

4-13-2011

# Bennett v. Patrick Augmentation Record Dckt. 38138

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# In the Supreme Court of the State of Idaho

LAW CLERK

MATTHEW R. BENNETT and BENJAMIN  
L. WALTON,

Plaintiffs-Appellants,

v.

NANCY PATRICK,

Defendant-Respondent.

ORDER GRANTING MOTION TO  
AUGMENT THE RECORD ON APPEAL

Supreme Court Docket No. 38138-2010  
Bannock County Docket No. 2008-4528

A MOTION TO AUGMENT THE RECORD ON APPEAL was filed by counsel for Appellants on March 31, 2011. Therefore, good cause appearing,

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

1. Motion to Alter and Amend Judgment and for Additur; and Motion for Pre-Judgment Interest, with attachments, file-stamped June 18, 2010;
2. Brief in Support of Motions for Additur, Increased Damages, and Pre-Judgment Interest, dated June 18, 2010; and
3. Memorandum & Brief in Support of Motion for Costs and Attorney's Fees to Plaintiffs Bennett & Walton, file-stamped June 18, 2010.

DATED this 13<sup>th</sup> day of April 2011.

For the Supreme Court



Stephen W. Kenyon, Clerk

cc: Counsel of Record

## AUGMENTATION RECORD

ORDER GRANTING MOTION TO AUGMENT THE RECORD ON APPEAL – Docket No.  
38138-2010

# In the Supreme Court of the State of Idaho

MATTHEW R. BENNETT and BENJAMIN  
L. WALTON,

Plaintiffs-Appellants,

v.

NANCY PATRICK,

Defendant-Respondent.

ORDER GRANTING MOTION TO  
AUGMENT THE RECORD ON APPEAL

Supreme Court Docket No. 38138-2010  
Bannock County Docket No. 2008-4528

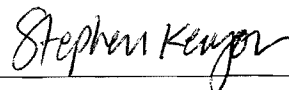
A MOTION TO AUGMENT THE RECORD ON APPEAL was filed by counsel for Appellants on March 31, 2011. Therefore, good cause appearing,

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

1. Motion to Alter and Amend Judgment and for Additur; and Motion for Pre-Judgment Interest, with attachments, file-stamped June 18, 2010;
2. Brief in Support of Motions for Additur, Increased Damages, and Pre-Judgment Interest, dated June 18, 2010; and
3. Memorandum & Brief in Support of Motion for Costs and Attorney's Fees to Plaintiffs Bennett & Walton, file-stamped June 18, 2010.

DATED this 13<sup>th</sup> day of April 2011.

For the Supreme Court



Stephen W. Kenyon, Clerk

cc: Counsel of Record

Charles Johnson  
**JOHNSON OLSON CHARTERED**  
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 Facsimile: (208) 232-9161  
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 E-Mail: [cjlaw@cableone.net](mailto:cjlaw@cableone.net)  
 Attorney for Plaintiffs

6-18-10

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,	)	<b>MOTION TO ALTER AND AMEND JUDGMENT</b>
	)	<b>AND FOR ADDITUR; AND MOTION FOR</b>
vs.	)	<b>PRE-JUDGMENT INTEREST</b>
	)	
NANCY PATRICK,	)	
	)	
Defendant.	)	
_____	)	

The plaintiffs, Mathew R. Bennett and Benjamin L. Walton, through counsel of record, hereby file this motion to alter or amend the judgment on the verdict, motion for additurs, and motion for pre-judgment interest on the stipulated past medical bills, on the Judgment on the Verdict in this case dated June 7, 2010. These motions are filed pursuant to Idaho Rules of Civil Procedure 59, 59.1 and 60, Idaho Code § 28-22-104 and otherwise under the legal and equitable powers of the Court. This motion is also based on the attached brief summarizing the proceedings at the trial and the basis for these motions. The relief requested in these motions is as follows:

1. The Court award Mat Bennett costs for his future medical care in the amount of \$1,000.00 based on the testimony of Dr. Henry

**EXHIBIT**  
 A

West as to his need for future chiropractic care, and the testimony of both Dr. Henry West and Dr. David Simon as to his future non-prescription pain medications are reasonably required for him.

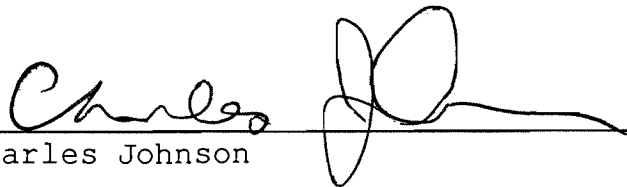
2. The Court award double the amount that the jury awarded for pain and suffering to both the plaintiffs Benjamin Walton and Mat Bennett. The amounts awarded for pain and suffering in this case were unreasonably small and less than the stipulated past medical expenses for Mathew Bennett, and only the amount of both the stipulated past and other medical expenses to be awarded to Ben Walton. The award of these sums for pain and suffering is unreasonable and against the weight of the evidence and appears to have been prompted by the defendant's statements that worker's compensation insurance existed or was somehow an issue in this case, speculation by the jury as to seat belts and air bags from the defendant's closing argument, or other factors. This resulted in an unusually small award for pain and suffering, especially for Mathew Bennett.

