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Bennett v. Patrick Appellant's Brief Dckt. 38138

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MATHEW R. BENNETT and BENJAMIN L. WALTON, Plaintiffs/Appellants, vs. NANCY PATRICK, Defendant/Respondent.	Idaho Supreme Court No. 38138-2010

APPELLANTS' BRIEF

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

THE HONORABLE DAVID C. NYE, DISTRICT JUDGE, PRESIDING

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3. STATEMENT OF THE CASE

i. Nature of the Case

This is an appeal of the denial by the District Court of attorney's fees under Idaho Code § 12-120(4) to two prevailing plaintiff parties after a jury trial. This appeal challenges the denial of attorney's fees based on the District Judge's belief that substantial new claims were asserted in the complaint and at trial, and after the Court expressed some hope that an appeal be filed to get some clarification on these issues; *see* R Vol. III, p. 487, L. 7, and Tr 502, L. 6-7.

ii. Course of Proceedings Below

The plaintiffs and appellants Mathew Bennett and Benjamin Walton (collectively called plaintiffs herein or by their last names Bennett and Walton), both made a written demand for payment of their personal injury claims to the defendant and respondent Nancy Patrick's insurer Allstate Insurance Company (Allstate herein), sixty (60) days before the litigation was filed, under Idaho Code § 12-120(4). A true and correct copy of this demand letter is attached as Exhibit 161, and is found at R Vol. II, p. 258-260. The demand letter included claims for past accrued medical expenses, future estimated medical expenses, lost wages, pain and suffering. *See* also attached Damage Summaries, R Vol. II, p. 318-319. A list of medical records attached to the demand letter set out on Exhibit Index Lists at R Vol. I, p. 178-182, and p. 240-244 as stipulated exhibits later admitted into evidence.

The District Court found that the demand letter complied in all material respects with Idaho Code § 12-120(4). A copy of the plaintiffs' Exhibit List with all medical records in possession of the plaintiffs' were attached to the demand letter. The plaintiffs waited a period of over 60 days before filing their complaint. *See* R Vol. III, p. 485.

In response to the plaintiffs' demand letter (R Vol. II, p. 258-260) on August 20, 2008 Allstate offered Walton $4,600.00; *see* R Vol II, p. 261. There was then other correspondence, and Allstate made a "final offer" to settle Walton's case for $5,000.00; R Vol. II, p. 262.

In response to the plaintiffs' demand letter (R Vol. II, p. 258-260), Allstate's first offer to Bennett was $2,300.00, including $710.45 for medical care. *See* copy of Allstate letter dated August 20, 2008 found at R Vol. II, p. 265. Subsequently, there was additional correspondence between the parties. Allstate later increased their offer to Bennett to $2,500.00 in a letter dated September 26, 2008. *See* copy of the Allstate letter dated September 26, 2008 found at R Vol. II, p. 266.

The plaintiffs then filed the underlying case of *Mathew R. Bennett and Benjamin L. Walton v. Nancy Patrick;* Bannock County Case No. CV-08-4528-PI. The plaintiffs' Verified Complaint for Personal Injury Damages in Automobile Collision and Demand for Jury Trial was filed against Nancy Patrick on November 6, 2008. A copy

of the Verified Complaint with exhibits is found in the CLERK'S RECORD on appeal at R Vol. I, p. 1-13.

The Verified Complaint was filed for an amount under $25,000.00, and sought attorney's fees under Idaho Code § 12-120(4), as stated specifically in the Prayer at paragraphs A and B, last sentence, and paragraph C on attorney's fees; *see* R Vol. I, p. 7-8, copy attached for the convenience of the Court. The Prayer of the Verified Complaint stated in pertinent part as follows:

> **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 $1,939.71, 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. *** (Emphasis Supplied).

The defendant Patrick filed her Answer and Demand for Jury Trial on December 4, 2008. *See* R Vol. I, p. 14-20. There was no affirmative defense raised that the demand letter or Complaint failed to comply with Idaho Code § 12-120(4). There were defenses

raised of comparative fault, and that (unbeknownst to the plaintiffs) the defendant Nancy Patrick had filed bankruptcy.

Therefore, in defendant Patrick's bankruptcy case, the parties entered into a Stipulation for Stay Relief In Re: Nancy D. Patrick, Idaho Chapter 7 No Asset Bankruptcy Case No. 08-40764-JDP; found at R Vol. III, p. 459-460. This stipulation expressly agreed that the plaintiffs would not pursue any claim in State Court against the defendant, personally, for any amount in excess of her Allstate insurance policy, which had policy limits of $25,000.00, per person, and $50,000.00 per accident. *See* R 381-382, 401-461, and 391 (Allstate Insurance declaration sheet). The Bankruptcy Court approved this stipulation in an Order Granting Relief from Stay from Bankruptcy Judge Jim D. Pappas at R Vol. III, p. 389-390.

The plaintiffs then filed a Motion for Summary Judgment on April 13, 2009. *See* R Vol. I, p. 21-24. The motion was supported by an affidavit of an eye witness, and the Verified Complaint, that the defendant Patrick had pulled onto a busy through street from behind a steam roller without looking or yielding, which caused the collision. The plaintiffs also filed a Motion to Compel on that same date. *See* R Vol. I, p. 25-52.

The defendant then filed a response and memorandum in opposition to the plaintiffs' Motion for Summary Judgment together with the Affidavit of Nancy Patrick on April 27, 2009. *See* R Vol. I, p. 53-61. In her Affidavit, Nancy Patrick testified, under oath, that she saw the plaintiff Walton's truck, he was speeding

and should have been able to avoid the collision, so Walton was at fault and there was comparative negligence by Walton in this case. *See* R Vol I p. 60.

The plaintiffs filed a Response in Support of Plaintiffs' Motion for Summary Judgment on May 6, 2009. *See* R Vol. I, p. 68-77. A hearing was held on the motions on May 11, 2009 with District Judge David C. Nye presiding. The Motion for Summary Judgment was denied without prejudice. *See* R Vol. I, p. 79-80.

The parties then completed written discovery and depositions. The plaintiffs filed a First Amended and Renewed Motion for Summary Judgment on November 19, 2009, together with the transcripts of the depositions. *See* R Vol. I, p. 81-127. The defendant Patrick testified, under oath, in her deposition that she did not even see the plaintiffs' truck before the collision, did not know the speed limit on the road, she was unaware of any facts that would show negligence on the part of the plaintiffs, and there were no facts to support the allegations made in her Affidavit at all.

The defendant's attorney then filed an Affidavit of Brendon Taylor with supplemental discovery on December 21, 2009, on the eve of the re-scheduled summary judgment hearing. *See* R Vol. I, p. 128-132. In this response the defendant Patrick amended her earlier response to the plaintiffs' request for admission in her Answer to Request for Admission No. 10, to *admit negligence and liability for the accident* for the first time.

The Court issued an Order Granting Plaintiffs' Motion for Summary Judgment on Liability, as stipulated, to by the defendant on January 4, 2010. *See* R Vol. I, p. 136-137. The plaintiffs filed a Memorandum of Costs and Affidavit of Charles Johnson in Support of Motion for Costs and Fees on the summary judgment motion under IRCP 11, 56(g), and 36-37 on the denied requests for admissions on liability. *See* R Vol. I, p. 138-149.

The defendant Patrick then filed an objection to the plaintiffs' motion for costs and attorney's fees on summary judgment as to liability on January 15, 2010. *See* R Vol. I, p. 150-159. The Court entered a Minute Entry & Order on February 22, 2010 denying the plaintiffs' motion under Rules 11 and 56, and took under advisement the Rule 36 fee issue. *See* R Vol. I, p. 160-161.

The Court entered the Decision on Costs and Attorney's Fees on March 12, 2010. *See* R Vol. I, p. 162-169. The Court held that no attorney's fees are be proper under the Idaho Court of Appeals decision of *Payne v. Wallace*, 136 Idaho 303, 309, 32 P.3d 695, 701 (Ct. App. 2001). The denial was without prejudice to a later motion for costs and attorney's fees after the trial, which is now part of the attorney's fees requested in this appeal.

An Order of Mediation in good faith was issued by the Court. *See* R Vol. I, p. 170-172. The final Allstate Offer of Judgment after mediation for Walton was $6,484.00; R Vol. II, p. 264.

Allstate then made an Offer of Judgment in the amount of $3,424.00 to Bennett dated April 29, 2010 at R Vol. II, p. 266. Subsequently, on May 18, 2010, Allstate increased their Offer of

Judgment to Bennett to $4,432.00; *see* Offer of Judgment R Vol. II, p. 267. This Offer of Judgment was received by facsimile transmission exactly 14 days before the jury trial.

