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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRANDON ELLER,

Plaintiff/Respondent,

vs.

IDAHO STATE POLICE, an Executive Department of the State of Idaho,

Defendant/Appellant.

Supreme Court No. 45698-2018
District Court No. CV OC 1500127

BRIEF OF AMICUS CURIAE
IDAHO TRIAL LAWYERS ASSOCIATION FOUNDATION

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

HONORABLE NANCY A. BASKIN, DISTRICT JUDGE PRESIDING

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I. INTRODUCTION

The Idaho Trial Lawyers Association Foundation (the "Foundation") sought leave to appear as amicus curiae in the above captioned proceedings to respond to anticipated arguments from Amicus Curiae for Idaho Associations of Counties, Inc. and Association of Idaho Cities ("IAC and AIC"). IAC and AIC argue for a results-oriented application of "per (1) occurrence" as that plain, unambiguous language appears in the Idaho Tort Claims Act ("ITCA"). For the reasons that follow, the Foundation respectfully requests that this Court reject IAC and AIC's request for a result-oriented application of the statute and affirm the decision of the district court consistent with well settled legal principles.

II. ARGUMENT

1. There is no Legal Justification for Applying Different Rules of Interpretation to the ITCA than to a Policy of Insurance.

As a threshold matter, there is no legal justification for interpreting and applying[1] "per (1) occurrence" differently in the ITCA than it is interpreted and applied for insurance purposes. The rules of statutory interpretation are well settled in Idaho.

> When interpreting a statute, the Court begins with the plain language. "[I]f the statutory language is clear and unambiguous, the Court need merely apply the statute without engaging in any statutory construction. Statutory interpretation begins with the words of the statute, giving the language its plain, obvious and rational meanings."

Pocatello v. State, 145 Idaho 497, 501, 180 P.3d 1048, 1052 (2008) (quoting from *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997)). Palpably absurd results cannot be produced from a reasonable interpretation of a statute; accordingly, this

[1] This brief makes a purposeful distinction between the words "interpretation" and "application". The interpretation of a phrase is required only when the phrase is ambiguous, i.e., subject to more than one reasonable meaning. If a phrase is not ambiguous, interpretation of the word is not necessary, and the Court need only apply the statute as written.

Court has reasoned that it does not have the authority to modify an unambiguous statute under the guise that the results are palpably absurd. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 894–96, 265 P.3d 502, 507–09 (2011). That a term is undefined does not render it ambiguous: "Words or phrases that have established definitions in common use or settled legal meanings are not rendered ambiguous merely because they are not defined in the document where they are used." *City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 201, 899 P.2d 411, 414 (1995) (citing *Mutual of Enumclaw v.* Wilcox 123 Idaho 4, 8, 843 P.2d 154, 158 (1992)).

IAC and AIC advance two results-oriented arguments for rejecting the district court's application of "per (1) occurrence," both of which suggest a plain reading of the phrase produces absurd results. First, they argue the district court's application should be rejected because it puts the financial condition of Idaho's cities and counties at risk. *Brief of Amicus Curiae Idaho Association of Counties, Inc. and Association of Idaho Cities* ("*Brief of Amicus*") at 2. Counsel cites no authority supporting the proposition that unfavorable results to a certain class of defendants overrides traditional cannons of statutory interpretation. This Court should reject that results-oriented approach.

Second, IAC and AIC suggest the district court's application is absurd because it renders the statute internally inconsistent. *Brief of Amicus* at 3.

> Simply put, why would the ITCA specifically limit liability to $500,000 regardless of how many people are injured and regardless of how many claimants are involved if the intent was to provide compensation in a situation such as Eller's where there is continued employment during which numerous adverse actions could have been taken by multiple employees on several different days?

Brief of Amicus at 3-4. However, IAC's and AIC's concerns regarding statutory inconsistency is the product of circular reasoning. Restated, their rhetorical question is: if one event causing multiple damages in multiple people is single occurrence, how is it possible that multiple events

causes cumulative damages in a single person are two occurrences. The answer is simple: the number of occurrence is equal to the number of events causing damage (it is not equal to the number of people damaged). If more than one event causes damages, then there is more than one occurrence. Idaho Code § 6-926(3) reads as follows:

> The entire exposure of the entity and its employee or employees hereunder shall not be enlarged by the number of liable employees or the theory of concurrent or consecutive torts or tort feasors or of a sequence of accidents or incidents if the injury or injuries or their consequences stem from one (1) occurrence or accident.