3. The plaintiffs' past medical expenses were stipulated and undisputedly due at law and under an express contract, such that pre-judgment interest is allowed and required on these stipulated past medical expenses under Idaho Code § 28-22-104. The amount due for such pre-judgment interest for the plaintiffs has been calculated from the time the medical bills were incurred through the date of the judgment on the verdict of June 7, 2010 as set out in the legal math computations attached as Exhibits A and B, and are follows:

Matthew Bennett pre-judgment interest of \$530.15; and  
Benjamin Walton pre-judgment interest of \$851.01.

WHEREFORE, the Court should alter and amend the judgment on the verdict in this case to award Matthew 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 both plaintiffs, and award pre-judgment interest on the stipulated past medical expenses from the date that they were incurred pursuant to the calculations that are attached to this motion and as set out above.

DATED this 18<sup>th</sup> day of June 2010.

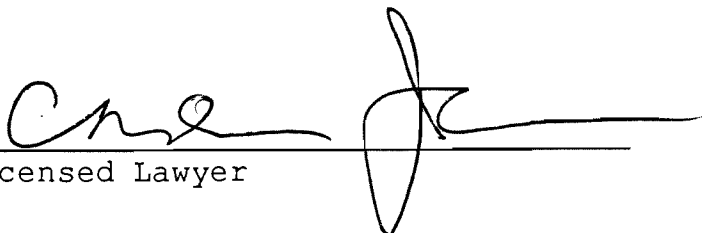
  
\_\_\_\_\_  
Charles Johnson

**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:

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

on this 18<sup>th</sup> day of June 2010.

  
\_\_\_\_\_  
Licensed Lawyer

**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 12/20/07 (Exhibit 71)	\$22.03
<b>TOTAL MEDICAL BILLS THROUGH MAY 2008</b>	<b>\$1,878.47</b>
West Chiropractic (Dr. Henry West) 02/05/10 through 02/08/10 (Exhibit 69) *Subsequent Treatment	\$168.00
<b>TOTAL MEDICAL BILLS THROUGH FEBRUARY 2010</b>	<b>\$2,046.47</b>

**EXHIBIT**  
150-A  
(Amended)

Schedule of Payments

June 9, 2010

Page: 1

Bennett, Mat  
Portneuf Exhibit No. 11

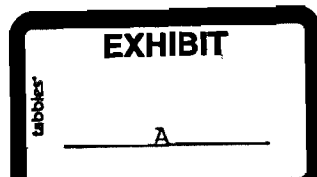
Simple Interest starting at: 12%

Payments are being applied: first to unpaid accrued interest, then to unpaid principal balance

Prepared using software licensed to Johnson Olson

Date	Amount due or payment received	# of days	Interest rate from this date forward	Interest earned since prior transaction	Total accrued interest	Portion of payment applied to interest	Transaction's effect (+ or -) upon principal balance	Principal balance
Dec 18, 2007	291.00	0	12	.00	.00		291.00	291.00
Jun 01, 2008	.00	166	12	15.88	15.88		.00	291.00
Jun 07, 2010	.00	736	12	70.41	86.29		.00	291.00
Total of Payments:				.00				
Total Interest Earned:				86.29			Principal Balance:	291.00
Amount Applied to Interest:				.00			Unpaid Accrued Interest:	86.29
Amount Applied to Principal:				.00			Total Amount Due:	= 377.29

86.29 +  
186.33 +  
92.98 +  
32.42 +  
55.49 +  
76.64 +  
530.15 \*





Schedule of Payments

June 9, 2010

Page: 1

Bennett, Mat  
 Portneuf Exhibit No. 27

Simple Interest starting at: 12%

Payments are being applied: first to unpaid accrued interest, then to unpaid principal balance

Prepared using software licensed to Johnson Olson

Date	Amount due or payment received	# of days	Interest rate from this date forward	Interest earned since prior transaction	Total accrued interest	Portion of payment applied to interest	Transaction's effect (+ or -) upon principal balance	Principal balance
Dec 23, 2007	631.84	0	12	.00	.00		631.84	631.84
Jun 01, 2008	.00	161	12	33.44	33.44		.00	631.84
Jun 07, 2010	.00	736	12	152.89	186.33		.00	631.84
Total of Payments:				.00				
Total Interest Earned:				186.33				
Amount Applied to Interest:				.00				
Amount Applied to Principal:				.00				
						Principal Balance:	631.84	
						Unpaid Accrued Interest:	186.33	
						Total Amount Due:	= 818.17	