The defendant Patrick then requested an Independent Medical Examination (IME) by Dr. David Simon in Idaho Falls, Idaho. His IME reports were favorable to the plaintiffs (discussed more fully below), and afterward the defendant Patrick admitted that the plaintiffs' past medical expenses were valid and not disputed.

A Stipulated Joint Pre-Trial Memorandum was entered on May 14, 2010. *See* R Vol. I, p. 172-189. This stipulated into evidence most of the plaintiffs' past medical records, and payment of their past medical bills and expenses, that were submitted with the demand letter, but not the IME reports of Dr. Simon. The defendant had admitted liability, and the plaintiffs' past medical expenses, so the only issues at trial were the plaintiffs' damages including: estimated future medical expenses for care and treatment, lost wages for one to two weeks for each plaintiff, and damages for pain and suffering. R Vol. I, p. 177 at paragraph K. [1]

The jury trial took place over two days and is discussed below; *see* also Minute Entry & Order at R Vol. II, p. 194-201, and 245-248, and Jury Instructions at R Vol. II, p. 194-239. The Stipulation and Order for Admission of Exhibits is in the Record at R Vol. II, p. 240-244.

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[1] These were the same claims that were always made in this case, and did not change during the course of the proceedings.

The Judgment on Verdict was entered on June 7, 2010. *See* R Vol. II, p. 203-205. The judgment awarded damages as follows:

Bennett	$3,978.47; and
Walton	$10,030.92.

The plaintiffs filed a Motion for Additur or new trial or to alter and amend the judgment on the verdict in this case to award Bennett an additional amount for other medical care and for non-prescription pain medications in the amount of $1,000.00, double the amounts of pain and suffering awarded to each plaintiff, and award pre-judgment interest on the stipulated past medical expenses from the date they were incurred. This was based on the defendant's statements that worker's compensation insurance existed or was somehow an issue in this case, speculation by the jury as to seatbelts, and air bags in the defendant's closing argument, or other factors. *See* Supplemental Record Exhibits A and B.

The plaintiffs filed a Motion for Costs and Attorney's Fees of the Prevailing Party on the Jury Verdict and Judgment on the Verdict (found at R Vol. II, p. 249-250), and a Memorandum of Costs and Affidavit of Charles Johnson in Support of Motion for Costs and Fees on June 18, 2010 (found at R Vol. II, p. 251-301). The Memorandum and Affidavit included the demand letter, responses to the demand letter, the Offers of Judgment, an Itemized Statement or Bill for all time spent by counsel for each plaintiff in the case. The Plaintiffs' Objection to Defendant's Motion for Costs also had the actual bills and invoices attached at R Vol. II, p. 342-361.

The plaintiffs also filed a Memorandum and Brief in Support of Attorney's Fees in the Supplemental Record as Exhibit C.

The defendant filed a motion for costs and memorandum for costs on June 21, 2010. *See* R Vol. II, p. 302-312. The defendant filed a motion for reduction of judgment on June 21, 2010. *See* R Vol. II, p. 313-327.

The plaintiffs filed an opposition to the defendant's motion for reduction to judgment on July 6, 2010. *See* R Vol. II, p. 328-331. The plaintiffs filed an objection to the defendant's motion for costs on July 6, 2010. *See* R Vol. II, p. 332-341.

The defendant filed an objection to the plaintiffs' post-trial motions for additur, interest, costs and attorney's fees on July 7, 2010. *See* R Vol. II, p. 362-366. The only objection to the attorney's fees was based on the allegation that substantial new claims were presented at trial on the plaintiffs' future medical care, pain and suffering, primarily because of the testimony of the IME Dr. Simon, and closing arguments of counsel for the plaintiffs. R Vol. II, p. 365. There was no objection or discussion that the language of the prayer of the complaint somehow did not comply with the requirements of Idaho Code § 12-120(4).

The defendant filed a supplement to defendant's post-trial motions, and responsive pleadings on July 22, 2010; *see* R Vol. II, p. 374-376. The Defendant's Post-Hearing Brief, filed after the hearing on the plaintiffs' motion for costs and attorney's fees, is found at R Vol. III, p. 449-453. There was no claim or objection by the defendant to the plaintiffs' demand letter or that the

complaint did not comply with the requirements of Idaho Code § 12-120(4). The defendant's sole objection or claim at that time was that the plaintiffs presented evidence at trial that included significant new items of damages not stated in their demand letter, in the IME testimony and closing argument on pain and suffering. The defendant also argued that the Court should determine prevailing party status under IRCP 54(d). The defendant also argued that *Johnson v. Sanchez,* 140 Idaho 667, 99 P.3d 620 (Ct. App. 2004) had allowed an increase in medical damages to be claimed, but stated that this case did not apply in the Court's discretion. The defendant also noted that the bankruptcy stipulation and order capped the plaintiffs' damages at $25,000.00 per person; since the defendant probably anticipated that the Court may award additional damages, costs, and attorney's fees.

The Court noted at the hearing held on July 26, 2010 on the post-trial motions that there was no dispute as to pre-judgment interest on the stipulated past medical expenses. The key issue was the costs and attorney's fees. Tr 465. The plaintiffs argued that their costs and attorney's fees should be awarded since the jury awarded double the amount of their pre-trial offers under Idaho Code § 12-120(4), and more than the augmented offers of judgment under IRCP 68. Tr 466. The Judge noted that there was prior case law that apparently adopted the plaintiffs' position. Tr 467.

The defendant argued that there were new and different claims for damages. Tr 468. The defendant did not mention or argue that

the complaint was defective or ambiguous on the claim for attorney's fees under Idaho Code § 12-120(4).

The Court noted that the Idaho Supreme Court had not adopted the defendant's position, and it appeared that the plaintiffs had met or beat the defendant's prior offers. Tr 469-470. The Court noted that what mattered was that the Offers of Judgment were beaten, and not by how much. Tr 471.

The defendant argued that in the motion for relief from stay to allow the personal injury case when Nancy Patrick filed bankruptcy, the parties had stipulated that the defendant would not be liable for any damages in excess of $25,000.00. Therefore, damages were capped at $25,000.00, not including attorney's fees. Tr 463-464. The defendant was never personally at risk for a higher verdict in excess of $25,000.00 per person.

The Court issued the decision on post-judgment motions on August 25, 2010; R Vol. III, p. 477-491. The Court recited the facts of the case pertinent to the motions with respect to the plaintiffs' demand letter under Idaho Code § 12-120(4), and Offers of judgment. The Court denied the plaintiffs' motion for additur for additional non-prescription pain medications, and the additur for pain and suffering, because the Court stated that insurance and the seatbelt defense evidence was cured with jury instructions, and the reference to the airbags not deploying was based on photographs (even though there was no testimony on that point at all as discussed below).

The Court granted the plaintiffs request for pre-judgment interest on the undisputed past medical expenses under Idaho Code § 28-22-104. Pre-judgment interest was added to the verdicts. R Vol. III, p. 479.

The Court granted the defendant's motion for remittur for payment of one of Walton's medical bills by Allstate. This verdict was reduced by the Court accordingly. R Vol. III, p. 480.

The Court found that both plaintiffs were the prevailing parties in this case. The Court found that Walton was a prevailing party since the verdict was, even after reduction for collateral sources, more than the Offers of Judgment. The Court also found that Bennett was a prevailing party based on his adjusted verdict under IRCP 68(b) of $4,336.62. R Vol. III, p. 481. This Court should note that this was even without considering an award of any attorney's fees. R Vol. III, p. 482.

The District Court then awarded the plaintiffs' costs as a matter of right, and discretionary costs. The Court found, at R Vol. III, p. 485, that the plaintiffs had complied with Idaho Code § 12-120(4), first and second paragraphs, as follows:

> Plaintiffs must have made a statement of claim in the amount of $25,000 or less sixty days before filing the Complaint. In Plaintiffs' motion for attorney fees, they have attached a document, which is the demand letter to Allstate Insurance Company, dated July 9, 2008 (Exhibit 161), which is more than sixty days prior to the filing of the Complaint. The letter demands $20,000 for Plaintiff Bennett and $23,000 for Plaintiff Walton, each of which is less than $25,000. Defendant attached to her documents Plaintiffs' Statement of Claims that accompanied the demand letter. The Defendant has made no objection to the validity of the submitted demand letter or the Statement of Claims. Thus, at least initially, I.C. § 12-120(4) applies to this case.