The statute's structure is not confusing. Multiple people may contribute to a single cause, event, accident or occurrence. Multiple torts occurring simultaneously, concurrently, consecutively, or sequentially may contribute to a single cause, event, accident or occurrence. A single cause, event accident or occurrence may produce multiple injuries to a single person or it may injure multiple people. All of these potential outcomes are subject to the single limit on liability.

However, the statute makes clear that the limits of liability are applied on a "per (1) occurrence" basis. Where there are multiple accidents or occurrences, the limits of liability apply to each accident or occurrence. Nothing in the statute suggests that multiple accidents or occurrences contributing to multiple injuries (or even cumulative injuries) shall be treated as a single accident or occurrence. To suggest otherwise would be to nullify the reference to "per (1) occurrence".

The statutory limit is applied on a per accident or occurrence basis. Consider a car accident: if a vehicle driven by a government employee was negligently maintained and the brakes failed while a driver was otherwise speeding, thereby causing a three-vehicle accident injuring six people there would be two (2) acts of negligence, one (1) causal event, three (3) instances of property

damage, and six (6) instances of personal injury. However, because there was only one (1) causal[2] event, there is only (1) occurrence and the statutory liability limit applies.

Conversely, if a government employee was driving negligently and ran into a single pedestrian who was walking to work and broke his leg, the full limits of liability would be available. Then, if that afternoon, the next day, the next week, or the next year that same employee struck that same pedestrian while he was walking through the same cross-walk and re-broke the same leg, it would still be a separate accident or occurrence. The full limits of liability would apply. Necessarily, if more than one cause, event, accident, or occurrence exists, then the statutory liability limit applies more than once.

Focusing on the event(s) causing the injuries, rather than the contributing participants or the resulting damages, leads to the proper application of the "per (1) occurrence" limitation on liability set forth in the ITCA. Contrary to the parade of horribles suggested by IAC and AIC (*Brief of Amicus*, at 3-4), there is little to no risk that plaintiffs will be able to manipulate courts into opening the floodgates of government liability by artfully pleading a single occurrence as multiple events. Courts in both Idaho and elsewhere have dealt with similar situations:

> However, counsel for Unigard has cautioned that insureds may be quick to embrace a continuous process approach when the aggregate damage is within policy limits, but they may resist such an approach if it causes policy limits to be exceeded. We acknowledge this possibility. If counsel's underlying point is that any standard for determining the number of occurrences must be applied consistently, we agree. A determination of the number of occurrences cannot be result-oriented. It must rest on a principled analysis that is not predisposed to favor insureds or insurers. We think the continuous process test satisfies this criterion.

[2] Section 2, below, discusses why it is proper to focus on the causal event when determining the number of occurrences.

Unigard Ins. Co. v. U.S. Fidelity and Guar. Co., 111 Idaho 891, 893, 728 P.2d 780, 782 (1986) (overruled on other grounds). When deciding *Unigard*, the Idaho Court of Appeals evaluated several cases from sister jurisdictions and determined that it was not possible to detect a results-oriented bias emerging from "continuous process test" when used in other similar cases.[3] *Id.* at n. 3. IAC's and AIC's concerns about plaintiff's artfully pleading themselves into additional coverage is simply not supported by case law.

2. Context for Applying "per accident or occurrence".

Courts apply "per accident or occurrence" or similar language in three different contexts: whether one or more events occurred; the timing of the event(s); and whether the event(s) triggers liability or coverage. Each context gives rises to different considerations that must be taken account when evaluating a given application of "per occurrence."

i. Number of Occurrences

When looking at whether one or more events occurred, the prevailing trend is to focus on causation. Though courts articulate the numerous causal tests in myriad ways (*see Unigard Ins. Co.*, 111 Idaho at 893), few bright lines apply: "It is difficult to draw an abstract line separating single and multiple occurrences. For this reason, perhaps, many insurance policies-including the one at issue here-contain no definition of 'occurrence' or 'accident' that addresses the issue. The cases tend to revolve around specific fact patterns." *Id.*