Schedule of Payments

June 9, 2010

Page: 1

Bennett, Mat  
Portneuf Exhibit No. 39

Simple Interest starting at: 12%

Payments are being applied: first to unpaid accrued interest, then to unpaid principal balance

Prepared using software licensed to Johnson Olson

Date	Amount due or payment received	# of days	Interest rate from this date forward	Interest earned since prior transaction	Total accrued interest	Portion of payment applied to interest	Transaction's effect (+ or -) upon principal balance	Principal balance
Dec 25, 2007	316.00	0	12	.00	.00		316.00	316.00
Jun 01, 2008	.00	159	12	16.52	16.52		.00	316.00
Jun 07, 2010	.00	736	12	76.46	92.98		.00	316.00
Total of Payments:				.00				
Total Interest Earned:				92.98				
Amount Applied to Interest:				.00		Principal Balance:		316.00
Amount Applied to Principal:				.00		Unpaid Accrued Interest:		92.98
						Total Amount Due:		= 408.98

Schedule of Payments

June 9, 2010

Page: 1

Bennett, Mat  
Portneuf Exhibit No. 41

Simple Interest starting at: 12%

Payments are being applied: first to unpaid accrued interest, then to unpaid principal balance

Prepared using software licensed to Johnson Olson

Date	Amount due or payment received	# of days	Interest rate from this date forward	Interest earned since prior transaction	Total accrued interest	Portion of payment applied to interest	Transaction's effect (+ or -) upon principal balance	Principal balance
Feb 08, 2008	116.00	0	12	.00	.00		116.00	116.00
Jun 01, 2008	.00	114	12	4.35	4.35		.00	116.00
Jun 07, 2010	.00	736	12	28.07	32.42		.00	116.00
Total of Payments:				.00				
Total Interest Earned:				32.42				
Amount Applied to Interest:				.00				
Amount Applied to Principal:				.00				
						Principal Balance:		116.00
						Unpaid Accrued Interest:		32.42
						Total Amount Due:		= 148.42

Schedule of Payments

June 9, 2010

Page: 1

Bennett, Mat  
Holmstead Exhibit No. 55

Simple Interest starting at: 12%

Payments are being applied: first to unpaid accrued interest, then to unpaid principal balance

Prepared using software licensed to Johnson Olson

Date	Amount due or payment received	# of days	Interest rate from this date forward	Interest earned since prior transaction	Total accrued interest	Portion of payment applied to interest	Transaction's effect (+ or -) upon principal balance	Principal balance
Jan 08, 2008	191.60	0	12	.00	.00		191.60	191.60
Jun 01, 2008	.00	145	12	9.13	9.13		.00	191.60
Jun 07, 2010	.00	736	12	46.36	55.49		.00	191.60
Total of Payments:				.00				
Total Interest Earned:				55.49			Principal Balance:	191.60
Amount Applied to Interest:				.00			Unpaid Accrued Interest:	55.49
Amount Applied to Principal:				.00			Total Amount Due:	= 247.09

Schedule of Payments

June 9, 2010

Page: 1

Bennett, Mat

West Chiropractic Exhibit No. 66

Simple Interest starting at: 12%

Payments are being applied: first to unpaid accrued interest, then to unpaid principal balance

Prepared using software licensed to Johnson Olson

Date	Amount due or payment received	# of days	Interest rate from this date forward	Interest earned since prior transaction	Total accrued interest	Portion of payment applied to interest	Transaction's effect (+ or -) upon principal balance	Principal balance
May 16, 2008	310.00	0	12	.00	.00		310.00	310.00
Jun 01, 2008	.00	16	12	1.63	1.63		.00	310.00
Jun 07, 2010	.00	736	12	75.01	76.64		.00	310.00
Total of Payments:				.00				
Total Interest Earned:				76.64		Principal Balance:		310.00
Amount Applied to Interest:				.00		Unpaid Accrued Interest:		76.64
Amount Applied to Principal:				.00		Total Amount Due:		= 386.64

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
<b>TOTAL MEDICAL BILLS</b>	<b>\$3,030.92</b>

EXHIBIT

Schedule of Payments

June 9, 2010

Page: 1

Walton, Benjamin  
Portneuf Exhibit No. 90

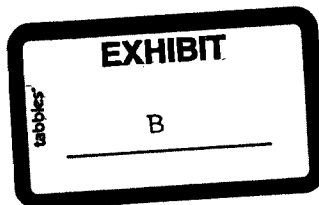
Simple Interest starting at: 12%

Payments are being applied: first to unpaid accrued interest, then to unpaid principal balance

