15 EXAMINATION
16 BY MR. TAYLOR:
17 Q. Would you please state your name and address for the record?
18 A. Mathew Robert Bennett, 10010 North Batiste Road, Pocatello, Idaho.
19 Q. Were you present for Ms. Patrick's deposition, Mathew?
20 A. Yes.
21 Q. Did you hear the instructions your counsel gave her with regard to how a deposition is to be

1 conducted?
 2 A. Yes, I did.
 3 Q. Are those terms agreeable to you?
 4 A. Yes, they are.
 5 Q. When I ask you a question, I'll expect that if
 6 you answer my question, you have heard the question,
 7 understood it, and are able to honestly answer it. Is
 8 that fair?
 9 A. Yes, it is.
 10 Q. Tell me what your current occupation is.
 11 A. I am a concrete finisher.
 12 Q. How long have you been doing concrete
 13 finishing?
 14 A. For about seven years on and off.
 15 Q. Who is your current employer?
 16 A. Kiggins Construction.
 17 Q. How long have you worked for Kiggins?
 18 A. Since November of '07, I believe.
 19 Q. Who is your supervisor at Kiggins?
 20 A. Chris Benzinger.
 21 Q. How long has Mr. Benzinger been your
 22 supervisor?
 23 A. For about four to six months.
 24 Q. Prior to him, who was your supervisor?
 25 A. Richard Lish.

1 Q. Before Kiggins where did you work?
 2 A. I worked for Ben Walton (indicating).
 3 Q. What period of time did you work for Mr.
 4 Walton?
 5 A. It would have been on and off for, I don't
 6 know, a year, maybe two.
 7 Q. What did you do for Mr. Walton?
 8 A. I spotted nails and help him texture.
 9 Q. So you were working drywall work?
 10 A. Yes.
 11 Q. Is that what you did the entire time you
 12 worked for him, spotted nails and texture work?
 13 A. Yes.
 14 Q. Did anybody besides Mr. Walton supervise you
 15 when you were working for him?
 16 A. No.
 17 Q. During the time you were working for Mr.
 18 Walton, you said on and off, was there someone else you
 19 worked for during that period of time?
 20 A. Yes, I worked for Sea Gull Bay as a caretaker.
 21 Q. What did those responsibilities include?
 22 A. They included taking launch fees and grounds
 23 keeping.
 24 Q. Did you have any construction responsibilities
 25 there?

1 Q. For what period of time was Mr. Lish your
 2 supervisor?
 3 A. Up until last year.
 4 Q. From the time you started until last year?
 5 A. Yes.
 6 Q. Have you had any other supervisors at Kiggins?
 7 A. No.
 8 Q. During the time you worked at Kiggins, have
 9 you always been a concrete finisher?
 10 A. Yes.
 11 Q. If you wouldn't mind taking me through a
 12 typical day of work and explain to me what you do from
 13 the time you get there until the time you are finished
 14 working, please.
 15 A. We form up boards, stake up boards, then we
 16 pour the concrete, then we trowel it and finish it.
 17 Q. When the concrete is poured, is that delivered
 18 by a truck typically?
 19 A. Yes, it is.
 20 Q. And you are actually the one doing the trowel
 21 work and smoothing out the concrete, then.
 22 A. Yes.
 23 Q. And that's been the course of your employment
 24 for the entire time you have been at Kiggins?
 25 A. Yes.

1 A. Not there.
 2 Q. When you say grounds keeping, was there
 3 digging involved?
 4 A. No, it was mowing the lawn, spraying the
 5 weeds.
 6 Q. What period of time did you work for Sea Gull
 7 Bay as the caretaker?
 8 A. From April to I want to say the end of July.
 9 Q. And what year was this?
 10 A. '07.
 11 Q. And that was just a period of three months?
 12 A. Yes.
 13 Q. Why is it that you stopped working at Sea Gull
 14 Bay?
 15 A. Because they had a short season and they
 16 didn't feel like they needed to pay me to sit there and
 17 do nothing.
 18 Q. Why did you stop working for Mr. Walton?
 19 A. Because I found a better paying job for
 20 Kiggins.
 21 Q. Before you worked for Mr. Walton or at Sea
 22 Gull Bay where did you work?
 23 A. I worked for -- I think it might have been Ram
 24 Concrete.
 25 Q. Ram Concrete?

1 A. Yes.
 2 Q. For what period of time did you work there?
 3 A. I am unsure of the dates. He is a close
 4 friend of mine so I still help him out occasionally.
 5 Q. If I represented to you that in your discovery
 6 responses you identified from March of '07 through
 7 October of '07, would that be accurate?
 8 A. Yes.
 9 Q. Other than still doing occasional work for
 10 him.
 11 A. Yes.
 12 Q. During the period of time that you worked for
 13 Ram Construction, what were your responsibilities?
 14 A. I was a finisher.
 15 Q. Was your job substantially similar to what you
 16 are doing at Kiggins currently?
 17 A. Yes, it is.
 18 Q. Who were your supervisors at Ram?
 19 A. Ryan McCowin.
 20 Q. Why did you quit working there?
 21 A. It's up in Idaho Falls and I live here in
 22 Pocatello. Driving up there got to be an issue every
 23 day.
 24 Q. And aside from those places of employment you
 25 have identified on your answer to Interrogatory No. 4,

1 job dependent?
 2 A. It was job dependent.
 3 Q. And if you would explain what you were doing
 4 in the fall of 2007 as far as how much time you would
 5 spend working for one versus the other.
 6 A. It was on and off; when Ben needed help, I
 7 would help him instead of driving to Idaho Falls. If
 8 they needed help, I would go help them.
 9 Q. And if they needed help meaning Ram
 10 Construction?
 11 A. Yes.
 12 Q. What is your current age?
 13 A. Twenty-nine -- twenty-eight, sorry.
 14 Q. Your marital status?
 15 A. I am married.
 16 Q. What is the highest level of school you have
 17 completed?
 18 A. High school.
 19 Q. When did you graduate?
 20 A. 2001.
 21 Q. What high school did you graduate from?
 22 A. Westview.
 23 Q. Have you ever had your driver's license
 24 suspended or restricted for any reason?
 25 A. Yes, I have.

1 you worked for a Jim Dolcheck?
 2 A. Yes.
 3 Q. What does Mr. Dolcheck do?
 4 A. Concrete as well.
 5 Q. And that employment was from April of '06
 6 through July of '07?
 7 A. Yes.
 8 Q. So that was the place you were working at the
 9 time of the accident in this case; is that correct?
 10 A. No.
 11 Q. April of '06 through July of '07 didn't
 12 include the time -- I guess it would have been October of
 13 '07; correct?
 14 A. Yes.
 15 Q. When you were working for Mr. Dolcheck what
 16 kind of daily activities did you do?
 17 A. Setting boards and pouring concrete, finishing
 18 it.
 19 Q. Was he the only supervisor you had there?
 20 A. Yes.
 21 Q. So at the time of the accident were you
 22 working for Walton or Ram Construction?
 23 A. I was working for both of them.
 24 Q. And can you tell me how much time do you spend
 25 during a week working for one versus another or was it

1 Q. For what purpose would that have been?
 2 A. Reckless driving.
 3 Q. When did you receive a reckless driving
 4 citation?
 5 MR. JOHNSON: Could I just object on the
 6 grounds of relevance since he wasn't a driver, counsel,
 7 and just note a continuing objection in that regard?
 8 MR. TAYLOR: That's fine.
 9 MR. JOHNSON: Also under Rule 404, that it's
 10 not a felony conviction, but we will just have a
 11 continuing objection to that line of questioning. Go
 12 ahead and answer, if you can.
 13 A. I am unsure of it. I think it might have been
 14 in '01 or '02.
 15 Q. Would you explain what was happening at the
 16 time you received the citation?
 17 A. I was in Shelley and I got pulled over.
 18 Q. What were the charges as far as the factual
 19 allegations supporting the charge for reckless?
 20 A. They thought that I had been drinking too
 21 much, and I had had a beer.
 22 Q. Did they do a sobriety test?
 23 A. Yes, they did.
 24 Q. And were you charged with a DUI?
 25 A. No, I wasn't.

1 Q. Did they explain to you what in your driving
2 led them to charge you with reckless driving?
3 A. I was going three miles over the speed limit.
4 Q. Did you pay the ticket or did you fight the
5 ticket?
6 A. I did fight it.
7 Q. And the result was a conviction for reckless
8 driving?
9 A. Yes.
10 Q. Have your driving privileges been suspended at
11 any other time for any other purpose?
12 A. Not that I know of.
13 Q. Do you have any felony convictions?
14 A. No.
15 Q. Do you have other convictions for other
16 criminal acts that relate to honesty or integrity?
17 A. No.
18 Q. That would include anything like fraud,
19 forgery, any of those sorts of things, do you have any of
20 those types of charges or convictions?
21 A. No, sir.
22 Q. I would like to talk about the day of the
23 accident. Do you recall that day?
24 A. I do.
25 Q. Do you recall the purpose of the trip that you

1 Q. And to the left of your vehicle were there any
2 obstructions?
3 A. Yes, there was oncoming traffic.
4 Q. If you were texting your wife, how did you
5 know there was oncoming traffic?
6 A. Because I know we were going up and they were
7 coming down.
8 Q. So you were looking up at the same time you
9 were texting?
10 A. No, I wasn't looking up, I just figured there
11 would be oncoming traffic in a two-lane road.
12 Q. But you didn't see the traffic because you
13 were texting; correct?
14 A. Correct.
15 Q. Was there anyone behind you, any other vehicle
16 behind you that you knew of?
17 A. Yes, there was Jason Walton.
18 Q. What kind of vehicle was he driving?
19 A. I believe he was driving a Mustang.
20 Q. Do you know how far behind you he was?
21 A. I am not sure. He was the car directly behind
22 us, but I don't know how far behind us he was.
23 Q. Had he been at lunch with you guys?
24 A. Yes.
25 Q. Was there anyone else in your vehicle or in

1 were on at the time of the collision?
2 A. Yes, we were on our way back to work from
3 lunch.
4 Q. Where had you gone for lunch?
5 A. To Ben's house.
6 Q. Where was the job that you were going to?
7 A. It was up Center and I can't remember the name
8 of the subdivision.
9 Q. What had you been doing that morning before
10 you broke for lunch?
11 A. Spotting nails.
12 Q. And, if you would, just take me through the
13 time right before the accident until the accident
14 happened and describe what happened in your own words.
15 A. We stopped at a stoplight and we continued to
16 go up the hill. I was texting my wife, and we got hit.
17 Q. Did you see the other vehicle before the
18 collision?
19 A. No.
20 Q. Were you talking to Mr. Walton at all?
21 A. No.
22 Q. How would you describe the visibility going
23 through that construction zone?
24 A. We did not see her; there was no way you could
25 have seen her, she was in front of the steam roller.

1 Mr. Walton's vehicle?
2 A. No.
3 Q. When did you first perceive that an accident
4 was going to happen?
5 A. After it already did.
6 Q. Had you been looking down when the vehicles
7 struck?
8 A. Yes.
9 Q. What happened to the vehicle you were in as a
10 result of the impact?
11 A. Well, from what I could tell she came out and
12 hit us on the door and our back tire went over her
13 bumper, the front end of her car.
14 Q. And after that happened did your vehicle stop
15 or -
16 A. Yes.
17 Q. Was it knocked into the other lane?
18 A. It was knocked into the other lane. We were
19 straddling the lane.
20 Q. Why don't we go ahead and give you a chance to
21 draw a diagram of the accident scene to the best of your
22 recollection. What I am interested in is the actual part
23 of the roadway where the accident happened and the
24 position of the vehicles.
25 A. The steam roller -- okay, we'll go like this.

1 We were coming up here, there was cones here, the steam
 2 roller was parked like this (indicating) --
 3 Q. If you would please put an SR on the steam
 4 roller.
 5 A. (Witness complies.) And we were coming right
 6 here (indicating) and from what I could tell she pulled
 7 out around the steam roller and hit us here and we ended
 8 up over here (indicating).
 9 Q. Now, just to make sure this is clear, is that
 10 roadway Center?
 11 A. Yes, this is Center.
 12 Q. Are you identifying one or two lanes there on
 13 Center?
 14 A. Okay, the cones were over here so this was
 15 like this, oncoming traffic coming this way and we were
 16 going this way (indicating).
 17 Q. And there were cones between the two lanes?
 18 A. I'm not sure; I believe so.
 19 Q. And you ended up in the other lane of travel?
 20 A. Yes.
 21 Q. Did you knock over cones?
 22 A. We must have if they were there; I can't
 23 exactly remember.
 24 Q. Did the vehicle you were in strike any other
 25 vehicles after this accident?

1 A. No.
 2 Q. Do you recall any other vehicles that were
 3 coming from the other direction that had to stop as a
 4 result of the accident?
 5 A. Yes. We ended up getting out of the car and
 6 directing traffic.
 7 Q. How soon was the first vehicle coming in the
 8 other lane, in the westbound lane?
 9 A. It was almost immediately that they had to go
 10 around us.
 11 Q. Do you recall any other vehicles having to
 12 swerve or take any evasive action to avoid being involved
 13 in this collision?
 14 A. Not that I can recall.
 15 Q. How about any vehicles behind you, do you
 16 recall them having to take any evasive action?
 17 A. Not that I can recall.
 18 Q. If you would here, why don't you point arrows
 19 to the vehicles so that we can see. First of all, Ms.
 20 Patrick's vehicle.
 21 A. (Witness complies.)
 22 Q. And then put an X in the vehicle position
 23 where you came to rest.
 24 A. (Witness complies.)
 25 Q. How far do you believe you traveled after the

1 point of impact before you came to rest?
 2 A. I don't know, maybe 10, 15 feet.
 3 Q. What was the speed limit on that roadway?
 4 A. I believe it was 25.
 5 Q. How fast was Mr. Walton traveling?
 6 A. We were in the flow of traffic with cars in
 7 front of us and cars behind us.
 8 Q. Do you know how fast it was that he was going?
 9 A. No, I don't.
 10 Q. At the time of the accident what happened to
 11 you in the vehicle? Were you jostled around, moved
 12 around --
 13 A. Yes, I was.
 14 Q. Can you describe what physically happened to
 15 you?
 16 A. I came up and came down and smacked my head on
 17 the side of the passenger window.
 18 Q. You were in the front passenger seat?
 19 A. Yes.
 20 Q. Were you wearing a seat belt at the time?
 21 A. I can't recall; I do believe I was.
 22 Q. And by the time the vehicle came to rest did
 23 you notice any pain that you were suffering?
 24 A. No, my adrenaline was going.
 25 Q. When was the first time that you felt that you

1 were in any pain as a result of this accident?
 2 A. About an hour afterwards.
 3 Q. Let's go back to the accident scene. After
 4 your vehicle came to a rest, what did you do?
 5 A. I got out of the car and I went and checked on
 6 Ms. Patrick to make sure she was okay, and she appeared
 7 to be fine.
 8 Q. Did she say anything to you?
 9 A. She said she was a little upset and she had
 10 very good insurance.
 11 Q. Did she say anything else to you during the
 12 time you conversed with her after the accident?
 13 A. No.
 14 Q. What else did you do after the accident?
 15 A. We directed traffic, because we did not move
 16 the vehicles until the police arrived.
 17 Q. Do you know who called the police?
 18 A. I am not sure.
 19 Q. Aside from directing vehicles and the brief
 20 conversation you had with Ms. Patrick, did you do
 21 anything else before the police arrived?
 22 A. No.
 23 Q. When the police arrived, what happened?
 24 A. Ms. Patrick's nose had been bleeding -- I did
 25 see her bang her head off the steering wheel, I heard her

1 horn before the police arrived.

2 Q. When was that in relation to the accident?

3 A. After I went and talked to her and she was
4 okay.

5 Q. Did you witness anything else before the
6 police arrived?

7 A. Just her banging her head on the wheel.

8 Q. And then when the police arrived, what
9 happened?

10 A. Officer Goss walked right by us and went and
11 gave her a hug and she said thank God, it's you.

12 Q. Do you recall anything else that was said
13 between them?

14 A. No, I don't.

15 Q. What happened after the embrace that he had
16 with Ms. Patrick?

17 A. I can't really recall.

18 Q. Did he ask you questions about the accident?

19 A. No, he said that she was upset when we went --
20 we attempted to talk to him and said that she was upset
21 and confused.

22 Q. Did Officer Goss ask you questions about how
23 the accident occurred?

24 A. No.

25 Q. Did he ask for a statement from you?

1 A. I called my wife.

2 Q. What did you tell her?

3 A. That we had just been in an accident.

4 Q. Did she ask you if you were okay?

5 A. Yes.

6 Q. What did you tell her?

7 A. I said yeah, seem to be fine.

8 Q. So at this point before you left the accident
9 scene you told me about talking to Ms. Patrick for a

10 short conversation and then officer didn't really talk to
11 you, but the second officer who arrived did talk to you.

12 A. Yes.

13 Q. And then you also called your wife.

14 A. Yes.

15 Q. Did you talk to anybody else at the accident
16 scene before you left?

17 A. Not that I can recall.

18 Q. I presume that you and Mr. Walton had
19 conversations there.

20 A. Yes.

21 Q. What did Mr. Walton say to you after the
22 accident happened?

23 A. I can't remember, really.

24 Q. Did he talk to you at all about whether or not
25 you were hurt or whether he was hurt?

1 A. No.

2 Q. How long did you stay on the accident scene
3 after Officer Goss arrived?

4 A. Maybe a half hour, 45 minutes.

5 Q. And what was the reason that you stayed on the
6 accident scene for that long?

7 A. Because we waited for -- another officer came
8 and talked to us.

9 Q. Who was that?

10 A. I cannot recall.

11 Q. Did the other officer take your statements?

12 A. Yes.

13 Q. When did the other officer arrive in regard to
14 when Officer Goss arrived, how long after Officer Goss
15 arrived?

16 A. I can't recall, maybe five minutes, ten
17 minutes.

18 Q. So did both you and Mr. Walton give statements
19 to this other officer?

20 A. I believe so.

21 Q. Was Mr. Walton's vehicle drivable after the
22 accident?

23 A. Yes, it was.

24 Q. Did you call anybody else or talk to anybody
25 else at the accident scene?

1 A. He said his neck hurt.

2 Q. How soon after the accident did he tell you
3 that his neck hurt?

4 A. When we were waiting for the officer to come
5 give us our statement.

6 Q. Can you estimate how long after the accident
7 that was in minutes?

8 A. Maybe 15, 20.

9 Q. Do you remember any other conversation you had
10 with Mr. Walton about the accident itself or any pain
11 either of you were suffering?

12 A. No.

13 Q. Do you remember any other conversation with
14 Mr. Walton at all at the scene of the accident?

15 A. No.

16 Q. Did you talk about a lawsuit at the scene of
17 the accident?

18 A. No.

19 Q. How is it that you left the accident scene,
20 what vehicle?

21 A. I can't recall; I don't know if it was Ben's
22 or Jason's.

23 Q. Where did you go after leaving the accident
24 scene?

25 A. Straight to the emergency room.

1 Q. Why did you go to the emergency room?
 2 A. Because I had -- my back was uncomfortable.
 3 Q. I believe you said before that it was about an
 4 hour after the accident that you first noticed you were
 5 in some pain. Were you at the accident scene for an
 6 hour?
 7 A. I don't know.
 8 Q. Can you describe the pain that you were
 9 feeling that made you decide to go to the emergency room?
 10 A. The inability to get comfortable.
 11 Q. Can you describe that as far as how your back
 12 was feeling?
 13 A. It was just uncomfortable, like I had to sit
 14 kind of cocked to the side (indicating).
 15 Q. What part of your back?
 16 A. My lower back.
 17 Q. And it was within that first hour that you
 18 started noticing pain in your lower back that made you so
 19 uncomfortable that you had trouble sitting?
 20 A. Yes.
 21 Q. Did you talk about your pain to anyone at the
 22 accident scene?
 23 A. Not at the accident scene -- or I might have
 24 talked to the paramedic about it.
 25 Q. When did the paramedics arrive?

1 Q. If you could just take me through what you do
 2 recall. How long do you believe you sat there?
 3 A. We were there for quite a while, two or three
 4 hours.
 5 Q. Were you treated at some point in time at the
 6 emergency room?
 7 A. Yes, I was.
 8 Q. Do you recall the doctor or nurse who treated
 9 you?
 10 A. I do not.
 11 Q. What did they do to treat you?
 12 A. They felt my back, made me move my arms and do
 13 various things and they gave me Vicodin to help with the
 14 pain, the uncomfortable, and sent me home.
 15 Q. Were there any diagnostic tests, x-rays or
 16 MRIs, done at the hospital?
 17 A. I don't recall. I know I did have them later.
 18 But initially I do not recall.
 19 Q. How long were you at the emergency room total?
 20 A. I'm unsure; I believe it was around two or
 21 three hours.
 22 Q. So after you finally waited and were seen, how
 23 long did somebody actually see and attend to you?
 24 A. Maybe a half hour.
 25 Q. I want to go back to the accident scene for

1 A. I don't know; after the second officer
 2 arrived.
 3 Q. Who did the paramedics come to help?
 4 A. They went straight to Ms. Patrick first.
 5 Q. And then who did they speak with?
 6 A. Then they came over and spoke to me and Ben.
 7 Q. Do you know who the paramedics were?
 8 A. No, I do not.
 9 Q. Had you seen them before?
 10 A. No.
 11 Q. When the paramedics may have talked to you and
 12 Ben, what did they say to you?
 13 A. Basically that it would probably be a good
 14 idea to go in and get checked out.
 15 Q. And so did you talk to them about your back
 16 pain?
 17 A. I told them it was getting uncomfortable.
 18 Q. Do you recall talking to anybody else at the
 19 accident scene about your back?
 20 A. No, I do not.
 21 Q. So after leaving the accident scene you said
 22 you went to the emergency room. Why don't you describe
 23 what happened when you arrived at the emergency room.
 24 A. We sat there for quite a while and they -- I
 25 can't really recall everything.

1 one more thing. Did you have a chance to see the
 2 vehicles after the accident?
 3 A. Yes, I did.
 4 Q. What damage did Ms. Patrick's vehicle have?
 5 A. Her bumper was torn off.
 6 Q. Do you recall seeing any other damage to her
 7 vehicle?
 8 A. I don't recall.
 9 Q. Do you recall looking at Mr. Walton's vehicle?
 10 A. I don't recall.
 11 Q. Do you know what damage his vehicle sustained?
 12 A. I believe he had a dent and his frame was
 13 tweaked.
 14 Q. When you say his frame was tweaked, did you
 15 actually see the frame?
 16 A. No, I did not see the frame, but I did drive
 17 the truck afterwards and it did pull pretty hard.
 18 Q. So I want to go back to the time you were
 19 released from the ER. Do you recall the instructions
 20 they gave you when you were discharged from the ER?
 21 A. They told me to take it easy and prescribed me
 22 Vicodin.
 23 Q. What did you do after leaving the ER?
 24 A. I went home.
 25 Q. How did you get home?

1 A. I can't recall; I think my wife may have come
 2 and got me.
 3 Q. And after getting home that afternoon, do you
 4 recall what happened?
 5 A. Yes, I laid in my chair all night.
 6 Q. Had you taken the Vicodin?
 7 A. I had taken the Vicodin about eight.
 8 Q. What time did you get home?
 9 A. I am unsure.
 10 Q. Why did you wait until 8:00 to take the
 11 Vicodin?
 12 A. Because it makes me nauseous and I take it to
 13 help me right before I go to sleep.
 14 Q. Had you taken Vicodin in the past?
 15 A. Yes.
 16 Q. For what did you take Vicodin before?
 17 A. My arm, I broke my arm when I was a kid; I had
 18 been in a previous accident.
 19 Q. Was that in 2004?
 20 A. Maybe.
 21 Q. And for the previous accident had you been
 22 prescribed Vicodin?
 23 A. Yes.
 24 Q. So at 8:00 you took the Vicodin on the day of
 25 the accident; correct?

1 A. Yes.
 2 Q. Do you recall anything after that for that
 3 first evening?
 4 A. I remember being uncomfortable and I slept in
 5 my chair.
 6 Q. When you say uncomfortable, what do you refer
 7 to?
 8 A. Ability to get comfortable.
 9 Q. On what part of your body?
 10 A. My back.
 11 Q. After that first night when was the next time
 12 you sought medical attention?
 13 A. It was about two weeks later after my Vicodin
 14 was gone and I could not sleep.
 15 Q. Who did you go to two weeks later?
 16 A. Dr. Homestead.
 17 Q. Was he your normal doctor?
 18 A. Yes.
 19 Q. Did you go back to work the day after the
 20 accident?
 21 A. No.
 22 Q. When did you go back to work?
 23 A. It was about a week later.
 24 Q. Why is it that you waited a week to go back to
 25 work?

1 A. Because of my back.
 2 Q. Had the emergency room doctors given you a
 3 work release?
 4 A. They did not give me a work release but they
 5 told me to take it easy for about a week.
 6 Q. When you went to see Dr. Homestead, do you
 7 recall that first time that you went to see him after the
 8 accident?
 9 A. Yes, a little bit.
 10 Q. What did you report to him at that time as far
 11 as the pain you were suffering and the reason you came to
 12 treat with him?
 13 A. My back pain and my inability to sleep at
 14 night.
 15 Q. What did he do for you in that office visit?
 16 A. He stretched me out and made me do some
 17 mobility tests.
 18 Q. Do you recall the results of the mobility
 19 test?
 20 A. I do not, but he said there was something
 21 wrong with my lower back.
 22 Q. Do you recall what he thought was wrong with
 23 your lower back?
 24 A. I'm not exactly sure.
 25 Q. Did the doctors at the ER give you a diagnosis

1 as to what they thought you had suffered as a result of
 2 the accident?
 3 A. They thought that I had a ruptured sac in
 4 between my vertebrae.
 5 Q. But they didn't do an x-ray?
 6 A. I cannot recall; I know I had them done
 7 eventually but not initially.
 8 Q. What did Dr. Homestead tell you, if anything,
 9 as far as his diagnosis of what your back problems were?
 10 A. I had a slipped disc or something.
 11 Q. When was the next time that you saw Dr.
 12 Homestead after that first visit at the end of October of
 13 2007?
 14 A. I am not really sure.
 15 Q. If his records show the next visit was
 16 approximately November 29 of 2007, about a month later,
 17 does that sound accurate?
 18 A. Yes.
 19 Q. Do you recall an accident at work that
 20 happened before you went back to see him?
 21 A. Yes, I had bent over and picked up a tool or
 22 something, and I felt like somebody had stuck a knife in
 23 my back.
 24 Q. And do you recall what kind of tool it was?
 25 A. I believe it was a mag or -- I can't recall

1 really. It wasn't anything heavy.
 2 Q. Had you ever had that kind of problem with
 3 your back before?
 4 A. No.
 5 Q. Was that different than the pain you recall
 6 right after the accident?
 7 A. Yes, it was a lot more intense.
 8 Q. At that time before you felt the pain in your
 9 back from bending over to pick up the tool, what was your
 10 back feeling like before then?
 11 A. It was sore and I had been taking ibuprofen
 12 every day.
 13 Q. How long did you remain on Vicodin after the
 14 accident?
 15 A. I just took it to go to sleep at night, so I'm
 16 not sure, maybe a month.
 17 Q. At this point, the end of November, when you
 18 went back in to see Dr. Homestead, the only medication
 19 you were taking to care for your back was the ibuprofen;
 20 is that right?
 21 A. And muscle relaxers.
 22 Q. What muscle relaxers were you on?
 23 A. It was one that did not make you drowsy, I
 24 can't remember the name of it.
 25 Q. And how often did you take that, was it daily?