[3] In *Lee v. Interstate Fire & Cas. Co.*, 86 F.3d 101, 104 (7th Cir. 1996) the court noted that the principle of *contra proferentum* is not helpful in construing "per occurrence" language because "what it means to construe this definition against the author is itself ambiguous. Winners and losers will change with the circumstances. Interstate today wants to call sustained sexual abuse multiple occurrences to increase the number of deductibles the Diocese must cover and the number of contributions the primary carrier must make. But if tomorrow the victim's loss exceeds the maximum coverage for a single occurrence, the roles will be reversed. The excess carrier would want to call the sexual abuse a single occurrence to cap its own exposure, while the Diocese would favor multiple occurrences in order to maximize its insurance coverage."

Generally, speaking, the "continuous process" test articulated in *Unigard Ins. Co. v. U.S. Fidelity and Guar. Co.*, is consistent with tests used throughout the country. 111 Idaho at 893, 728 at 782 (1986). In both *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56 (3d Cir. 1982) and *Transp. Ins. Co. v. Lee Way Motor Freight, Inc.*, 487 F. Supp. 1325 (N.D. Tex. 1980), two cases upon which AIC and IAC rely, the respective corporate policies were identified as the single cause that gave rise to multiple damages suffered by multiple persons.

> The general rule is that an occurrence is determined by the cause or causes of the resulting injury. "(T)he majority of jurisdictions employes the 'cause theory'. (citations omitted). Using this analysis, the court asks if '(t)here was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage.'"

Appalachian Ins. Co., 676 F.2d at 61 (string citation omitted).

Sometimes, however, damages result from both continuous and discreet causes at the same time: i.e., one causal agent might be a continuous process over time and, during that time frame, certain discrete events may also occur that contribute, additionally to damages. This is the nature of negligent hiring or negligent supervision in sex abuse cases. These cases consistently hold that each act of abuse is a separate event for liability purposes[4]. *See, e.g. Lee*, 86 F.3d at 104 (rejecting argument that exposure to a serial pedophile is the type of continuing tort that should be characterized as a single occurrence). The *Lee* Court recognized (but did not decide based on the insufficient record) that negligent supervision of a pedophile might be a singular act, or it could constitute multiple supervisory lapses over time that could trigger "multiple occurrences." *Id.*

Where there are some causes that are covered by insurance and some causes that are not covered by insurance, courts are split as to how to apply the "per occurrence" language. Some

[4] "'[C]ontinuous or repeated exposure to conditions' sounds like language designed to deal with asbestos fibers in the air, or lead-based paint on the walls, rather than with priests and choirboys. A priest is not a 'condition' but a sentient being, and of course the victim was never 'exposed' to the Diocese's negligent supervision." *Lee*, 86 F.3d at 104.

courts apply the "per occurrence" language with reference to the occurrences that give rise to coverage. *Id.* ("Each episode was discrete: [Priest] could have stopped at any time; and by continuing to commit new wrongs, with cumulative injury, [Priest] brought about multiple occurrences. Of course the priest's acts are not covered by the policy, but supervision itself is (or can be) discrete."). Other courts apply the "per occurrence" language to the immediate cause(s) that trigger liability[5]. *H.E. Butt Grocery Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 150 F.3d 526, 535 (5th Cir. 1998).[6] ("HEB cannot successfully argue that the two separate acts of sexual abuse on two different children constitute only one 'occurrence' under the policy. Neither Texas law nor the policy language allow this result. We reach this conclusion not by looking to the number of injuries or the number of victims, but rather by looking to the two independent events that gave rise to HEB's liability and caused the injury.") (Emphasis added.)

Based on the foregoing, when determining the number of occurrences, courts look to how many separate events caused the damages.

ii. Timing

When looking at timing of an event or occurrence—that is "when" an event is deemed to have occurred for notice, limitations, or coverage determinations—courts almost universally focus on resulting damages. "While the 'cause' test is appropriate for determining whether there is a single occurrence or multiple occurrences, it is not applicable in determining when an occurrence takes place. We hold that the determination of when an occurrence happens must be made by

[5] Any inclination to look at the context of employment in a caustic workplace as a continuing condition and, therefore, a single cause, must be avoided. Idaho law does not allow claims for negligent infliction of emotional distress for unpleasant workplaces. Accordingly, that "overarching" cause cited by IAC and AIC does not give rise to liability. Because it does not give rise to any liability, it is impermissible to look at that overarching condition to justify a finding of only one occurrence.