Prepared using software licensed to Johnson Olson

Date	Amount due or payment received	# of days	Interest rate from this date forward	Interest earned since prior transaction	Total accrued interest	Portion of payment applied to interest	Transaction's effect (+ or -) upon principal balance	Principal balance
Nov 18, 2007	917.00	0	12	.00	.00		917.00	917.00
Jun 01, 2008	.00	196	12	59.09	59.09		.00	917.00
Jun 07, 2010	.00	736	12	221.89	280.98		.00	917.00
Total of Payments:				.00				
Total Interest Earned:				280.98			Principal Balance:	917.00
Amount Applied to Interest:				.00		Unpaid Accrued Interest:		280.98
Amount Applied to Principal:				.00		Total Amount Due:		= 1,197.98

280.98 +  
54.84 +  
191.84 +  
311.71 +  
11.64 +  
851.01 \*



Schedule of Payments

June 9, 2010

Page: 1

Walton, Benjamin  
 Maynard Exhibit No. 104

Simple Interest starting at: 12%

Payments are being applied: first to unpaid accrued interest, then to unpaid principal balance

Prepared using software licensed to Johnson Olson

Date	Amount due or payment received	# of days	Interest rate from this date forward	Interest earned since prior transaction	Total accrued interest	Portion of payment applied to interest	Transaction's effect (+ or -) upon principal balance	Principal balance
Mar 05, 2008	202.42	0	12	.00	.00		202.42	202.42
Jun 01, 2008	.00	88	12	5.86	5.86		.00	202.42
Jun 07, 2010	.00	736	12	48.98	54.84		.00	202.42
Total of Payments:				.00				
Total Interest Earned:				54.84			Principal Balance:	202.42
Amount Applied to Interest:				.00			Unpaid Accrued Interest:	54.84
Amount Applied to Principal:				.00			Total Amount Due:	= 257.26



Schedule of Payments

June 9, 2010

Page: 1

Walton, Benjamin  
West Exhibit No. 123-124

Simple Interest starting at: 12%

Payments are being applied: first to unpaid accrued interest, then to unpaid principal balance

Prepared using software licensed to Johnson Olson

Date	Amount due or payment received	# of days	Interest rate from this date forward	Interest earned since prior transaction	Total accrued interest	Portion of payment applied to interest	Transaction's effect (+ or -) upon principal balance	Principal balance
Feb 28, 2008	703.00	0	12	.00	.00		703.00	703.00
Jun 01, 2008	.00	94	12	21.73	21.73		.00	703.00
Jun 07, 2010	.00	736	12	170.11	191.84		.00	703.00
Total of Payments:				.00				
Total Interest Earned:				191.84			Principal Balance:	703.00
Amount Applied to Interest:				.00		Unpaid Accrued Interest:		191.84
Amount Applied to Principal:				.00		Total Amount Due:		= 894.84

Schedule of Payments

June 9, 2010

Page: 1

Walton, Benjamin

Idaho Medical Imaging Exhibit No. 133

Simple Interest starting at: 12%

Payments are being applied: first to unpaid accrued interest, then to unpaid principal balance

Prepared using software licensed to Johnson Olson

Date	Amount due or payment received	# of days	Interest rate from this date forward	Interest earned since prior transaction	Total accrued interest	Portion of payment applied to interest	Transaction's effect (+ or -) upon principal balance	Principal balance
Mar 19, 2008	1,170.50	0	12	.00	.00		1,170.50	1,170.50
Jun 01, 2008	.00	74	12	28.48	28.48		.00	1,170.50
Jun 07, 2010	.00	736	12	283.23	311.71		.00	1,170.50
Total of Payments:				.00				
Total Interest Earned:				311.71		Principal Balance:		1,170.50
Amount Applied to Interest:				.00		Unpaid Accrued Interest:		311.71
Amount Applied to Principal:				.00		Total Amount Due:		= 1,482.21

Schedule of Payments

June 9, 2010

Page: 1

Walton, Benjamin

Radiology Physicians Exhibit No. 91

Simple Interest starting at: 12%

Payments are being applied: first to unpaid accrued interest, then to unpaid principal balance

Prepared using software licensed to Johnson Olson

Date	Amount due or payment received	# of days	Interest rate from this date forward	Interest earned since prior transaction	Total accrued interest	Portion of payment applied to interest	Transaction's effect (+ or -) upon principal balance	Principal balance
Nov 18, 2007	38.00	0	12	.00	.00		38.00	38.00
Jun 01, 2008	.00	196	12	2.45	2.45		.00	38.00
Jun 07, 2010	.00	736	12	9.19	11.64		.00	38.00
Total of Payments:				.00				
Total Interest Earned:				11.64			Principal Balance:	38.00
Amount Applied to Interest:				.00			Unpaid Accrued Interest:	11.64
Amount Applied to Principal:				.00			Total Amount Due:	= 49.64