1 and had the sharp pain?
 2 A. Yes.
 3 Q. Before having that incident you had gone to
 4 the emergency room on the date of the accident and had
 5 seen Dr. Homestead approximately two weeks later;
 6 correct?
 7 A. Yes.
 8 Q. And then you had gone about a month without
 9 medical care?
 10 A. No, it wasn't a month.
 11 Q. The Dr. Homestead visit was 10/30/2007;
 12 correct?
 13 A. I believe so.
 14 Q. And then the next visit, the first physical
 15 therapy evaluation was 11/26 of '07?
 16 A. No, I went to the emergency room the 20th,
 17 maybe two weeks after I had seen Dr. Homestead.
 18 Q. What was the emergency room on the 20th visit
 19 for?
 20 A. That is when I bent over at work.
 21 Q. Is that when they had done the x-rays on your
 22 back at that time?
 23 A. Yes.
 24 Q. Do you remember talking to a doctor about the
 25 results of the x-ray?

1 A. Daily.
 2 Q. Did you do physical therapy?
 3 A. Yes, I did.
 4 Q. What do you recall of doing physical therapy,
 5 when did you start and how long did you go for?
 6 A. I can't really recall when I started but I
 7 went a few times and he had me stretching, he showed me
 8 the stretches to do that I still do today.
 9 Q. Did you get relief from the physical therapy,
 10 did it help you?
 11 A. Yes, it did.
 12 Q. Can you describe the benefits you received
 13 from doing the physical therapy?
 14 A. My back is just less prone to be hurt now.
 15 Q. I mean at the time even, would you feel better
 16 at the time after doing a session of physical therapy?
 17 A. Yes.
 18 Q. What did you do at physical therapy?
 19 A. I stretched and he gave me electrode -- I
 20 can't remember the name of it. They put electrodes on my
 21 back.
 22 Q. How long would each session last?
 23 A. About an hour.
 24 Q. And do you recall that you began physical
 25 therapy after the incident at work where you bent over

1 A. I do.
 2 Q. Do you remember if they told you that the
 3 x-ray was essentially a normal x-ray?
 4 A. I don't remember that.
 5 Q. What do you remember?
 6 A. I remember him telling me that I had blown a
 7 sac out in my back, in between my vertebrae.
 8 Q. Who told you that?
 9 A. The doctor.
 10 Q. Go ahead and continue. What else did he tell
 11 you?
 12 A. And that more than likely I blew it out really
 13 big time that time.
 14 Q. That you blew it out at work?
 15 A. Yes.
 16 Q. Did anyone ever do an MRI on your back?
 17 A. I can't recall.
 18 Q. After you were released from physical therapy
 19 what medical care did you receive?
 20 A. I went to Dr. West and got a mobility test
 21 done.
 22 Q. Why is it that you went to Dr. West as opposed
 23 to any other care provider at that time?
 24 A. Because Mr. Walton had told me he was the one
 25 to go to.

1 Q. I have some records here that show that you
 2 went to Mountain View Family Medical Clinic again, Dr.
 3 Homestead, on April 16, 2008. Do you recall that?
 4 A. I don't recall.
 5 Q. Then I have a record from West clinic dated
 6 May 27, 2008. Is that the visit you are talking about
 7 going to see West Chiropractic?
 8 A. Yes.
 9 Q. Was that the only time you went to West
 10 Chiropractic, was on that one occasion?
 11 A. I believe so.
 12 Q. After going to West Chiropractic on May 27 of
 13 2008, have you sought any further medical care for your
 14 injuries related to this accident?
 15 A. No.
 16 Q. When you went in to see Dr. West, what did he
 17 do?
 18 A. He gave me a mobility test and popped my back,
 19 did his chiropractic thing.
 20 Q. So he gave you an adjustment and a mobility
 21 test.
 22 A. Yes. I believe he took x-rays as well.
 23 Q. Did he prescribe any medication for you?
 24 A. No, other than over-the-counter ibuprofen.
 25 Q. Did he recommend any further chiropractic care

1 A. In Iona or Ucon, one of them.
 2 Q. And were you on a country road?
 3 A. Yes.
 4 Q. How fast were you going?
 5 A. Fifty.
 6 Q. And when you hit the guardrail, what part of
 7 the vehicle struck the guardrail?
 8 A. The passenger side front end.
 9 Q. And as a result of impacting the guardrail,
 10 what happened to the vehicle?
 11 A. It tore off the tire and spun us around.
 12 Q. Who else was in the vehicle?
 13 A. Christopher Summers.
 14 Q. What injuries did you receive as a result of
 15 that accident?
 16 A. Whiplash and hole in my tongue.
 17 Q. Who did you treat with for your whiplash
 18 injuries?
 19 A. EIRMC.
 20 Q. Did you treat with a family doctor at all for
 21 your whiplash injuries?
 22 A. I do not believe so.
 23 Q. How long did you experience pain in the area
 24 of your neck after that accident?
 25 A. Not that long.

1 or physical therapy?
 2 A. No.
 3 Q. Do you recall whether he told you what he
 4 thought had happened with regard to your back injury?
 5 A. I do not recall.
 6 Q. Do you remember that at the time you went to
 7 see him whether or not you were still suffering pain?
 8 A. I wasn't really suffering more pain than I had
 9 been for the past, since physical therapy.
 10 Q. Do you remember if he told you that he
 11 diagnosed you with a lumbar strain from the motor vehicle
 12 accident?
 13 A. I believe so.
 14 Q. Do you remember if he told you that the x-ray
 15 of your lumbar spine was essentially a normal lumbar
 16 spine x-ray?
 17 A. I do not remember.
 18 Q. Let's talk about your accident that you had
 19 before this accident, which was in approximately 2004; is
 20 that correct?
 21 A. Yes.
 22 Q. What happened in that accident?
 23 A. I had looked down to turn on the radio and I
 24 hit a guardrail on a canal.
 25 Q. Where were you at at the time?

1 Q. And you had Vicodin; is that correct?
 2 A. Yes.
 3 Q. Did they prescribe muscle relaxers then, too?
 4 A. No.
 5 Q. Did you do any physical therapy?
 6 A. No.
 7 Q. Aside from the one visit to Dr. West, have you
 8 ever been to a chiropractor before?
 9 A. No.
 10 Q. Have you had physical therapy in your life
 11 other than for the approximate four sessions after the
 12 accident in this case?
 13 A. No.
 14 Q. Have you ever had any other injury to your
 15 lower back before or after the accident?
 16 A. No.
 17 Q. And I mean other than the two things we have
 18 talked about today, the accident itself and then bending
 19 over and experiencing sharp pain at work, are those the
 20 only times you have had injury to your back?
 21 A. Yes.
 22 Q. Did you have any back pain before the
 23 accident?
 24 A. No.
 25 Q. Have you had any other automobile accidents

1 besides the two we have talked about today?
 2 A. Not that I can recall.
 3 Q. Have you had any other accidents that have
 4 resulted in the need for you to seek medical attention
 5 besides those that we talked about today?
 6 A. No, other than various work related injuries.
 7 Q. Let's talk about the work related injuries.
 8 When were you injured at work for the first time?
 9 A. I smashed my thumb with a hammer.
 10 Q. When was that?
 11 A. When I was 14.
 12 Q. And you went to the doctor?
 13 A. No.
 14 Q. Did you have x-rays of your thumb?
 15 A. No.
 16 Q. After that incident when was the next time
 17 that you had a workplace injury that you went to see a
 18 doctor for?
 19 A. I really can't recall. I believe I got some
 20 chemicals on my hand and I went in.
 21 Q. Do you know when that was?
 22 A. I'm not sure. It was before I lived in
 23 Pocatello, though.
 24 Q. Do you remember an injury causing right arm
 25 pain back in September of 2006?

1 A. I was on Clark Street, Davis-Bacon wages.
 2 Q. Can you explain that?
 3 A. Davis-Bacon wages?
 4 Q. Yes, what is that?
 5 A. It's state wages, I guess.
 6 Q. And how much is that?
 7 A. It is around, I believe it was around 26,
 8 \$27.50 an hour.
 9 Q. Were those jobs done without you?
 10 A. Yes.
 11 Q. Do you have records that show what you were
 12 earning right before the accident?
 13 A. Right before the accident I was working with
 14 Ben Walton and, yes, I do have records.
 15 Q. In response to our discovery when we asked for
 16 records supporting your lost wage claim, you did provide
 17 tax returns. Do you recall doing that?
 18 A. Yes.
 19 Q. On one of those tax returns it shows that your
 20 income for 2004 was \$11,372 for wages, salaries, and
 21 tips; is that correct?
 22 A. I believe so.
 23 Q. Or did that include income that your wife
 24 would have made in 2004?
 25 A. I don't know.

1 A. Yes.
 2 Q. What happened there?
 3 A. I had tendinitis.
 4 Q. What caused the tendinitis?
 5 A. I believe it was finishing concrete.
 6 Q. In this case you have made a claim for loss of
 7 income; is that correct?
 8 A. Yes.
 9 Q. How did you calculate the amount for which you
 10 are claiming a loss of income?
 11 A. I missed the week directly after that because
 12 I was working with Ben and I did not work without him,
 13 and it was on and off after the November 20 I missed a
 14 week, and then on and off after that.
 15 Q. The week you missed after November 20, was
 16 that because of the workplace injury?
 17 A. Yes.
 18 Q. And yet you believe that Ms. Patrick should
 19 pay for that accident as well?
 20 A. Yes.
 21 Q. Why is that?
 22 A. Because my back had not been the same since
 23 the accident.
 24 Q. And how did you calculate the hourly rate for
 25 which you were assessing your lost income claim?

1 Q. Do you know, has your wife worked outside of
 2 the home in the last five years?
 3 A. Yes, she got a job at Sears in '07.
 4 Q. Before '07, is any of the income on your tax
 5 records as a result of her income?
 6 A. No.
 7 Q. So the income for 2004 would have been your
 8 income exclusively.
 9 A. I believe so.
 10 Q. In 2005 your income was \$10,255.77; is that
 11 correct?
 12 A. Yes.
 13 Q. In 2006 your income was \$21,613; correct?
 14 A. I believe so.
 15 Q. And in 2007 the income was \$22,948; is that
 16 correct?
 17 A. Yes.
 18 Q. If you were earning \$26 an hour, why was your
 19 income for the year not greater?
 20 A. Because you only get paid the Davis-Bacon
 21 wages on the Davis-Bacon jobs.
 22 Q. And you are saying that for the week right
 23 after the accident you would have gotten those wages?
 24 A. No.
 25 Q. What would you have gotten for the week right

Wages = \$10 / hour

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1 after the accident?
 2 A. I would have got \$10 an hour.
 3 Q. And that would have been for the week right
 4 after the auto accident; correct?
 5 A. Yes.
 6 Q. And for the week right after the accident that
 7 you had on the job site where you bent over and were hurt
 8 there, what would you have earned there?
 9 A. I would have made \$26 an hour.
 10 Q. So that would have been for one week.
 11 A. Yes, one week and a half.
 12 Q. Were you out for a week and a half?
 13 A. I was out for a week straight and then I ended
 14 up coming a day and then I was out for another half a
 15 week.
 16 Q. Did the doctor excuse you from work for that
 17 week?
 18 A. Yes, he did.
 19 Q. Which doctor was that?
 20 A. Homestead.
 21 Q. When you get paid the \$26 an hour or \$10 an
 22 hour, do you have any expenses that come out of that
 23 income?
 24 A. Just the regular taxes.
 25 Q. Are you a private contractor or are you an

1 potential adjustment, are still correct today?
 2 A. Yes.
 3 Q. There aren't any other new charges on there
 4 that we don't know about; correct?
 5 A. Not that I know of.
 6 Q. I would like to talk about how the injuries
 7 that you relate to the accident affected your daily life,
 8 and if you can take me from the time of the accident
 9 forward, can you tell me how the injuries have affected
 10 your daily life?
 11 A. I wake up every morning and stretch before I
 12 even get out of bed and then I crawl down on the floor
 13 and stretch some more, about 15, 20 minutes a day. I try
 14 to stay away from heavy lifting. I have got promoted now
 15 so I tend to try to stay away from the heavier labor
 16 work. I take ibuprofen every other day.
 17 Q. Are you unable to do things now that you could
 18 do before the accident?
 19 A. Yeah, I stay away from all the heavy lifting
 20 now.
 21 Q. Is it that you can't do it or that you want to
 22 be careful to not create further harm for yourself?
 23 A. Yes.
 24 MR. JOHNSON: That was kind of a compound
 25 question. I am not sure you got a good answer on the

1 employee when you are earning this money?
 2 A. I am an employee.
 3 Q. What documentation would you have that would
 4 show that you were earning \$26 an hour the week that you
 5 hurt yourself at work?
 6 A. I could get something from work.
 7 Q. Were there pay stubs for the work that you had
 8 done the week before?
 9 A. Yes.
 10 Q. Would the same be true for the work you were
 11 doing for \$10 an hour at the time of the accident?
 12 A. I believe so.
 13 Q. Would you agree to produce those for your
 14 attorney so they could be produced to me?
 15 MR. JOHNSON: Yes.
 16 A. Yes.
 17 Q. I would like to show you a statement that was
 18 produced in discovery, and I am not going to have this
 19 marked, but do you recognize that statement as the
 20 damages that you claim in this accident?
 21 A. Yes.
 22 Q. Are those figures, aside from perhaps the
 23 adjustment we talked about today to your income, not
 24 being all of your lost income being the \$26 an hour, but
 25 the former week being at \$10 an hour, aside from that

1 record. Maybe you can rephrase that.
 2 MR. TAYLOR: I will break it a little further
 3 down actually.
 4 Q. As a result of the accident, are there things
 5 that you cannot do, that you physically are unable to do
 6 because of the injuries you relate to the accident as we
 7 sit here today?
 8 A. Heavy lifting.
 9 Q. Are you able to do heavy lifting?
 10 A. I don't know.
 11 Q. When was the last time you tried to lift
 12 something that weighed more than 50 pounds?
 13 A. Probably last week.
 14 Q. What's the heaviest thing that you lift on
 15 your job now?
 16 A. Maybe a -- one side of an 80-pound plate
 17 compactor.
 18 Q. Before the accident what did you lift that
 19 would be heavy that you do not now lift?
 20 A. I would have thrown it -- I could lift the
 21 compactors by myself, the saws.
 22 Q. Other than lifting heavy items, are there any
 23 other ways that your injuries have changed your life?
 24 A. I don't have the stretch I used to when I am
 25 finishing.

1 Q. Are there any other ways that the injuries
2 have impacted your life?
3 A. Not that I can think of right now.
4 Q. Are you able to do the hobbies and personal
5 interests that you did before the accident?
6 A. I really haven't paintballed a lot since then.
7 Q. Have you paintballed at all since then?
8 A. No.
9 Q. Not at all?
10 A. No.
11 Q. How often did you paintball before the
12 accident?
13 A. A lot.
14 Q. Who did you paintball with?
15 A. My brother-in-law and father-in-law.
16 Q. Why is it that you have not sought any medical
17 care since you saw Dr. West?
18 A. I just felt like this is how it's going to be.
19 Q. Did he recommend that you may have any other
20 kind of care that would improve your condition?
21 A. Not that I can recall.
22 Q. Has Dr. Homestead recommended any further care
23 or treatment to you that you have not undergone?
24 A. Not that I can recall.
25 Q. Did either of those doctors leave you with

1 provide a list of names, addresses, and telephone numbers
2 of each and every individual who was either a witness or
3 has any knowledge of the facts and circumstances
4 surrounding any of the allegations of your complaint,
5 including liability and damages, and provide a statement
6 of what it is that each person knows about the facts of
7 this case.
8 In response to that you listed Matt Bennett,
9 so you listed yourself; you listed Benjamin Walton;
10 correct?
11 A. Yes.
12 Q. What information or knowledge does Mr. Walton
13 have that would be relevant to your case?
14 A. Would you ask that again, please?
15 Q. Sure. What information or knowledge does Mr.
16 Walton have that would lead you to believe he was a
17 witness that would be important for your case?
18 A. He was in the car, sitting right next to me.
19 Q. Is there any other testimony that you would
20 believe would be important for Mr. Walton to offer
21 besides the facts of the accident itself?
22 A. I don't know.
23 Q. Does he have knowledge of your physical
24 limitations?
25 A. Yes.

1 limitations or restrictions on work?
2 A. To not lift heavy, over 50 pounds.
3 Q. Any other limitations or restrictions by those
4 doctors?
5 A. No.
6 Q. Are there any other hobbies or personal
7 interests that you aren't able to do now that you could
8 do before the accident?
9 A. Not that I can recall.
10 Q. Since the date of the accident have you had
11 any conversations with Nancy Patrick?
12 A. No.
13 Q. Have you had any conversations with Mr. Walton
14 regarding the accident or this lawsuit?
15 A. No.
16 Q. When was it that you decided to file suit?
17 A. After we went to the hospital and they denied
18 our insurance.
19 Q. So on that first visit?
20 A. I believe so.
21 Q. Do you recall listing witnesses in the
22 discovery responses, people who you may call to testify
23 at the trial of this matter?
24 A. I don't recall.
25 Q. On Interrogatory No. 12 you were asked to

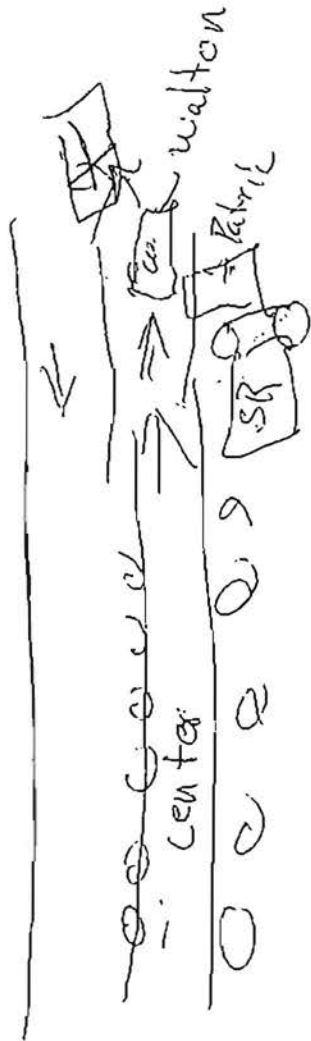
1 Q. What knowledge does he have of those?
2 A. He worked with me before the accident and he
3 has worked with me after.
4 Q. And aside from seeing how you worked before
5 and after the accident, does he have any other
6 information that would be important to know about your
7 injuries?
8 A. I don't know.
9 Q. Have you had conversations with him about your
10 injuries?
11 A. Other than my back hurts.
12 Q. And he was the one who recommended you go see
13 Dr. West; correct?
14 A. Yes, him and his wife.
15 Q. You had also listed Jason Walton, that he was
16 a witness to the accident in the case. Aside from him
17 witnessing the accident in the case, does he have any
18 other information or know of anything that would be
19 relevant to your lawsuit?
20 A. Not that I know of.
21 Q. Did he know anything about your injuries or
22 any damages that you suffered as a result of the
23 accident?
24 A. Yes, I worked with him as well.
25 Q. What do you believe he saw that would be

1 relevant in this case regarding your work?
 2 A. My heavy lifting, just my all-around work.
 3 Q. What heavy lifting did you do when you were
 4 working for Mr. Walton?
 5 A. Hanging drywall.
 6 Q. Were you able to hang drywall after the
 7 accident?
 8 A. I was limited.
 9 Q. How were you limited?
 10 A. I couldn't hold them above my head.
 11 Q. What would you do to accommodate not being
 12 able to hold drywall above your head?
 13 A. Get a lift.
 14 Q. Is that the only instance that they might have
 15 seen that would be relevant to your limitations as a
 16 result of your back injury?
 17 A. As far as I know.
 18 Q. You listed Kelly Bennett on your discovery
 19 responses for a person who is a witness. What
 20 information would she have relative to the case?
 21 A. She is my wife so I am sure she has seen a lot
 22 more.
 23 Q. What do you believe she has seen that would be
 24 relevant to this case?
 25 A. It's hard to say. My lifting, my -- I don't

1 Q. Who were you getting that with?
 2 A. Kiggins.
 3 Q. And how often did you get the \$26 an hour rate
 4 with Kiggins?
 5 A. It was through the whole Clark Street job.
 6 Q. Was that the only job that you had earned \$26
 7 an hour on?
 8 A. No.
 9 Q. At what other jobs in 2007 did you earn \$26 an
 10 hour?
 11 A. Maybe it wasn't in 2007. I know we did Fort
 12 Hall -- I am really not sure.
 13 Q. When you were not earning \$26 an hour for
 14 those state wages, what was your rate of pay at Kiggins?
 15 A. \$14.
 16 MR. TAYLOR: I need to review my notes, I
 17 think I may be done. If I could take a short break.
 18 MR. JOHNSON: Absolutely.
 19 (Pause in proceedings.)
 20 MR. TAYLOR: I have no further questions.
 21 (Discussion off the record.)
 22 MR. TAYLOR: Exhibit No. 1 has been marked as
 23 the drawing made by Mr. Bennett?
 24 MR. JOHNSON: That's correct.
 25 (Witness excused at 10:55 a.m.)

1 know; I am not the same in bed or anything.
 2 Q. Are there other areas of your life you believe
 3 that this injury has impacted that your wife would be a
 4 witness to?
 5 A. My love life.
 6 Q. So heavy lifting and your love life. Is there
 7 any other thing that you believe she has seen or
 8 witnessed that would be relevant to your injuries?
 9 A. Not that I know of.
 10 Q. Officer Clinton Goss is listed here. Is that
 11 solely because he was the investigating officer at the
 12 scene?
 13 A. Yes.
 14 Q. And you have no other witnesses listed here
 15 other than presumably your medical care providers as
 16 witnesses.
 17 A. (Witness nods head affirmatively.)
 18 Q. Do you know of any other persons who have
 19 information or knowledge about this case, that would have
 20 information relevant to this case?
 21 A. 'Not that I know of.
 22 Q. In the year 2007 during the time that you were
 23 working for Mr. Walton, how often were you working for
 24 the \$26 an hour rate?
 25 A. I was not getting that with Mr. Walton.

1 (Signature requested.)



Exb. No. 1
 Date 9-24-09
 Name BERNETT
 M & M Court Reporting

DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and)
BENJAMIN L. WALTON,)
Plaintiffs,)
vs.)
NANCY PATRICK,)
Defendant.)
_____)

COPY

Case No. CV-08-4528-OC

ORAL DEPOSITION OF BENJAMIN LLOYD WALTON
Taken on September 24, 2009

REPORTED BY:

PAUL D. BUCHANAN, RPR, RMR,

CSR No. 7, and Notary



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DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and BENJAMIN L. WALTON, Plaintiffs, vs. NANCY PATRICK, Defendant. Case No. CV-08-4528-OC

ORAL DEPOSITION OF BENJAMIN LLOYD WALTON Taken on September 24, 2009

REPORTED BY: PAUL D. BUCHANAN, RPR, RMR, CSR No. 7, and Notary Public

I N D E X

1-25 Index listing Examination By: Mr. Taylor (4), Mr. Johnson (57), Exhibits: No. 1 - Diagram (16)

1 APPEARANCES: 2 3 For the Plaintiff: CHARLES JOHNSON 4 Johnson Olson 5 Attorneys at Law 6 P. O. Box 1725 7 Pocatello, Idaho 8 9 10 For the Defendant: BRENDON C. TAYLOR 11 Merrill & Merrill 12 Attorneys at Law 13 P. O. Box 991 14 Pocatello, Idaho 15 16 17 18 19 20 21 22 23 24 25

1 BE IT REMEMBERED that on September 24, 2009, at 2 the hour of 11:00 a.m. the deposition of BENJAMIN LLOYD 3 WALTON, produced as a witness at the instance of the 4 defendant in the above-entitled action now pending in the 5 above-named court, was taken before Paul D. Buchanan, CSR 6 #7, and notary public, State of Idaho, in the law offices 7 of Merrill & Merrill, 109 North Arthur Avenue, Pocatello, 8 Bannock County, Idaho. 9 10 WHEREUPON, the following proceedings were had: 11 12 BENJAMIN LLOYD WALTON, 13 called at the instance of the defendant, having been 14 first duly sworn, was examined and testified as follows: 15 EXAMINATION 16 BY MR. TAYLOR: 17 Q. Would you please state your name and address 18 for the record? 19 A. Benjamin Lloyd Walton, 1771 South Second 20 Avenue, Pocatello, Idaho. 21 MR. TAYLOR: Let the record show this is the 22 time and place for the deposition of Mr. Walton taken 23 pursuant to notice and agreement of counsel. 24 Q. Did you bring any documents with you today? 25 A. Just -- I don't know what this (indicating) is

1 called, answers to my interrogatories from I guess you
2 guys. And I brought just showing speeding tickets and
3 stuff, my, what do you want to call it, case history of
4 being pulled over, I guess. I don't know what it's
5 called.

6 Q. Is it from the Idaho Repository?

7 A. Right, Idaho Repository, case history page.

8 Q. Those are the only documents you brought with
9 you today; correct?

10 A. Yes.

11 Q. Were you present for the prior two depositions
12 of Ms. Patrick and Mr. Bennett?

13 A. Yes.

14 Q. Do you recall the instructions given at the
15 beginning of those depositions?

16 A. Yes.

17 Q. Are you agreeable to those instructions and
18 conditions in taking your deposition?

19 A. Yes.

20 Q. Would you please tell me what your current
21 occupation is?

22 A. I am a small business owner, drywall.

23 Q. How long have you been doing that?

24 A. Owning the business or --

25 Q. Yes, how long have you owned the business?

1 A. No.

2 Q. Let's talk about the other employees that you
3 have had. I would like you to take me back through the
4 time of this accident and tell me who your employees have
5 been?

6 A. From the time of this accident?

7 Q. Yes.

8 A. Matt Bennett; Jason Walton, Aaron Walton --

9 Q. Is he a brother?

10 A. Yes. Josh Walton.

11 Q. Is that another brother?

12 A. Also another brother. Jamie Coles, C-O-L-E-S.

13 Q. Who is Jamie Coles?

14 A. He is a kid that lives in Blackfoot -- well, I
15 guess he is a man.

16 Q. What period of time did he work for you?

17 A. Oh, I guess the beginning of -- jeez, I am not
18 real sure. I could find that information out for you,
19 though.

20 Q. Just your best recollection, if you can,
21 knowing that this is an estimate.

22 A. From start time to end time?

23 Q. Correct.

24 A. Jeez, I would have to say the first part of
25 '08 to the last part of '08.

1 A. Let me see here.

2 Q. If you are referring to the interrogatory
3 responses, the question would have been Interrogatory No.
4 4 that talks about employers for the past ten years on
5 Page 2. If you have a chance to review that information
6 or anywhere else in the document that you brought that
7 can tell me how long you have owned your own business.