[6] For an in-depth and well-reasoned discussion of the distinctions between a "liability-triggering event" test and an "immediate cause" test, *see H.E. Butt Grocery Co.*, 150 F.3d at 535–38 (Benavides, Circuit Judge, concurring).

reference to the time when the injurious effects of the occurrence took place." *Appalachian Ins. Co.*, 676 F.2d at 61–62.

Idaho Courts are no different: "This Court held in *National Aviation Underwriters v. Idaho Aviation Center*, 93 Idaho 668, 670, 471 P.2d 55, 57 (1970), that '(i)t is well settled that the time of the occurrence of an 'accident,' within the meaning of a liability indemnity policy, is not the time the wrongful act was committed but the time the complaining party was actually damaged.' This rule is followed in every jurisdiction that has considered the issue except Louisiana." *Millers Mut. Fire Ins. Co. of Texas v. Ed Bailey, Inc.*, 103 Idaho 377, 379, 647 P.2d 1249, 1251 (1982) (string citation omitted).

The timing/damage rule exists respecting every type of tort: an accident or event is not said to have occurred for liability or coverage purposes unless and until there has been some damage suffered. The timing/damage rule applies when there is a "coincidence of a negligent act and the occurrence of damages." *Ralphs v. City of Spirit Lake*, 98 Idaho 225, 227, 560 P.2d 1315, 1317 (1977) (120-day ITCA notice requirement period began to run at the time of the battery). The timing/damage rule applies when the tortious conduct occurs long before the damages are suffered. *Streib v. Veigel*, 109 Idaho 174, 706 P.2d 63 (1985) (holding a cause of action for accounting malpractice does not arise until the IRS challenges the negligently prepared tax returns). The timing/damage rules applies where the tortious conduct is continuous, but in that situation, limitations does not begin to run until the tortious conduct stops. *See, generally, Farber v. State*, 102 Idaho 398, 630 P.2d 685 (1981) (holding that the 120-day ITCA notice requirement begins to run when state agency completes the construction product that gives rise to damages); *Curtis v. Firth*, 123 Idaho 598, 603-04, 850 P.2d 749, 754-55 (1993) (statute of limitations for

intentional infliction of emotional distress arising from an abusive relationship does not begin to run until the abuse stops).[7]

iii. Liability and/or Coverage

Finally, when looking at whether an event gives rise to liability and/or coverage, courts must look to language of the insurance contract, statute, or controlling substantive law. *See, e.g.*, *Farm Bureau Mut. Ins. Co. of Idaho v. Cook*, 163 Idaho 455, 458–59, 414 P.3d 1194, 1197–98 (2018).

3. Infliction of Emotional Distress is Not Readily Amenable to a Bright Line Test.

IAC and AIC argue that because *Curtis v. Firth* supports a continuing tort theory for limitations purposes, then all infliction of emotional distress claims must always be considered a continuing tort and for all purposes:

> To hold otherwise would mean that a continuing torts approach is used for statute of limitations purposes in Idaho, but for purposes of the ITCA liability limitations, the opposite would be true—a negligent infliction of emotional distress ["NIED"] claim would not be considered one accident or occurrence, but could be parsed into multiple claims which is contrary to a continuing tort.

Brief of Amicus at 7. This misapplies *Curtis v. Firth*, ignores the cautionary warnings set forth within that decision, and ignores the studied contextual analysis that a court must undertake when applying "per occurrence" language.

[7] The timing analysis that applies for coverage determinations calls into play considerations different from the timing analysis used for limitations determinations. *Compare Curtis*, 123 Idaho at 603–04 (statute of limitations for intentional infliction of emotional distress arising from an abusive relationship does not begin to run until the abuse stops) *with Appalachian Ins. Co.*, 676 F.2d at 62–63 (holding that there was no coverage because the "occurrence" takes place when the injury from a continuing tort first manifests itself, which was before the policy period) *and with Transport Ins. Co.*, 487 F. Supp. at 1331 (holding that even though damages from a continuing tort began occurring before the policy period, they continued into the policy period and therefore coverage was available from the inception of the policy period, moving forward). Because those distinctions are beyond the scope of issues presented by this appeal, they are not further explored here.