Charles Johnson  
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 Facsimile: (208) 232-9161  
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 E-Mail: [cjlaw@cablone.net](mailto:cjlaw@cablone.net)  
 Attorney for Plaintiffs

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,	)	
	)	<b>BRIEF IN SUPPORT OF MOTIONS FOR</b>
Plaintiffs,	)	<b>ADDITUR, INCREASED DAMAGES,</b>
	)	<b>AND PRE-JUDGMENT INTEREST</b>
vs.	)	
	)	
NANCY PATRICK,	)	
	)	
Defendant.	)	
_____	)	

The plaintiffs, Mathew R. Bennett and Benjamin L. Walton, through counsel of record, hereby file this brief in support of their motions to alter or amend the judgment on the verdict in this case dated June 7, 2010, motions for additurs, and motions for pre-judgment interest on the plaintiffs' stipulated past medical bills. The plaintiffs would show the Court as follows.

**A. PROCEEDINGS AT THE TRIAL**

The defendant admitted liability after a first summary judgment motion prior to trial, but then claimed this was a minor impact (but had no real proof or expert testimony to support this claim). The defendant stipulated and admitted to the plaintiffs' prior medical expenses, based on an IME conducted by Dr. David Simon, who also admitted causation and the need for the plaintiffs' future treatment.



The defendant tried to cross examine the plaintiffs on worker's compensation insurance, which was not present and did not apply, but even if it did exist it should not have been mentioned at all. The plaintiffs moved for a mis-trial which was denied and the jury was instructed to disregard this comment.

The jury denied all future medical care for the plaintiff Bennett. However, the undisputed testimony from both parties' experts was that over the counter non-prescription pain medications and some chiropractic care was appropriate and medically necessary for him in the future.

The defendant cross-examined some witnesses on seat belt use. The plaintiffs objected and the Court did give the jury the plaintiff's requested no seat belt defense jury instruction.

In their closing argument, the defendant then claimed the airbags did not even deploy. The plaintiffs objected (which the plaintiffs' counsel hates to do in a closing) since no witness had even mentioned the word "airbag" at any time in the trial, airbags do not deploy in side impact crashes, this would not have reduced their injuries, airbags are not even in the plaintiff's vehicle, etc.; the Judge over-ruled this objection and would not give a "seat belt defense like" limiting instruction.

The defendant then claimed in closing that the plaintiffs had perhaps not been forthcoming with all their prior medical records on prior back treatment. The plaintiffs pointed out the they had all records, releases to obtain records, and showed the jury a

stack of records (not admitted into evidence); the defendant objected to the plaintiffs doing so, and the Judge sustained the objection. This was an error that prejudiced the plaintiffs.

The jury asked for a calculator. The Judge refused. The jury awarded minimal pain and suffering using the defendant's "off the cuff" high end estimate, rather than the plaintiffs' "well reasoned" per-diem argument for which a calculator would have assisted the jury to compute.

#### **B. IDAHO RULES OF CIVIL PROCEDURE 59 AND 60**

Idaho Rules of Civil Procedure 59, 59.1 and 60 provide that the Court has the power to alter or amend a judgment or allow a new trial. The grounds for an amendment of a judgment under Idaho Rule of Civil Procedure 59(a) include, in pertinent part:

##### **Rule 59(a). New trial - Amendment of judgment - Grounds.**

A new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons:

1. Irregularity in the proceedings of the court, jury or adverse party or any other of the court or abuse of discretion by which either party was prevented from having a fair trial. \*\*\*

5. Excessive damages or inadequate damages, appearing to have been given under the influence of passion or prejudice.

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law.

Idaho Rule of Civil Procedure 59.1(a) provides that an additurs or remittiturs in lieu of a new trial.

##### **Rule 59.1. Additurs or remittiturs in lieu of new trial.**

(a) **Acceptance or rejection.** If a trial court

conditionally grants or denies a new trial subject to either an additur or remittitur, the party to whom it is directed shall have 42 days from entry of the order in which to accept or reject the same. If such party file a notice of an appeal, the appeal shall not constitute an acceptance nor rejection of the additur or remittitur and such party shall not be required to accept or reject the additur or remittitur until the determination of the appeal.

If the trial judge determines that the damages awarded differ substantially from a reasonable calculation and the difference can be only explained by unfair behavior, or what the law calls passion or prejudice on the part of the jury against one or more of the parties, then the judge should alter or amend the judgment to correct the amount due or award a new trial. *Quick v. Crane*, 111 Idaho 759, 769-770, 727 P.2d 1187 (1986).