8 A. 2004 to present.

9 Q. How long have you been doing drywall entirely?

10 A. Fifteen years.

11 Q. As a business owner, why don't you take me
12 through a normal day at work. What do you typically do?

13 A. Each day is a little different. If I am not
14 out bidding jobs, I am supervising.

15 Q. How many workers do you have?

16 A. Currently one.

17 Q. What's the greatest number of workers you have
18 had during the time you have owned your business?

19 A. Five.

20 Q. Who is your employee?

21 A. Christopher Maw, M-A-W.

22 Q. How long has Mr. Maw worked for you?

23 A. Eight months.

24 Q. Are there any other business owners associated
25 with the business that you own?

1 Q. Go ahead and proceed. Who are the other
2 employees that you have had?

3 A. Those are the only -- I am trying to think.
4 Everyone else that has worked are also other subs --

5 Q. These are the employees?

6 A. Employees, right.

7 Q. What subs have you contracted with to do work
8 under you?

9 A. Rock'n Ron; he is deceased, though --

10 Q. What was his last name?

11 A. Reisner, Ron Reisner. Cody Alverson, and I
12 think it's Alverson Drywall.

13 Q. Where is Cody operating out of?

14 A. He lives here, Chubbuck.

15 Q. Who else?

16 A. A Well Hung Drywall, and that was Anthony
17 Baldwin.

18 Q. Where does Anthony operate Well Hung Drywall
19 out of?

20 A. He has moved to Utah.

21 Q. Do you know where in Utah?

22 A. I am not sure.

23 Q. Who else?

24 A. It seems like that's about it.

25 Q. Before you owned and operated your own

1 business, where did you work?
 2 A. I worked for T.C. Drywall as a foreman.
 3 Q. Were you a foreman the entire time you worked
 4 there?
 5 A. Yes.
 6 Q. And that would be Tony Henley?
 7 A. Yes.
 8 Q. In your discovery responses you listed from
 9 '98 to 2000; is that correct?
 10 A. Yes.
 11 Q. Between 2000 and 2004 where did you work?
 12 A. I was subcontracting work, still
 13 self-employed, just not a legitimate business owner. And
 14 I have done work all the way from Wyoming to Sun Valley,
 15 so just different contractors.
 16 Q. And it's always been the drywall business that
 17 you have worked since 1998 forward?
 18 A. Yes.
 19 Q. Do you do the physical work on the jobs
 20 anymore?
 21 A. No.
 22 Q. Who does the physical work now for you?
 23 A. Employees.
 24 Q. When did you stop doing physical work?
 25 A. Jeez, I would have to say nine years.

1 A. I am 31.
 2 Q. Date of birth?
 3 [REDACTED]
 4 Q. And are you married?
 5 A. Yes.
 6 Q. What is your wife's name?
 7 A. Devan Evonne Holz, or Walton.
 8 Q. How long have you been married to her?
 9 A. Since 2001.
 10 Q. Do you have children?
 11 A. Two.
 12 Q. What are their names and ages?
 13 A. Cara Mae Walton --
 14 Q. With a K?
 15 A. C-A-R-A, M-A-E.
 16 Q. And her age?
 17 A. She is nine.
 18 Q. And your other child?
 19 A. Isaac Benjamin Walton; he is five.
 20 Q. And is your current spouse the only person you
 21 have been married to?
 22 A. Yes.
 23 Q. What is your highest level of education?
 24 A. Twelfth grade.
 25 Q. Did you graduate?

1 Q. I think before you told me a little bit about
 2 what you did in a typical day, told me it varies by going
 3 out to get jobs and a few other things. What makes up
 4 most of your time just in general as the owner and
 5 operator of the business?
 6 A. Oh, jeez, just lining up jobs to keep rolling,
 7 bidding, measuring, running the business, paying bills,
 8 making sure supplies are delivered, picking up supplies.
 9 Q. And it's been that way since you have owned
 10 and operated this business?
 11 A. Yes -- well, I mean if I hire somebody new and
 12 they don't know what's going on, I have to show them
 13 what's going on, so I will get dirty there.
 14 Q. Do you do any custom work, texturing, things
 15 of that nature, or is it just basically hanging drywall?
 16 A. We don't hang, we finish.
 17 Q. You do the finish work.
 18 A. Yes.
 19 Q. And have you always done just the finish work
 20 in the drywall business?
 21 A. Yes.
 22 Q. Is it mostly new construction?
 23 A. Yes, and patchwork, which would be door knob
 24 holes, water damage, stuff like that.
 25 Q. What is your age?

1 A. I did.
 2 Q. From what school?
 3 A. Blackfoot High School.
 4 Q. What year would that have been?
 5 A. 1997.
 6 Q. I would like to talk about your driving
 7 background. Have you ever had your driver's license
 8 suspended or revoked for any reason?
 9 A. It was --
 10 MR. JOHNSON: I'll object for the record on
 11 the grounds of relevancy and Rule 403 and 408. Can I
 12 have a continuing objection to this line of questioning?
 13 MR. TAYLOR: Yes.
 14 MR. JOHNSON: Thank you.
 15 Q. Go ahead and answer.
 16 A. I have gotten a speeding ticket and forgot to
 17 pay it and according to this it was failure to purchase a
 18 driver's license. So it wasn't -- it has never been
 19 suspended or anything like that. So I guess that would
 20 be no.
 21 Q. What was the result of that charge, did you
 22 just pay a fine and make sure your license was renewed?
 23 A. Right.
 24 Q. Do you have any convictions for felonies?
 25 A. No.

1 Q. Have you ever been convicted of any crime that
2 relates to honesty or integrity?

3 A. No.

4 Q. Have you been in any other lawsuits before?

5 A. No.

6 Q. And have you been in any other lawsuits since
7 this one was filed?

8 A. No.

9 Q. Do you recall the day of the accident?

10 A. Yes.

11 Q. I would like you to take me through that day
12 from the time that you got up that morning and what you
13 were doing until the time of the accident. I can break
14 it down into specific questions or if you want to give me
15 a narrative of what happened that morning.

16 A. Okay. Woke up in the morning and headed up to
17 the job site, waited for the guys to show up, tell
18 them -- lined them up with what I wanted them to do for
19 the day. I left, went to Western Wholesale at about 9:00
20 in the morning, was there for about an hour, came back to
21 the job, grabbed the guys, went to lunch.

22 And then at about 11:30, 11:40, we were
23 heading back to the job, and they were widening the
24 street up on Center by the new Maverik right there and it
25 split down to two lanes. We were in a flow of traffic,

1 A. Same place, 1771 South Second.

2 Q. Now, if we go back to the accident itself,
3 when did you first perceive that an accident was going to
4 happen?

5 A. Never; not until after it was over.

6 Q. You didn't see Ms. Patrick's vehicle until
7 after the collision had happened; is that correct?

8 A. No, and the information I have was from what
9 happened afterwards, was from my brother telling me what
10 he saw. So I just know what he saw -- all I know is,
11 from where I was sitting in my vehicle, I was driving up
12 the road following traffic in front and then, boom, got
13 hit, that's all.

14 Q. Do you know what the speed limit was for the
15 roadway you were on?

16 A. I believe 25.

17 Q. How fast were you going?

18 A. About 20.

19 Q. Why is it you believe you were going about 20?

20 A. Well, the traffic in front -- we had just come
21 from the light and it was maybe 150, 200 yards up to
22 where the steam roller was and the traffic in front of me
23 was just going a little slower.

24 Q. And when the impact happened, what happened to
25 you in the vehicle?

1 we were about the third car behind the light, the light
2 was red. The light turned green, we proceeded through
3 the light.

4 When we got up there was a parked steam roller
5 off where they were preparing the new blacktop. And
6 right as I passed the steam roller I had got hit and
7 jarred off to the oncoming -- oncoming traffic had to
8 stop and wait for us -- well, the first guy veered around
9 as he saw us coming at him.

10 Q. I'll go through what happened in the accident
11 and right after in a little more detail. I had a couple
12 of other questions I wanted to ask in regard to the
13 events in the morning before the accident happened.

14 You said you had lined up a job and were
15 waiting for guys to get to work. Who were you waiting
16 for to get to work?

17 A. Oh, I was lining them out with the work for
18 the day on the job that we were on, is what I meant.

19 Q. Who was working for you that day?

20 A. Jason Walton, my brother, and Matt Bennett.

21 Q. And when you said you went to lunch, where did
22 you go to lunch?

23 A. I got Little Caesar's pizza and just ate at my
24 house.

25 Q. Where was your house at that time?

1 A. She had hit the passenger door just behind --
2 well, just about at the door, and that jarred us sideways
3 and then my back wheel caught the front of her car and
4 that pushed us up. And myself from the impact I had
5 gotten jarred sideways and then when my back wheel hit.
6 I got thrown up into the air and then the impact back
7 down (indicating). And then when the truck was sliding
8 sideways, when it came to a stop, it jarred me to the
9 right -- to the left, I mean. So I went right, up, down,
10 left.

11 Q. How far would you estimate that your vehicle
12 went from the point of impact to the time that you came
13 to a stop?

14 A. I would say 15 to 25 feet.

15 Q. Why don't we go ahead and have one one last
16 art project. I would like you to draw the accident
17 scene, the roadway, where the vehicles were, including
18 the construction zone, and the position of the vehicles
19 at the time of the collision.

20 (Pause in proceedings.)

21 A. And show you the vehicles where the crash was
22 or how it happened --

23 Q. Why don't we label a couple of things. Would
24 you label where Center Street is.

25 A. (Witness complies.)

1 Q. And then you put an SR in the steam roller; is
 2 that correct?
 3 A. Yes. And these (indicating) are construction
 4 barrels.
 5 Q. And you are pointing to circles or dots that
 6 are adjacent to Center Street; is that correct?
 7 A. Correct. These are the orange construction
 8 barrels here.
 9 Q. And those additional orange construction
 10 barrels go up I guess perpendicular to Center Street?
 11 A. This is all Center Street -- I am guessing
 12 that the whole -- there are two lanes -- now, this is
 13 before, but now they have two lanes coming down and two
 14 lanes going up. That's all Center Street; right? It
 15 doesn't split into Clark until you hit that --
 16 Q. Unfortunately we have to rely on your
 17 information.
 18 A. I am pretty sure, yes, I would say Center
 19 Street, this is all Center Street.
 20 Q. And you have marked the area that was dirt
 21 that was the area of the construction zone; is that
 22 correct?
 23 A. Yes. Center Street was a two-lane road and
 24 they were widening it to a four-lane road, is what was
 25 going on. And Ms. Patrick came off the interstate here,

1 Q. And you have written BW on your vehicle;
 2 correct?
 3 A. Correct. And Jason Walton was behind me
 4 (indicating) --
 5 Q. And you have marked his vehicle with a JW;
 6 correct?
 7 A. Correct. And then there were vehicles coming
 8 down this side (indicating).
 9 Q. Is that the position where you have drawn them
 10 as to where all the vehicles were at the time of the
 11 collision?
 12 A. Correct. And this vehicle (indicating) had to
 13 swerve because my truck had gotten kicked over two lanes.
 14 Q. If you would put an S on the vehicle that you
 15 said had to swerve.
 16 A. (Witness complies.)
 17 Q. Now, go ahead and draw additionally where your
 18 vehicle came to rest in relation to that.
 19 A. After this?
 20 Q. After this.
 21 A. She bumped me and I came over here and my
 22 truck was -- this guy had to swerve around, so my truck
 23 was like, jeez, like that (indicating).
 24 Q. And if you could right there --
 25 A. BW after.

1 was supposed to -- when the light turned green for her,
 2 she was supposed to come to here and up the lane and
 3 there was oncoming traffic coming here -- draw cars or --
 4 Q. You have a line down the center of the street;
 5 is that correct?
 6 A. Yes, this is the center of the street. That's
 7 the divider of the two lanes.
 8 Q. And there weren't barrels in the center of
 9 that roadway?
 10 A. No, there was not, just off to the
 11 construction site here, all the way lining it. She was
 12 to come off here and follow these barrels around
 13 (indicating) --
 14 Q. Where was her vehicle right before the
 15 accident happened, if you want to go ahead and draw the
 16 vehicle on there just immediately prior to the point of
 17 impact.
 18 A. Right in front of the steam roller here
 19 (indicating).
 20 Q. Go ahead and mark that -- you have got it
 21 marked as NP; correct?
 22 A. Nancy Patrick.
 23 Q. Where was your vehicle?
 24 A. I guess about halfway between the steam roller
 25 there and the middle of her car (indicating).

1 Q. That would be fine.
 2 A. Nancy Patrick after had just moved -- her
 3 vehicle was into the oncoming traffic there.
 4 Q. And you described what happened to you
 5 physically as a result of the impact. When did you first
 6 notice any pain?
 7 A. I noticed pain about ten minutes or so after
 8 and the first thing I noticed was a nauseation, I felt
 9 like I needed to throw up.
 10 MR. TAYLOR: Let's go ahead and have this
 11 marked as Exhibit No. 1.
 12 (Deposition Exhibit No. 1 marked for
 13 identification.)
 14 Q. So you felt pain and nausea approximately ten
 15 minutes after the accident?
 16 A. I felt nauseated pretty much right after the
 17 accident. I started feeling stiffness and pain in my
 18 neck probably five or ten minutes after, yeah.
 19 Q. What did you do immediately after the
 20 accident?
 21 A. I pulled my emergency brake on and left my
 22 vehicle sitting where it was at. We walked over and the
 23 first thing was ask Nancy Patrick if she was okay. And
 24 then cars were starting to bundle up right at the
 25 accident scene both sides, so I told my brother Jason,

1 which was the car directly behind me, I told him to pull
2 his car off and around up to the gas station. And he
3 went up the hill and was stopping that traffic while I
4 was having the other traffic come around the accident, go
5 up, and then we would switch off and some come back down,
6 and we did that for 10, 15 minutes until Officer Goss
7 showed up.

8 Q. When you said you went to check on Nancy
9 Patrick to see if she was okay, what did she say to you?

10 A. She said she was fine, she was just upset and
11 couldn't believe that it had happened.

12 Q. Did you say anything to her?

13 A. Maybe that it's a good thing she wasn't hurt.

14 Q. Do you remember any other conversation you had
15 with Nancy Patrick at the accident scene?

16 A. I don't believe so, just that.

17 Q. Do you remember her ever saying anything else
18 to you about the accident at any time since the accident
19 happened?

20 A. No.

21 Q. Have you had any conversations with her from
22 the date of the accident until we were in here today?

23 A. No.

24 Q. Did you witness Nancy Patrick after your
25 conversation doing anything?

1 traffic.

2 Q. What was Officer Goss doing during this whole
3 time?

4 A. He was talking with Nancy Patrick.

5 Q. When the other officer arrived, what did you
6 do?

7 A. As soon as the other officer showed up,
8 Officer Goss told me to go move my vehicle, and that's
9 when I asked him, are you guys going to take pictures or
10 measurements or anything like that, and the other officer
11 said, yes, we will take measurements. They didn't have a
12 camera, so the other officer from what I saw was taking
13 measurements of skid marks from tires and stuff, and then
14 they had me move my truck into the Sinclair parking lot.
15 And Officer Goss moved Nancy Patrick's car back out of
16 the roadway so traffic could come through.

17 Q. Do you know who the other officer was?

18 A. I do not know his name.

19 Q. Did he take a statement from you regarding the
20 accident?

21 A. He did.

22 Q. Do you recall what you told him about how the
23 accident happened?

24 A. Just that I was coming up the road and got
25 swiped on the side.

1 A. She was sitting in her car, heard her horn
2 honk and by the time I looked back over, she was putting
3 a napkin on her face; other than that she just was
4 sitting there with a napkin on her face until the officer
5 showed up.

6 Q. And when the officer showed up, what did you
7 do?

8 A. Well, he walked right past me and went right
9 to Nancy Patrick and was hugging her, and I actually
10 waited a few minutes. I thought they knew each other, I
11 thought maybe it was her son or something. And then I
12 walked up to Officer Goss to let him know that I was the
13 other party involved in the accident. And he told me,
14 well, just stand off to the side of the road and wait for
15 another officer to show up on the scene. So I thought
16 maybe it was conflicting interest or something as far as
17 him knowing her or something, I don't know, so I just
18 waited for the other officer to show up.

19 Q. How long did it take for the other officer to
20 show up?

21 A. Maybe another five to ten minutes.

22 Q. And at that time were you just waiting?

23 A. Yes, just waiting.

24 Q. Who was directing traffic?

25 A. My little brother was still up directing

1 Q. Now, you marked on Exhibit No. 1 a car that
2 had swerved to try to avoid being hit. What did that car
3 do?

4 A. Proceeded down the road.

5 Q. I mean at the time of the impact and your
6 vehicle started moving into his lane, what evasive action
7 did he take?

8 A. He pulled off -- as she had come out and hit
9 me and I was going sideways like this and he was coming
10 down the hill and he just went around me like that
11 (indicating), stopped for a second, saw that I had come
12 to a stop and then continued down the road.

13 Q. So you are describing he moved further to the
14 right?

15 A. Yes, he just veered around into -- it was dirt
16 here (indicating) so he just, two tires off into the dirt
17 and came around me. The car behind him stopped and
18 waited until we started directing traffic around the
19 truck.

20 Q. Did you talk to either of those drivers?

21 A. I did not. They just bolted.

22 Q. The one that went off into the dirt, he just
23 had two tires in the dirt?

24 A. Yes.

25 Q. Was his vehicle farther into the dirt or

1 farther into the lane of travel at the time he went
2 around you?
3 A. You know, I don't know; I was still coming to
4 a stop, I just saw him veer off, so I wouldn't know how
5 much of his vehicle was still on the pavement or how much
6 was off in the dirt.
7 Q. Did you talk to any other drivers at any time
8 after the accident that had witnessed the accident
9 besides your brother?
10 A. No. They had all moved on, nobody stayed.
11 Q. How long were you at the accident scene total
12 before you left?
13 A. I would say 45 minutes, an hour.
14 Q. Was your vehicle drivable?
15 A. Yes, I drove it from the scene.
16 Q. Where did you go after leaving the scene?
17 A. To the emergency room, Portneuf Medical
18 Center.
19 Q. You talked about feeling nausea shortly after
20 the accident and a pain in your neck approximately five
21 to ten minutes after the accident; is that correct?
22 A. Yes.
23 Q. Were you feeling any other pain or discomfort
24 during the time that you were at the accident scene?
25 A. My lower back was aching.

1 Q. And, if you could, how would you describe the
2 back pain and neck pain that you were feeling at the
3 accident scene?
4 A. Like, jeez, like limited mobility of my neck,
5 tingling in my fingertips, the palm on my hand felt like
6 it was heating, just weird, like heating up and then
7 cooling off and then fingertips tingling; my neck just
8 felt really stiff, it was hard to turn my head either
9 way, and my lower back was -- I can't explain it, I don't
10 know. Like needles poking me in my back.
11 Q. Were you experiencing any other pain or
12 discomfort at the accident scene?
13 A. Just my -- just the feeling of nausea and my
14 neck and my lower back.
15 Q. At the time of the collision did you have both
16 hands on the wheel?
17 A. I did.
18 Q. And were you facing forward?
19 A. I was.
20 Q. Were you doing anything else at the same time?
21 A. Just watching the cars in front of me,
22 watching traffic.
23 Q. And your friend, Mr. Bennett, was texting his
24 wife, he had testified to. Do you recall that he was
25 doing that?

1 A. I am not sure, I wasn't watching him.
2 Q. Were you talking to him?
3 A. I wasn't.
4 Q. Was the radio on?
5 A. I can't recall.
6 Q. Did you typically drive with the radio on?
7 A. About 50-50, sometimes it is and sometimes I
8 don't.
9 Q. When the radio is on what do you listen to?
10 A. Talk radio, Rush Limbaugh; I like Rush.
11 MR. JOHNSON: I object and ask that the answer
12 be stricken from the record as irrelevant.
13 Q. When you were listening to the radio back at
14 the time this accident happened, just generally speaking,
15 were you the kind of guy that would crank up the music so
16 it would play loud or did you just listen to talk radio
17 at a quieter level?
18 A. Yes, that's all I ever have, is talk radio at
19 a quiet level; the guys hate it.
20 Q. Do you ever listen to like an MP3 player or
21 iPod?
22 A. No.
23 Q. You don't have any hands-free devices that you
24 would have something in your ear at the time?
25 A. No.

1 Q. You weren't reaching for anything or trying to
2 find any paperwork or anything like that at the time of
3 the accident?
4 A. No; like I said, hands were on the steering
5 wheel, facing forward.
6 Q. And the first time that you saw Ms. Patrick
7 was after the impact had actually happened; correct?
8 A. Correct.
9 Q. When you left the accident scene, you said you
10 drove your vehicle; is that correct?
11 A. Well, the paramedics, when they showed up,
12 they were dealing with Nancy Patrick. And again I had to
13 go to them and I told them that I was feeling nauseated
14 and my neck and back were hurting. And they had informed
15 me that they would take me down there. And I said I am
16 sure my truck can make it, I will just follow you guys.
17 So I followed the ambulance to the hospital in my truck.
18 Q. Did anyone ride in the ambulance?
19 A. I am not sure.
20 Q. Did anyone ride with you in your truck?
21 A. I believe that Matt did. He might have went
22 with my brother, though, I am not sure.
23 Q. When you got to the hospital what happened?
24 A. We walked -- followed the paramedics into the
25 ER and were seen by the physicians that were operating in

1 the emergency room.

2 Q. Did you have to wait a while like Mr. Bennett
3 had described?

4 A. No, actually they got me right in there. They
5 put a soft collar on me and laid me down on a bed almost
6 as soon as I walked through the door.

7 Q. Who did that?

8 A. Paramedics followed in and the paramedics had
9 told the physicians what was going on and how I was
10 feeling nauseated and they thought it might be something
11 severe, so they immediately put a collar on and had me
12 lay there and try not to move around.

13 Q. How long did you lay on the bed with the
14 collar on before the doctor came?

15 A. Maybe five, ten minutes. And then they took
16 me back and started giving me x-rays and stuff.

17 Q. Did they x-ray your lower back or just your
18 neck?

19 A. I am not sure on that.

20 Q. Do you remember speaking to the doctor about
21 the results of your x-ray?

22 A. I do, and he had told me, I don't remember the
23 terminology, but he told me -- jeez, I don't know the
24 terminology. Told me I was not good.

25 Q. He told you that the x-rays revealed something

1 A. I am not sure.

2 Q. Do you remember him reporting that you were
3 improving at that time?

4 A. No, actually he had told me that I had
5 swelling and he had prescribed me muscle relaxers and
6 some Motrin. I can't take pain medication, I am allergic
7 to that stuff. So he gave me muscle relaxers and told me
8 to follow up within a week if I hadn't improved. And I
9 still didn't improve, so I went back again to Maynard.
10 And that's when he had told me to go see West and get an
11 MRI done.

12 Q. I'll show you what your counsel has marked as
13 Exhibit No. 101. I have highlighted on there. It
14 appears that he is saying that your neck is improving and
15 the headaches and tingling in hands are improving. Do
16 you recall that you were improving after that first week?

17 A. I am not sure. What's the dates on these?

18 Q. This would have been 10/26/07.

19 A. Maybe improving but still had tingling and
20 stiffness, so I would say slight improvement.

21 Q. Then you said you saw him again the following
22 week; is that correct?

23 A. October 26 -- it was November 9 the next time
24 that I had gone in, so a week or two -- it was two weeks.

25 Q. Do you recall reporting to him that you were

1 that caused them concern or --

2 A. Yeah, what did they say? It was Dr. Robert
3 Beckstead, cervical spine strain and lumbar spine strain
4 is what he told me. I had numbness and tingling in my
5 extremities, severe neck and lower back pain, and
6 instructed me to wear a soft collar for a week, do no
7 lifting, and then follow up with my physician if my
8 condition did not improve.

9 Q. Did you wear the soft collar for a week?

10 A. I did.

11 Q. Did you adhere to the other recommendations of
12 not lifting anything more than five or ten pounds?

13 A. I did.

14 Q. At the end of that week how were you feeling?

15 A. I was still having numbness and tingling in my
16 fingers and my neck. And just over the next couple of
17 days it felt like it was getting worse and worse.

18 Q. When was the next time that you went to see a
19 doctor or medical care provider after visiting the ER on
20 the day of the accident?

21 A. I believe a week, and I went and saw my family
22 doctor.

23 Q. And that would have been Dr. Maynard?

24 A. Maynard, yes.

25 Q. And did he review the x-rays with you?

1 improving but still felt sore and tight but not as bad as
2 two weeks earlier?

3 A. No.

4 Q. I'll show you what your counsel has provided
5 as Exhibit No. 102. I have highlighted the subjective
6 portion of that note. If you want to go ahead and read
7 that and see if what I just asked you is accurate, your
8 recollection of your condition at that time.

9 (Pause in proceedings.)

10 A. What was your question, again?

11 Q. Do you remember that you were improving but
12 still felt sore and tight but not as bad as two weeks
13 earlier?

14 A. Yes.

15 Q. That's accurate for how you were feeling at
16 that time; correct?

17 A. Yeah.

18 Q. So the next time you sought medical attention
19 was when?

20 A. Dr. Maynard again. He had told me to come
21 back if I still wasn't feeling -- if the tingling and
22 stuff hadn't gone away. So I went back in and that's
23 when he had told me to see West and get an MRI for ti
24 tingling and the headaches and stuff that I was
25 experiencing.

1 Q. When was the visit that you went to see him
 2 next?
 3 A. I believe November 9.
 4 Q. That was the one we just talked about.
 5 A. So I went to Maynard on the 26th --
 6 Q. Of what date?
 7 A. Friday, October 26, for continuing problems --
 8 let me see here. Beckstead -- so October 26 and October
 9 9, and then the next one I saw was Henry West.
 10 Q. And you saw Dr. West from November 24 of 2007
 11 through May 7 of 2008; correct?
 12 A. Yes.
 13 Q. And it looks like you saw him a total of four
 14 times; is that correct?
 15 A. Yes.
 16 Q. Do you recall the treatment that Dr. West did
 17 on you?
 18 A. Jeez, I don't know the names of all the tests.
 19 He has got them here --
 20 Q. You are referring to your discovery responses;
 21 is that correct?
 22 A. Yes.
 23 Q. That's fine if that helps refresh your
 24 recollection. Do you recall what he did to treat your --
 25 A. Formal (sic) compression tests, shoulder

1 Q. Do you recall that on the 4/28/08 visit you
 2 were feeling better and there was no numbness in your
 3 fingers at that time?
 4 A. Correct.
 5 Q. And then the last visit, 5/7 of '08, that you
 6 were treated with electrical stimulation, ultrasound,
 7 manipulative treatment; do you remember those treatments?
 8 A. I do, yes.
 9 Q. And do you remember that being the last time
 10 that you treated with a medical care provider for any
 11 injuries related to this accident?
 12 A. Yes.
 13 Q. Why is it that you haven't treated with anyone
 14 else?
 15 A. Because my medical bills weren't getting paid
 16 and I couldn't keep accumulating stuff, knowing that I
 17 couldn't pay for it. I was denied by Allstate to pay my
 18 medical.
 19 Q. So is it solely financial reasons that you
 20 stopped treating?
 21 A. Yes.
 22 Q. You believed that you needed further
 23 treatment?
 24 A. Yes.
 25 Q. What were the total medical bills that you had

1 depression test, Bickele's test, the sitting roots test,
 2 bilateral leg raise. He took x-rays that showed
 3 significant injuries at C7, and he referred me to the
 4 Idaho Medical Imaging for an MRI. The MRI showed minor
 5 posterior broad-based disc bulges at C4-5 and C5-6 from
 6 the motor vehicle collision. Dr. West diagnosed
 7 Benjamin, or me, with acute traumatic side lash cervical
 8 sprain/strain, brachial rad -- I can't even say that
 9 word -- radicalbith (sic), and mid-level intersegmental
 10 dysfunction characterized by akinesis -- I am not sure
 11 how to -- and acute lumbar strain and limitations in the
 12 range of motion in the cervical and lumbar spine.
 13 Q. If we go through his treatment notes, you
 14 treated with him on 11/24/07 where he did electric
 15 stimulation, ultrasound and manipulative therapy, and I
 16 am referring to Exhibit No. 122 that your counsel
 17 previously provided to us.
 18 The next one was 2/22 of '08, so there would
 19 have been about a three-month gap there, then you went
 20 back and treated with him and the MRI was taken on 2/19
 21 of '08 that showed the bulge that you just referred to.
 22 Then you treated with him again on 4/28 of '08 and then
 23 5/7/08. Are those all the times that you recall treating
 24 with Dr. West?
 25 A. Yes.