The Court then discussed the plaintiffs' Complaint. The Court first said that the Complaint requested general damages of no more than $25,000.00, and noted that it did expressly discuss Idaho Code § 12-120(4); *see* R Vol. III, p. 486. However, the Court held (at R Vol. III, p. 486) that the Complaint eventually requested over $25,000.00 as follows:

> The Court, having reviewed Plaintiffs' Complaint, finds that the Plaintiff Bennett asked for special damages in the amount of $4,537.71, and general damages in an amount of more than $10,000, but less than $25,000. Plaintiff Walton asked for special damages in the amount of $4,192.92 and general damages in excess of $10,000, but less than $25,000.
>
> The Court understands each Plaintiff to be asking for general damages in the amount of no more than $25,000. However, the Complaint does not state that total damages will be less than $25,000. When adding in the special damages, each Plaintiff's demand would surpass the I.C. § 12-120(4) maximum of $25,000. Although **the Complaint does not include a different alleged injury or a significant new item of damage not set forth in the statement of claim**, the Plaintiff's Complaint does not comply with § 12-120(4) in that each **Plaintiff asks for more than $25,000.** Thus, Plaintiffs removed their case from the applicability of the statute when they filed their Complaint. (Emphasis supplied).

The Court then held that a different alleged injury or significant new item of damage was presented at trial. The Court held at R Vol. III, p. 486-487 as follows:

> The third and final factor is whether the Plaintiffs included in evidence offered at trial, a different alleged injury or a significant new item of damage not set forth in the statement of claim. The Court has reviewed the evidence offered at trial and finds that the **Plaintiffs have not alleged a different injury from that in the statement of claim,** but Plaintiffs have included in their evidence offered at trial a **significant new item of damage** not set forth in the statement of claim. (Emphasis supplied).

> The Plaintiffs provided to the Court their demand letter dated July 9th, 2010, that was given to the Defendant's insurer. The statement of claims for Plaintiff Bennett was in the amount of $20,600 and for Plaintiff Walton $23,200. During the trial, the Plaintiffs presented evidence of $30,734.47 in damages for Plaintiff Bennett and $41,252.72 for Plaintiff Walton. The Court finds a significant difference in the amounts asked for from the time of the demand letter/statement of claim to the evidence offered at trial. The difference in damages **leads the Court to believe that what is being asked is a significant new item of damage** that was not set forth in the statement of claim. I.C. § 12-120(4) was intended to encourage parties to settle when a claim for personal injury is less than $25,000. (Emphasis supplied).

The plaintiffs submit that the Court "believes" is simply irrelevant in this case.[2] In this case, the Court's belief is not supported by the record or case law (discussed below), since there was no different or significant new item of damage presented at trial, but only *argument* for increased pain and suffering.

The Court then discussed *Johnson v. Sanchez*, supra, as cited by the plaintiffs. The Court then rejected this rationale and decision and stated that it did not apply to this case. The appellants claim that this is really the key issue on appeal.

The Court, therefore, issued an amended judgment to Walton of $10,671.63, and Bennett of $5,065.11. R Vol. III, p. 491. This was after all interest and costs but before any attorney fees.

The plaintiffs then filed a motion for relief and reconsideration of the post-judgment motions denying attorney's

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[2] The plaintiffs may have believed that the Court simply wanted to help his former law firm employer and partner, but such beliefs really are irrelevant to this proceeding.

fees; R Vol. III, p. 493-494. The plaintiffs also filed a motion to amend the complaint to conform with the evidence under I.R.C.P. 15(b) and to make it more clear that the amount they requested was $25,000.00 or less. R Vol. III, p. 495-496.

The defendant filed an objection to the plaintiffs' motion. The defendant admitted that she did not specifically object to the plaintiffs' claim for costs and attorney's fees based on the allegations of the Complaint. R Vol. III, p. 498, fourth paragraph, first two sentences. The defendant claimed the plaintiffs asserted a significant new item of damages at trial not set forth in their demand letter. The defendant also stated that the Court should deny the motion to amend the complaint as not being timely filed by the plaintiff.

The hearing on the motion for reconsideration was held on September 27, 2010. The plaintiffs argued that the Complaint was filed for less than $25,000.00 under Idaho Code § 12-120(4), but a motion to amend the complaint had been filed to clarify the record. Further, there had been no evidence of any significant new item of damages offered at trial, and there was, at most, only an argument made for a higher range of verdicts to the jury. Tr 489-492.

The Court stated that there was an argument for additional damages at trial, but it was for the same old injuries and nothing new. Tr 502, L. 12-17. The Court stated that arguing a significant increased amount for the same old injuries warranted denial of attorney's fees. Tr 502-503 and 511 (amount claimed).

The Court noted that the plaintiffs have the right to appeal and hoped that they do, because there should be some clarification on this issue. Tr 502.

The Court issued its Minute Entry & Order denying the motion to reconsider at R Vol. III, p. 513-514. This appeal followed at R Vol. III, p. 515-519. The plaintiffs paid the judgment pending appeal of the attorney's fees issue. R Vol. III, p. 520-521. There was no cross appeal filed by the defendant on any issue.

iii. A Concise Statement of Facts and Evidence at Trial

The plaintiffs called seven (7) witnesses at trial. This included the plaintiffs Bennet and Walton, their wives Kelly Bennett and Devan Walton, Physical Therapist Ronald Rutten, Chiropractor Henry West, and the defendant's independent medical examination (IME) Dr. David Simon. Their testimony consisted of the only evidence offered at trial in this case, and the plaintiffs' damage summaries were not admitted into evidence after an objection that they were not evidence; although there was no objection to their admission under § 12-120(4). Tr 17, 117, and 120.

The jury was instructed that the defendant admitted liability. Tr 4, and 20. Therefore, the only issue in the case was the amount of the plaintiffs' damages for estimated future medical care, lost wages, pain and suffering. *See* also jury instructions found at R Vol. II, pages 228 and 235-236, and special verdict at R 192-193.

Kelly Bennett testified that her husband missed work after the injury. He went to the emergency room, and then received physical

therapy and treatment from Dr. Henry West. Tr 32, 33-36. At that point, the defendant attempted to place into evidence that worker's compensation insurance should have covered all or part of Bennett's medical expenses and lost wages. The plaintiffs objected and moved for a mis-trial, in part based on a pre-trial ruling that no insurance should be placed into evidence. The Court gave a curative instruction that such insurance is irrelevant. Tr 43-50, R Vol. II, p. 210-211.

Walton testified that he worked as a drywall finisher at the time of the collision. He testified as to what happened at the time of the collision when Nancy Patrick pulled out from behind a steam roller, on a main road on a through street and collided with his truck. Tr 51-52.

Walton was treated at the Portneuf Medical Center emergency room. Tr 53. He was diagnosed with a cervical sprain and strain and was tender at the C5-6 location of his back. Tr 56. He was placed in a soft cervical collar, and given a work restriction of not to lift over five to ten pounds. Tr 55, 59. He then rested from work for several days and took one week off work. Tr 61, 67. He testified that he had no prior back problems before the collision.

Walton then treated by his private physician Dr. Richard Maynard. He had tenderness with muscle spasms, and was treated with medication and heat therapy. Tr 67-71.

He received chiropractic treatment from Dr. Henry West. Dr. West performed several tests and prescribed an MRI (Magnetic

Resonance Imaging) test. Tr 74-80. The MRI showed a minor broad-based posterior disc bulge at C4 and 5 and C5-6. Tr 81, 83.

Dr. West then treated Walton with chiropractic manipulation, massage, electrical stimulation, ultrasound, and other therapy. He was not working during some of this time which apparently helped his recovery. However, he still had back pain and took Ibuprofen medication. Tr 81-84.

Walton was cross-examined by the defendant's attorney. His tax returns showed minimal income, so the jury awarded him no lost income. Tr 91-96, and 124.

He had headaches on consultation with Dr. Maynard and Dr. Simon. Tr 109. On cross-examination Walton testified at trial, and in his deposition, that he had been referred by Dr. Maynard for treatment with Dr. West. Tr 105-106.

The Court ruled again that the damage summaries (Exhibit 153) could not be admitted into evidence, because pain and suffering was simply argument and not evidence. Tr 120.

Bennett then testified that at the time of the collision he was texting his wife since he was a passenger in the truck. Tr 137-138. Therefore, like Nancy Patrick, he did not actually see what happened in the collision.

Bennett was treated at the Portneuf Medical Center emergency room with pain medications and muscle relaxers. Tr 140. Bennett was advised to take bed rest for a few days, and not work for a week. Tr 143-146. However, the jury awarded only minimal lost

wages for about one week; which was the approximate amount of his paycheck at Kiggins Concrete. Tr 204.

Bennett was then bending over picking up hand tools while working and had pain in his back. Tr 143-144. This pain was found to be related to the collision by his treating physician Dr. Holmstead. Tr 145-146, 158. Dr. Holmstead also found that he had muscle spasms. Id.

Bennett then had physical therapy including stretching, electrotherapy, heat therapy, and an injection of pain killers. This gave him some relief but he still continued to work in pain. Tr 149-156.

