10-2-2018

Eller v. Idaho State Police Appellant's Reply Brief Dckt. 45698

Electronically Filed
10/2/2018 5:31 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRANDON ELLER, Plaintiff-Appellant v. IDAHO STATE POLICE an executive agency of the State of Idaho, Defendant- Respondent	Docket No. 45699-2018 Ada County District Court CVOC-2015-127
BRANDON ELLER, Plaintiff-Respondent v. IDAHO STATE POLICE an executive agency of the State of Idaho, Defendant- Appellant	Docket No. 45698-2018 Ada County District Court CVOC-2015-127

APPELLANT--RESPONDENT BRANDON ELLER'S RESPONSE BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT FOR ADA COUNTY.

HONORABLE NANCY BASKIN
District Judge

Erika Birch, ISB No. 7831
T. Guy Hallam, ISB No. 6101
Strindberg & Scholnick, LLC.
1516 W. Hays St.
Boise, ID 83713
Attorneys for Appellant Eller

Andrew Brassey, ISB No. 2128
Jason Murray, ISB No. 7623
Brassey Crawford, PLLC
345 Bobwhite Ct., Suite 215
Boise, ID 83701
Attorneys for Respondent ISP

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

State Cases

Federal Cases

Statutes

Rules

Other Authorities

I. STATEMENT OF THE CASE

Eller set forth his statement of the case in his Opening Brief on Appeal.[1] Notably, most of the "facts" presented by ISP are not supported by citations to the evidence presented at trial. Instead, ISP relies on citations to the Record including pleadings such as the Amended Complaint and summary judgment briefing. On appeal, this Court should review the evidence adduced at trial in a light most favorable to Eller, the prevailing party. *Van v. Portneuf Med. Ctr., Inc.*, 156 Idaho 696, 700, 330 P.3d 1054, 1058 (2014). Thus, Eller respectfully submits that his statement of the case, which is supported by citations to the trial record, is a more appropriate summary of the evidence presented to the Jury. Additionally, to the extent that any factual issues are critical to this Court's determination on an issue in ISP's appeal, Eller will address the same within the argument section as opposed to presenting those facts here.

II. ADDITIONAL ISSUES PRESENTED

A. Did ISP invite error with respect to the Court's determination of the number of occurrences by failing to raise section 6-926 until after the Jury verdict?

B. Should ISP be estopped from arguing that this case presented a single occurrence of retaliation based on a theory of continuing tort?

[1] *See* Eller Opening Brief, pp. 1-14.

C. Has ISP waived its right to appeal certain of its issues by failing to properly preserve objections below with respect to jury instructions and the admission/exclusion of evidence?

III. ARGUMENT

A. Standard of Review

While Eller does not disagree with ISP's recitation of the applicable standards of review, ISP has ignored the requirement of Idaho Rule of Civil Procedure 51(i)(3) that it object to a jury instruction given, or not given, as a prerequisite to raising the same on appeal. Likewise, ISP has failed to recognize its burden under Idaho Rule of Civil Procedure 61 and Idaho Rule of Evidence 103(a), which requires that any error with respect to the admission or exclusion of evidence affect a party's substantial rights. Additionally, Rule 103(a) requires that a party timely object stating the specific ground for an objection to the admission of evidence, or with regard to the exclusion of evidence, the party inform the court of its substance by an offer of proof. I.R.E. 103(a).

B. Summary of the Argument

ISP raises four (4) issues on appeal[2] that, if successful, would likely require retrial of this case. Specifically, ISP complains that the Court erred in its interpretation of what constitutes protected activity under the Whistleblower Act, improperly instructed the Jury that Eller's protected activity was in good faith, and

[2] *See* Issues C. - F. in Section III. of ISP's Opening Brief.

erred in the admission and exclusion of certain evidence. For the reasons set forth below, none of these issues warrant reversal and/or a new trial. In fact, with regard to several of these issues, ISP failed to preserve its right to appeal. ISP's appeal on those grounds must be denied. Moreover, ISP has failed to establish the District Court erred as a matter of law, abused its discretion, and/or that any alleged error affected a substantial right, *i.e.*, was anything other than harmless error.

What ISP's appeal and Eller's concurrent appeal are really focused on is the Jury's award for negligent infliction of emotional distress based on ISP's retaliatory actions against Eller. The Jury returned a verdict of $1,500,000 in emotional distress damages. R., pp. 1827-29.[3] The District Court ultimately entered Judgment for $1,000,000 for Eller's emotional distress. R., p. 2069. On appeal, this Court has the following choices: (1) reverse the Court's Judgment and restore the Jury's original verdict;[4] (2) affirm the Court's Judgment as entered; or (3) vacate the Court's Judgment and remand to the District Court to make additional findings.

Absent from this Court's choices is reversing the District Court's Judgment and further reducing the Jury's verdict. There are multiple barriers preventing ISP

[3] When Eller cites to the Record ("R.") it is to the Record for Case No. 45699. If/when Eller cites to "ISP R." it is to the Record for Case 45698. As a point of clarification, the citations in Eller's Opening Brief to the Record are all to the Record for Case No. 45699.

[4] There are multiple paths to restoring the Jury's original verdict as set forth in Eller's Opening Brief: (1) this Court could find that Eller was entitled to emotional distress under the Whistleblower Act which has no cap (pp. 17-25); or (2) this Court could find that ISP waived its right to assert the cap under section 6-926 because it was an affirmative defense or avoidance that was not timely raised by ISP (pp. 33-40).

from further reducing the Judgment for Eller's emotional distress. Even if this Court finds that the District Court erred in the interpretation of the meaning of "occurrence," or its application to the Jury's verdict, the case must be remanded for appropriate findings based on the evidence adduced at trial and consistent with the Jury's verdict. Additionally, this Court could find that that ISP invited any error in the District Court's determination of the number of occurrences or that ISP is judicially estopped from now asserting that the continuing tort theory dictates a finding of a single occurrence under section 6-926.

C. ISP's attempts to have this Court further reduce the Jury's verdict on Eller's NIED claim must be rejected.

ISP would have this Court reverse the District Court's determination that the Jury found at least two occurrences resulting in emotional distress, and further reduce the Jury's Verdict to $500,000. As set forth in Eller's Opening Brief, the District Court correctly determined that occurrence "under the particular facts of this case . . . refers to each adverse action, not the protected activities."[5] R., p. 1991. As set forth below, the District Court applied the appropriate interpretation of occurrence to the unique facts of this case to find that there were at least two separate occurrences. Additionally, the cases relied upon by ISP, while not binding

[5] ISP appears to have now abandoned its argument made below -- that this case presents a single occurrence because all the adverse actions arose from a single protected activity, Eller's testimony in the *Sloan* case. R., p. 1937, Instead, ISP now argues that the retaliatory actions were "a continuing sequence of events." ISP Opening Brief, p. 28.

and distinguishable, actually bolsters the District Court's decision below. Second, ISP's contention that the District Court acted inappropriately in interpreting the Jury's verdict in order to determine at least two (2) occurrences caused Eller emotional distress, fails for multiple reasons including invited error. Finally, ISP should be estopped from making the argument it now makes on appeal regarding the number of occurrences in this case. ISP now argues that its retaliation against Eller was a continuing tort which is directly contrary to the position it took in its *Motion to Dismiss*, and for which it gained an advantage when the District Court ruled that a number of ISP's adverse actions were untimely under the Whistleblower Act's statute of limitations.

1. *The District Court did not err in its interpretation of "occurrence" as used in section 6-926 or its application to the unique facts of this case.*

ISP has not clearly identified any alleged error in the District Court's interpretation of "occurrence" under section 6-926. Specifically, ISP does not assign error with the District Court's use of Black's Law Dictionary as guidance for the plain meaning of occurrence, defined as ". . . an accident, event, or continuing condition *that results in personal injury* or property damages that is neither expected nor intended from the standpoint of an insured party." R., p. 1990 (emphasis in original)(quoting Black's Law Dictionary at 1248 (10th Ed. 2014)). Instead, ISP takes issue with the District Court's application of this definition. As

set forth below, in the unique context in this case, the Court correctly determined that "under the particular facts of this case, 'occurrence' refers to each adverse action." R., p. 1991. As such, this Court should not further reduce the Jury's Verdict.

a. Section 6-926's caps are to be applied per occurrence not per case or per claimant as ISP suggests.