1 incurred to that date?
 2 A. I am referring back to interrogatories; total
 3 medical is \$2,992.92.
 4 Q. Did you have auto insurance at the time?
 5 A. I did.
 6 Q. Did they have what's called a med pay
 7 provision in your auto insurance?
 8 A. I believe so.
 9 Q. Do you know what the limits were on that?
 10 A. I am not sure.
 11 Q. Were these bills submitted through your med
 12 pay?
 13 A. I believe they were and I was denied, I think;
 14 I am not sure.
 15 Q. Who did you go through with auto insurance at
 16 the time?
 17 A. Allstate.
 18 Q. They were your own provider?
 19 A. Yes.
 20 Q. And you just said you don't know what your
 21 limits were for your med pay policy; is that correct?
 22 A. No, I don't know.
 23 Q. Do you know if they were submitted through
 24 your med pay coverage?
 25 A. I'm not sure.

1 1 Q. What treatment do you believe you needed that
 2 you didn't get as a result of financial issues?
 3 A. I have still never been told by any care
 4 provider that I was 100 percent; I still have headaches,
 5 and my lower back still hurts.
 6 Q. Did any doctors tell you that we want to keep
 7 treating you and this is the course of treatment we
 8 recommend doing?
 9 A. Yes.
 10 Q. Who said that?
 11 A. West.
 12 Q. What did he recommend as far as a course of
 13 treatment?
 14 A. Just to keep coming in, keep getting the
 15 electric treatments and the -- the electrical stimulation
 16 and manipulative therapies.
 17 Q. Did he recommend surgery for you?
 18 A. No, not at that time he didn't.
 19 Q. How does your neck feel as we are sitting here
 20 today?
 21 A. My neck feels fine.
 22 Q. How does your lower back feel as we are
 23 sitting here today?
 24 A. Uncomfortable.
 25 Q. How often do you experience problems with your

1 Q. What did he do for treating your headaches?
 2 A. He had told me that it was more than likely
 3 due from injuries to my neck or back and that the
 4 treatments that he were doing would hopefully help.
 5 Q. Did he tell you what he diagnosed you with as
 6 far as your lower back?
 7 A. I am not sure.
 8 Q. Did he give you any diagnosis as to what you
 9 had suffered with regards to your neck?
 10 A. Yes, he did, but I don't know the exact
 11 terminology of what he had said here. No, I can't recal
 12 what he had said.
 13 Q. You referred to a page that showed your
 14 damages when you looked up the issue of medical bills
 15 date. I would refer you back to look at that again. And
 16 this was the damages summary provided in discovery b
 17 your counsel; correct?
 18 A. Correct.
 19 Q. And in that damage summary provided by your
 20 counsel and in the request for production of documents,
 21 do you see any damages on there that are not accurate?
 22 A. It looks good.
 23 Q. Are there any items that are missing from
 24 here, any damages that you have suffered as a result of
 25 this accident that are not listed there?

1 neck or your lower back?
 2 A. Every day with my lower back. As far as my
 3 neck goes, I still get headaches, and I can only blame
 4 the wreck on the headaches; I have never had headaches
 5 before that.
 6 Q. When did you begin having headaches after the
 7 accident?
 8 A. Oh, like the next day.
 9 Q. And how would you describe the headaches that
 10 you experienced?
 11 A. Severe, migraines, almost bring you to tears.
 12 Q. Where would the pain start?
 13 A. Behind my eyes.
 14 Q. And how often would you say you have had these
 15 headaches?
 16 A. Probably twice a month.
 17 Q. Has that been consistent since the time of the
 18 accident?
 19 A. It has.
 20 Q. Have you talked to any of the doctors about
 21 the headaches?
 22 A. Not from -- I have from initially, but I
 23 haven't been in to see a doctor since West.
 24 Q. Did you talk to Dr. West about the headaches?
 25 A. I did.

1 A. Could you restate that?
 2 Q. Is this listing incomplete in any way; is
 3 there anything not on the list that should be on the
 4 list?
 5 A. No.
 6 Q. This is a complete list; correct?
 7 A. Correct.
 8 Q. Did you ever have an MRI of your lower back?
 9 A. After the wreck?
 10 Q. Yes.
 11 A. I do not know for sure.
 12 Q. We had referred to the MRI of your neck area
 13 that talked about the disc protrusions and broad-based
 14 bulges, but do you recall having that same kind of
 15 examination done on your lower back, the MRI?
 16 A. I can't recall.
 17 Q. Have you been involved in any other motor
 18 vehicle accidents?
 19 A. Yes.
 20 Q. What other accidents have you been in, if you
 21 can take me back to the dates and location of each.
 22 A. I was -- how old was I -- 17, got in an
 23 automobile accident in my grandparents' car in Blackfoot
 24 Q. What are the name of your grandparents?
 25 A. Darreld and Reva Walton.

1 Q. And where was that accident?
 2 A. I don't know the names of the streets. In
 3 front of the Safeway in Blackfoot, I don't know if it's
 4 Judicial.
 5 Q. Judicial or Bridge?
 6 A. It's the same road you turn to go to the
 7 hospital on.
 8 Q. Is it the eastbound or the westbound one-way
 9 street?
 10 A. The grocery store sits between the one ways
 11 and I was pulling out to go towards the railroad tracks,
 12 so it would have been --
 13 Q. That would have been Judicial.
 14 A. I was sitting there stopped and a guy across
 15 the street came at my vehicle with oncoming -- traffic
 16 was coming this way and I was stopped looking that way
 17 (indicating) and he hit us on the side, just nudged us on
 18 the side. I guess he had said he was watching traffic
 19 and just kind of drifted off (indicating).
 20 Q. Were you injured as a result of that accident?
 21 A. No.
 22 Q. Have you had any other auto accidents?
 23 A. In high school when I was 18 I had rear ended
 24 a car.
 25 Q. Who did you rear end in that accident?

1 A. That's correct.
 2 Q. And it was based on one week of being out of
 3 work; is that accurate?
 4 A. Yes.
 5 Q. Were you given a doctor's release for not
 6 working for a week?
 7 A. I don't believe so.
 8 Q. Were you given instructions by a doctor to not
 9 work?
 10 A. I was told to take it easy and wear a collar
 11 for a week, so I guess that would be yes.
 12 Q. Would it be possible for you to work in your
 13 job and be able to take it easy?
 14 A. No, they told me to stay down for a week and
 15 wear that collar, so I just stayed home.
 16 Q. And how did you calculate the hourly rate for
 17 which you were assessing your lost income claim?
 18 A. Off of previous years' income tax returns.
 19 Q. Is it true that in previous years your
 20 business showed a negative income?
 21 A. I'm not sure.
 22 Q. We have looked at the tax records that you
 23 produced in discovery responses --
 24 A. You are asking business or personally?
 25 Q. I am asking for your income tax records and

1 A. I am not sure what their names are. They were
 2 high school girls.
 3 Q. Were you injured as a result of that accident?
 4 A. No.
 5 Q. Were there any lawsuits as a result of either
 6 of those accidents?
 7 A. No.
 8 Q. Any other accidents that you were in?
 9 A. Not that I can recall at this time.
 10 Q. Have you had any other accidents, not auto
 11 accidents, but other accidents that resulted in your need
 12 to seek medical care?
 13 A. I cut my hand here a few years back and went
 14 to the emergency room for stitches.
 15 Q. Any other accidents besides that that resulted
 16 in medical care?
 17 A. No.
 18 Q. Have you ever injured your neck or back before
 19 the accident?
 20 A. No.
 21 Q. Have you injured your neck or back in any way
 22 since the auto accident?
 23 A. No.
 24 Q. In your discovery responses you indicated a
 25 claim for lost wages or lost income; is that correct?

1 the income that you made. The income taxes that you
 2 reported to the government showed all the income that you
 3 made during the years; is that correct?
 4 A. Should be.
 5 Q. So for the year 2004, if we begin there, the
 6 wages, salaries, tips, et cetera, are \$21,416, but those
 7 would be your wife's income, correct, since you didn't
 8 work for wages, salaries, or tips during the year 2004?
 9 A. --I would say yes.
 10 Q. And the business income or loss shows a loss
 11 of \$3,387; is that correct?
 12 A. Yes.
 13 Q. If we go back to the form Schedule C that
 14 talks about profit or loss from business, it shows your
 15 gross receipts at \$35,765; correct?
 16 A. Correct.
 17 Q. And adjustments to your gross income bring it
 18 down to \$32,698; is that accurate?
 19 A. Yes.
 20 Q. And then it shows the expenses at \$36,085; is
 21 that correct?
 22 A. Correct.
 23 Q. Leaving you with a negative \$3,387 figure for
 24 your income for working in that business for that year;
 25 is that correct?

1 A. Correct.
2 Q. And that directly included costs that you had
3 for your truck and expenses of \$20,048; is that correct?

4 A. Correct.
5 Q. And actual contract labor expenses of \$13,877;
6 is that correct?

7 A. Correct.
8 Q. These aren't depreciation amounts, these are
9 actual expenses; is that right?

10 A. Correct.
11 Q. For the year 2005, if we go through the same
12 analysis, the \$19,206 amount for wages, salaries, and
13 tips was your wife's income; is that correct?

14 A. Correct.
15 Q. That year your business made approximately
16 \$13,615 if we look at business income through Line 12 on
17 your 1040 tax form; is that right?

18 A. Yes.
19 Q. If we go back to the profit and loss from your
20 businesses, you had gross receipts or sales of \$110,192;
21 correct?

22 A. Correct.
23 Q. Your gross income was reduced down to \$96,136;
24 correct?

25 A. Correct.

1 goods sold of, I am trying to read upside-down here,
2 \$32,010; is that correct?

3 A. Yes.
4 Q. So if you take the cost of goods sold out,
5 your gross income is \$39,347, and then reduce that by
6 your truck and car expenses and other expenses of \$40,817
7 to arrive at a loss that year of \$1,470; correct?

8 A. Correct.
9 Q. And the year in which the accident happened,
10 2007, your wife's income through her wages, salaries, and
11 tips was \$24,146; is that right?

12 A. Yes.
13 Q. Your business showed a profit of \$881;
14 correct?

15 A. Correct.
16 Q. And the profit and loss from your business
17 showed gross receipts of \$48,223; is that right?

18 A. Yes.
19 Q. Adjusted down to \$44,456 when taking out costs
20 of goods sold and other deductions above the gross income
21 tax line; correct?

22 A. Yes.
23 Q. And then your total expenses reduced that
24 amount by \$43,575 leaving a profit of your business of
25 \$881; correct?

1 Q. Your costs of doing business were \$80,190,
2 those are your total expenses; correct?

3 A. Correct.
4 Q. That leaves you with a \$15,946 of profit that
5 you made that year from your business; right?

6 A. Correct.
7 Q. Let's go to 2006. This would be the year
8 before the auto accident. It shows income from wages and
9 tips of \$22,726; is that right?

10 A. Correct.
11 Q. And that would have been your wife's income
12 again?

13 A. Correct.
14 Q. Your business gains or losses were a loss of
15 \$1,470; is that right?

16 A. Yes.
17 Q. If we go back to the profit and loss page
18 again, your business had gross receipts of \$71,357; is
19 that right?

20 A. Yes.
21 Q. And after taking away the figures, your gross
22 income came down to \$39,347, that would have been your
23 gross income for tax purposes; correct?

24 A. Yes.
25 Q. And that includes reductions for the cost of

1 A. Yes.
2 Q. If your business is showing losses each year,
3 how is it that you claim that one week of lost work
4 resulted in such a substantial figure to you?

5 A. Lost left by materials and I still have to pay
6 wages; that's where that loss comes from.
7 Q. What would you have been doing that week that
8 you weren't able to do?

9 A. I would have been out lining up jobs and
10 grabbing material.
11 Q. And I guess I am curious, if your business
12 operates at a loss each year with the exception of one
13 year essentially or a profit of less than a thousand
14 dollars, how did you calculate your hourly rate at the
15 amount that you did?

16 A. By what the business makes total before the
17 loss.

18 Q. So that figure is just your gross profits that
19 you would have made?

20 A. I am not understanding your question.
21 Q. The hourly rate you gave me would be
22 representative of your gross profits before expenses were
23 taken out?

24 A. I am not sure I understand the question.
25 Q. Well, you said that you relied on the income

1 figures from your business to arrive at your hourly rate
 2 that you are assessing for your lost wage claim; correct?
 3 A. Correct.
 4 Q. And I am saying that would be the gross profit
 5 figure that you are using from your tax records, not your
 6 total income, because it showed a loss; right? So the
 7 gross income figure that you are claiming should be
 8 offset by the expenses that you would normally incur
 9 during the same period of time; is that right?
 10 A. Yes.
 11 Q. When did you first decide to file a lawsuit
 12 with regard to this accident?
 13 A. I was dealing with the Allstate, Nancy
 14 Patrick's side of the Allstate claims lady and as soon as
 15 they had told me that I might be at fault for the
 16 accident, is when I sought legal help.
 17 Q. And when would that have been in relation to
 18 the accident; do you know?
 19 A. I would say three or four months after.
 20 Q. Were you dealing with somebody else for your
 21 side of the insurance?
 22 A. Claims representative on my side of stuff?
 23 Q. Yes.
 24 A. I think I was just dealing with Nancy
 25 Patrick's side.

1 A. No.
 2 Q. Did you have any other benefit or coverage
 3 that would provide payment for medical bills?
 4 A. Workmen's comp but it wouldn't cover an
 5 accident like that, it would have to be an on-job
 6 accident.
 7 Q. Were you heading to the work site at the time?
 8 A. I was heading back to the job site.
 9 Q. Did you make a claim under workers' comp?
 10 A. No.
 11 Q. Did you talk to anybody about making a claim
 12 under workers' comp?
 13 A. No. I don't think my workmen's comp policy
 14 covers me anyway, it covers employees.
 15 Q. Are you identified as an employee through your
 16 business?
 17 A. I don't believe so.
 18 Q. Let's talk about the physical limitations you
 19 have as a result of injuries you claim from this
 20 accident. What are you not able to do now that you could
 21 do before the accident?
 22 A. Drive long periods of time, can't drive very
 23 long now, have to pull off and get out and stand -- I
 24 can't sit very long, can't stand very long. I have
 25 headaches that keep me from doing all kinds of stuff.

1 Q. Did you make a claim for benefits under your
 2 side of the insurance through anyone?
 3 A. I am not sure of what --
 4 Q. Well, we talked before about the med pay and I
 5 am talking about any kind of claim. Did you talk to any
 6 other person from Allstate or even the person from the
 7 Nancy Patrick side of things about your own claim through
 8 your own policy for any purpose in this accident?
 9 A. Yeah, I was trying to get my medical bills
 10 paid by whoever.
 11 Q. And the property damage, was that paid?
 12 A. They did pay for my truck damage.
 13 Q. But you don't recall them paying any part of
 14 your medical bills for any part of the coverage that you
 15 have?
 16 A. No.
 17 Q. Have any of your medical bills been paid as of
 18 this date?
 19 A. I have set up payment plans with them and I
 20 have been paying it just to keep myself out of messing up
 21 my credit.
 22 Q. Do you have health insurance?
 23 A. I don't.
 24 Q. Have you had health insurance at any time
 25 since the accident?

1 Q. Are you able to operate your business?
 2 A. I have to.
 3 Q. Are you able to do activities, hobbies and
 4 personal interests that you did before the accident?
 5 A. I can't think of anything.
 6 Q. You can't think of any limitations that you
 7 have, is that what you mean --
 8 A. No, I can't think of anything, hobbies -- I
 9 just work, just trying to keep my business going.
 10 Q. Before the accident did you do hobbies?
 11 A. No, I was just working.
 12 Q. Do you have responsibilities around the house
 13 that you do that you either can't do fully or can only do
 14 on a limited basis now as a result of injuries from this
 15 accident?
 16 A. Just when I get headaches.
 17 Q. Are you currently on medication?
 18 A. Just self medicate with ibuprofen or Motrin.
 19 Q. I would like to refer to some discovery
 20 responses that you made starting on Page 9 of your
 21 answers, and this is Interrogatory No. 12 asking about
 22 the names of witnesses or people's knowledge about the
 23 accident. You have listed yourself first on there. Do
 24 you have any knowledge about the facts or circumstances
 25 of the accident itself or damages that you have sustained

1 that we haven't talked about yet today that you think
2 would be relevant for a jury to hear?

3 A. Would you repeat that?

4 Q. Sure. We talked about the accident itself and
5 your injuries, your treatment and limitations. Beyond
6 what we talked about today, do you have any knowledge or
7 information that you think would be relevant for a jury
8 to hear that you haven't told me?

9 A. No.

10 Q. You have listed your brother as the second
11 person with information or knowledge, Jason Walton. What
12 information or knowledge does he have relevant to your
13 case?

14 A. He witnessed the whole accident.

15 Q. Would his testimony be limited to the accident
16 itself or your claims for damages after the accident?

17 A. Both.

18 Q. What would he have seen after the accident?

19 A. He has witnessed headaches and he has
20 witnessed the pain and suffering that I was going through
21 after.

22 Q. And the third one would be your wife. What
23 has she witnessed?

24 A. My pain and suffering after.

25 Q. Does she have health benefits available

1 Q. And is that the extent of what he has
2 witnessed you having headaches that has prevented you
3 from being able to go fishing or getting out of bed?

4 A. I am sure he has heard me complain of pain in
5 my back.

6 Q. Do you think there is anything else you think
7 he has witnessed with regard to your damage claims?

8 A. I would say no.

9 Q. The last person you have listed is Officer
10 Clinton Goss. Do you believe he has any information that
11 would extend beyond his investigation of the accident?

12 A. Maybe just his knowledge of knowing Ms.
13 Patrick before the accident, maybe being biased; I am
14 not sure.

15 Q. You have seen the police report where he has
16 not attributed fault to you in the police report but has
17 attributed fault to Ms. --

18 A. Correct, but I don't believe any citations
19 were given when they should have been.

20 Q. That's where you think the bias was, that no
21 citations were issued.

22 A. Correct.

23 Q. Other than that, you don't believe that the
24 police report is inaccurate or shading the facts in Ms.

25 Patrick's favor, do you?

1 through her employment?

2 A. I'm not sure.

3 Q. No. 4 you have listed Matt Bennett. Aside
4 from being a passenger in the car and what he has
5 testified to in his own deposition about what he
6 witnessed at the accident scene, what information or
7 knowledge would he have regarding your case?

8 A. Just witnessed the pain and suffering.

9 Q. What do you think he has witnessed with regard
10 to your pain and suffering?

11 A. He has come over, has wanted me to go fishing
12 and stuff and I have had to tell him no from headaches.

13 Q. Is there anything else that you can think of
14 that he has witnessed with regard to your pain and
15 suffering besides not being able to go fishing with him?

16 A. Yeah, days that I just couldn't get out of bed
17 and he has come over.

18 Q. And what days would those have been as far
19 as -- I am not saying a specific date, but what happened
20 that caused you not to be able to get out of bed?

21 A. A headache.

22 Q. And how many of those days would you estimate
23 there were that you haven't been able to get out of bed
24 and he has come over and witnessed?

25 A. Oh, I would say two or three.

1 A. I don't believe so.

2 Q. Those are all the witnesses you have listed.
3 Presumably you would also refer to your medical care
4 providers as people with information or knowledge about
5 your damage claims?

6 A. Correct.

7 Q. Is there anyone else aside from the witnesses
8 we have discussed today and your medical care providers
9 that would have information or knowledge relevant to this
10 lawsuit?

11 A. No.

12 MR. TAYLOR: Let me take just a moment to
13 review my notes and then we may be finished.

14 (Pause in proceedings.)

15 MR. TAYLOR: I just have one more question.

16 Q. Aside from the doctors that we have covered
17 today, have you treated with any other medical care
18 provider for injuries you relate to this accident?

19 A. No.

20 Q. In the two years before the accident did you
21 treat with any doctors or medical care providers?

22 A. Except for just like my 30-year checkup I went
23 in and saw my doctor, Maynard.

24 Q. That's the only doctor you had seen in the two
25 years prior to the accident?

1 A. And then I think when I cut my hand in the
2 emergency room, whoever was there for that. Other than
3 that, I can't think of anything.

4 Q. Before the accident had you ever treated with
5 a chiropractor?

6 A. No.

7 Q. Since the accident and after you stopped
8 treating with Dr. West, have you treated with a
9 chiropractor for any other reason?

10 A. No.

11 MR. TAYLOR: No further questions.

12 MR. JOHNSON: Just one or two.

13 EXAMINATION

14 BY MR. JOHNSON:

15 Q. Mr. Walton, do your income tax returns also
16 include a deduction for depreciation?

17 A. Yes.

18 Q. Is that something that you pay somebody
19 out-of-pocket for?

20 A. Yes.

21 MR. JOHNSON: Maybe the witness can be shown
22 the '06 tax return.

23 Q. Do you understand what depreciation is?

24 A. Not really.

25 Q. I saw car and truck expenses of 32,000. Do

1 you know what those are for?

2 A. Gas, fuel, anything to do with oil changes and
3 stuff like that; right?

4 Q. That's what I am asking you.

5 MR. JOHNSON: I don't have anything further.

6 THE WITNESS: That is what I am making that's
7 going back into it; right? Yeah.

8 MR. JOHNSON: I have nothing further.

9 MR. TAYLOR: No follow-up based on that.

10 (Witness excused at 12:25 p.m.)

11 (Signature requested.)

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REPORTER'S CERTIFICATE

I, PAUL D. BUCHANAN, CSR NO. 7, Certified
Shorthand Reporter for the State of Idaho, certify:

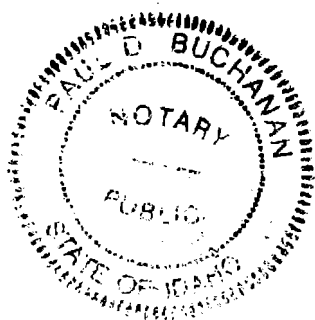
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That the testimony and all objections made were
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That the foregoing is true and correct record of
all testimony given, to the best of my ability;

I further certify that I am not a relative or
employee of any attorney or party, nor am I financially
interested in the action.

IN WITNESS WHEREOF, I set my hand and seal this
1ST day of October, 2009.



Paul D. Buchanan

PAUL D. BUCHANAN, CSR, RPR, RMR

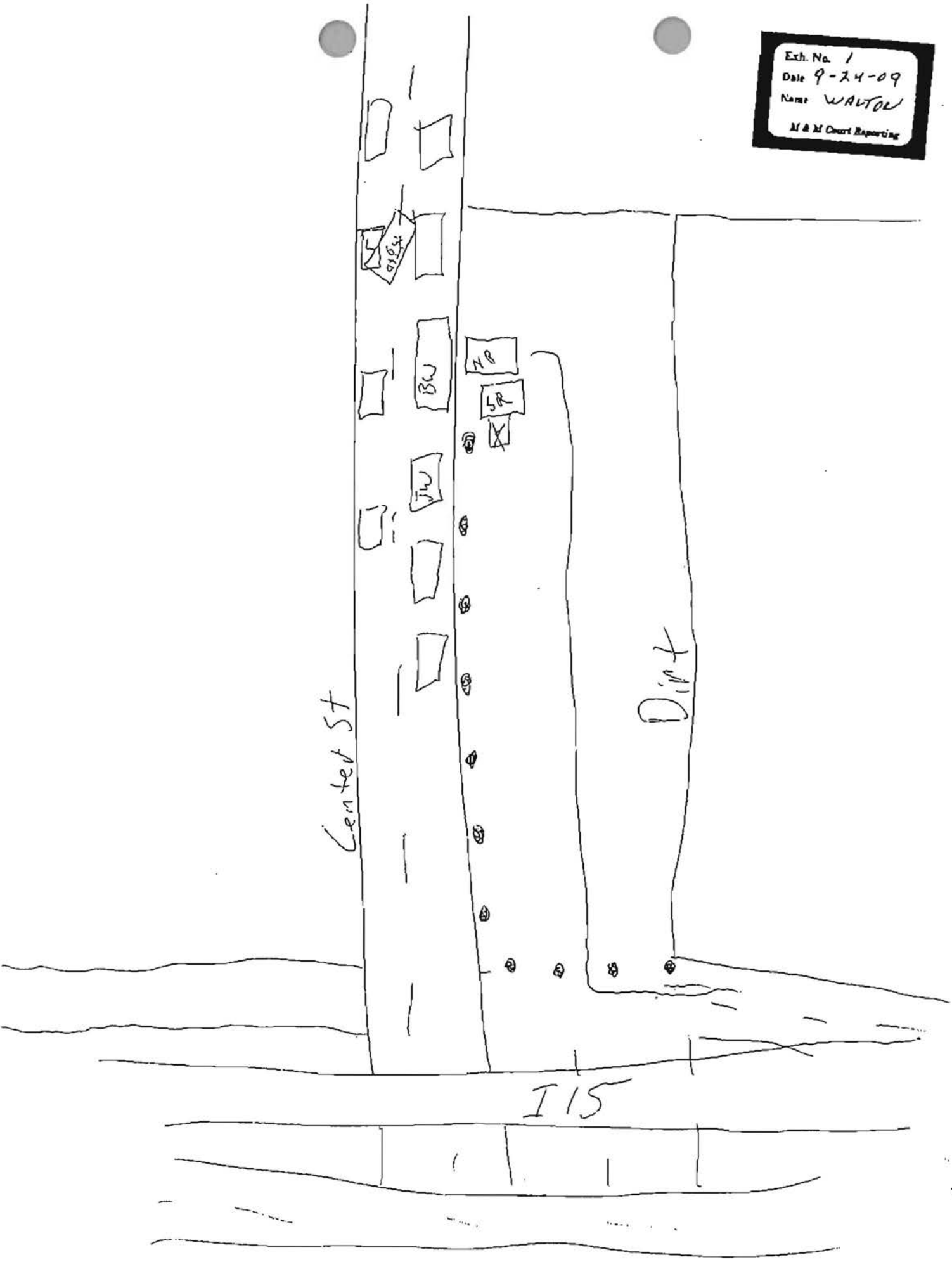
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DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and)
BENJAMIN L. WALTON,)
Plaintiffs,)

COPY

vs.)
NANCY PATRICK,)
Defendant.)
_____)

Case No. CV-08-4528-OC

ORAL DEPOSITION OF NANCY D. PATRICK

Taken on September 24, 2009

REPORTED BY:

PAUL D. BUCHANAN, RPR, RMR,

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DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK-

MATHEW R. BENNETT and BENJAMIN L. WALTON, Plaintiffs, vs. NANCY PATRICK, Defendant. Case No. CV-08-4528-OC

ORAL DEPOSITION OF NANCY D. PATRICK Taken on September 24, 2009

REPORTED BY:

PAUL D. BUCHANAN, RPR, RMR, CSR No. 7, and Notary Public

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1 APPEARANCES:

3 For the Plaintiffs: CHARLES JOHNSON Johnson Olson Attorneys at Law P. O. Box 1725 Pocatello, Idaho

10 For the Defendant: BRENDON C. TAYLOR Merrill & Merrill Attorneys at Law P. O. Box 991 Pocatello, Idaho

16 Also Present: Mathew R. Bennett Benjamin L. Walton

1 BE IT REMEMBERED that on September 24, 2009, at 2 the hour of 8:50 a.m. the deposition of NANCY D. PATRICK, 3 produced as a witness at the instance of the plaintiffs 4 in the above-entitled action now pending in the 5 above-named court, was taken before Paul D. Buchanan, CSR 6 #7, and notary public, State of Idaho, in the law offices 7 of Merrill & Merrill, 109 North Arthur Avenue, Pocatello, 8 Bannock County, Idaho.