Dr. Holmstead would then not treat Bennett further because he owed a bill. Bennett then saw chiropractor Dr. Henry West. Tr 157, 159-160, 266-268. Bennett then testified that Dr. West's chiropractic treatment included chiropractic manipulation (in which he could feel his back pop), ultrasound, electrical stimulation, and massage. Tr 187-188.

Bennett also attended an IME by Dr. David Simon. At the IME he hurt his back and he felt it "pop" during a test. He sought treatment with Dr. Holmstead, but could not pay, so he was treated by Dr. West two more times. Tr 189-192.

Physical Therapist Ronald Rutten testified as to the physical therapy treatment administered to Bennett, including ice and heat, electrical stimulation, and therapeutic exercise. Tr 168-172. Ronald Rutten thought that progress had been made and that Bennett

had improved. Tr 171-173. He testified in depth as to his charges for the physical therapy treatment. Tr 174-176.

Dr. Henry West is a chiropractic physician in Pocatello, Idaho that treated both the plaintiffs. Tr 266-229. The defendant stipulated that he was qualified as an expert. Tr 228.

Dr. West testified that he treated Walton for complaints of neck pain caused from the collision a month earlier. He was diagnosed with a cervical sprain or strain and given other tests that were summarized on Tr pages 233-240. Walton was referred and prescribed an MRI by Dr. West. The MRI was taken at Idaho Medical Imaging, and showed a minor posterior broad-based disc bulge at C5-6 noted as a cervical disc syndrome. Tr 245-246. Walton's objective complaints were consistent with the test results as to the nature of his reported injury. Tr 247. Dr. West found Walton had a 29 percent impairment as documented under the GAMA guidelines. Tr 253.

Walton was treated with spinal manipulation, ultrasound, and electrical stimulation. Tr 254-255. His prognosis was favorable and no surgery was indicated. Tr 247 and 265.

Dr. Henry West testified that he also treated Bennett. Tr 266-268. He was found to have low back pain secondary to a lumbar strain from the motor vehicle collision (a torsional strain), and his subjective complaints were substantiated by the record. Tr 269. He was also treated with chiropractic manipulation, ultrasound, and electrical stimulation. Tr 270-271. Bennett's condition improved. Tr 270.

Dr. West also treated Bennett for the aggravation of his prior injury when he was at work, and at the IME. Tr 270-271. His prognosis was good, but he would probably need more treatment and pain medication. Tr 274.

There was some cross-examination on Bennett not using a seatbelt at the time of the collision. Tr 283. The Court gave a curative instruction on the seatbelt defense; R Vol. II, p. 230.

Devan Walton testified that Ben Walton was injured in the collision and had muscle spasms. Tr 294-295, and 301. Therefore, he took non-prescription pain medication that cost about $5 to $15 a month. Tr 296.

Dr. David Simon is a physician in Idaho Falls, Idaho. He is the Medical Director of the Rehabilitation Unit of Eastern Idaho Regional Medical Center (EIRMC), a large hospital, in Idaho Falls, Idaho. Tr 324. He performed an Independent Medical Examination (IME) for the defendant on both plaintiffs. Tr 304-5.

The IME on Walton was marked and admitted over the defendant's objection as Exhibit 135. His medical history showed no pre-existing conditions prior to the collision, and his post collision treatment. Tr 308-309. The emergency room record marked and admitted into evidence as Exhibit 84 showed pain and stiffness, and the MRI marked and admitted into evidence as Exhibit 132 showed a disc bulge, both at the C5-C6 level of his back. Tr 313-314. There was a positive "Patrick's test" with trigger points and local muscle stiffness. Tr 316-318. He pointed where the trigger point occurred which was found near the C5-C6 level of his back. Tr 319-320.

On cross-examination Dr. Simon did not find that Walton's disc bulges were that meaningful; Tr 371-372. The IME showed mild residual pain and myofascial pain from a whiplash type injury caused by the collision. There was no evidence of pain exaggeration or magnification. Tr 321-323.

The defendant's IME Dr. Simon recommended that Walton receive additional physical therapy, muscle relaxers, trigger point injections, and home exercise. Tr 323-324. Dr. Simon recommended physical therapy for three to four weeks or six to twelve sessions. Tr 325-326. Dr. Simon (surprisingly) had no opinion as to the cost of the physical therapy, but the Judge permitted the plaintiffs to argue that Bennett's physical therapy bill was similar since Dr. Simon had noted it was not unusual or extraordinary. Tr 330.

Dr. Simon testified that the trigger point injections would be about $175 each. Tr 342. The three trigger point injections would be necessary at a cost of $525.00 total. Tr 349. He thought that chiropractic and physical therapy could be substituted to some extent, and it is not unreasonable for Walton to have more chiropractic treatment. Tr 345. Dr. Simon testified that the over-the-counter pain medications used by Walton were reasonable. Tr 348.

Dr. Simon testified that he thought Walton's prognosis was good. However, his condition would probably be the same, especially without intervention, for the rest of his life. Tr 355.

Dr. Simon also performed an IME on Bennett. Tr 356. His medical history showed no back problems prior to the collision that caused pain and stiffness in his lower to middle back. Tr 357-358.

He was diagnosed to have lumbar back strain, but recommended no MRI. Tr 358. He thought that Bennett's pain was minimal. Tr 358.

The Bennett IME found tenderness over the right sacroiliac area of the right lower back. The "Patrick's test" is an external rotation of the legs, and was positive for Bennett as well. Tr 359-360. This was the test in which Bennett felt back pain (popping) that caused the need for more chiropractic treatment.

Dr. Simon thought the second work injury was an aggravation or exacerbation of the pre-existing back injury caused by the MVC and could not apportion the damages. Tr 361-363, 380. He thought that the motor vehicle accident predisposed him to the work related injury within a reasonable medical probability. Tr 381-382. Dr. Simon testified that there was no significant pain magnification by Bennett. He testified that Bennett had no history of any prior chronic back problems or pain prior to the collision. Tr 364-365.

Dr. Simon thought Bennett's prognosis was good. He did not criticize Bennett for taking additional over-the-counter pain medications. Tr 366.

The plaintiffs rested. The defendant called Nancy Patrick. She admitted that she did not actually see what happened at the time of the collision, and admitted to hitting the plaintiffs' truck on the passenger side. However, she said the impact was minimal, despite tearing off her bumper, and spinning around Walton's truck on the road. Tr 388.

The Court then read the jury instructions. The parties then gave closing arguments. Tr 399.

Walton argued for an award of his past medical expenses of $3,030.92, future medical expenses of $4,972.80, including Dr. Simon's recommended treatment of about $1,524.00, future medication of $20.00 per month, lost wages of $1,200.00, and pain and suffering of $10,000.00 to $30,000.00. Tr 421-422.

Bennett then argued for his past medical expenses of $1,878.47, future medical expenses or pain medication of $5,000.00, lost wages of $2,600.00, and pain and suffering of $7,000.00 to $21,000.00. Tr 424.

The defendant argued in closing that the airbags did not deploy so it was not a very bad collision, the injury at work to Bennett was not caused by the collision, and Bennett's concrete work caused the injury, and there was evidence (not produced) of prior back injuries. The plaintiffs objected since airbags had not been brought up or mentioned by any party or witness before this testimony. Tr 432. The Court allowed this in closing and gave no curative instruction at all. Id. These defense arguments were really the only "new claims" made at trial by either party.

The defendant argued that both plaintiffs should be allowed their damages for past medical expenses which were stipulated by the parties. However, Bennett should only be awarded $600.00 to $700.00 in lost wages. Tr 438. The damages for pain and suffering should be awarded in the amount of only $1,000.00 for Bennett, and $3,000.00 to $4,000.00 for Walton. Tr 450.

The jury requested a calculator. The Court would not give them one. Tr 458-459. The jury awarded the plaintiffs total damages as follows: Bennett $3,978.47; and Walton $10,030.92.

4. ISSUES ON APPEAL

a. Whether the complaint complied with Idaho Code § 12-120(4) or alleged a claim in excess of $25,000.00?

b. Whether the complaint prayed for an amount less than $25,000.00 in substantial compliance with *Cox v. Mulligan*, 142 Idaho 356, 128 P.3d 893 (2005)?

c. Whether the decision to deny the Motion to Amend the Complaint was an abuse of discretion?

d. Whether there was any new significant item of damage not set forth in the plaintiffs/appellants' original claim?

e. Whether the plaintiffs/appellants offered any evidence (as opposed to argument) of any new item of damage at trial?

f. Whether the Court should have awarded attorney's fees under the case law of *Johnson v. Sanchez*, 140 Idaho 667, 99 P.3d 620 (Ct. App. 2004), *Harris v. Alessi*, 141 Idaho 901, 909-910, 120 P.3d 289 (Ct. App. 2005) and *Contreras v. Rubley*, 142 Idaho 573, 576-577, 130 P.3d 1111 (2006)?