ISP argues that the District Court found that Eller had "multiple 'claims' for emotional distress."[6] However, the District Court made no such finding.[7] ISP, without a foundation in the statute, argues that section 6-926 limits the recovery to the cap even where there are multiple "claims" for emotional distress.[8] No such language exists in the statute.

Instead, section 6-926 very clearly operates on a per occurrence basis, as it limits recovery "as the result of <u>any one (1) occurrence or accident</u>, regardless of the number of persons injured or the number of claimants,"[9] and further directs that the recovery should 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 <u>if</u> the injury or injuries or their consequences stem from <u>one (1) occurrence</u> or accident.[10]

---

[6] ISP Opening Brief, p. 21.
[7] Although if it had, it would be difficult to assign error given that the section 6-926 clearly is not intended to cap separate "claims" unless those separate claims arise from a single occurrence.
[8] *See* ISP Opening Brief, pp. 21-22. ISP states that Defendant's maximum liability may not be expanded even where there are multiple accidents or incidents. That position is clearly contrary to the literal language of the statute which states that the cap applies to injury or loss "as the result of any one (1) occurrence or accident." I.C. § 6-926(1).
[9] I.C. §6-926(1)(emphasis added)
[10] I.C. § 6-926(3)(emphasis added)

In other words, the Legislature plainly provided that even where one person or multiple persons suffer one or more injur(ies) from a single occurrence or accident, all recovery for all persons and for all injuries, no matter the number of liable tortfeasors, is limited to the $500,000 cap. But, at the same time, by continually clarifying that the cap applies per occurrence, the Legislature recognized that there may be situations where even a single claimant suffers injuries from separate occurrences or accidents, making the $500,000 limit applicable per occurrence. If, the Legislature had intended to create a hard-and-fast cap regardless of the number of occurrences, it certainly would have. *See, e.g., Aguilar v. Coonrod*, 151 Idaho 642, 650, 262 P.3d 671, 679 (2011)(this Court interpreted § 6-1603 to apply per individual claimant as opposed to per claim based on the plain reading of the statute.)

b. Because in Eller's case, separate breaches proximately caused separate emotional distress, there are multiple occurrences.

The parties seem to agree that the definition of "occurrence" in Black's Law Dictionary is appropriate. Black's Law Dictionary defines "occurrence" as ". . . an accident, event, or continuing condition *that results in personal injury* or property damages that is neither expected nor intended from the standpoint of an insured party." Black's Law Dictionary at 1248 (10th Ed. 2014).

The parties disagree, however, as to whether the "occurrences" were individual "event[s]" (*i.e.*, the individual adverse actions that ISP took against Eller) or were a "continuing condition" (*i.e.*, ISP's pattern of retaliation against Eller). The Court determined that separate occurrences proximately caused Eller emotional distress. R., pp. 1993-94. Eller agrees with that analysis. ISP, however, claims that the "occurrence" was a "continuing condition," arguing that ISP's "ongoing pattern of retaliatory conduct" proximately caused Eller's emotional distress.[11]

ISP's argument misapprehends the evidence introduced at trial, which must be interpreted in a light most favorable to Eller. *Van,* 156 Idaho at 700, 330 P.3d at 1058. First, when Eller filed his lawsuit in January of 2015, he had already suffered several discrete adverse actions and suffered resulting discrete emotional distress. For example, he learned on October 31, 2013, that after serving as a founding member of the CRU since 2004, he was being reassigned to a patrol team, effective immediately, and that the CRU was being "restructured." Tr. 08.17.17, pp. 379-81; Pltf. Ex 39. Eller discussed the emotional impact that had on him: ". . . it was devasting. You have your whole career path, your whole direction you want to go, and all of the sudden it's gone. It's changed…" Tr. 08.17.17, p. 386; LL. 12-17. Mrs. Eller confirmed that Eller "was very upset to be being pulled from the crash

[11] ISP Opening Brief, p. 25; *see also Id.* p. 24 ("[T]he alleged damage causing Plaintiff's emotional distress was the alleged pattern of continuous and ongoing retaliatory conduct."); *Id.* p. 27 ("Here, all of Plaintiff's claims for emotional distress stem from the same single proximate cause: the 'retaliatory' actions taken by Defendant following the Sloan investigation.")

reconstruction unit because he really felt that that was everything that he had worked towards in to his career and he felt like it was almost like an ending to his career." Tr., p. 960, L. 23 – p. 961, L. 3.

The silver lining left for Eller, after he had been forced out of the reconstruction program, was that he could continue to teach and train law enforcement in crash investigation. Eller told the jury that the "[o]ne thing that I'm passionate about . . . I love to teach." Tr. 08.17.17, p. 417, L. 21 - p. 418, L.2. In July 2014, Eller applied for a pay increase based on his many years of instructing and his desire and willingness to continue to do so in the future, but his application was denied without explanation. Tr. 08.17.17, pp. 418-24; Pltf. Ex. 31. When he tried to problem solve the denial, he was told that "HQ has reiterated that Eller will not be utilized to instruct ATC, POST, or ISP refresher courses. Additionally, should your team need remedial training, you should utilize a D3 reconstructionist to provide that training." Tr. 08.17.17, pp. 426-27; Pltf. Ex. 34. When Eller was told he could no longer teach, he was devastated because "[t]his is the last string that I can hang onto, and it's gone. I'm not allowed to do what I enjoy to do, what I enjoyed doing. And I don't understand why." Tr. 08.17.17, p. 429, LL. 16-19. Again, Mrs. Eller confirmed that he "was very frustrated because nobody could seem to tell him why he couldn't teach any longer . . . He repeatedly tried find out why he could no longer teach . . . and nobody could give him any answers. So it is like he is in trouble . . .

but nobody will tell him why he is in trouble so he can't figure out what is going on." Tr., p. 962, L. 13 - p. 963, L. 2. At trial, Eller testified that he had not been permitted to teach at all since the 2014 directive. Tr. 08.17.17, p. 430. As a result of the denied pay increase, Eller testified he lost $6,116.81 in pay. Tr. 08.17.17, p. 464. The Jury awarded him every penny of this loss. R., p. 1828.

The above events and their impacts on Eller occurred prior to his filing of the lawsuit. Then, in March 2016, some 14 months after Eller filed his suit, he applied for a promotion to a Sergeant position. Even though he had passed the initial promotional testing, and received a perfect score on an interview with the Captain, he did not receive the promotion. On October 6, 2016, he moved to amend his Complaint to add the denial of promotion claim to his case, which was granted by the District Court. R., p. 1828. Mrs. Eller testified that Eller "was very upset that he didn't get [the promotion] . . . when he tested and he didn't get [the] position, he went into HR . . . and he couldn't, once again, get any answers and didn't know where he fell in the line of testing." Tr., p. 963, LL. 10-15. As a result of the denied promotion, Eller testified he lost $24,412.16. Tr. 08.17.17, p. 466. The Jury also awarded him every penny of this loss. R., p. 1828.

Regardless of the above facts presented at trial, ISP argues on appeal that Eller's emotional distress only resulted because of the amalgamation of all of the adverse actions added together, equaling only one causal occurrence. Even the

continuing tort case ISP relies on, while distinguishable on the facts, recognizes that tortious acts may be different occurrences. *Curtis v. Firth,* 123 Idaho 598, 604, 850 P.2d 749, 755 (1993) ("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* involved an intentional infliction of emotional distress claim filed by a woman against her abusive partner (Firth alleged that Curtis was cyclically abusive to her over a ten-year period). *Id.* at 600, 850 P.2d at 751. This Court noted that Firth's intentional infliction claim, which required her to prove severe emotional distress, resulted from the continuing nature of the wrongful acts (as opposed to each wrongful act individually). *Id.* at 604, 850 P.2d at 755. In fact, this Court pointed to the testimony that Firth's more severe psychological injuries began after years of abuse. *Id.* Notably, in *Curtis*, this Court said, "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." *Id.* at 603, 850 P.2d at 754.