10 WHEREUPON, the following proceedings were had:

12 MR. JOHNSON: The record should reflect that 13 this is the time and the place for the taking of the 14 deposition of Nancy Patrick in the case of Bennett and 15 Walton versus Patrick.

17 NANCY D. PATRICK, 18 called at the instance of the plaintiffs, having been 19 first duly sworn, was examined and testified as follows:

20 EXAMINATION

21 BY MR. JOHNSON:

22 Q. Ms. Patrick, would you please state your name 23 for the record?

24 A. Nancy D. Patrick.

25 Q. Have you ever had your deposition taken

1 before?
 2 A. No.
 3 Q. A deposition is a formal way to gather facts
 4 in a civil case. Everything you say will be taken down
 5 by the court reporter. So it's important that we allow
 6 each other, me to complete my question and you to
 7 complete your answer before we proceed. It's also
 8 important that you not have a simple nod of the head or
 9 answer uh-huh or huh-huh, but to answer audibly to each
 10 of my questions. Can we agree to do that in this case?
 11 A. Yes.
 12 Q. Thank you. Do you have any aliases?
 13 A. No.
 14 Q. What is your date of birth?
 15 A. [REDACTED]
 16 Q. What is your current address?
 17 A. 5365 Southwest Tree Street, Lake Oswego,
 18 Oregon 97035.
 19 Q. What are the last four digits of your Social
 20 Security number?
 21 A. [REDACTED]
 22 Q. Are you married?
 23 A. Widowed.
 24 Q. Do you have any children?
 25 A. One surviving.

1 A. Secretary to the three agents in the office,
 2 administrative assistant to the unit manager.
 3 Q. Did you work in the claims department at all?
 4 A. No.
 5 Q. So you just worked for agents selling policies
 6 of insurance.
 7 A. Right; the claims people were there but that
 8 was not part of my job.
 9 Q. Have you ever been involved in any prior
 10 lawsuits?
 11 A. No.
 12 Q. Do you have any history of a felony
 13 conviction?
 14 A. No.
 15 Q. Did you ever serve any time in the military or
 16 on a mission for your church?
 17 A. No.
 18 Q. Are you a member of any organizations at this
 19 time?
 20 A. No longer.
 21 Q. What were you a member of before?
 22 A. Professional Secretaries International, Gate
 23 City Civitans, and Navy Wives Club.
 24 Q. What was it that caused you to move back to
 25 Oregon from Idaho?

1 Q. Do you have any grandchildren?
 2 A. Six.
 3 Q. What is the highest level of education that
 4 you have completed?
 5 A. Three years of college.
 6 Q. Where at?
 7 A. Good Samaritan Hospital School of Nursing in
 8 Portland, Oregon.
 9 Q. Did you complete a degree or certificate?
 10 A. No, due to an auto accident.
 11 Q. Not in this case.
 12 A. No.
 13 Q. Are you a nurse at this time?
 14 A. No.
 15 Q. Tell us, if you would, briefly, what jobs or
 16 professions you have had since you got out of high
 17 school.
 18 A. I worked for a surgeon in Klamath Falls,
 19 Oregon before I was married in 1964. Then I was a
 20 homemaker until my husband passed away, and I went back
 21 to work, I worked for Western Equipment Company here in
 22 town for eight and a half years and then Allstate
 23 Insurance Company for 20 years, and I have been retired
 24 for seven or eight years.
 25 Q. What were your job duties at Allstate?

1 A. Wanted to live closer to my son, and then I
 2 lost my daughter, she passed away March 4.
 3 Q. Of what year?
 4 A. This year.
 5 Q. Of 2009?
 6 A. Yes.
 7 Q. Do you have a current driver's license?
 8 A. Yes, I do.
 9 Q. Did you have a driver's license at the time of
 10 the collision in this case?
 11 A. Yes, I did.
 12 Q. Did you have a driver's education class before
 13 you got your license?
 14 A. Yes, back in high school.
 15 Q. Have you been in any prior accidents?
 16 A. No. Excuse me --
 17 Q. You said you had been in one before.
 18 A. One back in 1962.
 19 Q. Tell us what happened in that accident.
 20 A. I was with friends and my dad, we were out
 21 hunting, coming home and a vehicle crossed the highway
 22 right smack in front of us, blew a stop sign, and it
 23 caused our car to spin around and threw me out and the
 24 car landed on top of me.
 25 Q. Were you injured?

1 A. Yes.
 2 Q. Seriously?
 3 A. Yes.
 4 Q. And that didn't result in litigation?
 5 A. I don't believe it did, I think we just
 6 settled.
 7 Q. Did you visit the scene of this accident in
 8 preparation for the deposition today?
 9 A. No.
 10 Q. Did you review any photographs or other
 11 documents?
 12 A. Just the interrogatories that I had answered
 13 to previously.
 14 Q. Did you also look at the affidavit that we
 15 have marked as Exhibit No. 4; do you recall?
 16 A. No.
 17 Q. Tell us about the physical scene of the
 18 accident. What do you remember about it at the time?
 19 A. Coming off the freeway from the south, there
 20 were a row of barrels I guess to the east, and on the
 21 front of the barrel was an arrow pointing uphill
 22 (indicating), and I wasn't sure where to go, but I looked
 23 at that and that barrel -- and I couldn't see that there
 24 was enough room behind the barrels. It was gravel, fine
 25 sand to my right and there were tire tracks through it.

1 so I turned in there to go up the hill.
 2 Q. It was a construction site.
 3 A. Yes.
 4 Q. Do you recall seeing a flagger or flag person?
 5 A. No, there was no one there where you come off
 6 the freeway. Some construction was going on down by
 7 where the freeway goes over Center Street, but there were
 8 no flaggers.
 9 Q. Tell us when you got to the bottom of the hill
 10 where the barrels were, what that scene looked like at
 11 the time, that you recall?
 12 A. Empty, I mean there were no other vehicles,
 13 just the barrels going uphill, so I turned (indicating).
 14 Q. And this was the Interstate 15 exit proceeding
 15 from the south onto Center Street.
 16 A. Correct.
 17 Q. And it was marked as a construction area, you
 18 knew it was a construction area?
 19 A. Yes.
 20 Q. Was the off ramp under construction at that
 21 time?
 22 A. No.
 23 Q. So you got to the bottom of the off ramp and
 24 what did you see at that time?
 25 A. My red light, saw barrels, saw barrels and

1 other construction equipment to my left, I believe.
 2 Q. So at the bottom of the hill the light was
 3 red?
 4 A. Yes.
 5 Q. Did you stop there at that intersection where
 6 the red light was?
 7 A. Yes.
 8 Q. What did you do next?
 9 A. I turned right when the light turned green.
 10 Q. On the side of the barrels, there was no
 11 pavement; is that correct?
 12 A. Correct.
 13 Q. You turned onto what was part of the
 14 construction site, it was sand and gravel; is that
 15 correct?
 16 A. Right.
 17 Q. Is there a reason you didn't turn where the
 18 pavement was?
 19 A. I couldn't see that there was pavement on
 20 behind the barrels; they were far enough away from me --
 21 it didn't look like there was room to go across and turn
 22 behind the barrels, so I just wasn't sure where to turn,
 23 so I turned into the gravel, and when I did, there was a
 24 barrel up a ways with an arrow pointing to the left where
 25 I would go across to Maverik. So when I turned there,

1 there is another arrow pointing that way, I must be in
 2 the right spot, so that's where I turned in.
 3 Q. And when you say that's where you turned in,
 4 that was behind the backhoe --
 5 A. In front --
 6 Q. Steam roller.
 7 A. In front of the steam roller.
 8 Q. Showing you Exhibit No. 2, this is a portion
 9 of the police report. Does that show the relevant
 10 positions of the vehicles, the steam roller, your
 11 vehicle, and the Walton pickup?
 12 A. The only thing that I see that is different,
 13 and I could be wrong, is my car wasn't at that much of an
 14 angle, because when I came up and turned, I was pointed
 15 more across the street to the Maverik gas station
 16 (indicating).
 17 Q. So the vehicles were actually further towards
 18 the north; is that your testimony?
 19 A. Yes. My vehicle (indicating).
 20 Q. Furthering our chronology, you were confused
 21 when you got off the freeway, you didn't know where to
 22 go?
 23 A. Wasn't positive, yes.
 24 Q. So instead of staying on the pavement you went
 25 onto the part of the construction site to the right; is

1 that correct?

2 A. Correct.

3 Q. Is there a reason that you decided not to
4 drive on the pavement, that you decided to go behind the
5 barrels into the construction area?

6 A. I turned in front of the barrels.

7 Q. Right. Was there a reason that you did that
8 instead of staying on the pavement?

9 A. I thought that must be the way you are
10 supposed to go because the arrow said that way and there
11 were tire tracks through it.

12 Q. From the construction vehicles?

13 A. Apparently, yes.

14 Q. Were there any other cars driving on that part
15 of the road that you saw at the time that you stopped at
16 the light?

17 A. No.

18 Q. The other traffic that you saw would proceed
19 along on the paved portion of the road; is that correct?

20 A. Right, but I did not see any -- when I was
21 stopped at the red light, I did not see any traffic
22 coming up and going over on the paved part.

23 Q. So your testimony is when you were stopped at
24 the red light at the bottom of the hill, there wasn't any
25 cross traffic at all on the road?

1 Walton's pickup truck?

2 A. Correct.

3 Q. It says in your affidavit that you released
4 the brake, rolled forward, and then struck the pickup
5 truck. Why didn't you make an effort to try to see
6 whether that lane was clear before you attempted to cross
7 it?

8 MR. TAYLOR: I would object, I think that
9 mischaracterizes her testimony, but go ahead and answer,
10 if you can.

11 A. I was not trying to proceed on across without
12 looking that direction (indicating), I was looking uphill
13 at the vehicle coming down the hill and eased up on the
14 brake apparently without realizing I was easing up and
15 rolled (indicating) far enough forward to strike the
16 vehicle.

17 Q. So isn't it true that you tried to pull out
18 into this lane of traffic (indicating) when you hadn't
19 verified that there was no other vehicle coming the other
20 direction?

21 A. Correct.

22 Q. Do you think that Mr. Walton was able to see
23 your vehicle before the collision?

24 A. I'm not sure.

25 Q. If he says he couldn't see you before the

1 A. Correct.

2 Q. What did you do next?

3 A. After I turned right into that?

4 Q. Yes.

5 A. Then I made a left turn in front of the steam
6 roller to go across to Maverik.

7 Q. Did you see the Walton vehicle at all before
8 the collision?

9 A. No, I was looking uphill.

10 Q. You don't remember the shape or detail of the
11 Walton pickup truck at that time?

12 A. No, I do not.

13 Q. Just so your testimony is real clear, you
14 tried to merge into the lane where the Walton pickup
15 truck was located, you didn't see him at all before the
16 collision?

17 A. No, and I was not trying to merge up into that
18 lane, I was trying to go straight across.

19 Q. I see. Did you stop just before the
20 collision?

21 A. Yes, I had been stopped there.

22 Q. In front of the steam roller?

23 A. Yes.

24 Q. So you stopped in front of the steam roller,
25 and then just proceeded forward without seeing Mr.

1 collision took place at all, would you disagree with his
2 statement in that regard?

3 A. No.

4 Q. At this construction site do you recall that
5 vehicular traffic was limited to two lanes at that time
6 or were there four lanes open?

7 A. Two.

8 Q. And when you stopped at the stop sign you saw
9 that these two lanes were open and traffic was going both
10 ways on those two paved lanes; is that correct?

11 A. No, I did not see any traffic when I was
12 stopped.

13 Q. When you stopped at the stop sign --

14 A. At the stop sign at the off ramp.

15 Q. You might have misunderstood my question.
16 What I am saying is that when you stopped at the stop
17 sign, you could see that there were two lanes of traffic
18 that were paved?

19 A. No, I could not.

20 Q. You couldn't tell?

21 A. I couldn't tell.

22 Q. But there were in fact two paved lanes at the
23 stop sign at the time you stopped; isn't that correct?

24 A. Correct.

25 Q. Now, does Exhibit No. 2 depict, even though

1 it's not to scale, the relative location of the vehicles
 2 at the time of the collision?
 3 MR. TAYLOR: Objection, asked and answered
 4 before already, but go ahead and answer again, if you
 5 need to.
 6 A. No. My vehicle was not at that angle
 7 (indicating).
 8 Q. It was more of a straight on?
 9 A. Yes.
 10 Q. What we would call a T-bone collision?
 11 A. Yes.
 12 Q. In other words, the vehicles were in this
 13 alignment (indicating) like the letter T --
 14 A. Right.
 15 Q. -- your vehicle would have been more straight
 16 north to south.
 17 A. Correct.
 18 Q. I am showing you your affidavit marked as
 19 Exhibit No. 4. Have you seen that before?
 20 (Pause in proceedings.)
 21 A. Yes.
 22 Q. You have seen that before. Is that a true and
 23 correct copy of that affidavit?
 24 A. Yes.
 25 Q. In Paragraph 5 it says I perceived plaintiff

1 speeding?
 2 A. No.
 3 Q. And if Mr. Walton would have been speeding,
 4 you wouldn't have pulled directly out in front of a
 5 speeding vehicle, would you?
 6 A. No.
 7 Q. Let me ask you this. What do you think Mr.
 8 Walton should have done to try to prevent this collision?
 9 A. I'm not sure.
 10 Q. You really don't have any facts to support
 11 that he failed to take any evasive action, do you?
 12 A. No.
 13 Q. You don't have any facts to support that he
 14 should have honked his horn?
 15 A. No.
 16 Q. Do you have any facts to support the fact that
 17 he should have swerved?
 18 A. No.
 19 Q. Do you have any facts to support the fact that
 20 he should have braked?
 21 A. No.
 22 Q. So are there any facts at all to support the
 23 allegations that are made in Paragraph 4 of your
 24 affidavit? Go ahead and read that, if you would.
 25 A. I have read it. No.

1 to be exceeding the speed limit when the collision
 2 occurred. Did I read that correctly?
 3 A. Yes.
 4 Q. Didn't you just admit that you didn't even see
 5 his vehicle before the collision?
 6 A. I did not see his vehicle before the collision
 7 but I saw it after the collision.
 8 Q. Do you know what the speed limit was on that
 9 road?
 10 A. To my knowledge, it's 25 miles an hour through
 11 a construction.
 12 Q. Well, that wasn't the question, though. The
 13 question was do you know what the speed limit was on that
 14 road at the time?
 15 A. No.
 16 Q. Do you know how fast Mr. Walton's pickup truck
 17 was going at all?
 18 A. No.
 19 Q. Did you see him pass any other vehicles at the
 20 time of the collision? You didn't see him at all before
 21 the collision so you didn't see him pass any vehicles,
 22 did you?
 23 A. No.
 24 Q. Do you have any facts that you can testify to
 25 today that support your conclusion that Mr. Walton was

1 Q. No facts to support that at all?
 2 A. No.
 3 Q. Do you claim any other person or parties at
 4 fault in this case?
 5 A. Pardon?
 6 Q. Do you claim that there is some other party or
 7 person that is at fault in this case?
 8 A. No.
 9 Q. Do you claim there is any other party that's
 10 negligent at all?
 11 A. No.
 12 Q. Do you claim that Mr. Walton was negligent at
 13 all?
 14 A. No.
 15 Q. Is there anything you can think of that Mr.
 16 Walton should have done in this case that he didn't do?
 17 A. Excuse me?
 18 Q. Is there anything that Mr. Walton should have
 19 done in this case that he did not do?
 20 A. Not that I know of.
 21 Q. Do you claim that the State of Idaho or
 22 somebody on the construction site is somehow at fault in
 23 this case?
 24 A. I didn't claim that; I just felt that it was
 25 unclear the way their signs were set up as to where to

1 go.

2 Q. Do you have any proof or facts that they did

3 something wrong in this case?

4 A. No.

5 Q. Do you intend to make a claim against the

6 State of Idaho or the construction company that they did

7 something wrong in this case?

8 A. No.

9 Q. Wouldn't you agree with me, ma'am, that really

10 the collision and accident in this case was just all your

11 fault?

12 A. I guess I would have to say yes.

13 Q. What did you do after the collision? Do you

14 remember what happened after the collision took place?

15 A. Called my daughter to come and get me, and I

16 was so upset it caused a severe nose bleed that we could

17 not get stopped. So I went to the hospital.

18 Q. Were you injured in the collision?

19 A. No.

20 Q. How did the nose bleed start?

21 A. It just (indicating) started.

22 Q. Do you recall after the collision in sort of

23 frustration banging your head on the steering wheel?

24 A. No, I don't.

25 Q. In this case there was a police report

1 prepared that we have marked as Exhibit No. 1, and I have

2 a copy of that, and I can show that to you. In the

3 police report I'll represent to you, ma'am, on

4 contributing circumstances it has the only contributing

5 circumstance it shows is that there was inattentive

6 driving on your part. Would you agree with that police

7 report?

8 A. No.

9 Q. What do you think were the contributing

10 circumstances to the collision?

11 A. I honestly misunderstood where to go.

12 Q. And you pulled out without seeing whether the

13 way was clear with respect to Mr. Walton?

14 A. I did not pull out, my foot was not on the

15 gas, I eased up on the brake looking uphill and rolled

16 out (indicating).

17 Q. You would agree with me that you pulled out

18 from behind the steam roller into Mr. Walton's lane of

19 traffic?

20 A. Correct.

21 Q. And you did that without verifying whether he

22 was there or not, you didn't see him before the

23 collision?

24 MR. TAYLOR: I object to the compound

25 question. I think it asks two questions. I would ask

1 you to rephrase, if you would, Mr. Johnson.

2 MR. JOHNSON: Thank you, counsel, that was a

3 compound question.

4 Q. Ms. Walton, you pulled into Mr. Walton's lane

5 of traffic without verifying that the way was clear, did

6 you not?

7 A. Correct, without intention of pulling out

8 there.

9 Q. But it was still your action that did that.

10 A. Yes.

11 Q. You didn't intend to hit Mr. Walton, it was

12 just a mistake on your part; right?

13 A. Yes, I apparently eased up on the brake and

14 rolled out there.

15 Q. It was just your negligence.

16 A. I don't know whether I agree with negligence

17 or not.

18 Q. Well, it wasn't Mr. Walton's fault.

19 A. No.

20 Q. So really wasn't it your fault?

21 A. Yes.

22 Q. I just want to be real clear on this. You

23 didn't see that Mr. Walton should have done anything

24 differently?

25 A. Looking back on it, I don't know.

1 Q. You can't identify anything as you sit here

2 today?

3 A. No.

4 Q. Do you know Officer Goss, Clint Goss, who

5 wrote the accident report?

6 A. I know who he is, yes.

7 Q. How did you know him?

8 A. He was the resource officer at Franklin Junior

9 High when one of my granddaughters attended Franklin

10 Junior High.

11 Q. I see. Were you friends with him?

12 A. No.

13 Q. But you weren't enemies.

14 A. No.

15 Q. You were acquaintances.

16 A. I don't want to be an enemy.

17 Q. I am not saying -- but you had a good

18 relationship with Mr. Goss.

19 A. Yes.

20 Q. And you knew at the time of the accident, do

21 you recall whether you and Mr. Goss exchanged any

22 greetings?

23 A. Yes.

24 Q. What do you recall was said at that time?

25 A. Just hello. He asked me if I was okay,

1 because I was sitting in the car with my nose bleeding.
 2 And he had me get out of the car and he moved my car
 3 back, and then got the parameds. He also asked me what
 4 happened.
 5 Q. What did you tell him?
 6 A. I told him I wasn't sure, that I was looking
 7 uphill for a vehicle that was coming down the hill, and I
 8 don't know if I eased up on the brake too much and rolled
 9 out, I just all of a sudden heard the crash and when I
 10 looked in front, saw Mr. Walton's vehicle going and
 11 stopping quite a ways up the hill (indicating) and saw
 12 parts of the front end of my car in the road.
 13 Q. This is the report that Officer Goss wrote,
 14 it's marked as our Exhibit No. 1. It says contributing
 15 circumstances (indicating) and then on you it says
 16 No. 22, and you are Unit No. 1, ma'am, that's Patrick --
 17 have you seen these before when you worked at Allstate?
 18 A. Oh, yes.
 19 Q. You know what I am talking about, then, it's
 20 not like I am catching you cold.
 21 A. No.
 22 Q. And it has No. 22, inattention on your part.
 23 A. (Witness nods head affirmatively.)
 24 Q. Do you disagree with Officer Goss's
 25 conclusion?

1 Q. But before the collision were you late?
 2 A. No, I had plenty of time before the collision.
 3 Q. At the time just before the collision, were
 4 you operating your radio?
 5 A. No.
 6 Q. Were you on a cell phone?
 7 A. No.
 8 Q. Were you doing anything else other than
 9 driving?
 10 A. Just driving.
 11 Q. People multitask now, it's pretty common for
 12 people to be on a cell phone, radio, stereo, IPODs. Were
 13 you doing any of those things?
 14 A. No.
 15 Q. Was your car totaled in the collision or did
 16 you have it repaired and drive it?
 17 A. I was able to drive it after the collision. I
 18 did not have collision insurance on my vehicle. My
 19 daughter's brother-in-law put it back together.
 20 Q. So you drove it --
 21 A. Yes, I was able to drive it afterwards for a
 22 while.
 23 Q. Just before the collision did you turn on a
 24 turn signal at all, activate a turn signal, if you can
 25 recall?

1 A. I didn't think I was being inattentive, but if
 2 that's what he --
 3 Q. You agree that's a conclusion that somebody
 4 could reasonably reach, that Officer Goss's conclusion
 5 was reasonable?
 6 A. Yes.
 7 MR. JOHNSON: Could I take a few minutes to
 8 review my outline. I am pretty sure I am done.
 9 (Short recess.)
 10 MR. JOHNSON: I have just got a few more
 11 questions.
 12 Q. Do you know of any witnesses to the collision?
 13 A. No, I don't.
 14 Q. Do you know of any investigation done by
 15 anybody into the facts of the collision?
 16 A. The gentleman from the state, I think he was a
 17 State Department of Transportation.
 18 Q. Where were you going at the time of the
 19 collision? I understand you were pulling off -- tell us
 20 where you were going.
 21 A. I was going to the Maverik station to put gas
 22 in my car and then to go to my exercise class.
 23 Q. So you were on your way to an exercise class.
 24 Were you late?
 25 A. I didn't make it.

1 A. I don't believe I used a turn signal when I
 2 made that left turn in front of the steam roller. I did
 3 coming off freeway.
 4 Q. Just to summarize, you operated your turn
 5 signal, exited the freeway, turned right at the
 6 construction site --
 7 A. With a signal.
 8 Q. -- and then stopped, at least slowed down or
 9 stopped in front of the steam roller, and then you didn't
 10 have your turn signal on before you proceeded to go in
 11 front of the steam roller into traffic.
 12 A. No, because I was going straight.
 13 MR. JOHNSON: Do you have a white piece of
 14 paper, counsel? I think I better have her draw for the
 15 record.
 16 (Pause in proceedings.)
 17 Q. Ma'am, what I would like you to do is to draw
 18 a diagram of the interstate highway, the exit, and the
 19 relative location of the vehicles at the time of the
 20 collision. Are you able to do that?
 21 A. I will try. You want the interstate
 22 (indicating) --
 23 Q. Mark that I-15, if you would.
 24 A. (Witness complies.) And this is the exit
 25 (indicating), this is Center Street -- let's see, better

1 make this right over here, so apparently there were two
2 lanes there. This was sand, steam roller, a barrel, this
3 was solid barrels down here, at the sign pointing uphill,
4 this had a sign pointing across. This became pavement
5 here, and there were businesses over there. And over
6 here was the Maverik driveway with the Maverik here.

7 My car was right here and he was coming
8 uphill, there was a vehicle coming downhill up here that
9 I was watching to come down and just starting to turn my
10 head watching him to look the other way when the accident
11 happened (indicating).

12 MR. JOHNSON: Let's mark that as Exhibit
13 No. 3, if you would, in the bottom left-hand corner.

14 A. (Witness complies.)

15 Q. What I would like you to do, ma'am, is mark
16 where you indicated there is sand, just put an S, just so
17 we -- we have got to try to make a good record here.

18 A. (Indicating.)

19 Q. You wrote sand on there, okay. Let's put an
20 SR with an arrow where the steam roller is.

21 A. (Witness complies.)

22 Q. And put Patrick vehicle.

23 A. (Witness complies.)

24 Q. And put the arrow, if you would, clear in to
25 the vehicle.

1 A. (Witness complies.)

2 Q. And then if you would mark the steam roller,
3 you have it marked Mr. Walton's, Mr. Walton's pickup
4 truck at the time of the collision was right where your
5 vehicle was anyway.

6 A. Yes.

7 Q. I see what you are saying, it was a T-bone
8 collision, in your opinion.

9 A. Yes.

10 Q. So you came down off the off ramp; is that
11 correct?

12 A. Correct.

13 Q. And then instead of proceeding on the
14 pavement, you took an immediate right in the construction
15 area and then went behind the steam roller, tried to go
16 straight across the street to the Maverik and that's
17 where the collision took place?

18 A. Correct.

19 Q. And you saw some vehicles coming in the
20 opposite lane of traffic?

21 A. One vehicle.

22 Q. That looks to me like it's in the same lane of
23 traffic as --

24 A. I am sorry.

25 Q. I just want to make a good record.

1 A. I'm not good at drawing.

2 Q. So now we have the vehicle in the other lane
3 of traffic coming down the hill, and you didn't see any
4 vehicles going up the hill at the time at all?

5 A. No.

6 Q. And you didn't see any flaggers at the bottom
7 of the hill here (indicating) where you got off the
8 freeway?

9 A. No.

10 MR. JOHNSON: That's all I have, counsel,
11 thank you. Do you have any questions?

12 MR. TAYLOR: No.

13 (Discussion off the record.)

14 MR. JOHNSON: We have previously marked the
15 police report as Exhibit No. 1. I am not going to attach
16 it to the deposition, counsel, if that's okay.

17 MR. TAYLOR: I have no objection.

18 MR. JOHNSON: We will just attach Exhibits 2,
19 3, and 4 that we talked about in her deposition at this
20 time. I will retain a copy of Exhibit No. 1.

21 (Witness excused at 9:30 a.m.)

22 (Signature requested.)

23

24

25

Brendon C. Taylor
 Jared A. Steadman
MERRILL & MERRILL, CHARTERED
 109 North Arthur - 5th Floor
 P.O. Box 991
 Pocatello, ID 83204-0991
 (208) 232-2286
 (208) 232-2499 Telefax
 ISB #6078 (BCT), #7804 (JAS)

2009 DEC 21 AM 9:58

[Handwritten signature]
 CLERK

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and)
 BENJAMIN L. WALTON,)
)
 Plaintiffs,)
)
 vs.)
)
 NANCY PATRICK,)
)
 Defendant.)
 _____)

Case No. CV-08-4528-OC

**AFFIDAVIT OF BRENDON
 TAYLOR**

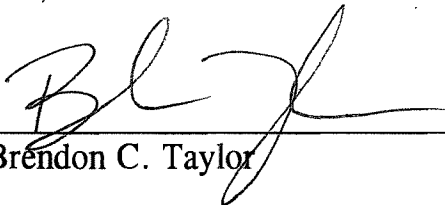
STATE OF IDAHO)
 :ss
 County of Bannock)

Brendon Taylor, being first duly sworn, deposes and states:

1. I am one of the attorneys for the Defendant in the above entitled action and as such I make the following statements of my own personal knowledge and belief.