First, *Curtis v. Firth* makes clear that where a discrete act gives rise to a claim for infliction of emotional distress, a continuing tort theory does not save limitations.

> It is also important to note what does not constitute a continuing tort. Wrongful acts which are separate and wholly dissimilar are separate causes of action and the statute of limitations begins to run from the time of the commission of each wrongful act. *Fox v. Higgins*, 149 N.W.2d 369 (N.D. 1967). Thus, it is important to distinguish between separate acts which may be assault, defamation, or battery, and a continuing course of wrongful conduct which constitutes intentional infliction of emotional distress.

Curtis, 123 Idaho at 603. The Court went on to make clear that it is inappropriate for a plaintiff to pretend separate, actionable torts are one continuing tort to save the statute of limitations:

> We note, however, that embracing this concept in the area of intentional or negligent infliction of emotional distress does not throw open the doors to permit filing these actions at any time. The courts which have adopted this continuing tort theory have generally stated that the statute of limitations is only held in abeyance until the tortious acts cease.[8] *See, e.g., Page*, 729 F.2d at 818 and *Twyman v. Twyman*, 790 S.W.2d 819 (Tex. App. 1990). At that point the statute begins to run. If at some point after the statute has run the tortious acts begin again, a new cause of action may arise, but only as to those damages which have accrued since the new tortious conduct began.

Curtis, 850 P.2d at 755. Just as it is inappropriate to pretend two separate and distinct acts were a continuing tort to save limitations, it is equally inappropriate to pretend that two separate and distinct acts are a continuing tort to invoke the ITCA's limits of liability:

> If counsel's underlying point is that any standard for determining the number of occurrences must be applied consistently, we agree. A determination of the number of occurrences cannot be result-

[8] Under Idaho law, the discrete act that gives rise to a claim of negligent infliction of emotional distress is the violation of a legal duty. Because the tort is complete at the time the legal duty is violated, the statute of limitations begins to run at that time. That damages continue to accrue following the completion of the tort does not extend the limitations period or change the fact that a tort has occurred. *Ralphs v. City of Spirit Lake*, 98 Idaho 225, 227, 560 P.2d 1315, 1317 (1977) ("Therefore applicable statutes begin to run from the occurrence of the wrongful act albeit the full extent of the damages may be unknown or unpredictable at that initial time."). Accordingly, the statute of limitations protects government entities from prior occurrences that pre-date the limitations period and, so long as a governmental entity does not engage in multiple violations of legal duties within the applicable limitations period, the single liability limit will apply.

> oriented. It must rest on a principled analysis that is not predisposed to favor insureds or insurers. We think the continuous process test satisfies this criterion.

Unigard Ins. Co., 111 Idaho at 893.

When considering whether one or more events occurred, courts look to the causes of damage. Here, IAC and AIC argue that the "cause" of Eller's emotional distress was long term exposure to an uncomfortable and hostile environment in the work place:

> Eller's negligent infliction of emotional distress claim is one overarching tort. It is based on a series of acts culminating in one claim (and listed as one claim in his complaint) of emotional distress stemming from acts occurring during his employment that, when taken as a whole, caused him distress.

Brief of Amicus at 2. The problem with that argument is, under Idaho law, a continuing course of bad conduct does not state a claim for negligent infliction of emotional distress in Idaho.

> The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt.

Frogley v. Meridian Joint Sch. Dist. No. 2, 155 Idaho 558, 569, 314 P.3d 613 (2013) (quoting *Brown v. Fritz*, 108 Idaho 357, 362, 699 P.2d 1371, 1376 (1985)) (but reversing summary dismissal of plaintiff's complaints because genuine issues of material fact potentially show violation of a legal duty). *See also Bollinger v. Fall River Rural Elec. Co-op., Inc.*, 152 Idaho 632, 272 P.3d 1263 (2012) (dismissing NIED claim because termination of at-will employee in violation of company policy does not breach a legal duty); *Nation v. State, Dep't of Correction*, 144 Idaho 177, 158 P.3d 953 (2007) (dismissing NIED claim for failure to show breach of a legal duty).