As the District Court correctly determined, the denial of the pay increase and the denial of the promotion were clearly separate occurrences -- these two discrete actions, separated in time by twenty months, and involving different decisionmakers, stand on their own as separate violations of the Whistleblower Act

and breaches of ISP's duty to Eller. They were not related to one another nor dependent on one another. Just because Eller was denied the teaching pay increase did not dictate that he would later be denied the promotion. ISP did not argue or present any evidence of causal or continual relationship between the two acts. Likewise, these two events separately caused Eller independent emotional distress. Had Eller not been denied the promotion, he still would have had emotional distress resulting from the other adverse actions.

For the above reasons, ISP's position here, that it was only the continuous pattern of retaliation that proximately caused Eller's emotional distress, fails.

c. The cases cited by ISP support the District Court and Eller's interpretation and application of the term "occurrence."

The two Idaho cases cited by ISP, while not directly applicable here, further support the District Court and Eller's interpretation and application of the term "occurrence." Both *Unigard Ins. Co. v. U.S. Fid. & Guar. Co.*, 111 Idaho 891, 728 P.2d 780 (Ct. App. 1986)[12] and *Idaho Counties Risk Mgmt. Program Underwriters v. Northland Ins. Co.*, 147 Idaho 84, 205 P.3d 1220 (2009)[13] involved the application of the term "occurrence" in an insurance policy. Both cases essentially applied, what

[12] *Unigard* involved a snow-plow operator who damaged 98 storage-unit doors in a continuous four-hour period; the Court of Appeals determined there was only one occurrence because each door was damaged as the result of a continuous process. 111 Idaho at 892, 894, 728 P.2d at 781, 783.

[13] *Northland* involved an indemnification dispute between two insurers after the insured county settled a lawsuit stemming from a prosecutor's withholding of exculpatory evidence. The coverage issue depended on the timing of the occurrence. This Court held that the occurrence was at the time of prosecution, because that was when the injury first manifested. 147 Idaho at 90, 205 P.3d at 1226.

the *Unigard* case termed as the "functional event" test which focuses on the proximate cause of the injury, and asks "whether or not the damage-causing process [is] continuous and repetitive." 111 Idaho at 893, 728 P.2d at 782. Under the facts of those cases, the courts held that there was a single occurrence. The facts here are distinguishable because, as set forth above, ISP's individual adverse actions were unrelated in time and type, involved different decision makers, and, most importantly, proximately caused Eller to suffer independent emotional distress. For example, the denial of the pay increase and ability to teach occurred almost two years before Eller would suffer the denial of the sergeant promotion. Those events were perpetrated by different individuals, not dependent on one another, and independently caused Eller emotional distress.

It is apparent from the Court's decision below that it used a proximate cause/functional event application in determining how many occurrences the Jury found to have caused Eller emotional distress. Specifically, the District Court considered whether or not ISP's actions were one continuous process or discrete events. The Court wrote it was

> not persuaded that the adverse actions constitute a single "occurrence" because they shared a common catalyst . . .. Each alleged adverse action would have required a distinct decision and act, often by different peoples within Defendant's organization; there is no evidence that any were inevitable simply because others had preceded them. Each adverse action could have established a separate breach of duty independent from the others. In addition, the time elapsed between

> many of the alleged adverse action is a significant factor. . .. [T]he alleged adverse action often occurred months apart over the course of three to four years . . ..

R., p. 1992. Thus, even though the above cases are not binding authority here, the District Court's analysis was consistent with the approach applied in those cases.

In sum, the District Court correctly ruled that the individual adverse actions were the events which proximately caused separate and distinct emotional distress for Eller. Specifically, the District Court determined that the jury found at least two (2) occurrences – the rejection of the pay increase in 2014, and the denial of the promotion in 2016. As set forth above these were two, completely separate, independent acts involving different actors and with distinct damage (both economic and emotional) to Eller. As such, this Court should find that the District Court properly interpreted section 6-926's term "occurrence" and appropriately applied that definition within the unique circumstances of this case to enter Judgment for <u>at least</u>[14] two separate occurrences based on the Jury's verdict. As such, this Court should not further reduce the Jury's Verdict.

2. <u>The District Court had a duty to appropriately construe the jury's verdict, and any error was invited by ISP.</u>

ISP faults the Court for "attributing the maximum permissible amount of damages under § 6-926 to the two 'adverse actions' that the court believed may have

[14] As set forth in Eller's Opening Brief, the District Court erred in not recognizing its authority under Rule 49(a)(3) to make findings on the total number of occurrences. *Id.,* pp. 40-43

existed."[15] ISP contends the Judgment was "not the jury's product; it was the district court's invention."[16] ISP's position is faulty for several reasons.

First, it was ISP's own post-trial motion that required the Court to revisit the Jury's verdict, when, for the first time, ISP raised section 6-926 asking the District Court to reduce the Jury's emotional distress award. R., p. 1838-46. As this Court has recognized, it is error to fail to give effect to a verdict simply because it is ambiguous. *Griffith v. Latham Motors, Inc.*, 128 Idaho 356, 360, 913 P.2d 572, 576 (1996). Thus, if confronted with an ambiguous special verdict, a "court must look at the evidence and the instructions given" and, if it is possible to construe the Jury's findings consistently, "the court must resolve the case in that way." *Id.* In short, the District Court had not only the authority but the duty to construe the Jury's Special Verdict when faced with ISP's *Motion for Reduction*.

Here, the Jury awarded all of the economic damages it could have with regard to ISP's denial of Eller's pay increase application and passing over Eller for the sergeant promotion. Given that the Jury clearly found at least those two adverse actions, and based upon the instructions and evidence presented during trial viewed in a light most favorable to Eller,[17] the District Court did not err in attributing a portion of the Jury's award of emotional distress to these two

---

[15] ISP's Opening Brief, p. 18.
[16] *Id.* at 19.
[17] *Van,* 156 Idaho at 700, 330 P.3d at 1058 ("When reviewing a jury verdict on appeal the evidence adduced at trial is construed in a light most favorable to the party who prevailed at trial.")

occurrences. *See e.g., Passitano v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 509 (9th Cir. 2000)(upholding district court's allocation of jury's award of compensatory damages, front pay, and backpay to plaintiff's state law claim and the jury's award of punitive damages to plaintiff's federal law claim subject to a cap.)

Second, "[i]t has long been the law in Idaho that one may not successfully complain of errors one has acquiesced in or invited." *Taylor v. McNichols*, 149 Idaho 826, 833, 243 P.3d 642, 649 (2010). To the extent the District Court erred in entering Judgment with a finding of at least two occurrences, such error was invited by ISP, and "invited errors are not reversible." *State v. Caudill*, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985). The invited error doctrine applies to jury instructions to prevent a party who "played an important role in prompting a trial court to give or not give an instruction from later challenging that decision on appeal." *State v. Carlson*, 134 Idaho 389, 402, 3 P.3d 67, 80 (2000). Here, as set forth in Eller's Opening Brief, ISP did not raise section 6-926 in its *Answer* to Eller's *Amended Complaint* although it did raise several other damage cap statutes. Indeed, at no point during the litigation prior to the dismissal of the Jury post-verdict, did ISP raise section 6-926. Had ISP done so, the Jury would have been asked to make a finding on the number of occurrences it found for Eller's NIED claim. Instead, ISP waited until nine days after the Jury rendered its verdict to raise section 6-926. ISP never explained why it was dilatory in raising section 6-926 even though it raised

other damage caps in its Answer. As such this Court could find that ISP made a tactical decision not to raise it prior to the Jury's verdict. In other words, by not raising Section 6-926 until post-verdict, ISP prevented the Court from properly instructing the Jury on making findings on the number of occurrences. Thus, ISP invited any alleged error committed by the District Court in determining how many occurrences the Jury found.