This case is in many ways similar to *Collins v. Jones*, 131 Idaho 556, 558-559, 961 P.2d 647 (1998). The District Court in the *Collins* case granted an additur for lost wages, pain and suffering on a small verdict in a low impact case. The Court of Appeals affirmed and held the trial court determination that there was a substantial disparity between the verdict and what was required in fairness and equity which appeared at trial, which had been adequately explained by the judge.

The Court of Appeals reached a similar conclusion in the case of *Leavitt V. Swain*, 131 Idaho 765, 963 Idaho 1202 (1998). The court of appeals reversed a district judge and held that a jury verdict finding comparative fault could not be supported by the evidence and should have granted an additur for increased damages.

The court held that the judge is required to make an independent assessment of damages and compare it with the jury verdict.

The Court of Appeals was also critical of defense counsel's closing arguments that attacked the plaintiff's credibility and invited speculation on insurance. These same arguments were made here by defense counsel on the worker's compensation insurance, the alleged failure of the plaintiffs to produce their medical records of prior back problems (which simply do not exist), and the seat belt and air bag arguments. The denial of a calculator for use by the jury also unfairly prejudiced the plaintiffs since the jury could not compute their damages.

Idaho Rule of Civil Procedure 60(b) provides that the Court may relieve a party from a final judgment based on mistake and inadvertent surprise or excusable neglect or (3) misconduct by an adverse party. This rule provides additional basis for relief from the final judgment by increasing the plaintiff's damage awards.

In this case the small additur is required in the interests of justice. The unfair behavior, passion and prejudice against the plaintiffs must be remedied by the Court. There is a substantial disparity between the verdict and what was required in fairness and equity which appeared at trial, as set out above. An additur for the plaintiffs, especially for the plaintiff Bennett, is required here. See also *Schaffer v. Ready*, 134 Idaho 378, 3 P.3d 56 (2000), similar conclusion based on mention of liability insurance.



### C. PRE-JUDGMENT INTEREST

Idaho Code § 28-22-104 provides for the legal rate of interest of 12% on money due by a just contract and money after the same becomes due. Idaho Code § 28-22-104(1) and (2) states as follows:

**28-22-104. Legal rate of interest.** - (1) Where there is no express contract in writing fixing a different rate of interest, interest is allowed at the rate of twelve cents (12¢) on the hundred by the year on:

1. Money due by express contract.
2. Money after the same becomes due. \*\*\*
4. Money received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied. \*\*\*

This pre-judgment interest is allowed for the amount claimed as liquidated or may be ascertained by mathematical computation. *United States Fidelity and Guranty Company v. Clover Creek Cattle Company*, 92 Idaho 889, 900, 452 P.2d 993 (1969); *McGill v. Lester*, 108 Idaho 561, 565, 700 P.2d 964 (Ct. App. 1985); *Child v. Blaser*, 111 Idaho 702, 706, 727 P.2d 893 (Ct. App. 1986); numerous other citations omitted.

The Court determined that an insurer is liable for pre-judgment interest on the amount of bills from the date of the accident, because this is when the contractual duty to pay accrues. *Walton v. Hartford Insurance Company*, 120 Idaho 616, 621 818 P.2d 320 (1991) which reversed a denial of pre-judgment interest. Similarly, in *Dyet v. McKinley*, 139 Idaho 526, 531-532, 81 P.3d 1236 (2003), the plaintiff is entitled to pre-judgment interest where the amount recovered is greater than the defendant's

settlement offer under Idaho Code § 28-22-104.

The parties' Stipulated Joint Pre-Trial Memorandum, Special Verdict and Judgment both provided stipulated past medical expenses as follows: Mat Bennett in the amount of \$1,878.47 and Benjamin Walton in the amount of \$3,030.92.

The plaintiffs have attached as Exhibit A the calculation of the pre-judgment interest due on Mathew Bennett's medical bills set out on Exhibit 150-A. The medical provider, amount of original bill, and amount of interest is set out in the table below.

The plaintiffs have attached as Exhibit B the calculation of pre-judgment interest due on Benjamin Walton's medical bills set out on Exhibit 152. The interest is not compounded and is just simple interest at the rate of 12%. The medical provider, amount of original bill, and amount of interest is set out in the table below as follows:

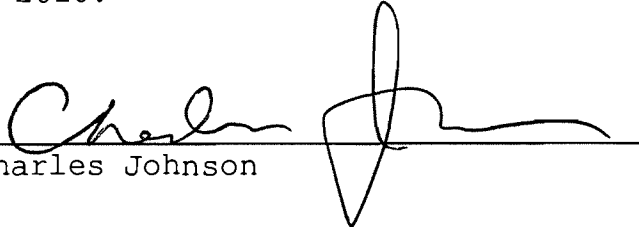
<b>PLAINTIFF MATHEW BENNETT</b>		
<b>MEDICAL PROVIDER</b>	<b>AMOUNT OF ORIGINAL INVOICE</b>	<b>PRE-JUDGMENT INTEREST</b>
Portneuf Medical	\$291.00	\$ 86.29
Portneuf Medical	\$631.84	\$186.33
Portneuf Medical	\$316.00	\$ 92.98
Portneuf Medical	\$116.00	\$ 32.42
Dr. Holmstead	\$191.60	\$ 55.49
West Chiropractic	\$310.00	\$ 76.64
<b>Mat Bennett Total Pre-Judgment Interest</b>		<b>\$530.15</b>

\*\*\*

PLAINTIFF BENJAMIN WALTON		
MEDICAL PROVIDER	AMOUNT OF ORIGINAL INVOICE	PRE-JUDGMENT INTEREST
Portneuf Medical	\$917.00	\$280.98
Dr. Maynard	\$202.42	\$ 54.84
West Chiropractic	\$703.00	\$191.84
Idaho Medical Imaging	\$1,170.50	\$311.71
Radiology Physicians	\$38.00	\$ 11.64
<b>Ben Walton Total Pre-Judgment Interest</b>		<b>\$851.01</b>

WHEREFORE, the Court should award additional damages for the plaintiff Bennett's future medical care and non-prescription medication in the amount of \$1,000.00, award both the plaintiffs' double the amount of the jury verdict for their pain and suffering (especially as to the plaintiff Mathew Bennett), and award pre-judgment interest on both the plaintiffs' past due medical expenses set forth above.

DATED this 18<sup>th</sup> day of June 2010.

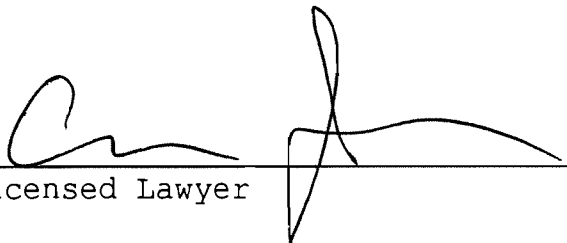
  
Charles Johnson

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:

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

on this 18<sup>th</sup> day of June 2010.

  
\_\_\_\_\_  
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  
 E-Mail: cilaw@cableone.net  
 Attorney for Plaintiffs

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,	)	
	)	<b>MEMORANDUM &amp; BRIEF IN SUPPORT OF</b>
Plaintiffs,	)	<b>MOTION FOR COSTS AND ATTORNEY'S</b>
	)	<b>FEES TO PLAINTIFFS BENNETT &amp; WALTON</b>
vs.	)	
	)	
NANCY PATRICK,	)	
	)	
Defendant.	)	
_____	)	

The plaintiffs, Mathew R. Bennett and Benjamin L. Walton, through counsel of record, hereby file this memorandum and brief in support of their motion for costs and attorney's fees in this case. The facts are as stated in the affidavit in support of the motion for costs and attorney's fees and will not be repeated here.

**A. 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 in pertinent part 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.

In this case, the amount plead in the complaint was less than \$25,000.00. 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 bills, future medical bills, lost income and property damages. A legible copy of all medical bills and other documents was included with the demand.

In this case the plaintiffs' claim did not change significantly between the time of the demand and trial. The claim was virtually the same in all material respects.

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

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

Therefore, under this section, the plaintiffs, and not defendants, are entitled to an award of costs and attorney's fees.

See *Gonzalez v. Thacker*, \_\_\_ Idaho \_\_\_, (January 21, 2009).

## B. IDAHO RULE OF CIVIL PROCEDURE 68(B)

Idaho Rule of Civil Procedure 68(a) provides for an offer of judgment at any time more than 14 days before trial begins. The Idaho Rules of Civil Procedure 68 and 68(b) are copied and attached to this brief since they are so voluminous.

However, anytime more than 14 days before trial begins the parties may make an offer of judgment which "shall be deemed to include all claims recoverable, including any attorney's fees allowable under Rule 54(e)(1), and costs awardable under Rule 54(d)(1) which have accrued up to the date of the offer of judgment." A subsequent offer of judgment is allowed within a reasonable time not less than 14 days prior to a hearing to determine the extent of liability.

Idaho Rule of Civil Procedure 68(b) provides that in cases involving claims for damages the offer of judgment must be compared with the "adjusted award" which is defined by the verdict in addition to the offeree's costs and attorney's fees. Idaho Rule of Civil Procedure 68(b) states as follows:

### **Rule 68. Offer of judgment.**

(b) In cases involving claims for monetary damages, any costs under Rule 54(d)(1) awarded against the offeree must be based upon a comparison of the offer and the "adjusted award." The adjusted award is defined as (1) the verdict in addition to (2) **the offeree's costs under Rule 54(d)(1) incurred before service of the offer of judgment** and (3) **any attorney fees under Rule 54(e)(1) incurred before service of the offer of judgment.**

Provided, in contingent fee cases where attorney fees are awardable under Rule 54(e)(1), the court will pro rate the offeree's attorney fees to determine the amount incurred before the offer of judgment in reaching the adjusted award.