5. ATTORNEY'S FEES AND COSTS ON APPEAL

The plaintiffs and appellants Bennett and Walton claim attorney's fees and costs on appeal pursuant to Idaho Code § 12-120(4). These attorney's fees and costs are proper in this case for the reasons stated in this brief. *See* also Idaho Appellate Rules 35(b)(5), 38, 40 and 41. The plaintiffs reserve the right to file further statements, and assert a claim for attorney's fee when this Court issues a decision on the merits.

6. ARGUMENT

A. STANDARD OF REVIEW

The Court exercises free review over questions of law and statutory interpretation, like the issues in this case; *Johnson v. Sanchez*, 140 Idaho 667, 669, 99 P.3d 620 (Ct. App. 2004), discussed below with numerous other citations omitted. *See* also *State v. Stover*, 140 Idaho 927, 929, 104 P.3d 969, 971 (2005); *State v. Yager*, 139 Idaho 680, 689, 85 P.3d 656, 665 (2004); *Wattenbarger v. A.G. Edwards & Sons*, Inc. ____ Idaho ____, 246 P.3d 961 (2010); *Lamprecht v. Jordan, LLC*, 139 Idaho 182, 185, 75 P.3d 743 (2003).

B. IDAHO CODE § 12-120(4)

Idaho Code § 12-120(4), provides for an award of costs and attorney's fees in civil cases where the amount of the damages requested is under $25,000.00. This section provides as follows:

> **12-120. Attorney's fees in civil actions - (4).** In actions for personal injury, where the amount of plaintiff's **claim for damages** does not exceed twenty-five thousand dollars ($25,000), there **shall** be taxed and allowed to the claimant, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees. For the plaintiff to be awarded attorney's fees for the prosecution of the action, written demand for payment of the claim and **a statement of claim** must have been served on the defendant's insurer, if known, or if there is no known insurer, then on the defendant, not less than sixty (60) days before the commencement of the action; provided that no attorney's fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action, an amount at least equal to ninety percent (90%) of the amount awarded to the plaintiff.

> The term "statement of the claim" shall mean a written statement signed by the plaintiff's attorney, or if no attorney, by the plaintiff which includes:
>
> (a) An itemized statement of each and every item of damage claimed by the plaintiff including the amount claimed for general damages and the following items of special damages: (i) medical bills incurred up to the date of the plaintiff's demand; (ii) a **good faith estimate of future medical bills**; (iii) lost income incurred up to the date of plaintiff's demand; (iv) a good faith estimate of future loss of income; and (v) property damage for which the plaintiff has not been paid.
>
> (b) Legible copies of all medical records, bills and other documentation pertinent to the plaintiff's alleged damages.
>
> If the plaintiff includes in the complaint filed to commence the action, or in evidence offered at trial, a **different alleged injury or a significant new item of damage** not set forth in the statement of claim, the plaintiff shall be deemed to have waived any entitlement to attorney's fees under this section. (Emphasis added).

The statute only requires that "medical bills incurred up to the date of plaintiff's demand" and a "good faith estimate of future medical bills" be included in the demand. The key issues in this case are whether the complaint filed to commence the action, or in evidence offered at trial, raised a different alleged injury or significant new item of damage not set forth in the statement of claim which would require that the plaintiffs be deemed to have waived any entitlement to attorney's fees.

In this case, there was a demand made 60 days prior to the filing of the action on the defendant's insurer, and a statement of a claim containing an itemized statement of each item of damage, including past medical expenses, future estimated medical expenses, lost income, and property damages. A legible copy of all medical bills and other documents were included with the original demand.

There is no dispute or objection raised on these matters so the Court ruled the demand was proper at R Vol. III, p. 485.

In this case the defendant did not tender, prior to commencement of the action, at least 90% of the amount awarded to the plaintiffs. A computation of the amounts tendered before the filing of the litigation are as follows:

Plaintiff	Defendant's offer	90% of jury verdict
Walton:	$5,000.00	$9,027.83
Bennett:	$2,500.00	$3,508.62.

Therefore, under this section, the plaintiffs and not the defendant, are entitled to an award of costs and attorney's fees. *See Gonzalez v. Thacker,* 148 Idaho 879, 231 P.3d 524 (2009).

1. Plaintiff Ben Walton.

In this case Walton was awarded over $10,000.00 at trial. This was over twice as much as Allstate's final offer of $5,000.00 before the case was filed under Idaho Code § 12-120(4). This was about one-third more than the final Allstate mediation offer and offer of judgment of $6,484.00. Therefore, he is clearly the prevailing party under Idaho Code § 12-120(4), Idaho Rule of Civil Procedure 54(d)(1), and Idaho Rule of Civil Procedure 68.

The Court should note that the damages awarded by the jury included Walton's total past medical expenses, his future medical expenses which the defendant's IME Dr. Simon testified were reasonably medically necessary, but did not include any compensation for lost wages, and only a small portion of Walton's pain and suffering. These claims are virtually identical, and not

substantially new or different from what Walton claimed prior to the filing of this litigation and in his demand letter under Idaho Code § 12-120(4).

Walton would argue that the failure to award him more damages for his pain and suffering was likely motivated by the conduct of the defendant's counsel as stated in the motion to alter or amend the judgment. The jury did not award the amount suggested to them by counsel plaintiff's in closing arguments so there was no harm or prejudice to the defendant from the argument in this case. However, this supports awarding the plaintiff Walton his costs and attorney's fees to increase damages for pain and suffering to a more reasonable amount.

2. Plaintiff Mat Bennett

In this case Bennett was awarded about $4,000.00 by the jury. This was almost twice as much as what Allstate offered to Bennett prior to litigation being filed under Idaho Code § 12-120(4), so Bennett is entitled to his costs and attorney's fees under that section. The jury award was also more than the first Allstate offer of judgment made on April 29, 2010 in this case. Bennett notes that under the law he was the prevailing party up to that point.

However, Allstate made a second offer of judgment on May 18, 2010 to "Plaintiff Mathew Bennett in the amount of Four Thousand Thirty-Two Dollars ($4,032.00). In this offer the plaintiff would be required to pay any and all remaining subrogation demands or

claims of liens, and any attorney's fees allowed by contract or law as well as costs incurred to date." *See* R Vol. II, p. 267. This offer of judgment expressly included "all attorney's fees allowable by contract or by law as well as costs incurred to date" which is the same language included in the adjusted award under IRCP 68(b).

The adjusted award for Bennett was computed by the Court to be a total of $5,065.11. R Vol. III, p. 491. This included pre-judgment interest and costs, but no attorney's fees at all, which would have substantially increased his award.

Bennett notes that if Allstate would have made an offer prior to the case being filed of over $4,000.00 and/or an offer of judgment of $4,000.00, plus accrued costs and attorney's fees to be set by the Court, which was declined by Bennett, then they may be entitled to their costs. Allstate should have doubled their offer before the case was filed, and increased their offer to include costs and attorney's fees after the case was filed, in their offers of judgment. Instead they spent almost the amount in controversy in Court costs to try to defeat the plaintiffs' valid claim. The failure to do so makes liability for Bennett's costs and attorney's fees clear under Idaho Code § 12-120(4) and IRCP 68(b).

The Court should compare the offer and recovery for each party independently. *Gilbert v. City of Caldwell,* 112 Idaho 386, 399, 732 P.2d 355 (Ct. App. 1987).

However, even if the Court combines the offers, the plaintiffs as a group are still the prevailing parties. *See Collins v. Jones,*

131 Idaho 556, 559-560, 961 P.2d 647 (1998); instructive on Rule 68(b). In this later case the District Court granted an additur then held that based on the additur alone, without costs and fees, the plaintiff was entitled to costs and attorney's fees.

C. THE COMPLAINT COMPLIED WITH IDAHO CODE § 12-120(4)

The decision on post-trial motions raised for the first time a claim that over $25,000.00 was sought in the complaint. In fact, the plaintiffs note that the Verified Complaint was filed for an amount under $25,000.00 and sought attorney's fees under Idaho Code § 12-120(4), as stated specifically in the Prayer at paragraphs A and B, last sentence, and paragraph C on attorney's fees and costs. The Prayer of the complaint is stated above, and attached hereto.

The issue or objection that over $25,000.00 had been prayed for in the complaint was not raised by the defendant Patrick or her insurer at any time. *See* Defendant's Answer at R Vol. I pages 18-19, Defendant's Objection to Plaintiffs' Post-Trial Motions for Additur, Interest, Costs and Attorney's Fees filed July 7, 2010 at R Vol. II, p. 362; and the entire case file, since this claim was not ever made by the defendant.