Finally, as set forth in Eller's Opening Brief, pursuant to Rule 49(a)(3), the District Court also had the authority, albeit erroneously unrecognized below, to make independent findings of fact on questions not demanded to be submitted to the Jury.[18] Indeed, Eller has asked this Court to vacate the Judgment and remand the case to the District Court so that it can make findings of fact with respect the number of occurrences, unless it restores the Jury's original Verdict by holding that Eller was either entitled to emotional distress damages under the Whistleblower Act or that ISP waived the caps by failing to raise them as an affirmative defense/avoidance before the verdict.[19]

3. ISP should be now be judicially estopped from arguing there is only one occurrence under the continuing tort theory.

In ISP's briefing related to its *Motion for Reduction*, ISP argued that there was a single occurrence because the retaliation all arose from Eller's protected

[18] *See* Eller Opening Brief, pp. 40-43.
[19] *Id.*

activity vis-à-vis the Sloan case. R., p. 1937. As set forth above, ISP has abandoned that position on appeal and now presents a new argument. ISP now asserts that "it is evident that the 'occurrence' in this case was the overarching course of alleged retaliatory action" such that it constitutes a "concurrent or consecutive torts" under section 6-926(3).[20] ISP further contends that "even though the district court has pointed to individual 'adverse actions' in its analysis, each of those 'acts' were part of the larger course of alleged retaliation, which constituted the single occurrence in this matter."[21] Given that ISP gained an advantage in successfully arguing against the application of a continuing tort theory with respect to its retaliatory actions against Eller at the beginning of the case, this Court should find ISP is judicially estopped from arguing the flip-side to its advantage on appeal. *See Loomis v. Church,* 76 Idaho 87, 277 P.2d 561 (1954).

In August of 2015, ISP filed a *Motion to Dismiss* Eller's case. R., pp. 39-67. In its *Amended Memorandum* ("Memo"), ISP argued that Eller only had "180 days after the occurrence of the alleged violation" to file a civil action. R., p. 60. In doing so, ISP relied on *Patterson v. Dept. of Health & Welfare*, 151 Idaho 310, 256 P.3d 718 (2011), wherein this Court found an IPPEA claim untimely because constructive discharge was a discrete act. R., p. 60.

[20] ISP Opening Brief, p. 22.
[21] *Id.*, pp. 22-23.

ISP then asserted that the denial of Eller's choice point pay increase "is a discrete act and not the culmination of adverse actions constituting a continuing incident." R., p. 61. Thus, ISP argued that Eller's earlier claims of adverse actions[22] must be dismissed as untimely because they occurred prior to July 10, 2014 (the 180-day threshold). R., pp. 61-62. ISP also requested it be awarded attorneys' fees and costs in part because the "Idaho Supreme Court has also addressed the specifics of what constitutes an 'adverse action' as used in the Whistleblower Act, and found that an 'adverse action' is a discrete event, complete with a specific date of occurrence." R., p. 66 (quoting *Patterson,* 151 Idaho 310) (emphasis added).

Consistent with ISP's arguments, the District Court (then Hon. Judge Hansen) ruled that earlier retaliatory acts, such as Eller's removal from the CRU and reassignment to patrol, were separately actionable at the time they took place. R., p. 107. The Court refused to apply a continuing violation theory under the circumstances because the wrongful acts and the resulting damages they caused occurred at the same time, making them independent, actionable occurrences. *Id.*

Thus, ISP gained an advantage in this case by dismissing portions of Eller's whistleblower claim for any adverse actions prior to the 180-day period by arguing there was no continuing retaliation, just discrete adverse actions. As a result, the

[22] This included downgrading his performance, removing him from the CRU and putting him back on patrol with rotating night shifts; removing him as the interim statewide program manager, interfering with a reconstruction, and ultimately forcing him out of reconstruction work all together.

Jury was specifically instructed that they were only permitted to award economic damages for adverse actions occurring from July 10, 2014 *forward* for Eller's whistleblower claim. *See* R., pp. 1804, 1807, 1821 (Jury Instruction Nos. 18, 21 & 35) (emphasis in originals).

The doctrine of judicial estoppel exists to protect the "orderly administration of justice" and regard for the "dignity of judicial proceedings," and to "protect against a litigant playing fast and loose with the courts." *McKay v. Owens,* 130 Idaho 148, 152, 937 P.2d 1222, 1226 (1997) (quoting *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 601 (9th Cir. 1996) (internal citations omitted)). This Court first adopted the doctrine of judicial estoppel in *Loomis*, *supra*, and has applied it in myriad contexts.[23] Judicial estoppel applies when a litigant makes a statement, or takes a position, and thereby gains an advantage, and then later takes an inconsistent position or makes contrary allegations against another party arising out of the same transaction or subject matter. *See McKay*, 130 Idaho at 152 (citing *Loomis,* 76 Idaho at 93-94).

Here, as set forth above, ISP filed a *Motion to Dismiss* Eller's *Complaint* and asserted that the adverse actions taken prior to July 10, 2014 were untimely because they were "discrete event[s], complete with a specific date of occurrence."

[23] *See, e.g.*, *Heinze v. Bauer*, 145 Idaho 232, 178 P.3d 597 (2008) (legal malpractice), *Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport, & Toole, P.S.*, 159 Idaho 679, 365 P.3d 1033 (2016) (security transactions), *A & J Constr. Co., Inc. v. Wood*, 141 Idaho 682, 116 P.3d 12 (2005) (real property joint venture).

R., p. 66 (emphasis added). ISP gained an advantage when the District Court ruled that Eller could not recover for any adverse actions prior to July 2014. In its appeal, ISP now argues that its retaliatory actions against Eller were a "continuing tort."[24] In fact, ISP cites to this Court's opinion in *Curtis* which, in ISP's words, recognized that "theory of consecutive torts fittingly applied to actions involving claims of negligent infliction of emotional distress."[25] ISP's position on appeal is directly contrary to its earlier position in this same case.

The elements of judicial estoppel are met in the instant matter such that this Court should find that ISP is judicially estopped from now arguing that Eller's claim is based on but a single occurrence because it is a continuing tort.[26] For all the reasons set forth above, this Court should not further reduce the Jury's Verdict.

D. The District Court Correctly Determined that Eller Engaged in Protected Activity under the Whistleblower Act.

ISP next argues that the District Court erred in determining that Eller engaged in protected activities under the Whistleblower Act.[27] In making this argument, ISP ignores the plain language of the Act, this Court's decisions interpreting the Act, and also the evidence presented at trial.

---

[24] ISP Opening Brief, pp. 24-25.
[25] ISP's Opening Brief, p. 24.
[26] Eller recognizes that he also raised a judicial estoppel argument to the District Court below, which was rejected. However, ISP has refined its argument on appeal so as to specifically assert that ISP's retaliation was a continuing tort. Thus, it has reopened the door for this Court to apply the judicial estoppel doctrine.
[27] ISP Opening Brief, p. 29. To the extent ISP is also arguing that the jury instruction given by the trial court on this issue was error, ISP has failed to object as set forth in Section E., *infra*.

1. *The District Court correctly determined that Eller's participation in the Sloan investigation and testimony at the Sloan preliminary hearing were protected activity.*

ISP does not dispute that Eller participated in an investigation or that he participated in a hearing or court proceeding. Instead, ISP argues that Eller's involvement in the *Sloan* investigation "simply required him to do his job"[28] and "there was no evidence presented by Plaintiff establishing, or even tending to show, that his participation in the Sloan investigation uncovered any waste or violations of law, rule or regulation."[29]

The "participation clause" of the Act states:

> (2) An employer may not take adverse action against an employee because an employee participates or gives information in an investigation, hearing, court proceeding, legislative or other inquiry, or other form of administrative review.

I.C. § 6-2104(2). The participation clause is designed to address the factual scenario involved in the instant matter – an employer cannot retaliate (take an adverse action) against its employee who participates or gives information in an investigation, hearing, court proceeding, etc.

ISP, however, argues that a law enforcement officer's duties are unique, in that law enforcement is often involved in investigations and testifies at hearings, and further suggests that this Court should not "exclusively follow the literal

[28] ISP Opening Brief, p. 31.
[29] ISP Opening Brief, p. 32.

language of the statute."[30] ISP cites *Black v. Idaho State Police*, 155 Idaho 570, 314 P.3d 625 (2013) in support of its position that that protections of the Act do not extend to "everyday work activities which are not designed to uncover, or which incidentally uncover any wasteful, illegal or illicit activity…."[31] ISP's reliance on *Black* is not well taken.