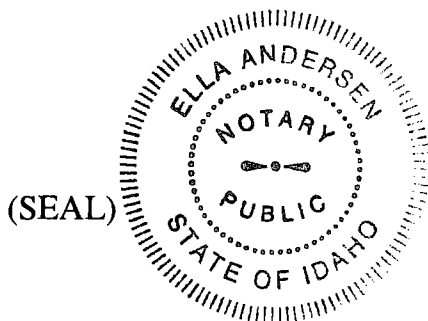
2. On December 18, 2009, Defendant served upon Plaintiffs Defendant's Second Supplemental Answers and Responses to Plaintiffs' First Set of Interrogatories, Requests for Production, and Requests for Admission, wherein Defendant admitted liability for the accident at issue in this lawsuit.
3. A true and correct copy of Defendant's Second Supplemental Answers and Responses to Plaintiffs' First Set of Interrogatories, Requests for Production, and Requests for Admission is attached hereto as Exhibit A.
4. Further, your affiant saith naught.


DATED this 21st day of December, 2009.



Brendon C. Taylor

SUBSCRIBED AND SWORN to this 21st day of December, 2009.





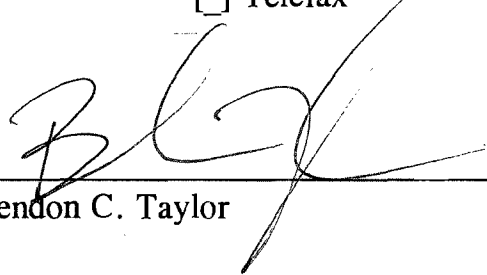
NOTARY FOR IDAHO
Residence: Bannock
Commission expires: 1-18-2014

CERTIFICATE OF SERVICE

I, Brendon C. Taylor, the undersigned, one of the attorneys for the Defendants, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing document was this 21st day of December, 2009, served upon the following in the manner indicated below:

Charles Johnson
JOHNSON OLSON CHARTERED
PO Box 1725
Pocatello, Idaho 83204-1725

- U.S. Mail
- Hand Delivery
- Overnight Delivery
- Telefax



Brendon C. Taylor

Brendon C. Taylor
Jared A. Steadman
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax
Idaho State Bar #6078, 7804

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and BENJAMIN L. WALTON,)	
	)	Case No. CV-08-4528-PI
Plaintiffs,)	
	)	DEFENDANT'S SECOND
vs.	)	SUPPLEMENTAL ANSWERS AND
	)	RESPONSES TO PLAINTIFFS' FIRST
NANCY PATRICK,	)	SET OF INTERROGATORIES,
	)	REQUESTS FOR PRODUCTION AND
Defendant.	)	REQUESTS FOR ADMISSION
_____)	

COMES NOW the Defendant, by and through her counsel of record, Brendon C. Taylor of Merrill & Merrill, Chartered and hereby supplements her prior responses to Plaintiffs' First Set of Interrogatories, Request for Production of Documents and Request for Admissions to Defendant as follows:

REQUEST FOR ADMISSION NO.1: Please admit that the plaintiff, Mathew R. Bennett, at all times material hereto, was a resident of Pocatello, Bannock County, Idaho.

ANSWER TO REQUEST FOR ADMISSION NO. 1: Admitted

REQUEST FOR ADMISSION NO.2: Please admit that the plaintiff, Benjamin L. Walton, at all times material hereto, was a resident of Pocatello, Bannock County, Idaho.

ANSWER TO REQUEST FOR ADMISSION NO. 2: Admitted.



REQUEST FOR ADMISSION NO.7: Please admit that there is no factual or legal basis for any claim of comparative fault on the part of the plaintiff in this case.

ANSWER TO REQUEST FOR ADMISSION NO. 7: Defendant now admits liability for the accident.

REQUEST FOR ADMISSION NO.10: Please admit that the conduct of the defendant Nancy Patrick was negligent, and negligent per se, in the following particulars:

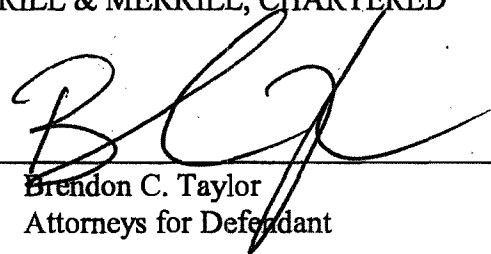
- a. Failure to use due care under Idaho Code 49-615.
- b. Failure to yield to a vehicle entering the roadway under Idaho Code 49-642.
- c. Failure to turn properly under Idaho Code 49-644.
- d. Failure to turn properly under Idaho Code 49-808(1).
- e. Reckless, grossly negligent and inattentive driving under Idaho Code 49-1401.

ANSWER TO REQUEST FOR ADMISSION NO. 10: Defendant admits her own negligence and liability for the accident, without admitting any of the specific code sections stated above.

DATED this 18th day of December, 2009.

MERRILL & MERRILL, CHARTERED

By



Brendon C. Taylor
Attorneys for Defendant

CERTIFICATE OF SERVICE

I, Jared A. Steadman, the undersigned, one of the attorneys for the Defendant, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing **DEFENDANT'S SECOND SUPPLEMENTAL ANSWERS AND RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSION** was this 18th day of December, 2009, served upon the following in the manner indicated below:

Charles Johnson
JOHNSON OLSON CHARTERED
P.O. Box 1725
Pocatello, ID 83204

- U.S. Mail
- Hand Delivery
- Overnight Delivery
- Telefax



Jared A. Steadman

2010 DEC 21 PM 4:51

[Handwritten signature]
CLERK OF DISTRICT COURT

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT IN AND
FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

MATHEW R. BENNETT and BENJAMIN
L. WALTON,

Plaintiffs,

vs.

NANCY PATRICK,

Defendant.


Case No: CV-2008-0004528-PI

ORDER FOR MEDIATION

Plaintiffs filed a Motion for Expedited Trial Setting, Small Lawsuit Resolution Act Proceedings, and Mediation. After hearing, the Court hereby orders the parties to participate in good faith in mediation in front of the Honorable Mitch W. Brown. Mediation must occur by March 15, 2010. All parties and an insurance representative for Defendant must appear in person for the mediation. Counsel shall contact Judge Brown's office to obtain available dates for mediation. If mediation is not successful, the parties shall comply with the requirements of I.C. § 7-1503(3), at which time the Court will order this matter to be submitted to an evaluator for resolution.

Case No.: CV-2008-0004528-PI
ORDER FOR MEDIATION
Page 1 of 2

DATED this 21st day of December, 2009.


DAVID C. NYE
District Judge

CERTIFICATE OF SERVICE

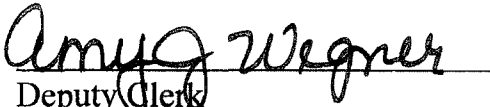
I HEREBY CERTIFY that on the 23rd day of December, 2009, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Charles Johnson
Johnson Olson Chartered
P.O. Box 1725
Pocatello, Idaho 83204-1725

U.S. Mail
 Overnight Delivery
 Hand Deliver
 Fax: 232-9161

Brendon C. Taylor
Merrill & Merrill, Chartered
P.O. Box 991
Pocatello, Idaho 83204-0991

U.S. Mail
 Overnight Delivery
 Hand Deliver
 Fax: 232-2499


Deputy Clerk

Charles Johnson
JOHNSON OLSON CHARTERED
419 West Benton
P.O. Box 1725
Pocatello, Idaho 83204-1725
Telephone: (208) 232-7926
Facsimile: (208) 232-9161
ISB No. 2464
E-Mail: cjlaw@allidaho.com

2008 JUN 11 AM 11:55
JW

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT


STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and) Case No. CV-08-4528-OC
BENJAMIN L. WALTON,)
)
Plaintiffs,) **ORDER GRANTING PLAINTIFFS' MOTION**
) **FOR SUMMARY JUDGMENT ON LIABILITY**
vs.)
)
NANCY PATRICK,)
)
Defendant.)
_____)

The plaintiffs, Mathew R. Bennett and Benjamin L. Walton, through counsel of record, filed a first amended and renewed motion for summary judgment in this case, and the defendant having stipulated and agreed that the motion may be granted and that they admit liability in this case, and good cause appearing;

IT IS HEREBY ORDERED, ADJUDGED AND AGREED that the plaintiffs' FIRST AMENDED AND RENEWED MOTION FOR SUMMARY JUDGMENT is GRANTED that the Court holds that there are no material facts in dispute since Nancy Patrick has admitted liability and that there is no comparative fault by the plaintiffs or any other party. The case will proceed to trial on damages only against the defendant Nancy Patrick. The plaintiffs may pursue further and other relief as may be appropriate in this case.

DATED this 4th day of January 2010.


District Judge David Nye

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the forgoing document by placing the same in the United States mail, postage prepaid, addressed as follows:

Thomas W. Lyons
Brendon C. Taylor
MERRILL & MERRILL, CHARTERED
P.O. Box 991
Pocatello, Idaho 83204-0991

Charles Johnson
JOHNSON OLSON CHARTERED
P.O. Box 1725
Pocatello, Idaho 83204-1725

on this 5th day of January 202010


District Clerk

Charles Johnson
JOHNSON OLSON CHARTERED
P.O. Box 1725
Pocatello, Idaho 83204-1725
Telephone: (208) 232-7926
Facsimile: (208) 232-9161
ISB No. 2464
E-Mail: cjlaw@allidaho.com
Attorney for Plaintiffs

FILED
BANNOCK COUNTY CLERK
2010 JAN -6 AM 9:25
BY *[Signature]*
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and	)	Case No. CV-08-4528-OC
BENJAMIN L. WALTON,)	
	)	MEMORANDUM OF COSTS AND AFFIDAVIT
Plaintiffs,	)	OF CHARLES JOHNSON IN SUPPORT OF
	)	MOTION FOR COSTS AND FEES
vs.)	
)	
NANCY PATRICK,)	
)	
Defendant.)	
_____)	

STATE OF IDAHO)
: ss
County of Bannock)

Charles Johnson, after being first duly sworn, does hereby
depose and say as follows:

1. I am counsel and attorney for plaintiffs Bennett and
Walton in the above-entitled action. This affidavit is based on my
own knowledge and information. I file this affidavit in support
of the motion for costs and attorney's fees for a summary judgment
determination on liability pursuant to Idaho Rule of Civil
Procedure 56(g) on summary judgment affidavits made in bad faith,
IRCP 36 on denied requests for admissions, IRCP 11 on bad faith
conduct, and Idaho Code § 12-120(4).

2. I have been a member of the bar of the State of Idaho since September 1979. I am also admitted to practice before the United States District Court for the District of Idaho, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court.

3. The insurance adjuster for the defendant initially stated that they would not contest and would admit liability. The defendant then vigorously contested liability through discovery, a first summary judgment hearing, and depositions of the parties. The plaintiffs invited and requested in writing a stipulation as to liability, but none was forthcoming until the last business day before the hearing on the second summary judgment hearing.

4. The costs in this case are as follows: filing fees for the complaint in the amount of \$88.00, service fees of \$40.00, and the depositions of the parties of \$445.18 (pursuant to the attached invoice). This is our memorandum of costs under IRCP 54(d) (5).

5. The time and labor required on this case was average in a contested liability case.

6. The novelty and difficulty of the questions were about average, but the liability defense raised required some time.

7. The skill requisite to perform the legal services properly and the experience and ability of this attorney are known to the Court generally.

8. The prevailing charges for similar work are \$120.00 to \$180.00 per hour.

9. This is a contingency case, but the fees requested in this motion are on a fixed hourly rate of \$150.00 an hour.

10. The time limitations imposed by the client and circumstances of the case were about average.

11. The amount involved in the case is over \$10,000.00.

12. The results obtained was granting of summary judgment on the issue liability with no negligence by the plaintiffs.

13. The case is fairly desirable because the plaintiffs Bennett and Walton are good and decent persons.


14. The awards in similar cases are believed to be similar.

15. I have attached to this declaration an itemization of the hours I expended in this case with the tasks that were performed. I was responsible for all of the work listed on the attached itemization which are all related to the summary judgment determination on liability.

16. The hours listed are based upon contemporaneous records which I personally kept as I did the work. All of the hours listed were necessary to the prosecution of this case.

WHEREFORE, based on the applicable law that awards attorney's fees, the plaintiffs request an award of costs of \$573.18 and attorney fees for 50.60 hours of \$7,590.00 for a total of costs and attorney fees of \$8,163.18.

DATED this 5th day of January 2010.

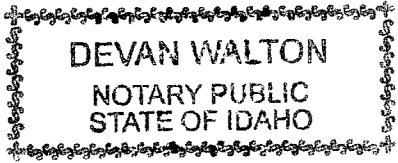


Charles Johnson

AFFIDAVIT

3

SUBSCRIBED AND SWORN TO before me by Charles Johnson on this
5th day of January 2010.



Devan Walton
NOTARY PUBLIC FOR IDAHO
Residing at Pocatello
Commission Expires: 07/30/2011

Key Bank - Chec Inv Nos. 29709B5; 29714B5 & 2971

445.18

JOHNSON OLSON, CHARTERED

16680

M&M Court Reporting Service, Inc.

10/15/2009

53

Deposition Costs

445.18

Key Bank - Chec Inv Nos. 29709B5; 29714B5 & 2971

445.18

Billed: 10/1/2009

Billed to : Charles Johnson
Johnson Olson Chartered
419 West Benton
P.O. Box 1725
Pocatello ID 83204-1725

&M
Court Reporting
Service, Inc.
Fed Id No. 82-0298125

Boise, Idaho
421 W. Franklin Street
P.O. Box 2636 83701-2636
208 345-9611
208 345-8800 (fax)
mail m-and-m@qwestoffice.net

JOB INFORMATION (21634B4)

Invoice # 2970985

SOUTHERN OFFICES
1 800 234-9611

Twin Falls, Idaho
208 734-1700
Pocatello, Idaho
208 233-0816
Ontario, Oregon
541 881-1700

NORTHERN OFFICES
1 800 879-1700

Coeur d'Alene, Idaho
208 765-1700
Spokane, Washington
509 455-4515

Case: Bennett/Walton v. Patrick
Taken: 9/24/2009
Witness : Nancy D. Patrick (*Orig. & 1 copy*)
Location : Merrill & Merrill Chtd
109 N. Arthur, 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991

Amount Due: \$197.81

(Return bottom portion with check)

Billed To: Charles Johnson
Invoice # 2970985
Billed: 10/1/2009
Amount Due: \$197.81

Billed: 10/1/2009



**Court Reporting
Service, Inc.**
Fed Id No. 82-0298125

Boise, Idaho
421 W. Franklin Street
P.O. Box 2636 83701-2636
208 345-9611
208 345-8800 (fax)
mail m-and-m@gwestoffice.net

SOUTHERN OFFICES
1 800 234-9611

Twin Falls, Idaho
208 734-1700
Pocatello, Idaho
208 233-0816
Ontario, Oregon
541 881-1700

NORTHERN OFFICES
1 800 879-1700

Coeur d'Alene, Idaho
208 765-1700
Spokane, Washington
509 455-4515

Billed to : Charles Johnson
Johnson Olson Chartered
419 West Benton
P.O. Box 1725
Pocatello ID 83204-1725

JOB INFORMATION (21636B4)

Invoice # 29714B5

Case: Bennett/Walton v. Patrick

Taken: 9/24/2009

Witness : Mathew Robert Bennett *(Copy)*

Location : Merrill & Merrill Chtd
109 N. Arthur, 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991

Amount Due: \$118.08

(Return bottom portion with check)

Billed To: Charles Johnson
Invoice # 29714B5
Billed: 10/1/2009
Amount Due: \$118.08

RECEIVED

OCT - 7 2009

JOHNSON OLSON, CHTD

Billed: 10/1/2009



**Court Reporting
Service, Inc.**

Fed Id No. 82-0298125

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Billed to : Charles Johnson
Johnson Olson Chartered
419 West Benton
P.O. Box 1725
Pocatello ID 83204-1725

JOB INFORMATION (21635B4)

Invoice # 29712B5

Case: Bennett/Walton v. Patrick
Taken: 9/24/2009
Witness : Benjamin Lloyd Walton **(Copy)**
Location : Merrill & Merrill Chtd
109 N. Arthur, 5th Floor
P.O. Box 991
Pocatello, ID 83204-0991

Amount Due: \$129.29

(Return bottom portion with check)

Billed To: Charles Johnson
Invoice # 29712B5
Billed: 10/1/2009
Amount Due: \$129.29

JOHNSON OLSON, CHARTERED
P.O. BOX 1725
POCATELLO, IDAHO 83204-1725

L. CHARLES JOHNSON, III
TELEPHONE: (208) 232-7926
FACSIMILE: (208) 232-9161
EMAIL: cilaw@allidaho.com

USE P.O. BOX FOR MAIL
PHYSICAL STREET ADDRESS
419 WEST BENTON
POCATELLO, IDAHO 83204-1725

1/5/2010

BEN WALTON
1771 S. 2ND AVENUE
POCATELLO, IDAHO 83201

In Reference To: Bennett and Walton v. Patrick
Our File No.: 07-130
Our Federal Tax ID #82-0356054

Date	Description	Hours	Amount
09/30/2008	Balance forward		0.00
	WALTON/Patrick-		
10/18/2008	Prepare Draft Complaint	1	150.00
10/24/2008	Final Complaint	2	300.00
10/30/2008	Correspondence	0.4	60.00
11/05/2008	Bannock Court Filing Fees (File Complaint and Issue Summons)	1	88.00
11/05/2008	Correspondence - Clerk Letter to File Complaint and Issue Summons	0.3	45.00
11/10/2008	Bannock Sheriff Service Fees (Serve Summons and Complaint on Plaintiff)	1	40.00
11/10/2008	Correspondence - Sheriff Letter to Serve Summons and Complaint	0.4	60.00
12/11/2008	Correspondence; Document Preparation - Counsel letter with Motion for Relief and Stipulation for Relief that BK Does Not Apply	3	450.00
01/16/2009	Correspondence	0.4	60.00
01/23/2009	Correspondence; Pretrial Discovery	1	150.00
01/26/2009	Correspondence; Document Preparation	0.8	120.00
02/05/2009	Correspondence; Pretrial Discovery	0.4	60.00
	Balance Due		\$8,163.18

1/5/2010

BEN WALTON
1771 S. 2ND AVENUE
POCATELLO, IDAHO 83201

In Reference To: Bennett and Walton v. Patrick
Our File No.: 07-130
Our Federal Tax ID #82-0356054

Date	Description	Hours	Amount
02/18/2009	Correspondence; Document Preparation - Discovery Replies	1.4	210.00
02/23/2009	Correspondence; Document Preparation - Discovery Replies	2	300.00
02/24/2009	Correspondence	1	150.00
03/05/2009	Correspondence	0.3	45.00
03/11/2009	Correspondence (Rec and Review Answers to Interrogatories, Medical Release to Defendant, Letter to Counsel to Supp Discovery and Liability)	2	300.00
04/08/2009	Conference with Clients	1	150.00
04/09/2009	Correspondence; Document Preparation; Investigation (Summary Judgment on Liability)	1.3	195.00
04/10/2009	Correspondence; Document Preparation (Summary Judgment on Liability)	0.8	120.00
04/15/2009	Correspondence (Summary Judgment on Liability)	0.2	30.00
04/28/2009	Correspondence; Document Preparation (Summary Judgment on Liability)	0.8	120.00

Balance Due \$8,163.18

1/5/2010

BEN WALTON
1771 S. 2ND AVENUE
POCATELLO, IDAHO 83201

In Reference To: Bennett and Walton v. Patrick
Our File No.: 07-130
Our Federal Tax ID #82-0356054

Date	Description	Hours	Amount
04/30/2009	Correspondence; Document Preparation; Investigation (Summary Judgment on Liability)	1	150.00
05/01/2009	Work on Summary Judgment Response	3	450.00
05/07/2009	Plaintiff's Reply to Defendant's Response and Memorandum in Opposition to Plaintiff's Motion to Compel	1	150.00
05/10/2009	Preparation for Court	1	150.00
05/11/2009	Court Appearance	1	150.00
06/16/2009	Supplementation to Record on Failure By Defendant Nancy Patrick to Schedule her Deposition	1	150.00
06/18/2009	Notice of Deposition	0.4	60.00
06/24/2009	Correspondence - Letter to Counsel Re: Hearing Conflict	0.5	60.00
06/27/2009	Correspondence	0.5	75.00
07/13/2009	Call from Counsel re: Deposition and Letter to Clients	0.7	105.00
08/15/2009	Correspondence	0.5	75.00
09/23/2009	Preparation for Depositions	4	600.00
09/24/2009	Attend Depositions of Plaintiffs and Defendant	5	750.00
		Balance Due	\$8,163.18

1/5/2010

BEN WALTON
1771 S. 2ND AVENUE
POCATELLO, IDAHO 83201

In Reference To: Bennett and Walton v. Patrick
Our File No.: 07-130
Our Federal Tax ID #82-0356054

Date	Description	Hours	Amount
09/26/2009	Correspondence	0.5	75.00
10/15/2009	M&M Court Reporters (Deposition Transcripts of Plaintiffs and Defendants)	1	445.18
11/11/2009	Read All Depositions	4.5	675.00
11/12/2009	Draft Summary Judgment	1	150.00
11/17/2009	Correspondence	0.4	60.00
11/18/2009	Letter to M&M Court Reporting Re: Deposition Changes, Signature Pages and Inquiry as to Patrick Verification and Amended Notice of Hearing	1	150.00
12/18/2009	Correspondence	0.4	60.00
12/21/2009	Court Appearance (Hearing on S/J)	1	150.00
12/23/2009	Correspondence; Document Preparation - Letter to Judge with Draft Order Granting Summary Judgment and Letter to Clients re: Mediation	0.8	120.00
01/05/2010	Prepare and Final Motion for Costs and Attorney Fees with Memorandum	1	150.00

Balance Due \$8,163.18

FILE
BANNOCK COUNTY
CLERK OF THE COURT

2010 JAN 15 PM 12: 21

BY [Signature]
DEPUTY CLERK

Brendon C. Taylor (ISB# 6078)
R. William Hancock, Jr. (ISB# 7683)
MERRILL & MERRILL, CHARTERED
109 North Arthur - 5th Floor
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Pocatello, ID 83204-0991
(208) 232-2286
(208) 232-2499 Telefax

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and BENJAMIN L. WALTON,)	
	)	Case No. CV-08-4528-OC
)	
Plaintiffs,)	
	)	DEFENDANT'S OBJECTION TO
vs.	)	PLAINTIFFS' MOTION FOR COSTS
	)	AND ATTORNEY'S FEES ON
NANCY PATRICK,	)	SUMMARY JUDGMENT AS TO
	)	LIABILITY
Defendant.)	
)	
)	
)	
_____)	

COMES NOW the Defendant, Nancy Patrick ("**Patrick**"), by and through her attorneys of record, Merrill & Merrill, Chartered, and files this Objection to Plaintiffs' Motion for Costs and Attorneys Fees on Summary Judgment as to Liability.

Plaintiffs' motion is based in part on Idaho Rule of Civil Procedure 36 on denied requests for admissions, on Idaho Rules of Civil Procedure 11 and 56(g) on claims of bad faith conduct in this litigation, and on Idaho Code § 12-120(4) on allowance of attorney's fees on small personal injury claims. For the reasons set forth more fully below, the Plaintiffs' Motion for Costs and Attorney's Fees should be denied.

**PATRICK'S DENIALS OF PLAINTIFF'S REQUESTS FOR ADMISSIONS
ON LIABILITY DOES NOT SUPPORT AN AWARD OF COSTS
AND ATTORNEYS FEES IN THIS CASE**

While Plaintiffs cite to Rule 36 as their basis for claiming costs and attorney's fees from Patrick's denial of Plaintiffs' Requests for Admissions on liability, the Idaho Rule of Civil Procedure which governs this issue is, in fact, Rule 37(c). That rule states in its entirety:

Rule 37(c). Expenses on failure to admit.

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

Idaho R. Civ. Pro. 37(c). In this case, Plaintiffs argue that Patrick's failure to admit negligence and liability from the outset of this case was unreasonable and should, therefore, result in Plaintiffs automatically being awarded costs and attorney's fees pursuant to the above rule. Plaintiffs' contention in this regard, however, is directly contrary to this rule and is also directly contrary to the Idaho Supreme Court's interpretation of such rule.

As set out immediately above, a plain reading of this rule demonstrates that payment of costs and attorneys fees are contemplated only *after* the following three elements have been satisfied: (1) a party serves requests for admission upon an adverse party; (2) the adverse party denies such requests for admissions; *and* (3) the serving party then proves them to be true. All three elements must be present *before* an award of costs and attorney's fees can even be considered by the court. The third element has not been satisfied in this case and, therefore, this court should not even consider the Plaintiffs' requests for costs and attorneys fees pursuant to Rule 37(c).

Notably, in *Payne v. Wallace*, 136 Idaho 303 (2001), the Idaho Supreme Court interpreted the proof necessary to satisfy the requirements of the third element to mean proof by trial:

By its plain terms, Rule 37(c) authorizes sanctions only in favor of a party who, after a request for admission was denied, "thereafter *proves* . . . the truth of the matter . . ." Here, although [Defendant]'s refusal to admit one or both of the [Plaintiff]'s requests for admissions may have been unreasonable, he ultimately

stipulated to liability, thereby removing the issue of his negligence or the [Plaintiffs]' comparative negligence from the issues to be contested **at trial**. Applying the plain language of Rule 37(c), we conclude that in this circumstance, because the [Plaintiffs]' were not called upon to prove **at trial** the issues covered by the requests for admissions, Rule 37(c) sanctions were properly denied by the district court.

Payne, 136 Idaho at 309 (emphasis in bold added; italicized emphasis in the original).

In *Payne*, the admission of liability was made literally on the eve of trial. In this case, Patrick admitted liability well before any trial. Indeed, Patrick stipulated to liability even *before* Plaintiffs' second Motion for Summary Judgment on the issue of liability. Therefore, Plaintiffs have not had the burden of proving the issue of liability "at trial" in this matter. As such, under Idaho Rule of Civil Procedure 37(c), as interpreted by the Idaho Supreme Court in *Payne*, an award of costs and attorneys fees is inappropriate under the circumstances of this case because Patrick admitted the issue of liability prior to the time of trial on the issue.

It is irrelevant whether Plaintiffs believe that Patrick's failure to admit liability from the outset was unreasonable because liability has been admitted *prior* to the time of trial. Notably, the Idaho Supreme Court found in *Payne* that the Defendant's refusal to "admit one or both of the [Plaintiff's] requests for admissions *may have been unreasonable*." *Payne*, 136 Idaho at 309 (emphasis added). Yet, despite the court's view on this fact, the Court ultimately found that an award of costs and attorneys fees under Rule 37(c) would be inappropriate because the Defendant admitted the facts *prior to trial* and the Plaintiff did not have the burden of proving the issues "at trial." *Id.*

Regardless, despite Plaintiffs' contentions to the contrary, Patrick's failure to admit liability from the outset of this case was both reasonable and in good faith. Significantly, when Plaintiffs first filed a motion for summary judgment on the issue of liability very early on in this case, this court found that discovery had not yet been conducted in the case and that Patrick was entitled to conduct routine discovery on the issue of liability and thereafter could supplement her answers to Plaintiffs' discovery requests as necessary. See District Court's *Minute Entry & Order*, dated June 19, 2009. Such routine discovery did go forward and Patrick's discovery responses were timely and appropriately amended upon the completion of this discovery. It simply cannot be said that ordinary and routine discovery is an onerous burden to be placed upon any party. This is especially true when all the issues of the litigated matter have not been resolved

and ordinary and routine discovery would have already occurred. As such, the Plaintiffs have not been unduly burdened or prejudiced by Patrick's denial of liability at the outset and by Patrick's counsel conducting ordinary and routine discovery on all the issues in this case, including the issue of liability.