Idaho Rule of Civil Procedure 8(c) provides that a party must assert all affirmative defenses in their answer. The failure to raise this defense may be considered a waiver of that claim or defense. *See McKee Brothers Ltd. v. Mesa Equipment, Inc.*, 102 Idaho 202, 202-203, 628 P.2d 1036 (1981).

Moreover, the failure to make an objection or raise the claim that the complaint failed to comply with § 12-120(4), in response to the plaintiffs' motion for costs and attorney's fees, should be construed as a waiver of that claim as well. *See Conner v. Dake*, 103 Idaho 761, 653 P.2d 1173 (1982), failure to object as a waiver of right to contest an award of attorney's fees.

The defendant understood that there would be a claim under Idaho Code § 12-120(4), since the complaint is plain and unambiguous. The defendant waived any claim or defense to the contrary by her failure to object and raise this defense in their answer or subsequent pleadings.

Second, the Court should recall that the statute at Idaho Code § 12-120(4), only states that, "If the plaintiff includes in the complaint filed to commence the action, or in evidence offered at trial, a different alleged injury or **a significant new item of damage** not set forth in the statement of claim, the plaintiff shall be deemed to have waived any entitlement to attorney's fees under this section." (Emphasis added). The statute, on its face, does not preclude filing a complaint with a prayer in excess of $25,000.00, *just a different alleged injury or a significant new item of damages*. There was no significant new item of damage since the IME of the plaintiffs by Dr. Simon had not taken place, and the prayer is the same as the demand letter.

Further, the statute requires a *good faith estimate of future medical bills*. There is no way a plaintiff can know the exact

amount of their future medical treatment and bills if their treatment is not complete and they have not fully recovered.

It is important to note that the complaint did not include or allege a different injury or a significant new item of damages not set forth in the statement of claim. The amount prayed for in the complaint does not even have to be stated, as it was in this case, to be less than $25,000.00.

The Idaho Supreme Court rejected a substantially similar claim that the amount of damages prayed for barred an attorney's fees claim under Idaho Code § 12-120(4) in *Cox v. Mulligan*, 142 Idaho 356, 128 P.3d 893 (2005). This court held that a plaintiff was not even required to plead for damages under $25,000.00, where the plaintiff made a written demand that complied with Idaho Code § 12-120(4), and the amount awarded by the jury is less than $25,000.00. The Court noted that a complaint, like the in this case, that requested damages of $25,000.00 or less, would comply with the statute. The Court reasoned, at 142 Idaho 358, as follows:

> The Defendants argue that the pleading requirement of subsection (1) is essential to put defendants on notice that the plaintiff is seeking attorney's fees. We disagree. Under subsection (1), the complaint would include an allegation that the damages sought do not exceed $25,000.00. Under subsection (4), the statement of claim would include an itemized list of damages that did not exceed $25,000.00. The allegation in the complaint required by subsection (1) would not provide any greater notice than the allegations in the statement of claim served under subsection (4).

Finally, the plaintiffs moved to amend their complaint under Idaho Rule of Civil Procedure 15(b) to conform to the evidence,

since the amount awarded by the jury was under $25,000.00. R Vol. III, p. 495-496. This motion was denied by the District Court, but should have been granted to cure any alleged ambiguity in the complaint as to the amount claimed.

Idaho Rule of Civil Procedure 15(b) states as follows:

> **Rule 15(b). Amendments to conform to the evidence.**
> When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such **amendment of the pleadings as may be necessary** to cause them to conform to the evidence and to raise these issues may be made upon motion of any party **at any time, even after judgment;** but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the **pleadings to be amended and shall do so freely** when the presentation of the merits of the action will be subserved thereby **and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party** in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. (Emphasis supplied).

Therefore, this Court has ruled that unless surprise or unfair prejudice is shown, the amount of a claim may be amended to conform to the proof, even during or after a trial on the merits. *See Resource Engineering Inc. v. Nancy Lee Mines, Inc.*, 110 Idaho 136, 137, 714 P.2d 526 (Ct. App. 1985).

Thus, where no facts had been presented to show any specific unfair advantage and the defendant was informed in the plaintiffs' first pleading, and had been on notice throughout the litigation, that the plaintiff sought to claim foreclosure of a lien for whatever amount the court might determine, the district court

abused its discretion by refusing to allow a revision of the amount claimed for the pleaded time period. *Resource Engineering Inc. V. Nancy Lee Mines, Inc.*, supra, 110 Idaho at 138.

In conclusion, the complaint was correctly pled with no new or different claims to obtain an award of attorney's fees and costs under Idaho Code § 12-120(4). There was no defense raised in the answer or an objection in any later pleading that it did not do so. The Court should reaffirm the decision in *Cox v. Mulligan*, that the prayer is sufficient if it puts the defendant on notice of the potential claim for fees, but can be filed for more than $25,000.00. Finally, to the extent there is any ambiguity, this Court should grant the plaintiffs' motion to amend the complaint.

D. No Evidence of Any Different or New Item of Damage at Trial.

The Court then finds that there was no **different** alleged injury from that stated in the claim, but the Court "believed" that the plaintiffs "included in their evidence offered at trial a significant **new item of damage** not set forth in their original statement of the claim." *See* Decision on Post-Judgment Motions R Vol. III, p. 486-487; Tr 502, L. 12-17 and 502-503. The plaintiffs strongly disagree factually (as stated above) and legally (as set out below) for the following reasons.

The lead case interpreting this statute is the case of *Johnson v. Sanchez*, supra, 140 Idaho at 667. In this case the plaintiff made a statement of the claim as required by Idaho Code § 12-120(4), waited for 60 days, then sued for damages under $25,000.00.

However, "During the trial, Johnson presented **testimony and argument** to the jury reflecting her damages in an amount greater than the amount demanded in her statement of claim." 140 Idaho 668. Further, "Johnson's statement of the claim submitted damages in the amount of $3,500.00 for future medical bills. However, at trial Johnson presented video-tape deposition testimony of a doctor ... Johnson's future medical bills could cost as little as $15,000.00 but *could reach as high as $100,000.00.*" Id at 669. The jury awarded $21,126.00 in damages, and the court awarded attorney's fees which was affirmed on appeal. This decision is "on all fours" and clearly supports an award of attorney's fees to the plaintiffs in this case.

The *Johnson v. Sanchez* Court began the analysis with the standard of free review in statutory interpretation under the plain meaning rule, at 140 Idaho 669, as follows:

> The interpretation of a statute is **an issue of law over which we exercise free review.** *Zener v. Velde*, 135 Idaho 352, 355, 17 P.3d 296, 299 (Ct. App. 2000). When interpreting a statute, we will **construe the statute as a whole to give effect to the legislative intent.** *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990); *Zener*, 135 Idaho at 355, 17 P.3d at 299. The **plain meaning of a statute will prevail** unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results. *Watkins Family*, 118 Idaho at 540, 797 P.2d at 1388; *Zener*, 135 Idaho at 355, 17 P.3d at 299. (Emphasis supplied).

The Trial Court Judge, who was affirmed on appeal, held that there was no waiver of attorney's fees in this case as follows:

Sanchez raised the issue of whether significant new items of damage were offered at trial in his motion to disallow attorney fees. In addressing the motion, the district court stated:

> Having reviewed the evidence, as well as the statement of claim, it is this Court's determination that [Johnson] did not offer evidence at trial of a different injury or of a significant new item of damage. However, there is no doubt that [Johnson] did submit evidence at trial which would have permitted the jury to award an amount of damages in excess of the amount set forth in the statement of claim. Even if one were to classify such evidence as constituting a "new item of damage," the amount in question was such that it did not constitute a "significant" new item of damage. Based on the foregoing, it is the determination of this Court that [Johnson] did not waive [99 P.3d 623] attorney fees and is, pursuant to the provisions of I.C. § 12-120(4), entitled to the same.

The Appeals Court went on to hold there was no significant new item of damages claimed, at 140 Idaho 670, ss follows :

> No Idaho case law exists construing the phrase "significant new item of damage not set forth in the statement of claim." However, I.C. § 12-120(4)(a) outlines the requirements for a statement of claim, which includes a statement for general damages and certain **"items" of special damages such as medical bills and future lost wages.** Johnson complied with the requirements in I.C. § 12-120(4)(a). **At trial, Johnson did not present evidence of items not listed in the statement of claim, such as property damage.** Johnson only offered evidence with respect to those items already listed in the statement of claim. Nevertheless, Johnson provided evidence of an increased amount of damages. Thus, we must determine whether the offering evidence of different amounts of damages in this case constituted a significant new item of damage.
>
> Idaho Code Section 12-120(4) presumes that the amount of damages may change from the time the statement of claim is drafted to the date of trial. For instance, the statute requires that the plaintiff include a **"good faith estimate" of future medical bills and of future loss of income. It does not require that the plaintiff list the precise amount that will later be presented at trial.** In personal injury cases such as this one, it may

> be years after the statement of claim is submitted before the case reaches trial and the parties present evidence of damages. Even if a plaintiff submits a statement of claim with his or her good faith estimate of damages, at the time of trial the plaintiff may have incurred more damages that were not earlier foreseen and may have a more accurate estimate of the amount of future damages because of intervening developments. **Therefore, although Johnson presented evidence of an increased amount of damages at trial, this does not in itself constitute a waiver of attorney fees**. Having reached this conclusion on the plain meaning of "significant new items of damage not set forth in the statement of claim," we cannot conclude that the district court abused its discretion in its findings. Where a trial court's findings are not clearly erroneous and where the trial court properly identifies and applies the law to the facts, then the trial court's exercise of discretion has not been abused. *Crawford v. Pacific Car & Foundry Co.*, 112 Idaho 820, 822, 736 P.2d 872, 874 (Ct. App. 1987).