The *Black* case addressed the parameters of the communication clause, I.C. § 6-2104 (1) and refusal clause, I.C. § 6-2104 (3). *Black*, 155 Idaho at 573, 314 P.3d at 628. *Black* did not involve participation clause claims. In discussing the refusal clause, this Court noted that implicit in the Whistleblower Act is a requirement that the employer engage in some sort of predicate act that triggers the applicability of the Act. *Id.* at 574, 314 P.3d at 629. The participation clause contains no such proviso or requirement.[32] In short, *Black* does not support ISP's argument.

As part of its argument that Eller's participation in the *Sloan* investigation and his in-court testimony is not protected activity, ISP attempts to distinguish and limit this Court's recent decision in *Wright v. Ada County*, 160 Idaho 491, 376 P.3d

---

[30] ISP Opening Brief, p. 32. ISP does not identify why this Court should ignore the express language of the Act. Indeed, Statutory interpretation "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole." *Wright*, 160 Idaho at 497, 376 P.3d at 64 (citations omitted) (emphasis added). If the statute lacks ambiguity, "this Court does not construe it, but simply follows the law as written." *Id.*

[31] ISP Opening Brief, p 31.

[32] Additionally, there is no exception to the Act for the Idaho State Police. Nor is there an exception to the Act for law enforcement officers. ISP's suggestion, that this Court should re-write the statute and provide a blanket exception to whistleblower protection for law enforcement officers, is without merit or support.

58 (2016). However, in its effort to graft some limitation to the holding of *Wright*, ISP ignores significant portions of this Court's decision, particularly as to the participation clause. As this Court noted, "there is nothing in [the participation clause] that requires the investigation to relate to waste or a violation of law, rule, or regulation." *Wright*, 160 Idaho at 498, 376 P.3d at 65. Further, *Wright* held that

> It is immaterial that the investigation was not officially initiated for the purpose of uncovering waste or a violation of law, rule, or regulation. Rather, it was sufficient that Wright participated in an official investigation as part of his responsibilities as the Director of the Department of Administration.

Id. at 499, 376 P.3d at 66 (emphasis added). Clearly protected activity can arise from performance of the responsibilities of one's job.

In order to prevail in an action under the Whistleblower Act, the employee must prove that the employee "has suffered an adverse action because the employee … engaged or intended to engage in an activity protected under [Idaho Code §]6-2104." *Wright*, 160 Idaho at 496, 376 P.3d at 63; I.C. § 6-2105(4). The Act explicitly protects public employees who experience adverse action after participating or giving information in an investigation or court proceeding. *See* I.C. §6-2104(2). ISP concedes that Eller participated in an investigation and that he testified in a court proceeding.[33] The evidence is undisputed. Further, the evidence presented at trial confirms that ISP did exactly that which the participation clause is designed to

[33] ISP Opening Brief, p. 32.

deter – retaliated against Eller after his participation and testimony. The Court did not err in finding that Eller's participation and testimony were protected activity. [34]

2. The District Court correctly determined that Eller's communications related to the destruction of documents were protected activities.

ISP also argues that Eller's communications related to the destruction of documents were not protected activity under the Act. ISP does not dispute that Eller communicated to his commanders that he believed the destruction of documents policy implemented by ISP would result in in destruction of evidence and violations of the requirements of *Brady v. Maryland*. Instead, ISP premises its argument upon the suggestions that (1) Eller had a "mistaken understanding" of what constitutes exculpatory evidence and *Brady* material,[35] and (2) Eller's communications related to "potential future violations of law.[36]

Pursuant to the "communications clause" of the Act, "[a]n employer may not take adverse action against an employee because the employee . . . communicates in good faith the existence of . . . a violation or suspected violation of a law, rule or regulation adopted under the law of this state." I.C. § 6–2104(1)(a). Communications regarding suspected violations of law, rule or regulation do not

[34] Furthermore, ISP's argument would have this Court ignore the fact that Eller's participation and testimony inherently dealt with a suspected violation of law. ISP was investigating whether Sloan had committed a crime, and Eller's testimony supported that Sloan had failed to operate his police car "with the due regard for the safety of all persons" and in "reckless disregard for the safety of others." I.C. § 49-623(4).
[35] ISP Opening Brief, pp. 33-35.
[36] ISP Opening Brief, pp. 33, 35-36.

need to be confirmed in order to qualify as a protected activity. *Van*, 147 Idaho at 559, 212 P.3d at 989. Thus, ISP's argument that, in order to be "objectively reasonable," a communication about a suspected violation of law, rule, or regulation must be correct, is not supported by the plain language of the Act.[37]

Further, the evidence supports the finding that Eller's communications related to destruction of documents were protected activities. After Eller received the email from Major Hudgens directing that "**Effective immediately CRU members will not keep draft copies of their reports in the official case file. As is current practice within ISP, those reports should be destroyed,**"[38] Eller was concerned because he knew from his training that everything created during an investigation is potentially discoverable under *Brady.* Tr. 08.17.17, pp. 372-76; Pltf. Ex. 156.

As Eller testified, he approached two of his commanding officers (Lt. Doty and Cpt. Kelley) and expressed concerns that the directive could cause a *Brady*

---

[37] Although this Court need not reach the issue of whether there was an actual violation of law, rule, or regulation by ISP, there is ample legal support related to the reasonableness of Eller's communications about the destruction of documents. Below, ISP argued that *Brady* "does not constitute a law, rule, or regulation 'adopted' under the law of this state … or the United States as required by I.C. § 6-2104(1)(a)." R., p. 843. However, as noted by the District Court, in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), the U.S. Supreme Court established a prosecutor's duty to disclose to an accused any material, exculpatory evidence in the prosecutor's possession, the failure of which duty is a violation of the accused person's right to due process. Evidence is exculpatory if it "tends to clear an accused of alleged guilt, excuses the actions of the accused, or tends to reduce punishment." *State v. Johnson*, 120 Idaho 408, 411, 816 P.2d 364, 367 (Ct. App. 1991). *See also Gibson v. State*, 110 Idaho 631, 633, 718 P.2d 283, 285 (1986). The duty of disclosure enunciated in *Brady* is an obligation of not just the individual prosecutor assigned to the case, but of all the government agents having a significant role in investigating and prosecuting the offense. *State v. Gardner*, 126 Idaho 428, 433, 885 P.2d 1144, 1149 (Ct. App. 1994) (citations omitted).

[38] Tr. 08.17.17, pp. 78-79, 370-71; Pltf. Ex. 83 (emphasis added).

issue, leaving officers unable to turn over exculpatory evidence. Eller also stated that he thought "legal," (*i.e.,* ISP's deputy attorney general) should be asked to render a decision regarding the legality of the directive. Both Lt. Doty and Cpt. Kelley ignored Eller's concerns and made it clear that he was to follow the directive and destroy peer review reports. Tr. 08.17.17, pp. 373-76. ISP does not dispute the communications made by Eller. Although Eller refused to follow the directive, he was notified that peer review reports had been destroyed in a number of fatal crash files. Tr. 08.17.17, pp. 79-81, 376; Pltf. Ex. 135.

Eller was not the only ISP officer concerned about the legality of this directive. At least four (4) other ISP crash reconstructionists confirmed Eller's concerns (*i.e.* the reasonable basis) about the destruction of documents. For example, ISP witnesses testified that peer reviews were stored by ISP because those documents are evidence, and ISP personnel who complete peer reviews of reconstruction reports are "quite often" called to court to testify. Testimony confirmed that peer review reports are exculpatory evidence and discoverable. Tr. 08.17.17, pp. 17-18, 79 (Carmack trial testimony), 314-15 (Gibbs trial testimony); 692-93; 706 (Smith trial testimony), 769-70, 774-75 (Rice trial testimony); Tr., pp. 1079-80 (Bakken trial testimony). In fact, Steve Smith, who was a reconstructionist at ISP for 15 years testified that he believed Maj. Hudgen's email was essentially a directive to destroy exculpatory evidence. Tr. 08.17.17, p. 706. Additionally, The

Sloan prosecutor informed Carmack that they "want everything," not just peer reviews but everything ISP had to do with the crash reconstruction reports. Tr. 08.17.17, pp. 54-55. An ISP trooper's job is to deliver evidence to the prosecutor, and that prosecutor makes the determination as to what is exculpatory evidence. Tr. 08.17.17, pp. 56-57.