If the adjusted award obtained by the offeree is less than the offer, then:

(I) the offer must pay those costs of the offeror as allowed under Rule 54(d)(1), incurred after the making of the offer;

(ii) the offeror must pay those costs of the offeree, as allowed under Rule 54(d)(1), incurred before the making of the offer; and

(iii) the offeror shall not be liable for costs and attorney fees awardable under Rules 54(d)(1) and 54(e)(1) of the offeree incurred after the making of the offer.

If the adjusted award obtained by the offeree is more than the offer, the offeror must pay those costs, as allowed under Rule 54(d)(1), incurred by the offeree both before and after the making of the offer.

After a comparison of the offer and the adjusted award, in appropriate cases, the district court shall order an amount which either the offeror or the offeree must ultimately pay separate and apart from the amount owed under the verdict. A total judgment shall be entered taking into account both the verdict and the involved costs.

©) In cases involving claims for relief other than monetary damages, if the judgment, including attorney fees awardable under Rule 54(e)(1) incurred before service of the offer of judgment, and costs incurred before service of the offer of judgment, finally obtained by the offeree is not more favorable than the offer, the offeree must pay the offeror's costs, as allowed under Rule 54(d)(1), incurred after making of the offer. If the judgment including such attorney fees and costs is more favorable than the offer, the offeror must pay all costs of the offeree allowable under Rule 54(d)(1) both before and after the making of the offer.

The Court is then to compare the adjusted award with the offers of judgment. IRCP 68(b), third paragraph states as that, "if the adjusted award obtained by the offeree is more than the offer, the offeror must pay those costs, as allowed under Rule 54(d)(1) incurred by the offeree both before and after the making of the offer." Idaho Rule of Civil Procedure 54(d)(1) provides for an award of costs as a matter of right to the prevailing party as well as discretionary costs including attorney's fees allowed under Idaho law.



In this case Benjamin Walton obtained substantially more than any offer or offer of judgment Allstate ever made. He is clearly and undisputedly entitled to all of his costs and attorney's fees in this case. The Court should award the full amount requested to Benjamin Walton.

In this case Mathew Bennett was awarded substantially more than the pre-filing offer by Allstate under Idaho Code 12-120(4), substantially more and more than the first Allstate offer of judgment, but the jury verdict was less than the last Allstate offer of judgment. However, the adjusted award of Mathew Bennett is computed as follows:

Judgment of Verdict:	\$3,978.47
Pre-judgment interest of past medical bills:	\$ 530.15
Court costs for Mathew Bennett pre-offer:	\$ 994.54
Attorney's fees of Mathew Bennett before second offer of judgment:	\$10,227.50
Total:	\$15,730.66

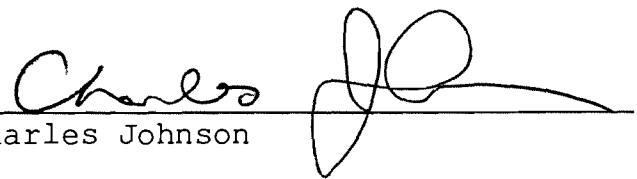
Therefore, the "adjusted award" for plaintiff Mathew Bennett is substantially more than the Allstate offer of judgment. Therefore, under the clear provisions of IRCP 68(b) Allstate is liable for all of Mathew Bennett's costs and attorney's fees as in this case as well.

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 offer the plaintiffs as a group are still the prevailing party.

This case of *Collins v. Jones*, 131 Idaho 556, 559-560, 961 P.2d 647 (1998) is again instructive on Rule 68(b). In this case the district court granted an additur then held that based on the additur alone, without costs and fees, the plaintiff was ~~not~~ entitled to costs and the plaintiff was entitled to attorney fees on appeal.

WHEREFORE, the Court should award both the plaintiffs Bennett and Walton their costs and attorney fees in this case.

DATED this 18<sup>th</sup> day of June 2010.

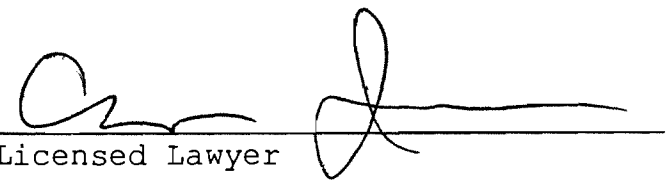
  
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Licensed Lawyer