The Idaho Supreme Court went even further and rejected a similar defense claim in the case of *Contreras v. Rubley*, supra, 142 Idaho at 573, 576-577. The Court held that even a new property damage claim of $2,500.00 "was not significant enough to constitute a waiver of *Contreras'* right to attorney's fees" under § 12-120(4). The Court found this sum was insignificant when compared to the total claim that was made and was not a factor in the decision made by the defendant's insurer to deny the claim.

The Court in *Contreras v. Rubley* noted there was no prejudice to the defendants from the undisputedly new claim, since the defendants had failed to settle the case and the jury verdict was ultimately under $25,00.00. The Court ruled, at 142 Idaho 577:

> Even though evidence of the property damage was new, it is not significant enough to constitute a waiver of Contreras' right to attorney fees. Contreras' original Statement of Claim to Rubley's insurer on June 18, 2002,

> sought $20,000 in damages. The insurer disclaimed liability for the accident and made no tender to respondents in an attempt to settle the case. *** As Rubley's insurer disclaimed any liability by concluding Siebanthaler was 100% responsible for the accident, it is difficult to see how a lack of awareness of damage to the car played any part in Rubley's insurer's refusal to settle prior to the commencement of the suit. We affirm the district court's award of attorney fees to Contreras made pursuant to I.C. § 12-120(4).

Similarly, the Court in *Harris v. Alessi*, supra, 141 Idaho at 901, 909-910 held that even though one medical bill had not been presented, that a small difference in the claim did not constitute a waiver of costs and attorney's fees. The Court ruled that because the insurance company already knew about all the bills at the time the case was filed and during settlement negotiations, there was substantial compliance with the statute.

7. CONCLUSION

First, it is the items of damage and amount stated in the written demand, and not the amount stated in the complaint, that is the touchstone; *Cox v. Mulligan* (supra). The claims in this case (for past and future estimated medical expenses, lost wages, pain and suffering) were totally identical in the demand letter and complaint, which expressly complied with Idaho Code § 12-120(4).

The defendant's Answer failed to object or raise any affirmative defense to the award of attorney's fees under Idaho Code § 12-120(4), which were all waived under the case law. Rather, the parties stipulated and the Court ordered in the defendant Patrick's bankruptcy that there would be no award in excess of $25,000.00 to each plaintiff under the Allstate policy;

which was the law of the case after that date, really making any opposition to an award of attorney's fees based on the complaint or arguments at trial under Idaho Code § 12-120(4) in this case legally irrelevant and moot.

The defendant then also failed to object to an award of attorney's fees under Idaho Code § 12-120(4) based on the complaint, in all her later post-trial pleadings, motions and oppositions to the plaintiffs' motions. There was a double and even triple waiver of these defenses under the case law.

Second, the plaintiffs' injuries and claims have always been the same and they never made any claim to any DIFFERENT or NEW injury or item of damage. The plaintiffs made claims for back injuries that included damages for past and estimated future medical expenses, lost wages, and pain and suffering.

This is shown from the summary of damages attached to the demand letter and the closing argument made to the jury. There is no new claim made at all, and the claims are in fact virtually identical: past medical bills, future medical bills, lost wages, pain and suffering. The plaintiffs did not offer any evidence of any kind of any new injury or item of damages at trial. There is no place in the record where the plaintiffs presented any evidence of any kind of new injury, like, for example, a foot or arm injury, property damage claim, lost consortium, etc.

The plaintiffs' only adjusted and slightly increased their prior estimated item of damages for future medical bills based

solely on the evidence at trial of the defendant's IME Dr. Simon as to their need for future medical care and events that transpired at the IME. The plaintiffs then presented a closing *argument* that the jury could consider increasing the items of prior damage for future medical care, pain and suffering.

As to Walton, it is true that the *defendant/respondent's* IME doctor prescribed additional future medical care to him, but this was for his same old back injury (not a new injury) to his spine at C5-6. This only slightly increased his estimated future medical care claim by about $1,500.00, which is far less than $2,500.00 discussed in *Contreras v. Rubley*, supra; and increased the argument made to the jury to consider a higher range for future pain and suffering.

As to Bennett, the IME "Patrick's test" was positive, which caused an aggravation of his prior symptoms for which he sought treatment from his chiropractor and used over-the-counter pain medication that caused some relief. This only increased his estimated future medical care claim by about $168.00, which is again far less than $2,500.00 discussed in *Contreras v. Rubley*, supra; and increased the argument made to the jury to consider a higher range for future pain and suffering.

The Court should rule that the testimony and evidence of the defendant/respondent's IME Dr. Simon, including opinions on future necessary medical care, may be introduced by the plaintiffs without waiving attorney's fees under Idaho Code § 12-120, and the cases of

Johnson v. Sanchez, *Contreras v. Rubley*, and *Harris v. Alessi* (supra). Otherwise, the defendant may obtain an IME without fear of an adverse opinion which will never see the light of day, the truth will be suppressed and not known to the jury, plaintiffs will go under-compensated and justice denied to injured Idahoans. The plaintiffs' counsel had an ethical obligation to pursue the case zealously and within the bounds of the law. There was a legitimate dispute as to how much the damages for pain and suffering for the same old injuries the jury should award and the IME was clearly relevant on that issue. The defendant can claim no prejudice from her own IME being put into evidence.

Further, the Court should affirm the old horn book rule that *arguments are not evidence* under IDJI 1.00 and 1.05. In this case the jury was instructed twice that closing arguments are not evidence, at R Vol. II, p. 212 and 213, as follows:

> Just as the opening statements are not evidence, neither are the closing arguments. During the closing arguments, the attorneys will summarize the evidence to help you understand how it relates to the law.
>
> In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and any undisputed or admitted facts. While the arguments and remarks of the attorneys may help you understand the evidence and apply the instructions, what they say is not evidence. If any attorney's argument or remark has no basis in the evidence, you should disregard it.

Moreover, an argument for increased damages is not prohibited by Idaho Code § 12-120(4) either expressly or by implication. The argument that the Court could award an amount in a range of

$7,000.00 to $41,000.00 for pain and suffering for these same old injuries that were already in evidence is not improper. In fact, this is consistent with the case law including, especially the cases of *Contreras v. Rubley* and *Johnson v. Sanchez*.

In the experience of the plaintiffs' counsel, juries rarely award the amount claimed by the plaintiff in closing arguments, and frequently reduce these claims by 50% (one-half). In cases like this, where the defendant is a sympathetic older woman and the jury is not informed there is any insurance, the jury's award for damages would be expected to be reduced by the jury, and was significantly reduced in this case.

There has never been a case that holds that a "significant difference" in amounts asked for in oral argument (for the same old injuries) amounts to a "significant new item of damage" which would warrant denial of attorney's fees. This holding is totally contrary to the express language of the statute, and all the case law interpreting it. The Court should re-affirm the rule that "argument" is not "evidence", and plaintiffs' counsel may argue from the same old existing evidence, the jury may award damages in excess of $25,000 without waiving the right to claim attorney's fee under the other cases cited above since there is no different alleged injury or a significant new item of damage in evidence.

Moreover, even if this were a decision that was left to the discretion of the District Court, the denial of attorney's fees under the circumstances of this case would be a clear abuse of

discretion. The jury clearly intended that the plaintiffs receive the entire amount of their verdict, without a reduction for any kind of Court costs or attorney's fees. If the Court fails to grant attorney's fees, the plaintiffs will not have the benefit of their bargain and their contract agreed in the stipulation that the defendant pay their past medical bills.