Additionally, testimony confirmed that ISP actually destroyed evidence after the directive, which was "effective immediately." Tr. 08.17.17, pp. 79-81 (Carmack Trial Testimony); 315 (Gibbs Trial Testimony). Thus, Eller's communications were not related to future violations of law but rather present suspected violations of law (*i.e.*, destroy the reports now), which in fact actually occurred.

The evidence supports Eller's reasonable basis in communicating about ISP's policy, effective immediately, to destroy documents related to crash reconstruction. For the reasons above, the District Court did not err in determining that Eller's communications were a protected activity.

E. ISP Failed to Preserve Any Issues Related to Whether Eller's Communications were Made in Good Faith.

ISP argues that the District Court erred in instructing the Jury that Eller's communications were made in good faith. On appeal, ISP suggests that the Court "removed a key factual determination from the province of the jury" and "deprived

Defendant of its right to have the issue decided by the jury."[39] ISP inexplicably fails to acknowledge that it did not raise this issue below, did not request a jury instruction related to the "good faith" basis of Eller's communications, and further failed to object to the instruction that it now complains about. Additionally, ISP did not present any evidence to dispute that Eller's communications were in good faith.

ISP is correct that the issue of whether an employee communicates in good faith is normally a question of fact. *See Black*, 155 Idaho at 573, 314 P.3d at 628; *Curlee v. Kootenai Cnty. Fire & Rescue*, 148 Idaho 391, 224 P.3d 458 (2008). And in the instant matter, prior to trial, the District Court correctly recognized that the question of whether Eller communicated in good faith was a question for the Jury. For example, at summary judgment, the District Court held that there was a genuine issue of material fact as to whether or not the communications by Eller were made in good faith. R., pp. 1599, 1604. Additionally, on July 31, 2017, during the pretrial conference, the Court noted that whether or not the communications were made in good faith "will have to be determined by the jury." Tr., p. 166 ("So, that is a jury finding that the Court left open.").

However, shortly before trial was to begin, at another hearing, the District Court inquired of counsel about whether the issue of the good faith of Eller's communication was truly disputed. Specifically, the District Court asked:

---

[39] ISP Opening Brief, p. 38.

> Do the parties anticipate putting on evidence as to this issue or will there be a stipulation that the plaintiff's communications regarding the draft reports constituted protected activity? …
> Are we really trying to make the jury decide the good faith question or are the parties stipulating that Mr. Eller's communication regarding his view of the change in the policy on the draft reports was in fact good faith such that we would just instruct the jury there were two protected actives *[sic]* as a matter of law and you're focussing *[sic]* on whether or not there was an adverse action that resulted and was causally linked to that protected activity?

Tr., pp. 258-59. Counsel for ISP noted that he would "think about it" and call Eller's attorneys with a decision. Tr., p. 259. The record does not contain response from ISP's counsel. However, the absence of a requested good faith instruction or an objection to the provided instruction by ISP is telling and dispositive.[40]

The District Court's initial instructions to the Jury advised only that Plaintiff was involved in two protected activities and did not instruct the jury that Eller's communications were made in good faith. Tr., pp. 454-55. During trial there was no evidence presented to support a finding that Eller's communications were not in good faith. Following the close of evidence, the District Court provided both parties with the opportunity to raise objections to proposed instructions and objections related to the Court's failure to give any of the parties' proposed instructions. *See* Tr., pp. 1387-90, 1397-99. However, ISP failed to object to Jury Instruction No. 17

[40] Indeed, Plaintiff initially requested an instruction related to "good faith" communications. R., p. 1696 (Plaintiff's Proposed Instruction). ISP did not. R., pp. 1527-60 (Defendant's Proposed Jury Instructions). Further, Defendant filed supplemental jury instructions which also did not address "good faith." ISP R., pp. 527-30 (Defendant's Supplemental Proposed Jury Instructions).

which instructed the Jury that the Court had determined Eller engaged in protected activity which included his "communications in good faith of a suspected violation of law . . . regarding his opinion on [ISP's] policy regarding the destruction of peer review and draft reports." *See* R., p. 1802; Tr., p. 1387-90, 1397-99, 1417.

Idaho Rule of Civil Procedure 51(i)(3) notes

> (3) Objections. No party may assign as error the giving of or failure to give an instruction unless the party objects before the jury deliberates, stating distinctly the instruction to which that party objects and the grounds of the objection.

(emphasis added). This Court will not consider challenges to a jury instruction on appeal when there was no objection preserved below. *Profits Plus Capital Mgmt. LLC v. Podesta*, 156 Idaho 873, 890, 332 P.3d 785, 802 (2014); *Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716, 725, 291 P.3d 399, 408 (2012). As a result, ISP's challenge to the jury instruction related to Eller's good faith protected activity is without merit.

The arguments raised by ISP on appeal, along with the failure to object procedural issues, mirror those addressed by this Court in *Profits Plus*. In that case, one of the parties, Street Search, conceded that it had failed to propose a jury instruction on fraud or constructive fraud. 156 Idaho at 889, 332 P.3d at 801. Despite this failing, Street Search argued on appeal that the trial court's failure to give instructions on fraud or constructive fraud amounted to "essentially a directed

verdict" by the lower court which amounted to an error of law. *Id.* at 890, 332 P.3d at 802. In *Profits Plus*, there was no record on appeal of the jury instruction conference. *Id.* In light of the lack of record, this Court noted:

> 'It is the litigant's duty to not only clearly state its contentions to the trial judge, but to make such contentions, and the rulings thereon, of record so they may be reviewed on appeal.' *Van Velson Corp. v. Westwood Mall Assocs.*, 126 Idaho 401, 406, 884 P.2d 414, 419 (1994). Therefore, if the claims were indeed dismissed, it was incumbent upon Street Search's counsel to object to the dismissal and to request that the court record the objection or direct the reporter to record what had transpired. *Annau v. Schutte*, 96 Idaho 704, 710, 535 P.2d 1095, 1101 (1975). This Court 'will not review a trial court's alleged error on appeal unless the record discloses an adverse ruling which forms the basis for the assignment of error.' *State v. Fisher*, 123 Idaho 481, 485, 849 P.2d 942, 946 (1993).

Id.

In the instant matter, as in *Profits Plus*, ISP failed to propose a jury instruction related to whether Eller's communications were made in "good faith" despite the fact that the Court had raised this issue at a pre-trial hearing when discussing jury instructions. The record does not contain an adverse ruling which forms the basis for ISP's instant assignment of error. The jury instruction conference is in the record in this matter. No objection was raised to Jury Instruction No. 17. Under such circumstances, ISP has failed to adequately preserve this issue for appellate review.[41] *Id.* at 890-91, 332 P.3d at 802-03. *See also*

[41] Alternatively, should this Court determine to address ISP's argument on this issue on the merits, there is no evidence to support ISP's suggestion that Eller lacked good faith in his communications.

Idaho Military Historical Soc'y v. Maslen, 156 Idaho 624, 629, 329 P.3d 1072, 1077 (2014)("Where an incomplete record is presented to an appellate court, missing portions of the record are presumed to support the action of the trial court.")(citation omitted).

F. The District Court Correctly Denied ISP's Objections Regarding Eller's Testimony about Physical Symptoms Related to his Emotional Distress.

Proof of Eller's NIED claim required a showing that his emotional distress manifested in physical symptoms. This Court has recognized the following symptoms as manifestations of emotional distress: "sleep disorders, headaches, stomach pains, suicidal thoughts, fatigue, loss of appetite, irritability, anxiety, reduced libido and being 'shaky-voiced.'" *Carrillo v. Boise Tire Co., Inc.*, 152 Idaho 741, 750, 274 P.3d 1256, 1265 (2012). ISP concedes that Idaho appellate courts have held lay testimony of physical symptoms of emotional distress permissible.[42] However, ISP argues that Eller's testimony regarding having headaches, getting sick, having issues eating, losing weight and experiencing skin issues should have been excluded because they required expert medical testimony.[43]

Hence, there was no evidentiary support for a jury instruction to have been given on this issue, even had ISP requested one.