Thus, even were this Court find that Plaintiffs have somehow met all the necessary elements to make a claim for costs under Rule 37(c), this Court should deny the Plaintiffs' requests for costs and attorney fees because Patrick's actions in this case clearly fall within the delineated exceptions to an award of fees under Rule 37(c). Specifically, Patrick's denials of admissions fall within the third and fourth exceptions outlined under Rule 37(c).

First, Plaintiffs' Requests for Admissions were served fairly early on in the discovery process of this case. Based upon this fact alone, Patrick had a reasonable basis to either deny liability or to indicate in her responses that she could not either admit or deny liability until further discovery was completed. It was in this light that Patrick in fact responded to the Plaintiffs' Requests for Admissions.

For instance, in responding to Plaintiffs' Request for Admission No. 12 concerning Plaintiffs' comparative fault, Patrick states:

At this early state in the discovery process, Defendant cannot admit or deny the above request for admission. There have been no depositions in the matter and Defendant has not yet received Plaintiff's responses to her discovery requests. As such information becomes available, Defendant will supplement this answer.

See Answer to Request for Admission No. 12 (attached as an exhibit to Plaintiffs' Motion for Costs and Attorney's Fees). Considering the short amount of time allowed to make a response under the rules and also considering the limited amount of discovery that had occurred up to that time, Patrick's response was both reasonable and appropriate. Patrick simply wanted an opportunity at that early stage to conduct reasonable discovery, to interview witnesses, and to depose Plaintiffs before admitting liability. Without an opportunity to conduct such normal and routine discovery, Patrick could not in good conscious admit the matter. As previously noted, this court agreed that Patrick was entitled to such discovery when it denied, without prejudice, the Plaintiffs' first motion for summary judgment on the issue of liability.

Additionally, Patrick asserts that at the time she either denied liability or refused to admit or deny the Plaintiffs' liability that Patrick had reasonable grounds to believe that she might be able to prevail on that issue should it go to trial. Significantly, at the time Patrick's initial

responses were made there had been no opportunity to fully investigate the issue. At the onset of the case, there could have been any number of explanations that had not come out in the police report and initial investigations. As such, Patrick had a reasonable ground to deny fault and believe she might prevail on the issue of her negligence. Furthermore, as is demonstrated by her affidavit in response to the Plaintiffs' first motion for summary judgment, Patrick was of the honest opinion at that early stage of the litigation that the Plaintiff driver, Benjamin Walton, may have been speeding at the time of the accident or that he otherwise failed to take action necessary to avoid the accident. Based upon the above, her responses to Plaintiffs' Requests for Admissions were neither unreasonable nor in bad faith. However, now that the investigation has been completed and now that Patrick has been placed under the stress of examination through deposition, it has become clearer that Patrick will likely not win on the issue of negligence. Accordingly, Patrick has now taken the reasonable step and admitted her negligence in this case and has also admitted that Plaintiffs bare no comparative fault.

The above is simply the litigation process at work. It is because of the recognition that new information and new facts result from the discovery process that courts allow parties to amend their answers to discovery, including to amend answers to requests for admissions, as this new information becomes available through discovery. Indeed, if courts were to begin penalizing parties who reasonably amend their answers as discovery develops, such actions by the courts would serve to stifle parties' willingness to amend answers based upon new information developed through discovery. This would be a poor result because it would not allow issues to become simplified prior to trial because parties would fear sanctions by admitting issues prior to trial. This court should not allow this to happen in this case and rather should find that Patrick's actions in denying admissions until the facts were fully developed in discovery and thereafter timely admitting the issues was both reasonable and appropriate under the circumstances.

Finally, not only should this court find that Patrick's actions were appropriate and, therefore, fall within the third exceptions to Rule 37(c) because she had a reasonable ground to believe she might prevail on the issue of negligence, the court should also find that Patrick's actions fall within the fourth exception to Rule 37(c) because of the early timing of the requests for admissions. The early timing of the Plaintiffs' requests provided sufficiently good reason for failure to admit or deny liability at that time. It is unreasonable to expect a defendant in a personal injury action to admit negligence without first being given a reasonable opportunity to

fully investigate the matter. Indeed, this court denied, without prejudice, the Plaintiffs' first motion for summary judgment on the issue of liability because this court found that discovery had not yet occurred and that the Defendant, Patrick, was reasonably entitled to conduct discovery on the issues in the case, including the issue of liability.

While Plaintiffs' counsel attempts to argue that denying liability and conducting discovery on the same was unreasonable because he believed that Patrick's claim adjuster had agreed to admit liability prior to his filing suit, this Court should not accept Plaintiffs' invitation to go down that road. Rather, this court should recognize that once the Plaintiffs' suit had been filed against Patrick, that Patrick became the party to the lawsuit and, as such, was entitled to work with her counsel to develop any defenses she reasonably believed she had to the action. As has been previously discussed, Patrick reasonably believed at that early state of litigation that she had defenses to the action and further reasonably believed, based upon her own perceptions and feelings at the time of the accident, that Plaintiffs bore some comparative fault for this accident. Although Patrick would ultimately back down from this position as she became educated through the discovery process, such change in position does not alter her right as a party to the action to conduct reasonable discovery to confirm or deny her initial impressions after the accident. Once Patrick became convinced that she would not be able to prevail on the issue of liability, she took the reasonable step to amend her answers to discovery and to admit this issue.

In summary, Patrick's failure to admit liability at the outset of this case did not cause the Plaintiffs any undue hardship or prejudice. Because there were other disputed issues in this case, discovery would have continued whether or not Patrick admitted liability at the outset. Furthermore, the Plaintiffs' argument that Patrick's failure to admit liability forced Plaintiffs to prove the issue is unreasonable. The Plaintiffs did not prove liability, but rather Patrick stipulated to liability prior to the Plaintiffs' renewed motion for summary judgment. Liability was not proved but rather was admitted. Ultimately, the Plaintiffs were forced to do very little except to participate in routine discovery and to allow Patrick time to investigate the case and make an informed decision regarding liability. Such routine discovery was not unreasonable nor did it place an onerous burden on the Plaintiff.

For the above reasons, this Defendant respectfully requests that the court deny Plaintiff's Motion for Costs and Attorney's fees based upon the Defendant's initial denial of Plaintiffs' Requests for Admissions on the issue of liability.

**PATRICK'S ACTIVELY DEFENDING THIS CASE DOES NOT CONSTITUTE
BAD FAITH AND SHOULD NOT SERVE AS A BASIS FOR AN
AN AWARD OF COSTS AND ATTORNEYS FEES**

In their Motion for Costs and Attorneys Fees the Plaintiffs have requested an award of attorneys fees pursuant to Rule 11 of the Idaho Rules of Civil Procedure and as factual support thereof have merely alleged "bad faith conduct" by Patrick, without citing to any specific acts or actions they claim as "bad faith conduct." Similarly, Plaintiffs have requested an award of attorneys fees pursuant to Rule 56(g) and as factual support merely state "summary judgment affidavits made in bad faith," again without citing to any specific portion of the affidavit they claim as being made in bad faith nor citing to any other specific evidence they claim as supporting their contention that Patrick's affidavit was made in bad faith. Plaintiffs bare the burden of proving these allegations and have not come forward with any evidence in support of these allegations. In fact, the Plaintiffs have not even come forward with any specific facts that could support these allegations.

Patrick contends that Plaintiffs have not cited to any specific facts or evidence in support of their allegations of bad faith because no such specific facts or evidence exists. Rather, this is just another backdoor attempt by the Plaintiffs to generally argue their belief that it was unreasonable for Patrick to deny liability at the outset of this case and, therefore, that Patrick's actions must have been done in bad faith. To the degree that Plaintiffs' allegations of unreasonableness here are exactly the same as the Plaintiffs' arguments in support of Rule 37(c) sanctions, Patrick hereby generally reincorporates her arguments in the previous section which establish her basis for initially denying liability and later admitting liability after discovery was able to be completed.

To the extent, however, that Plaintiffs specifically allege that Patrick's affidavit in opposition to Plaintiffs' original motion for summary judgment was made in bad faith, Patrick hereby more fully responds. First, Patrick denies that the affidavit in support of her opposition to Plaintiffs' motion for summary judgment was made in bad faith. While Patrick ultimately backed down from her affidavit statements when she was examined by Plaintiffs' counsel in deposition with leading questioning, this fact alone does not mean that her affidavit statements were false. Rather, it simply means that Patrick stated her opinions and beliefs within her original affidavit testimony and when pressed during her deposition to provide specific evidence to support such opinions and beliefs she was unable to do so. This court is well aware of the fact that individuals can have honest opinions and beliefs that do not withstand the pressure of examination by counsel. Again, this reality does not mean that the original opinions or beliefs were in bad faith, but rather means that individuals

have become educated to the fact that the burden of supporting a claim in court is greater than the burden to support an opinion in one's own mind. Such was simply the case here. Patrick based her affidavit upon her honest opinions and beliefs from her initial perceptions of the accident. When she was intensely examined by Plaintiff's counsel on these same issues, she realized that she could not point to specific facts or evidence to support these personal opinions or belief. This is not bad faith; it is simply the legal process at work and discovery being used to help parties recognize the strengths and weaknesses of their own positions.

Because there is no evidence that Patrick or her counsel acted in bad faith in defending this action, including their participation in ordinary and routine discovery, this Court should deny Plaintiffs' requests for costs and attorneys fees under Rules 11 and 56(g).

**PLAINTIFFS' CLAIMS FOR ATTORNEYS FEES ARE EXCESSIVE SINCE
ALL COSTS AND ATTORNEYS FEES IDENTIFIED ARE NOT
RELATED TO THE ISSUE OF LIABILITY**

Finally, though Plaintiffs should not be entitled to costs and attorneys fees for the reasons stated above, should this court find that an award of costs and attorneys fees is appropriate under the circumstances of this case, this court should not award the full amount requested by Plaintiff. It is clear that Plaintiffs' Motion for Costs and Attorneys Fees is related solely to the issue of liability. Indeed, the issue of damages remains in this case. Therefore, the only costs and attorneys fees that could be compensable in this motion are simply those costs and attorneys fees limited to the issue of liability.

Yet, a look at the Plaintiff's Memorandum of Costs and Affidavit of Charles Johnson in Support of Motion for Costs and Fees, including the supporting documentation, shows that Plaintiffs have sought compensation for costs and fees far in excess of the issue of liability. For instance, Plaintiff's counsel requests compensation for the costs and fees associated with drafting and filing a Complaint in this action. Yet, even if liability had not been an issue in this case from the outset, the issue of damages still remains. As such, Plaintiffs would still have had to draft and file the same Complaint to bring their issue of damages before the court. Therefore, none of the fees and costs associated with drafting, filing, and serving the Complaint should be charged against Patrick as a result of her admitting liability in this matter.

Similarly, Plaintiffs' counsel lists all time associated with drafting discovery in this matter and claims that such was limited to the issue of liability. This simply is not true. Even a cursory

review of the Plaintiffs' discovery requests attached to Plaintiffs' motion for fees demonstrates that the overwhelming majority of Plaintiffs' discovery in this case is related to the issue of damages and not to the issue of liability. Because damages remains as a contested issue in this case, the Plaintiffs' discovery expenses related to the issue of damages is not chargeable against Patrick on her admissions of liability. Furthermore, because damages is a contested issue in this case, the Plaintiffs still would have been deposed even had liability been admitted by Patrick at the outset. Thus, Plaintiffs' counsel attending their deposition is not as a result of his "proving liability" but rather is a natural consequence of his filing a legal action on their behalf. In fact, Plaintiffs' counsel asked no questions during their deposition. Therefore, Plaintiffs' counsel proved nothing from their deposition. Therefore, costs and fees associated with this routine discovery, including any and all associated with the Plaintiffs' depositions, are not recoverable under the Plaintiffs' current claim for costs and fees.

Indeed, a review of the itemization for legal fees provided by Plaintiffs' counsel demonstrates that a overwhelming majority of the fees and costs claimed are fees and costs that would have accrued regardless of whether liability had been admitted at the outset of this matter. In fact, Patrick asserts that the only possible claim that Plaintiffs can have to costs and attorneys fees associated with liability would be those associated with Plaintiffs' renewed motion for summary judgment. Even then, Plaintiffs should not be entitled to costs and fees for "proving liability" by this motion because Plaintiffs, in fact, did not prove liability. Liability was not proven but rather was stipulated. Had Patrick had chosen not to admit liability or not to concede comparative fault prior to Plaintiffs' hearing on the motion for summary judgment it is unlikely that Plaintiffs' motion would have been granted because a jury would have been entitled to consider whether Plaintiffs could have taken evasive actions to avoid the accident. Yet, Plaintiffs did not have to face this reality because Patrick stipulated to liability prior to the hearing on the motion for summary judgment and the court granted summary judgment solely on this stipulation. Indeed, because the issue had already been stipulated to prior to hearing, Plaintiffs did not even have to force hearing on this issue but rather could have proceeded in the case based upon the stipulation. The Plaintiffs chose to bare the extra expense of having hearing on the issue *after* it had already been stipulated to and, therefore, should be held liable for their costs in proceeding with such hearing.

For the above reasons, this Defendant respectfully requests that the court deny the Plaintiffs requests for costs and attorneys fees and not award any such costs or fees to the Plaintiffs.

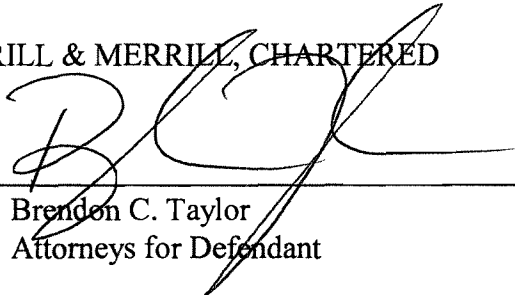
CONCLUSION

Ultimately, all of Plaintiffs' arguments in this case can be boiled down to the simple fact that Plaintiffs believe Patrick should have admitted liability from the outset of this case. Patrick did not, however, and simply requested the right to conduct normal and routine discovery in this case. After completion of such discovery, Patrick ultimately admitted liability. Patrick did so in a timely manner and before any trial on the issue of liability and, indeed, before a substantive motion for summary judgment on the issue. Patrick's actions in this case were reasonable and were done in good faith. As such, this court should deny Plaintiffs' Motion for Costs and Attorneys Fees on Summary Judgment as to Liability.

DATED this 14th day of January, 2010.

MERRILL & MERRILL, CHARTERED

By



Brendon C. Taylor
Attorneys for Defendant

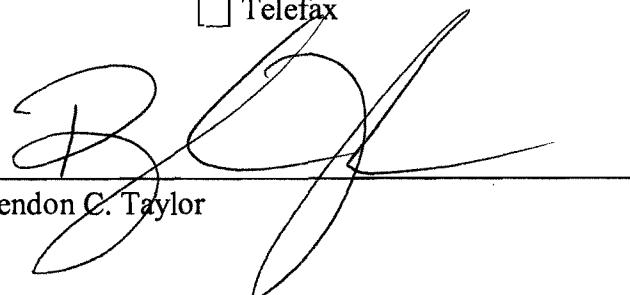
CERTIFICATE OF SERVICE

I, Brendon C. Taylor, the undersigned, one of the attorneys for the Defendants, in the above-referenced matter, do hereby certify that a true, full and correct copy of the foregoing document was this 14th day of January, 2010, served upon the following in the manner indicated below:

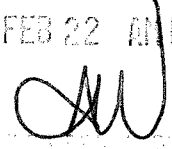
Charles Johnson
JOHNSON OLSON CHARTERED
PO Box 1725
Pocatello, Idaho 83204-1725

- U.S. Mail
- Hand Delivery
- Overnight Delivery
- Telefax

Brendon C. Taylor



2010 FEB 22 AM 11:12



IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT IN AND
FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

MATHEW R. BENNETT and BENJAMIN
L. WALTON,

Plaintiffs,

vs.

NANCY PATRICK,

Defendant.

Case No: CV-2008-0004528-PI

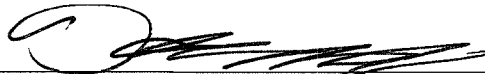
MINUTE ENTRY & ORDER

THE PARTIES came before the Court on the 16th day of February, 2010 for a hearing on Plaintiffs' Motion for Attorney Fees & Costs on Summary Judgment as to Liability. Charles Johnson appeared in person on behalf of the Plaintiffs. Brendon Taylor appeared in person on behalf of the Defendant. The parties waived the presence of a Court Reporter.

At the outset, the Court heard oral argument from the parties regarding Plaintiff's Motion.

Thereafter, the Court **DENIED** the Plaintiffs' Motion under Rules 56 & 11. The Court took the matter under advisement as to Rule 36 and will issue a decision within 30 days.

DATED this 22nd day of February, 2010.



DAVID C. NYE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of February, 2010, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Charles Johnson
Johnson Olson Chartered
P.O. Box 1725
Pocatello, Idaho 83204-1725

- U.S. Mail
 Overnight Delivery
 Hand Deliver
 Fax: 232-9161

Brendon C. Taylor
Merrill & Merrill, Chartered
P.O. Box 991
Pocatello, Idaho 83204-0991

- U.S. Mail
 Overnight Delivery
 Hand Deliver
 Fax: 232-2499



Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT IN AND
FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

MATHEW R. BENNETT and BENJAMIN
L. WALTON,

Plaintiffs,

vs.

NANCY PATRICK,

Defendant.

Case No: CV-2008-0004528-PI

**DECISION ON COSTS AND
ATTORNEY FEES**

This matter came before this Court for hearing on Plaintiffs' Motion for costs and attorney fees on February 16, 2010. The Plaintiffs, Mathew Bennett and Benjamin Walton were represented by Charles Johnson. The Defendant Nancy Patrick was represented by Brendon Taylor. The Court reviewed the documents submitted by the parties and heard oral argument from counsel. During the arguments, the Court denied the Plaintiffs' Motion for costs and fees under Rules 56 and 11. The Court took the remaining matter concerning Rule 37(c)¹ and I.C. § 12-120(4) under advisement and now issues its decision denying attorney fees without prejudice.

PROCEDURAL HISTORY AND BACKGROUND

Plaintiffs served Requests for Admission on Defendant. Included within those requests was a request that Defendant admit that she was liable for the accident and a request that Defendant admit that Plaintiffs had no comparative liability. Initially,

¹ Plaintiffs' original motion for fees came pursuant to Rule 36, however, at the hearing the parties properly argued the matter under Rule 37(c).

Defendant denied those requests for admission. On December 21, 2009, the parties came before the Court for a hearing on a Motion for Summary Judgment. The parties stipulated to the Summary Judgment concerning the Defendant's liability. Following the hearing the Court issued an Order for Mediation to take place before March 15, 2010. On January 5, 2010, the Court signed an Order in favor of the Plaintiffs granting summary judgment on the Defendant's liability. This order was not a final judgment.

This matter is now before the Court on the Plaintiffs' Motion for Costs and Attorney's Fees on Summary Judgment as to Liability which was filed on January 6, 2010. Plaintiffs argue that they are entitled to attorneys fees pursuant to IRCP 56(g), IRCP 11, IRCP 37, and I.C. § 12-120(4). On February 16, 2010, the parties argued the motion before the Court, in which the Court denied the motion under Rules 56(g) and 11 and took the matter of Rule 37 and I.C. § 12-120(4) under advisement.

STANDARD OF REVIEW

IRCP 54(e)(1) states: "In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract." The determination of who is the prevailing party is committed to the sound discretion of the trial court. *Rockefeller v. Grabow*, 139 Idaho 538, 82 P.3d 450 (2003). In making this determination courts look to Idaho Rule of Civil Procedure 54(d)(1)(B) which provides:

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 part 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.

Once the issue of the prevailing party is determined, it is also within the trial court's discretion to determine whether the attorney fees requested by a party are reasonable and recoverable. *Kelly v. Hodges*, 119 Idaho 872, 811 P.2d 48 (Ct. App. 1983).

DISCUSSION

The issues in this matter are whether the Plaintiffs are entitled to attorney fees per Rule 37(c) when the Defendant admits liability before trial and whether Plaintiffs are entitled to attorney fees pursuant to I.C. § 12-120(4) before a final judgment has been issued by the Court. The Court will take up the matter of Rule 37(c) first.

1. Rule 37(c) Delay Admitting Liability. The Plaintiffs argue that their requests for admission regarding liability were unobjectionable and of critical importance because the Defendant did not have any reasonable ground to believe that she might prevail in her argument of comparative fault. Plaintiffs seek attorney fees under Rule 37(c). The Rule states:

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

I.R.C.P. 37(c). The Idaho Court of Appeals has held that even where a defendant's refusal to respond to admissions is unreasonable, Rule 37(c) sanctions should be denied unless Plaintiff has actually proved the truth of the matter asserted during trial. *Payne v. Wallace*, 136 Idaho 303, 309, 32 P.3d 695, 701 (Ct. App. 2001).

In *Payne*, the plaintiffs argued that they were entitled to attorney fees due to the defendant's "unreasonable" denial of two requests for admissions. During the discovery phase the plaintiffs served requests asking the defendant to admit liability, which the defendant initially denied. However, on the day before the trial the defendant admitted liability. The district court denied the plaintiffs' claim for attorney fees under Rule 37(c) and the Idaho Court of Appeals affirmed the decision. In its decision, the Court of Appeals stated:

By its plain terms, Rule 37(c) authorizes sanctions only in favor of a party who, after a request for admission was denied, "thereafter *proves* ... the truth of the matter" (Emphasis added.) Here, although Wallace's refusal to admit one or both of the Paynes' requests for admissions may have been unreasonable, he ultimately stipulated to liability, thereby removing the issue of his negligence or the Paynes' comparative negligence from the issues to be contested at trial. Applying the plain language of Rule 37(c), we conclude that in this circumstance, because the Paynes were not called upon to prove at trial the issues covered by the requests for admissions, Rule 37(c) sanctions were properly denied by the district court.

Id.

In the case before this Court, the Defendant originally denied liability after the Plaintiffs served requests for admission. The Plaintiffs contend that they did prove the truth of the admission at depositions and in summary judgment proceedings in which the

parties stipulated as to the Defendant's liability. As *Payne* states, even when liability is admitted on the day before the trial Rule 37(c) sanctions should be properly denied and the matter of the reasonableness need not be considered. Due to the stipulation of the parties and the order of summary judgment signed by this Court as to the liability of the Defendant, the issues of the Defendant's negligence have been now removed from being contested at trial and sanctions under Rule 37(c) must be denied.

This Court recognizes the Plaintiffs' argument that Rule 37(c) does not state that the rule is limited to proof at trial. However, the *Payne* Court held that the district court's denial of the Rule 37(c) sanctions was proper by stating that the Court is "confident that [its] holding, disallowing Rule 37(c) sanctions where an admission was made belatedly but in sufficient time to avoid the necessity for the opponent to *prove the matter at trial*, will not foster unscrupulous discovery practices." *Id.* at 310, 32 P.3d at 702 (emphasis added). Therefore, it is clear to the Court that as long as the admittance to liability comes at anytime before trial Rule 37(c) sanctions should be denied.

The Plaintiffs direct the Court to *Schwan's Sales Enterprises, Inc. v. Idaho Transp. Dept.*, 142 Idaho 826, 136 P.3d 297 (2006), specifically noting that in that case the Idaho Supreme Court awarded attorney fees under Rule 37(c) because there was no reasonable inquiry or witness interviews into the issues of defense.² The Plaintiffs argue that the facts of *Schwan's* are closely related to the facts here. However, the *Schwan's* Court was affirming the district court, which ruled on the matter after the case went to trial. *Id.* at

² The Supreme Court in *Schwan's* affirmed the holding of the district court.
Case No. CV-2008-4528-PI
DECISION ON ATTORNEY FEES
Page 5 of 8

835, 136 P.3d at 306.³ As such, the facts here do not relate to *Schwan's* because the plaintiffs there were able to prove the liability at trial. The Supreme Court in *Schwan's* did not rule on whether Rule 37(c) sanctions are allowed when liability is admitted before trial, such as the holding did in *Payne*. Therefore, the Court finds that the Plaintiffs' argument under *Schwan's* is irrelevant to the facts of this case.

Additionally, the Plaintiffs argue that the Idaho Court of Appeals held that awarding attorney fees is mandatory under *Ruge v. Posey*, 114 Idaho 890, 892, 761 P.2d 1242, 1244 (Ct. App. 1988). Again, *Ruge* was decided after the case went to trial and therefore the facts of that case are inapplicable to the facts before this Court.

Ultimately, the Court finds that even though the Defendant's admissions were belated, the admissions did come before trial and therefore the sanctions sought by the Plaintiffs under Rule 37(c) are denied. Of course, if this matter proceeds to trial and Plaintiffs prevail, Plaintiffs may have the right to seek attorney fees under I.C. § 12-120, I.C. § 12-121, or other applicable statute and still recover the fees sought for under IRCP 37(c).

2. Attorney Fees Pursuant to I.C. § 12-120(4).

In order to award costs or attorney fees under the Idaho Rules of Civil Procedure ("IRCP") and under I.C. § 12-120(4), the Court must determine who, if anyone is the prevailing party, if attorney fees have been provided for, and the amount of the attorney fees. Under IRCP 54(d)(1)(B), the Court in its discretion can determine the prevailing

³ The *Schwan's* Court direct language was "In its memorandum awarding fees under Rule 37 (c), the district court noted that at trial, an agency witness admitted the agency had a duty to maintain traffic – control signs at the intersection and that the agency offered no evidence the signage had not changed after the accident." *Id.*

party.


The Court signed an Order for Motion for Summary Judgment as to Liability of the Defendant on December 21, 2009. The stipulation of the parties only addressed liability, damages have not been resolved, and no final judgment has been entered. Accordingly, the Court does not yet find a prevailing party in the matter and as a result the Court denies attorney fees at this time under I.C. § 12-120(4).

CONCLUSION

The Defendant admitted liability before this case went to trial and as a result the Plaintiffs' requests for attorney fees under Rule 37(c) are denied. At this point of the case there is no final judgment and the Court accordingly denies attorney fees pursuant to I.C. § 12-120(4). Therefore, the Plaintiffs' Motion for Costs and Attorney Fees on Summary Judgment as to Liability is **DENIED** without prejudice.

IT IS SO ORDERED.

DATED this 12th day of March, 2010.


DAVID C. NYE
District Judge

CERTIFICATE OF SERVICE

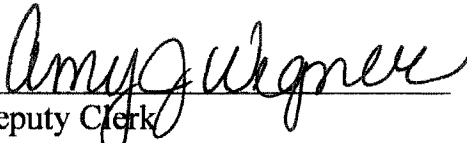
I HEREBY CERTIFY that on the 12th day of March, 2010, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Charles Johnson
Johnson Olson Chartered
P.O. Box 1725
Pocatello, Idaho 83204-1725

- U.S. Mail
- Overnight Delivery
- Hand Deliver
- Fax: 232-9161

Brendon C. Taylor
Merrill & Merrill, Chartered
P.O. Box 991
Pocatello, Idaho 83204-0991

- U.S. Mail
- Overnight Delivery
- Hand Deliver
- Fax: 232-2499



Deputy Clerk

BANNOCK COUNTY
DISTRICT COURT

2010 APR 22 PM 3:31

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

BY *MW*
DEPUTY CLERK

Mathew R. Bennett and Benjamin L. Walton,
Plaintiffs,

CASE NO. CV-2008-4528-PI

vs.

NOTICE OF MEDIATION

Nancy Patrick,

Defendants.