The policy behind the statute is clearly to encourage defendants to make reasonable settlement offers before the case is even filed. The court's decision does not encourage the defendants to settle, but instead rewards them for making inadequate initial offers, contesting liability through summary judgment, continuing to make inadequate offers of judgment, and forcing cases to trial; then making totally improper arguments based on worker's compensation insurance, the seat belt defense and the similar air bag defense, and otherwise. The Court's decision did not make the plaintiffs' whole since they had to pay their attorney's fees and costs. If an erroneous and hyper-technical reading of the statute applies, then no attorney will take on these smaller personal injury cases because of the risks involved, and victims will go uncompensated or under-compensated.

There can only be a forced waiver of attorney's fees if: there is *evidence* offered at trial of a significant **new item** of damage not set forth in the statement of the claim. In this case, the claim was for the same injuries and same damages, although the amount of claim for pain and suffering was higher, which is not

only expected to occur, but is expressly allowed by the Court in *Johnson vs. Sanchez* and the other cases, supra.

The intent of the statute seems to be to prevent a plaintiff from making a written demand under § 12-120(4) that intentionally omits a specific item of damages, and then claiming attorney's fees on top of a large award in excess of $25,000.00. This type of "sandbagging" is not present here since there is no claim for any specific new item of damages and the total damages awarded were less than $25,000.00, to both plaintiffs.

In any case, the total amount awarded was less than $25,000.00 for all these same claims (past and future medical expenses, lost wages, and pain and suffering). The amounts awarded at trial for each item of damage were the same or less than the demand letter to Allstate. The plaintiffs' argument for an additional award of damages (for the same old alleged injuries) was rejected by the jury to a large extent. An excessive verdict may be modified by remittur, which was done here and granted here by the Court. There was no harm or prejudice to the defendant from the plaintiffs' claim at trial, and the intent of the legislature is that they should get their fees.

Finally, there was a Bankruptcy Court stipulation and order that there would be no award in excess of $25,000.00 to each plaintiff under the Allstate policy. This was the law of the case after that date really making the rest of the defendant's claims of any opposition to an award of attorney's fees based on the

arguments at trial under Idaho Code § 12-120(4) in this case irrelevant and moot.

WHEREFORE, the appellants/plaintiffs Bennett and Walton request that this Court reverse the decision of the District Court so that the legitimate and valid claims for costs and attorney's fees be awarded to the appellants/plaintiffs.

DATED this 30th day of March, 2011.

Charles Johnson
JOHNSON OLSON CHARTERED
Attorney for Appellants/Plaintiffs

CERTIFICATE OF MAILING

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

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

jsteadman@merrillandmerrill.com
bt@merrillandmerrill.com

on this 30th day of March, 2011.

Licensed Lawyer

JOHNSON OLSON, CHARTERED
P.O. BOX 1725
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USE P.O. BOX FOR MAI
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July 9, 2008

Beulah Geren
Barrett Saito
Allstate Insurance Company
Idaho-E. Washington
P.O. Box 6828
Boise, Idaho 83707-0828

Re: Mathew Bennett and Benjamin Walton v. Nancy Patrick
INSURED: NANCY PATRICK
DATE OF LOSS: October 18, 2007
CLAIM NO: 0105166771

Dear Ms. Geren and Ms. Saito:

This acknowledges my prior letter to you dated May 8, 2008 (copy enclosed) regarding the case of Mathew R. Bennett and Benjamin L. Walton v. Nancy Patrick. This letter is written to update and supplement that letter with the following information. You have admitted your client is totally at fault and we propose to settle the case in full with Allstate and not pursue claims against the road construction companies who probably have no fault.

First, Mathew Bennett and Benjamin Walton have basically completed their treatment and substantially recovered from the injuries they suffered from the motor vehicle collision in this case. They continue to have some minor residual pain and suffering but have now completed their chiropractic treatment with Dr. Henry West.

Second, I am enclosing an Exhibit List including all the medical records for Mathew Bennett and Benjamin Walton in this case. There are no other medical records on treatment of these individuals that we know of at this time.

Third, I am enclosing a list of the medical providers, medical bills, and damages summaries for these individuals. This includes the full amount of their wage loss to date.

Benjamin Walton was seen at the emergency room immediately after the motor vehicle collision. He had severe neck pain and complained of being nauseated. Benjamin 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. The x-rays at the hospital showed a mild straightening of the lumbar spine associated with muscle spasm.

Ben Walton was then seen by Dr. Richard Maynard for pain and stiffness in his lower back. He missed work for about one week, causing losses of $1,000.00 to $1,200.00. He was treated conservatively with pain relievers and then chiropractic treatm
from Dr. Henry

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.

The cervical spine MRI shows minor posterior broad-based disc bulges at C4-5 and C5-6 and cervical disc syndrome 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.

However, Benjamin 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.

Mathew Bennett was seen at the emergency room immediately after the motor vehicle collision. He complained of moderate neck and back pain with stiffness and chest pain. He was diagnosed with acute and chronic musculoskeletal low back pain from the motor vehicle collision. He was given medications, including Flexoral, and Vicodin. Dr. Evan Holmstead saw Mathew Bennett on October 30, 2007 for his complaints of low back pain from the motor vehicle collision. He has limited range of motion with a finding of objective paraspinous muscle spasm. He was given a release from work from Evan Holmstead, M.D., (marked as Exhibit 53). He then received physical therapy at Portneuf Physical Therapy for about three weeks. He attempted to work but his back pain flared up during this process. He improved slowly and had some progress from this treatment, but still had returning flare ups in his pain.

On November 20, 2007 Mathew Bennett was again seen at the emergency room for low back pain. He was apparently unable to work for about another week after this flare up in his symptoms. The 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.

Mathew Bennett then sought further chiropractic treatment from Dr. Henry West 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.

In my opinion, a reasonable Bannock County jury would find no negligence on the part of Benjamin Walton and find Nancy Patrick totally at fault. However, if this claim is not resolved with your organization then Mathew Bennett and Benjamin Walton reserve the right to join any other parties that are or may be responsible in this case.

Finally, I have summarized Mathew Bennett and Benjamin Walton's medical bills, pain and suffering and lost wages on the enclosed damages summaries. A reasonable Bannock County jury would probably award reasonable compensation and damages to Mathew Bennett in the amount of at least $20,000.00, and Benjamin Walton in the amount of at least $23,000.00.

Therefore, these claimants would be willing to settle this case for a payment to them in these amounts, if accepted within the next sixty (60) days. If this offer is not accepted then Mathew Bennett and Benjamin Walton reserve the right to file a lawsuit for recovery of their damages, lost wages, costs, expenses and attorney's fees pursuant to Idaho Code § 12-120(4).

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

Sincerely,

Charles Johnson

CJ/nv
Enclosure

c: Clients

MATTHEW R. BENNETT DAMAGES SUMMARY	
MEDICAL BILLS	
Portneuf Medical Center 10/18/08	$291.00
Portneuf Medical Center 11/20/08	$631.84
Portneuf Medical Center Physical Therapy 11/26/08 through 11/27/07	$316.00
Portneuf Medical Center Physical Therapy 12/06/07	$116.00
Mountain View Family Medicine (Dr. Evan Holmstead) 10/30/07 and 11/29/07	$191.60
West Chiropractic (Dr. Henry West)	$310.00
Shopko Pharmacy Prescriptions 10/18/07 through 04/21/08	$81.27
TOTAL MEDICAL	**$1,937.71**
Future Medical Bills; estimated to be $20.00 a month for pain medication for rest of life expectancy plus future medical care as necessary	$2,500.00
LOST WAGES	
Lost Wages of $26.00; an hour, for the date accident for two and a half weeks at eight hours a day	$2,600.00
PAIN AND SUFFERING	
Pain and Suffering (estimated three times bills)	$13,500.00
TOTAL	**$20,600.00**

BENJAMIN L. WALTON DAMAGES SUMMARY	
MEDICAL BILLS	
Portneuf Medical Center 10/18/07	$917.00
Primary Care Specialists (Dr. Richard Maynard) 10/26/07 and 11/09/07	$202.42
West Chiropractic 11/21/07 through 05/07/08	$703.00
Idaho Medical Imaging 02/19/08 (MRI)	$1,170.50
TOTAL MEDICAL	**$2,992.92**
Future Medical Bills; estimated to be $20.00 a month for pain medication for rest of life expectancy plus future medical care as necessary	$2,500.00
LOST WAGES	
Lost Wages for one week from the date accident	$1,200.00
PAIN AND SUFFERING	
Pain and Suffering (estimated three times medical bills)	$16,500.00
TOTAL	**$23,200.00**

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Attorney for Plaintiffs

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 BENJAMIN L. WALTON,	Case No. CV 08 4538 PI
Plaintiffs,	Filing Fee Category A1 $88.00
vs.	**VERIFIED COMPLAINT FOR PERSONAL INJURY DAMAGES IN AUTOMOBILE COLLISION AND DEMAND FOR JURY TRIAL**
NANCY PATRICK,	
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.

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 inter-sigmental 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