Curiously, AIC and IAC seem to tacitly argue that a continuing tort version of negligent infliction of emotional distress should not be allowed in Idaho in the employment context. *Brief*

of Amicus at 7-9. Indeed, by the authorities cited above, it appears that it is not. Rather, under Idaho law, a claim for negligent infliction of emotional distress requires an employee show that the employer breached a specific legal duty. *Wright v. Ada Cty.*, 160 Idaho 491, 376 P.3d 58 (2016) (holding Idaho Protection of Public Employees Act ("IPPEA") violation is a breach of a legal duty that gives rise to a claim for negligent infliction of emotional distress); *Hatheway v. Bd. of Regents of Univ. of Idaho*, 155 Idaho 255, 310 P.3d 315 (2013) (holding Idaho Human Rights Act violations would give rise to a claim for NIED, but affirming dismissal of NIED claims because there were no violation found.).

In concluding that two separate adverse actions under the IPPEA constitute two separate occurrences under the ITCA, the district court explained how the jury instructions required specific breaches of a legal duty in order for the jury to enter a verdict on Eller's negligent infliction of emotional distress claims:

> Further, the jury was instructed that it may consider any violations of the IPPEA that occurred from January 6, 2013 forward as evidence that Defendant breached its duty of care for the purpose of Plaintiff's NIED claim. Jury Instruction No. 23. Without finding that adverse actions occurred and damaged Plaintiff, the jury could not have found that Defendant violated the IPPEA, and likewise, there would be no basis for finding that Defendant breached its duty of care to Plaintiff. Thus, the adverse actions were the events or conditions that resulted in Plaintiff's injury.

Memorandum Decision and Order (R. 645). The district court recognized and applied Idaho law regarding negligent infliction of emotional distress when it concluded that at least two separate violations caused Eller's emotional distress. *Memorandum Decision and Order* (R. 648).

The ISP violated specific legal duties owed to Eller on at least two separate and distinct occasions. Each time, Eller suffered damages. In holding that each separate violation was a separate occurrence, the district court correctly applied the "per (1) occurrence" language of the

ITCA. Accordingly, this Court should reject IAC's and AIC's request to adopt a bright line rule holding that all claims for infliction of emotional distress are continuing torts and, therefore, must be characterized as a single occurrence.

III. CONCLUSION

This Court should reject IAC's and AIC's invitation to reach a "single occurrence" conclusion by super-imposing a continuing tort theory on ISP's separate violations of the IPPA. Their request is premised on a results-oriented approach, buttressed by unfounded claims that properly applying unambiguous language will open the floodgates to spurious parsing of "actions" by disgruntled employees that will surreptitiously circumvent the ITCA's liability limitations:

> As a result, the court's ruling, if adopted by this court, will greatly affect the financial condition of the cities and counties. Put another way, an employee will always be able to state numerous "actions" as to why he is upset. The question is whether "actions" equate to "accidents" or "occurrences." The district court appears to have so found, thereby putting at risk the financial security of every governmental entity dealing with a distressed employee in need of counseling or discipline.

Brief of Amicus at 2. IAC and AIC go on to argue:

> In the present matter, Eller is still employed by ISP. He works with numerous other employees who, on any given day, may act in a way as to upset him. This is the nature of continuing employment. As argued above, to find that each action of an employee that causes emotional distress is a separate accident or occurrence under the ITCA is to completely disregard the plain language of the ITCA, and to disregard the reasons for its liability limitations.

Brief of Amicus at 13-14. These concerns are not well founded because, under Idaho law, having thin skin or getting upset at work does not give rise to a claim for negligent infliction of emotional distress. Rather, an employee must prove that the employer breached a specific legal duty.

In this case, the district court found that the ISP violated two legal duties owed to Eller on two separate occasions. It reduced Eller's award for emotional distress accordingly. There is no

basis or authority to link these two occasions together as a continuing tort and pretend there was only one. For these reasons, the Foundation respectfully requests that this Court hold that under the Idaho Tort Claims Act, a violation of a legal duty that supports a claim for negligent infliction of emotional distress constitutes an "occurrence", and a violation of more than one such legal duty constitutes more than one "occurrence."

DATED this 2nd day of October 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of October 2018, I caused a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE FOR IDAHO TRIAL LAWYERS ASSOCIATION FOUNDATION** to be served upon the following individuals in the manner indicated below:

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