Comes now the undersigned and hereby notifies the Court in the foregoing matter that on April 16, 2010, the parties mediated the forgoing matter at the law office of Merrill & Merrill at 109 North Arthur – 5th Floor, Pocatello, Idaho. The parties were not successful in reaching a mediated agreement.

DATED this 20th day of April, 2010.

Mitchell W. Brown
MITCHELL W. BROWN
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of April, 2010, I served a true and correct copy of the foregoing to:

L. Charles Johnson, III
Johnson Olson, Chrt'd
PO Box 1725
Pocatello, ID 83204-1725

Faxed: 2082329161

Brendon C. Taylor
MERRILL & MERRILL, CHARTERED
P.O. Box 991
Pocatello, ID 83204-0991

Faxed: 208-232-2499

District Judge David C. Nye
Bannock County District Court
624 East Center, Room 309
Pocatello, ID 83205

Original mailed to Court



Charles Johnson
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 ISB No. 2464
 E-Mail: cjlaw@cablone.net
 Attorney for Plaintiffs

FILED
 BANNOCK COUNTY
 CLERK OF THE COURT

2010 MAY 14 PM 4:07

BY
 DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

MATHEW R. BENNETT and	)	Case No. CV-08-4528-PI
BENJAMIN L. WALTON,)	
)	
Plaintiffs,	)	STIPULATED JOINT PRE-TRIAL MEMORANDUM
)	
vs.)	
)	
NANCY PATRICK,)	
)	
Defendant.)	
_____)	

The plaintiffs Mathew R. Bennett and Benjamin L. Walton, and defendant Nancy Patrick, through their counsel of record, hereby file this Stipulated Joint Pre-Trial Memorandum in compliance with the pre-trial order in this case. The parties would show the Court as follows.

A. **Exhibit List.** The plaintiffs have prepared their Exhibit Index List which is attached hereto. The parties have stipulated to the admission of all of the exhibits except as stated herein. There is no stipulation as to Exhibits: 1, 2, 40, 41, 57, 62, 65, 73, 112, 120-121, 125, 134-141 and 145 on. The medical records and invoices (statements) of the treating physicians have been stipulated into evidence in lieu of live testimony by the physicians; and there are some new exhibits discussed below.

The plaintiffs may not move Exhibit 1 into evidence but leave it marked at this time as it may be used to refresh the parties' recollection. The plaintiffs have withdrawn old Exhibit 151, the Affidavit of Jason Walton.

The parties have agreed to the redaction of the insurance carrier's name from all exhibits, which will be accomplished before trial. The actual exhibits will be filed with the Court at the time of trial.

The plaintiffs have a few documents that are marked as new exhibits, but copies have been produced for the defendant. These include Exhibits: Exhibit 41 (detail bill), Exhibit 125 (Resume for Dr. Henry West), 134 (the Letter from Idaho Medical Imaging on payment arrangements), 135 (the MRI Computer Disc on plaintiff Walton), 136-141 (the actual pictures from the plaintiff Walton's MRI). The defendant has not stipulated to the admission of Exhibits 145-146 (the reports of Dr. David Simon on the plaintiffs), 147 (Dr. David Simon's Resume) and 148 (the PMC quote for the costs of the future medical care for the plaintiff Walton recommended in Dr. David Simon report). A stipulation is under consideration by defendant on these exhibits, after review by Dr. Simon of these exhibits (and any update of his report to which the plaintiffs will be allowed to respond).

The defendant has filed her exhibit index list which is attached. The defendant will specify exactly which exhibits and furnish a copy of the exhibits to the plaintiffs for review by the time of the pre-trial conference.

Because the plaintiffs submitted to defendant the MRI film for Plaintiff Benjamin Walton on May 13, 2010, defendant is of the

position that Dr. Simon should be allowed to review the MRI film and update his opinions. Should Dr. Simon's opinions regarding plaintiff Walton change, defendant would notify the plaintiffs in writing a week before trial, and then allow a reasonable time for plaintiffs to depose Dr. Simon (personally or by conference telephone call) and respond to any change in Dr. Simon's opinions. Plaintiffs do not stipulate that Dr. Simon may change his opinions based on the record in this case. Based upon Dr. Simon's current report, the parties have executed this Stipulated Joint Pre-Trial Memorandum. Regardless of any change in Dr. Simon's opinion regarding plaintiff Benjamin Walton, the stipulations as to the admissibility of the exhibits and other matters shall not change, unless further agreed by all parties.

B. The parties' depositions have been taken but it is not anticipated that they will be used in lieu of live testimony. The defendant has stipulated to the admission of the plaintiffs' exhibits in lieu of testimony of their physicians.

C. The parties have stipulated to the admission of the summary of the plaintiffs' past medical expenses in a SUMMARY OF MEDICAL BILLS marked as Exhibits 150 and 152 (subject to future agreement on the dollar amounts). The parties have stipulated that these are reasonable and necessary expenses incurred by the plaintiffs in this case, except for the 2010 Chiropractic care of Mat Bennett, subject to adjustment and correction on the actual dollar amounts.

The plaintiffs are preparing amended DAMAGES SUMMARIES to supplement the damage summaries previously prepared, and the latest draft is attached and marked as Exhibits 151 and 153. However, the

plaintiffs reserve the right to amend and supplement this exhibit depending on the proof at trial.

D. **Witness List**. The plaintiffs' witness list is attached. The defendant has attached her witness list as well. The parties reserve the right to amend and supplement their witness lists at trial with notice to the other party.

E. **Summary of Factual Nature of Case**. This is an automobile collision case. The Court has determined that there is no defense to liability.

The defendant has agreed she is liable for the plaintiffs' past medical expenses through May of 2008; which includes all expenses except as to the chiropractic care of the plaintiff Bennett in 2010. The plaintiffs claim that this is a sum certain so the defendant is liable for pre-judgment interest at 12% under Idaho Code § 28-22-104.

The plaintiffs seek damages including their stipulated past accrued medical expenses, estimated future medical expenses for care and treatment, lost wages for one to two weeks each, and damages for pain and suffering.

F. The parties discussed settlement unsuccessfully.

G. **Discovery Replies**. The answers to interrogatories and other disclosures reflect the facts known as of the date of this memorandum. The defendant is supplementing her replies to the plaintiffs' second interrogatories, requests for production of documents and requests for admissions; as follows: Interrogatory 14 on the actual percentages of work done by Dr. David Simon for plaintiffs and defendants, Interrogatory 15 on the actual percentage and numbers from tax returns as to IME income, and

Interrogatory 20 on a statement of any medical care that Dr. David Simon disagreed with for the plaintiffs.

The parties adopt the prior discussion on Exhibits at paragraph A. The parties Exhibits will be reviewed at the pre-trial conference for further stipulations on admissibility.

H. **Statement of Claims.** A statement of the claims of the plaintiffs is included in their damages' summaries. These are marked as Exhibits 151 and 153, subject to modification at trial.

I. **Admissions or Stipulations of the Parties.**

First, the plaintiffs adopt the prior discussion on Exhibits at paragraph A and their new exhibits. A stipulation on these exhibits will be reviewed at the pre-trial conference.

Second, based on Dr. David Simon's reports, the defendant has agreed that the medical treatment and bills (which Dr. Simon related to the accident) were reasonable and necessary as a result of the motor vehicle collision, and would stipulate to the special damages of the plaintiffs' past medical expenses through May of 2008. This would specifically exclude the plaintiff Bennett's recent chiropractic care in 2010; which would still have to be proven at trial.

Third, the parties have agreed that Dr. David Simon will have to testify just once at the trial, so cross examination outside the scope of the direct examination will be allowed. The cost of his testimony would be an item of cost that may be recoverable at the trial by the defendant.

Fourth, the plaintiffs agreed to withdraw and reschedule the motion to compel. The parties adopt the prior discussion on

Discovery Replies at paragraph G.

Fifth, the parties agreed that the plaintiffs' medical records and medical bills, and other exhibits, will be admitted at the trial (as set out above in paragraph A) without the necessity of putting on further proof through foundation witnesses. The parties will still have Dr. Henry West and Dr. David Simon testify.

J. **Any Issues of Law Abandoned by The Parties.** The defendant does not dispute liability, or the plaintiffs' past medical bills (except as stated above).

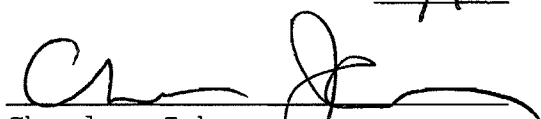
K. The issues remaining to be decided are liability for Bennett's chiropractic care in 2010, future medical expenses, lost wages, pain and suffering. The only issue at trial is damages.

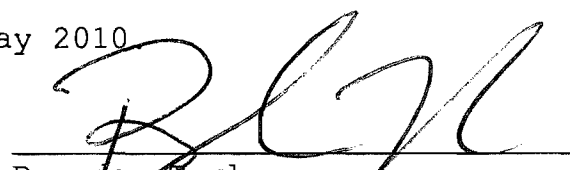
L. The plaintiffs have filed one motion in limine to expedite the trial. This would exclude the reference to the alleged referral by counsel for the plaintiffs to Dr. Henry West for examination and treatment. The parties agree that the witness will be instructed not to mention insurance generally or the name of any insurance carrier.

M. **Opening Statements.** Counsel do not require more than 30 minutes per side for the opening statements in this case. The trial is expected to take about two days.

N. The parties will file a trial brief (if any), requested voir dire and jury instructions at the pre-trial conference as stated in the pre-trial order.

DATED on this 14th day of May 2010


Charles Johnson
Counsel for Plaintiffs


Brendon Taylor
Counsel for Defendant

**MATHEW R. BENNETT AND BENJAMIN L. WALTON
EXHIBIT INDEX LIST**

EXHIBIT	DESCRIPTION	DATE	ADMITTED
1	Idaho Vehicle Collision Report (four pages)	10/18/07	
2	ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY	01/05/10	
3-5	RESERVED		
MAT'S MEDICAL RECORDS			
PORTNEUF MEDICAL CENTER			
October 18, 2007			
6	EMERGENCY SERVICES	10/18/07	Stip
7	CONSENT TO MEDICAL AND SURGICAL TREATMENT	10/18/07	Stip
8	Picis Charting (24 pages)	10/18/07	Stip
9	Picis Charting Summary (3 pages)	10/18/07	Stip
10	PORTNEUF MEDICAL CENTER DISCHARGE INSTRUCTIONS RECEIPT	10/18/07	Stip
11	PATIENT DETAIL STATEMENT	10/18/07	Stip
12-20	RESERVED		
November 20, 2007			
21	EMERGENCY SERVICES	11/20/07	Stip
22	CONSENT TO MEDICAL AND SURGICAL TREATMENT	11/20/07	Stip
23	RADIOLOGY REPORT (X-Ray Lumbar Spine, Two to Three Views Dr. Ellen Eng)	11/20/07	Stip
24	Picis Charting Summary (4 pages)	11/20/07	Stip
25	PORTNEUF MEDICAL CENTER DISCHARGE INSTRUCTIONS	11/20/07	Stip
26	PORTNEUF MEDICAL CENTER DISCHARGE INSTRUCTIONS RECEIPT	11/20/07	Stip
27	PATIENT DETAIL STATEMENT	11/20/07	Stip
28-30	RESERVED		
Physical Therapy November 26, 2007			
31	EMERGENCY SERVICES	11/26/07	Stip
32	CONSENT TO MEDICAL AND SURGICAL TREATMENT	11/26/07	Stip
33	Patient Medical History Questionnaire	11/26/07	Stip
34	Physical Therapy Initial Evaluation	11/26/07	Stip
35	Patient Education	11/26/07	Stip

36	Physical Medicine Progress Notes Physical Therapy	11/26/07 through 12/13/07	Stip
37	WEIGHT/REPETITIONS/TIME-LEFT/RIGHT	12/06/07 through 12/13/07	Stip
38	Outpatient Physical Therapy Report	12/18/07	Stip
39	PATIENT DETAIL STATEMENT	11/26/07 and 11/27/07	Stip
40	IDAHO AMENDED HOSPITAL LIEN	12/21/07	
41 *	PATIENT DETAIL STATEMENT	12/06/07	
42-50	RESERVED		
MOUNTAIN VIEW FAMILY MEDICINE			
51	Chart Notes	10/30/07	Stip
52	Chart Notes	11/30/07	Stip
53	Doctor Note "Please excuse from work"	11/27/07	Stip
54	Letter from Dr. Evan Holmstead	01/03/08	Stip
55	Transaction History	01/08/08	Stip
56 *	Letter from Dr. Evan Holmstead	09/16/08	Stip
57 *	E. Evan Holmstead M.D. Curriculum Vitae	Undated	
58-60	RESERVED		
WEST CHIROPRACTIC			
61	Automobile Accident Questionnaire	undated	Stip
62	Health Reports and Doctor's Lien	04/16/08	
63	Chart Note	04/16/08	Stip
64	Low Back Examination Form (four pages)	04/16/08	Stip
65	Letter from Dr. Henry West Re: Mathew Bennett	05/27/08	
66	Patient Ledger History	04/16/08 through 05/25/08	Stip
67	Chart Notes (Exam Summary)	04/16/08	Stip
68 *	Chart Notes	05/24/08 through 02/08/10	Stip
69 *	UPDATED Patient Ledger History	04/16/08 through 04/20/10	Stip
70	RESERVED		

SHOPKO PHARMACY			
71	Medical Expenses Summary	10/18/07 through 04/21/08	Stip
72	RESERVED		
KIGGINS PAYROLL SUMMARY			
73	Kiggins Concrete & Construction Co. PAYROLL SUMMARY (comparable wages) (Redact Written Part?)	10/30/07 through 02/01/08	
74	Kiggins Concrete & Construction Co. PAYROLL TRANSACTION DETAIL	10/30/07 through 02/01/08	Stip
75-80	RESERVED		
BEN'S MEDICAL RECORDS			
PORTNEUF MEDICAL CENTER			
81	Emergency Services	10/18/07	Stip
82	CONSENT TO MEDICAL AND SURGICAL TREATMENT	10/18/07	Stip
83	Picis Charting (24 pages)	10/18/07	Stip
84	Picis Charting Summary (3 pages)	10/18/07	Stip
85	PORTNEUF MEDICAL CENTER PRESCRIPTION	10/18/07	Stip
86	PORTNEUF MEDICAL CENTER DISCHARGE INSTRUCTIONS	10/18/07	Stip
87	PORTNEUF MEDICAL CENTER DISCHARGE INSTRUCTIONS RECEIPT	10/18/08	Stip
88	RADIOLOGY REPORT (X-Ray Cervical Spine, Four Views Dr. David M. Cameron)	10/18/07	Stip
89	RADIOLOGY REPORT (X-Ray Lumbar Spine, Three Views Dr. David M. Cameron)	10/18/07	Stip
90	Statement	10/18/07	Stip
91	RADIOLOGY PHYSICIANS OF IDAHO (XR Spine Lumbar 2-3 V)	10/18/07	Stip
92-100	RESERVED		
FAMILY PRACTICE GROUP			
101	Progress Notes by Dr. Richard Maynard	10/26/07	Stip
102	Progress Notes by Dr. Richard Maynard	11/09/07	Stip
103	Letter from Dr. Richard Maynard	01/21/08	Stip
104	STATEMENT	10/26/07 and 11/09/07	Stip

	Transaction History *Paid in full	10/27/07 through 06/23/08	Stip
106-110	RESERVED		
WEST CHIROPRACTIC			
111	Automobile Accident Questionnaire	Undated	Stip
112	IRREVOKABLE LIEN AGREEMENT	11/21/07	
113	Chart Notes	11/21/07	Stip
114	Range of Motion Exam	11/21/07	Stip
115	Initial Examination	11/21/07	Stip
116	Notes	11/21/07	Stip
117	DIAGNOSIS (three pages)	11/21/07	Stip
118	Computerized Spine Range of Motion Exam	11/21/07	Stip
119	Exam Summary	11/21/07	Stip
120	Patient Summary by Dr. Henry West	11/21/07	
121	Letter from Dr. Henry West Re: Benjamin Walton	11/27/07	
122	Progress Notes	11/24/07 through 05/07/08	Stip
123	Patient Ledger History	11/21/07 through 05/07/08	Stip
124 *	STATEMENT	02/25/10	Stip
125 *	Dr. Henry West Resume	undated	
126-130	RESERVED		
IDAHO MEDICAL IMAGING			
131	IMAGING CONSULTATION REQUEST	Undated	Stip
132	MRI CERVICAL SPINE WITHOUT CONTRAST	02/19/08	Stip
133	IDAHO MEDICAL IMAGING Statement	02/19/08	Stip
134 *	Letter from IDAHO MEDICAL IMAGING re: payment arrangements of \$10 per month.	06/13/09	
135 *	Copy of MRI Computer Disc	02/19/08	
136 *	Copy of MRI Spine; Cervical Page 1	02/19/08	
137 *	Copy of MRI Spine; Cervical Page 2	02/19/08	
138 *	Copy of MRI Spine; Cervical Page 3	02/19/08	
139 *	Copy of MRI Spine; Cervical Page 4	02/19/08	
140 *	Copy of MRI Spine; Cervical Page 5	02/19/08	
141 *	Copy of MRI Spine; Cervical Page 6	02/19/08	

-144	RESERVED		
145 *	IME Report on Benjamin Walton by David C. Simon, M.D.	02/02/10	
146 *	IME Report on Mat Bennett by David C. Simon, M.D.	02/02/10	
147 *	David C. Simon, M.D. Curriculum Vitae	Undated	
148 *	Cost of the future medical care recommended by Dr. Simon for Ben Walton from Portneuf Medical Center		
149 *	RESERVED		
150 *	Mat Bennett Medical Bills Summary	undated	
151 *	Mathew Bennett Damages Summary	undated	
152 *	Benjamin Walton Medical Bills Summary	undated	
153 *	Benjamin Walton Damages Summary	undated	
154-200	RESERVED		

* Indicate's New Records

Defendant's Exhibit List:

- A) Defendant reserves the right to use or offer any Exhibit listed or disclosed by Plaintiff.
- B) Plaintiff Mathew Bennett prior medical records.
- C) Select Medical records for Plaintiff Matthew Bennett.
- D) Plaintiff Matthew Bennett's pay stubs.
- E) Plaintiff Matthew Bennett's tax returns.
- F) Select Medical Records for Plaintiff Benjamin Walton.
- G) Plaintiff Benjamin Walton's pay stubs/tax returns.
- H) Photographs.
- I) Surveillance Video of Plaintiffs.

PLAINTIFFS' TRIAL WITNESS LIST

1. Benjamin Walton
1771 S. 2nd Avenue
Pocatello, Idaho 83204-6863
Telephone: (208) 406-4170
2. Mat Bennett
10010 Batiste Road
Pocatello, Idaho 83202-5355
Telephone: (208) 604-1952
3. Jason Walton
Blackfoot, Idaho 83221
Telephone: (208) 680-1221
4. Kelly Bennett
10010 Batiste Road
Pocatello, Idaho 83202-5355
Telephone: (208) 604-3785
5. Devan Walton
1771 S. 2nd Avenue
Pocatello, Idaho 83201-6863
Telephone: (208) 406-4170
6. Dr. Henry West
West Clinic, PA
1188 Call Place
Pocatello, Idaho 83204
Telephone: (208) 232-3216
7. Dr. David Simon
Idaho Falls Physical Medicine & Rehabilitation
2860 Channing Way, Suite 213
Idaho Falls, Idaho 83404
Telephone: (208) 535-4420
8. Ron Rutten, Physical Therapist
Portneuf Physical Therapy
651 Memorial Drive
Pocatello, Idaho 83201
9. Joann Hayward
Portneuf Medical Center
Patient Accounts
651 Memorial Drive
Pocatello, Idaho 83201
Telephone: (208) 239-1000
10. Kiggins Concrete
Payroll
3610 Highway 30 West
Pocatello, Idaho 83204
Telephone: (208) 233-91⁶⁵₁₈₄

Defendant's Witness List:

- 1) Plaintiff Benjamin Walton.
- 2) Plaintiff Mathew Bennett.
- 3) Officer Goss.
- 4) Defendant Nancy Patrick. Ms. Patrick would be able to testify as to the facts leading up to and immediately following the accident.
- 5) Timothy Gervais or a representative of Gervais & Associates, who conducted surveillance on the plaintiffs in January and February of 2008.
- 6) Dr. David Simon. Dr. Simon performed Independent Medical Examinations on each of the Plaintiff's and he is expected to testify regarding Plaintiffs' medical conditions prior to and following the accident.
- 7) Plaintiffs' medical care providers. Defendant may call any medical provider for either Plaintiff to testify as to Plaintiff's medical conditions prior to and following the accident at issue in this lawsuit.
- 8) Defendant reserves the right to call any witness listed, identified or called by Plaintiffs.

**MATTHEW R. BENNETT
MEDICAL BILLS SUMMARY**

MEDICAL BILLS

Portneuf Medical Center 10/18/07 (Exhibit 11)	\$291.00
Portneuf Medical Center 11/20/07 (Exhibit 27)	\$631.84
Portneuf Medical Center Physical Therapy 11/26/07 and 11/27/07 (Exhibit 39)	\$316.00
Portneuf Medical Center Physical Therapy 12/06/07 (Exhibit 41)	\$116.00
Mountain View Family Medicine (Dr. Evan Holmstead) 10/30/07 and 11/29/07 (Exhibit 55)	\$191.60
West Chiropractic (Dr. Henry West) 04/14/08 through 04/16/08 (Exhibit 66)	\$310.00
Shopko Pharmacy Prescriptions 10/18/07 through 04/21/08 (Exhibit 71)	\$81.27
TOTAL MEDICAL BILLS THROUGH MAY 2008	\$1,937.71
West Chiropractic (Dr. Henry West) 02/05/10 through 02/08/10 (Exhibit 69) *Subsequent Treatment	\$168.00
TOTAL MEDICAL BILLS THROUGH FEBRUARY 2010	\$2,105.71

**MATTHEW R. BENNETT
UPDATED DAMAGES SUMMARY**

EXHIBIT

PAST MEDICAL BILLS

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Portneuf Medical Center 10/18/07 (Exhibit 11)	\$291.00
Portneuf Medical Center 11/20/07 (Exhibit 27)	\$631.84
Portneuf Medical Center Physical Therapy 11/26/07 through 11/27/07 (Exhibit 39)	\$316.00
Portneuf Medical Center Physical Therapy 12/06/07 (Exhibit 41)	\$116.00
Mountain View Family Medicine (Dr. Evan Holmstead) 10/30/07 and 11/29/07 (Exhibit 55)	\$191.60
West Chiropractic (Dr. Henry West) 04/14/08 through 04/16/08 (Exhibit 66)	\$310.00
Shopko Pharmacy Prescriptions 10/18/07 through 04/21/08 (Exhibit 71)	\$81.27
TOTAL PAST MEDICAL (not disputed)	\$1,937.71
West Chiropractic (Dr. Henry West) 02/05/10 through 02/08/10 (Exhibit 69) *Subsequent Treatment	\$168.00
Future Medical Bills; estimated to be \$20.00 a month for pain medication for rest of life expectancy plus future estimated medical and chiropractic care as necessary	\$2,500.00
TOTAL MEDICAL	\$4,605.71
LOST WAGES	
Lost Wages of \$26.00, an hour, for the date accident for two and a half weeks at eight hours a day (100 hours)	\$2,600.00
PAIN AND SUFFERING	
Pain and Suffering (estimated three times bills) or Past pain and suffering of one dollar per hour for six months (or 12 hours x 180 days) equals \$2,160.00, plus Pain and suffering of ten cents per hour for two years and discounted life expectancy of 21.20 (12 x 365 x 23.20 x .10) equals \$10,161.60; For a total of \$12,321.60	\$13,500.00
TOTAL DAMAGES	\$20,537.71
TOTAL DAMAGES WITH SUBSEQUENT TREATMENT	\$20,705.71

**BENJAMIN L. WALTON
MEDICAL BILLS SUMMARY**

MEDICAL BILLS

Portneuf Medical Center 10/18/07 (Exhibit 90)	\$917.00
Primary Care Specialists (Dr. Richard Maynard) 10/26/07 and 11/09/07 (Exhibit 104)	\$202.42
West Chiropractic 11/21/07 through 05/07/08 (Exhibits 123-124)	\$703.00
Idaho Medical Imaging 02/19/08 (MRI) (Exhibit 133)	\$1,170.50
Radiology Physicians of Idaho (MRI diagnostic) (Exhibit 91)	\$38.00
TOTAL MEDICAL BILLS	\$3,030.92

EXHIBIT

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**BENJAMIN L. WALTON
DAMAGES SUMMARY**

MEDICAL BILLS

Portneuf Medical Center 10/18/07 (Exhibit 90)	\$917.00
Primary Care Specialists (Dr. Richard Maynard) 10/26/07 and 11/09/07 (Exhibit 104)	\$202.42
West Chiropractic 11/21/07 through 05/07/08 (Exhibits 123-124)	\$703.00
Idaho Medical Imaging 02/19/08 (MRI) (Exhibit 133)	\$1,170.50
Radiology Physicians of Idaho (MRI diagnostic) (Exhibit 91)	\$38.00
TOTAL PAST MEDICAL	\$3,030.92
Future Medical Bills; estimated to be \$20.00 a month for pain medication for rest of life expectancy; plus future medical care as necessary per Dr. David Simon for: Physical Therapy, per session (four sessions) \$ 525.00 Muscle Relaxers, per pill (included in above estimate) Trigger Point Injections, per injection x 3 of \$3,000.00	\$2,500.00 and \$3,525.00
TOTAL MEDICAL	\$9,055.92
LOST WAGES	
Lost Wages for one week from the date accident (\$30 hr)	\$1,200.00
PAIN AND SUFFERING	
Pain and Suffering (est three times medical bills) or Past pain and suffering of one dollar per hour for six months (or 12 hours x 180 days) equals \$2,160.00 plus Pain and suffering of twenty cents per hour for two years and discounted life expectancy of 20.72 years (12 x 365 x .20 x 22.72) \$19,902.72 For a total of \$22,062.72	\$27,000.00
TOTAL	\$37,255.92

EXHIBIT

CLERK OF THE COURT

2019 MAY 24 PM 4:53

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

BY *[Signature]*
DEPUTY CLERK

MATHEW R. BENNETT and	)	Case No. CV-08-4528-PI
BENJAMIN L. WALTON,)	
)	
Plaintiffs,	)	ORDER GRANTING MOTION IN LIMINE
	)	AS TO DR. HENRY WEST
vs.)	
)	
NANCY PATRICK,)	
)	
Defendant.)	
_____)	

The above-entitled matter came on for hearing on the Motion in Limine to preclude the alleged referral of the plaintiffs by their counsel to Dr. Henry West for chiropractic care and treatment. The Court heard oral arguments of the parties and considered the briefs that had been submitted. The Court determined that for good cause the motion should be granted.

IT IS HEREBY ORDERED ADJUDGED AND DECREED that there shall be no mention of how the plaintiffs were referred to Dr. Henry West at trial at this time. The defendant may attempt to show how this is relevant at trial, outside the presence of the jury; and if relevant to some issue in this case then the Court may review this issue further at trial.

Dated May 24th, 2010.



David C. Nye
Sixth District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing document by placing the same in the United States mail, postage prepaid, addressed as follows:

Jared A. Steadman
Brendon C. Taylor
MERRILL & MERRILL, CHARTERED
P.O. Box 991
Pocatello, Idaho 83204-0991

Charles Johnson
JOHNSON OLSON CHARTERED
P.O. Box 1725
Pocatello, Idaho 83204-1725

on this 26th day of May 2010.


District Clerk