[42] ISP Opening Brief, p. 41.

[43] *Id.* Notably, ISP did not object to Jury Instruction No. 25 which listed anxiety, lost sleep, weight change and irritability as symptoms which could constitute physical manifestations of emotional distress. R., p. 1811. Thus, to the extent ISP's current appeal deals with Eller's testimony regarding any of these symptoms, it has been waived by its failure to object to this instruction. I.R.C.P. 51(i)(3); *Profits Plus Capital Mgmt. LLC*, *supra*.

The District Court did not abuse its discretion in permitting Eller to testify to the physical manifestations of his emotional distress.[44] Although a lay person may not testify "where the subject matter regarding the cause of disease, injury or death of a person is wholly scientific or so far removed from the usual and ordinary experience of the average person that expert knowledge is essential to the formation of an intelligent opinion," *Dodge-Farrar v. American Cleaning Serv. Co., Inc.*, 137 Idaho 838, 841-42, 54 P.3d 954, 957-58 (Ct. App. 2002), expert testimony is clearly *not* required in all cases. *Id.* This Court has found lay testimony regarding the types of symptoms that Eller testified to in this case permissible to support NIED claims. For example, in *Cook v. Skyline Corp.*, 135 Idaho 26, 34, 13 P.3d 857, 865 (2000), relied upon by ISP, this Court said "Cook's physical manifestations of distress included symptoms as lost sleep, irritability, anxiety, and being 'shaky-voiced' which a lay person should be able to testify he or she had experienced." The *Cook* case was remanded to the district court to exercise discretion to determine which physical manifestations might require expert testimony, and this Court specifically pointed out ulcers and headaches as symptoms for the lower court to analyze.[45] In *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 837, 801 P.2d 37,

---

[44] ISP recognizes that the District Court's evidentiary rulings are reviewed under an abuse of discretion standard. ISP's Opening Brief, p. 16.

[45] The Court of Appeals in *Dodge-Farrar* incorrectly stated that this Court held in *Cook* that symptoms of ulcers and headaches are medical conditions for which expert testimony is required to establish causation. 137 Idaho at 842, 54 P.3d at 958. However, *Cook* remanded the case to the

44 (1990), this Court held that Brown's own testimony that she suffered loss of sleep, headaches, and stomach pains sufficient to overcome summary judgment on her NIED claim. In fact, headaches are often included as permissible physical symptoms resulting from emotional distress, along with other symptoms of a common nature. *See, e.g., Czaplicki v. Gooding Joint Sch. Dist. No. 231*, 116 Idaho 326, 332, 775 P.2d 640, 646 (1989)(finding plaintiffs' description of physical symptoms such as "severe headaches, occasional suicidal thoughts, sleep disorders, reduced libido, fatigue, stomach pains and loss of appetite" sufficient to overcome summary judgment on NIED claims.)

Here, Eller's testimony was that ". . . when I'm under a great deal of stress, I will have headaches, which is not normal for me . . . the headaches would come on usually right before the beginning of my shift . . ." Tr.08.17.17, p. 416, LL. 2-12. In this context, Eller's headaches are exactly the type of common ailment that is within the ordinary experience of an average person and not some injury or disease that is wholly scientific, for which the time and expense of a medical expert should be required. *See Dodge-Farrar*, 137 Idaho at 842, 54 P.3d at 958 (recognizing that not all cases require the expense of medical experts). The District Court acted within the outer bounds of its discretion, consistent with the above legal standards,

---

district court to "exercise its discretion to determine which of the Cooks' physical manifestations are medical conditions for which expert testimony is required to establish causation." 135 Idaho at 35, 13 P.3d at 866. This Court did not hold that headaches required expert testimony.

and reached its decision to allow this testimony by an exercise of reason. *See* Tr. 08.17.17, pp. 233-34.

Moreover, even if the District Court had erred in admitting this evidence, ISP has made no attempt to establish manifest abuse of discretion affecting a substantial right, as required by I.R.C.P. 61 and I.R.E. 103(a). Indeed, because evidence of other, unquestionably permissible, physical manifestations supported Eller's NIED claim, ISP cannot overcome the harmless error rule.[46] This Court must reject ISP's appeal on this ground.

G. The District Court did not Abuse its Discretion in Admitting Evidence Regarding Similarly Situated Employees as Circumstantial Support for Eller's Claims.

ISP complains that the District Court erred in the following evidentiary rulings: (1) admission of evidence related to ISP's investigation of Carmack's participation in the *Sloan* investigation and preliminary hearing and ISP's reprimand of Carmack regarding the same; and (2) exclusion of evidence regarding an unrelated investigation of Fred Rice at the time of his retirement from ISP.[47]

Pursuant to Rule of Evidence 103(a) ISP must show that any alleged error affects a substantial right and:

---

[46] ISP cannot belatedly address the harmless error issue (or other issues for the first time) in Reply. ISP has therefore waived this issue on appeal. *AgStar Fin. Servs., ACA v. Nw. Sand & Gravel, Inc.*, 161 Idaho 801, 816, 391 P.3d 1271, 1286 (2017) ("A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking.")(*quoting Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 16, 175 P.3d 172, 178 (2007)).

[47] *See* ISP Opening Brief, p. 42.

(1) if the ruling admits evidence, a party on the record:
(A) timely objects or moves to strike; and
(B) states the specific ground, unless it was apparent from the context; or
(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

I.R.E. 103(a). As set forth below, the District Court did not err in admitting testimony from Carmack as relevant circumstantial evidence supporting retaliation against Eller. Additionally, ISP did not object on Rule 403 grounds and hence waived its right to raise that objection on appeal. *Carlson*, 134 Idaho at 398, 3 P.3d at 76 (the specific ground for the objection must be clearly stated and objecting on one basis does not preserve a separate and different basis for exclusion of the evidence). Additionally, ISP did not proffer the evidence regarding Rice's retirement that it complains was omitted. More importantly, ISP cannot show that the District Court abused its discretion or that any alleged error affected a substantial right.

1. *Carmack's testimony and Exhibit 120 were appropriately admitted as relevant evidence, and even if admitted in error, ISP has not made a showing that it impacted a substantial right.*

As set forth in Eller's Opening Brief, Carmack was a fellow ISP reconstructionist working in the Crash Reconstruction Unit in District 3. Carmack was assigned as the reconstructionist for the Sloan crash. After following normal procedures including peer review, Carmack's reconstruction report with his conclusions was finalized and approved by Rice, the statewide crash reconstruction

coordinator. District 3 commanders (Lt. Kelley and Cpt. Richardson) called Carmack and Rice into a heated meeting wherein they made clear that Carmack had to change his already finalized and approved report. In Carmack's opinion, these demanded changes were intended to lessen the culpability of Deputy Sloan.[48]

After Carmack testified at Sloan's preliminary hearing, Sloan's criminal defense attorney wrote a letter complaining against Carmack and Rice. Tr., pp. 584-85. ISP then put Carmack and Rice on leave pending its Office of Professional Standards (OPS) internal investigation of them. Tr., pp. 588-89. On the other hand, the prosecutor in the *Sloan* matter, Richard Linville, had also written a complaint letter regarding Justin Klitch who was assigned as the investigator in the Sloan crash and testified on behalf of the defense at the preliminary hearing. Tr., pp. 575-76; Tr. 08.17.17, pp. 198-200; Pltf. Ex. 3. Linville's letter raised concerns about the truthfulness of Klitch's testimony and the fact that he had clandestinely recorded Linville's investigative interview of him, and then informed the defense (without informing the prosecutor) of the recording's existence. Tr., p. 577; Pltf. Ex. 3. ISP did not subject Klitch to an OPS investigation, nor place him on leave. Tr., pp. 582-84. In fact, ISP did not even ask Klitch about the concerns raised in Linville's complaint. Tr., pp. 728-29. Instead, ISP wrote back to Linville defending Klitch and his actions. Tr. 08.17.17, pp. 200, 722-24; Pltf. Ex. 95. Likewise, Lt. Kelley and Cpt.

[48] *See* Eller Opening Brief, pp. 4-6.

Richardson had been subjected to an OPS investigation regarding their actions vis-à-vis Carmack's *Sloan* reconstruction report, but they were not placed on leave, were cleared of any wrongdoing, and in fact were both promoted during the pendency of the investigations. Tr., pp. 564-65, 568-72; Tr. 08.17.17, pp. 201, 204-206; Pltf. Ex. 87, 92. Carmack and Rice, however, were on leave for six months and then reprimanded as a result of the OPS investigations against them. Tr., pp. 587-89; Tr. 08.17.17, pp. 64, 68-72, 205-06. The day that Carmack returned to work after leave, he was told (as was Eller) that he was being removed as a member of the CRU and placed back on patrol, rotating through night shifts. Tr., pp. 68, 72-74.

At trial, ISP objected, on *relevance* grounds, to two questions of Carmack and one exhibit that it now raises on appeal. One question asked Carmack to describe his experience being placed on administrative leave for six months, and the other question asked Carmack if being placed back on a patrol team had a negative impact on him. Carmack's testimony established that he viewed both of these actions taken by ISP as punitive. Tr. 08.17.17, pp. 64-65, 72-75. Likewise, Exhibit 120, ISP's Letter of Reprimand to Carmack, related to his reconstruction report and preliminary hearing testimony in the *Sloan* case. *Id.*, pp. 68-69. Thus, the evidence showed that Carmack, who engaged in protected activity like Eller and hence was similarly situated, was also retaliated against by ISP. This evidence was admissible circumstantial evidence of retaliatory motive and/or pretext. Stated more broadly,

evidence that ISP treated the employees who supported the agency's goal[49] more favorably than those employees who believed Sloan bore some responsibility for the crash, is probative of ISP's retaliatory intent and pretext. *See e.g., Heyne v. Caruso*, 69 F.3d 1475, 1480 (9th Cir. 1995)(Recognizing that '[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes,' the Supreme Court held that evidence of the employer's discriminatory attitude *in general* is relevant and admissible to prove race discrimination) (*quoting U.S. Postal Serv. v. Aikens,* 460 U.S. 711, 716, 103 S.Ct. 1478, 1482 (1983)); *see also Spulak v. K Mart Corp.,* 894 F.2d 1150, 1156 (10th Cir. 1990) ("As a general rule, the testimony of other employees about their treatment by the defendant [employer] is relevant to the issue of the employer's discriminatory intent."); *c.f. Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388, 128 S. Ct. 1140, 1147 (2008) (holding that evidence of discrimination of others and by other supervisors may be admissible and relevant); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988) (*abrogated on other grounds*)("Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it. . . . A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.") (*quoting Riordan v.*

[49] To avoid sending Sloan to prison. Tr. 08.17.17, p.773.

Kempiners, 831 F.2d 690, 697–98 (7th Cir. 1987)). Thus, this evidence was relevant and the District Court did not err in allowing its admission.

On appeal, ISP asserts that:

> even if the discussion of other officers' investigations and the results thereof could have been deemed marginally relevant, the evidence should have been excluded on the grounds that its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or waste of time.[50]

ISP did not object on Rule 403 grounds at trial. *See* Tr. 08.17.17, p. 64, LL. 13-21; p. 68, L. 21 - p. 69, L. 8; p. 73, LL. 1-21; and p. 74, L. 10 - p. 75, L. 10. Thus, a Rule 403 objection was not preserved for appeal purposes. *Carlson*, *supra*; I.R.E. 103(a)(1). Moreover, the probative value of this evidence is supported by the cases cited above recognizing the importance of permitting this circumstantial evidence in discrimination/retaliation cases. Finally, even if the admission of this evidence was in error, this Court must "disregard all errors . . . that do not affect a party's substantial rights." I.R.C.P. 61. ISP made absolutely no showing of the same.

2. *The District Court did not err in disallowing questions of Rice regarding an unrelated OPS investigation.*

Plaintiff called Fred Rice as a witness at trial.[51] As a preliminary question, Rice was asked the following:

[50] ISP Opening Brief, p. 43.
[51] Rice's involvement in the *Sloan* reconstruction is discussed briefly in Eller's Opening Brief, pp. 4-5.

> Q. And my understanding is that you're currently retired from the Idaho State Police; is that right?
>
> A. Yes, that's correct.

Tr. 08.17.17, p. 755, LL. 18-21. Before cross examination of Rice, outside the presence of the Jury, defense counsel told the Judge that he wanted to be able to ask Rice if he retired while there was a pending OPS investigation, not related to the *Sloan* case. Tr. 08.17.17, p. 786, L. 24 - p. 787, L. 1. The Court said: "I'm not going to allow that question. I think it's beyond the scope. And I think it's – it brings up collateral matters that are not at issue in this trial and would not be allowed pursuant to 403." *Id.* at p. 787, LL. 2-6. Defense counsel did not explain or proffer that such evidence supposedly went to establish potential bias against ISP, as it now asserts.[52] Thus, this argument is not preserved for appeal. *Carlson*, *supra*; I.R.E. 103(a)(1). Regardless, ISP was allowed to ask Rice if he previously sued ISP, to which he answered he had. Tr. 08.17.17, p. 788, LL. 13-15. It is hard to imagine how asking Rice if he retired while under an unrelated OPS investigation would provide more support for potential bias than telling the jury that Rice had previously sued ISP. In other words, ISP has made no showing that the exclusion of this evidence was anything but a harmless error, if error at all.

ISP has failed to present an appealable issue based upon the District Court's evidentiary rulings which would support reversal of the Verdict.

[52] ISP's Opening Brief, p. 42.

H. Eller is Entitled to Costs and Attorney Fees for this Appeal.

The Whistleblower Act provides that a court may order "payment by the employer of reasonable costs and attorneys' fees" to the employee. I.C. § 6-2106(5). Likewise, section 6-2105's remedies include "court costs and reasonable attorneys' fees." I.C. § 6-2105(1). *See also Wright,* 160 Idaho at 502, 376 P.2d at 69 (permitting an award of reasonable costs and fees on appeal if Wright prevailed on his Whistleblower Act claim on remand). As such, Eller should be awarded his costs and attorney fees incurred from this appeal.

IV. CONCLUSION

For the reasons set forth above, Appellant/Plaintiff Brandon Eller respectfully requests that this Court reject ISP's grounds for appeal, and award Eller the relief requested in his Appeal including his reasonable fees and costs on appeal.

DATED this 2d day of October, 2018.

By: _____
Erika Birch
T. Guy Hallam
STRINDBERG & SCHOLNICK, LLC
Attorneys for Appellant/Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 2 day of October, 2018, I caused to be served a true and correct copy of the foregoing document by the method indicated below to the following:

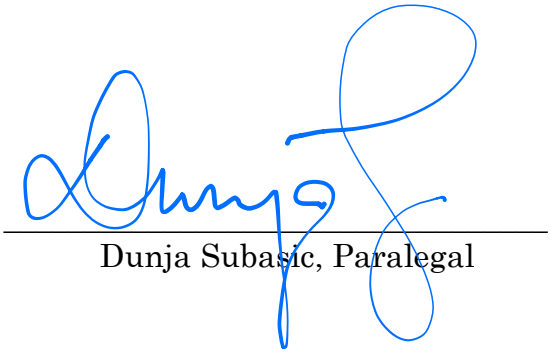
Andrew C. Brassey
Jason Murray
BRASSEY CRAWFORD, PLLC
345 Bobwhite Court
P.O. Box 1009
Boise, Idaho 83701-1009

Mr. Michael J. Kane
Michael Kane & Associates, PLLC
4355 West Emerald Street, Suite 190
Boise, ID 83706

Marty Durand
Herzfeld & Piotrowski, PLLC
PO Box 2864
Boise, ID 83701

Stephen Kohn
National Whistleblower Center
PO Box 25074
Washington, DC 20027

Rebecca Rainey
Fisher Rainey Hudson
950 W. Bannock St., Ste. 630
Boise, ID 83702



Dunja Subasic, Paralegal