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Eller v. Idaho State Police Respondent's Brief Dckt. 45698

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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 Case No. 45698-2018 and 45699-2018

Ada County Case No. CV OC 1500127

RESPONDENT IDAHO STATE POLICE'S BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County

The Honorable Nancy Baskin, Presiding

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I.
STATEMENT OF THE CASE

A. Nature Of The Case.

On January 6, 2015, Plaintiff Brandon Eller filed suit against his employer, Defendant Idaho State Police, in the Fourth Judicial District in and for Ada County, Case Number CV OC 1500127. R., pp. 20-26. The action was brought under the Idaho Protection of Public Employees Act ("IPPEA"), set forth at Idaho Code, Section 6-2101, *et seq.*, and commonly known as the "Whistleblower Act." Plaintiff alleged that Defendant's employees retaliated against him as a result of testimony he offered against another police officer during a preliminary hearing, and for raising concerns over Defendant's policy which required members of the crash reconstruction unit to destroy draft reports. R., p. 25. In October, 2016, Plaintiff filed a Motion to Amend his Complaint, seeking to add a number of factual allegations, as well as a claim for negligent infliction of emotional distress. Following oral argument, the Court issued a Memorandum Decision and Order on January 17, 2017 which, *inter alia*, granted Plaintiff's Motion to Amend. R., pp. 46-55. As a result, Plaintiff filed his Amended Complaint and Demand for Jury Trial on January 24, 2017. R., pp. 56-66.

B. Course Of Proceedings.

The matter was tried before a jury beginning on August 14, 2017. Following the Pretrial Conference, held July 31, 2017, Plaintiff filed his Amended Proposed Jury Instructions on August 10, 2017 (*see* R., pp. 1680-1717), among which was the following:

> If you decide Eller is entitled to recover from the ISP on Eller's claim for violation of the Idaho Protection of Public Employees Act, you must determine the amount of

> money that will reasonably and fairly compensate Eller for the following elements of damages proved by the evidence to have resulted from the ISP's wrongful actions against Eller:
>
> Economic Damages:
> 1. The reasonable value of lost past income and benefits, and
> 2. The present cash value of lost future income and benefits, and
>
> Non-Economic Damages:
> 1. The physical and mental pain and suffering, past and future.
>
> Whether any of these elements of damage has been proved to a reasonable degree of certainty is for you to determine.

R., p. 1701. Defendant filed an Opposition to Plaintiff's Proposed Jury Instruction on August 16, 2017. R., pp. 1732-1739. During the course of trial, and prior to the presentation of Plaintiff's evidence on damages, the District Court made an oral ruling on Defendant's Opposition, and denied Plaintiff's request to seek non-economic damages under the IPPEA. *See* R., p. 580. At Plaintiff's request, a Memorandum Decision and Order was issued by the Court on September 1, 2017. *See* R., pp. 580-587.

At the conclusion of trial on August 30, the jury returned a verdict in Plaintiff's favor, awarding him $30,528.97 in economic damages under the IPPEA, and the sum of $1.5 million in non-economic damages under his negligent infliction of emotional distress claim. R., pp. 577-579. Defendant filed a Motion for Reduction Pursuant to [Idaho Code] § 6-926 on September 7, 2017, seeking to reduce the amount of non-economic damages assessed against the State. R., pp. 15, 588-596. After all briefing and oral argument had been submitted, the district court entered a Memorandum Decision and Order on December 12, 2017, reducing Plaintiff's non-economic

damage award from $1.5 million to $1 million. R., pp. 631-649. The district court found that I.C. § 6-926 indeed limited the State's liability in actions brought under the Idaho Tort Claims Act to $500,000.00 "per occurrence," and further found that in the instant matter, there had been two "occurrences" of negligent infliction of emotional distress. R., pp. 641-648.

The instant appeal flows from the district court's decisions during the course of trial and in post-trial proceedings, including its December 12, 2017 Memorandum Decision and Order, wherein the court concluded that it was Defendant's "retaliatory actions against" Plaintiff for performing his "work responsibilities" that "violate[d] the [IPPEA], breache[d] the employer's duty of care," which then formed the basis for the "unexpected and unintended" conduct that constituted an "occurrence" under the ITCA. *See* R., p. 645. The district court further determined that as a result, the term "occurrence" referred to "each adverse action[1]" alleged by Plaintiff. *See id.* This appeal is thus also taken from the Judgment entered in accordance with the district court's decision (*see* R., pp. 651-652), as well as other evidentiary and substantive rulings of the district court during trial as set forth in the Defendant's Notice of Appeal and Amended Notice of Appeal. *See* R., pp. 653-660.

C. Statement Of Facts.

A detailed Statement of Facts setting forth the key events and circumstances giving rise to the underlying suit and the subsequent appeals by both sides is set forth in the Appellant's Brief filed

[1]The district court explained this conclusion as follows: "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 the Defendant breached its duty of care to Plaintiff. Thus, the adverse actions were the events or conditions that resulted in Plaintiff's injury." R., p. 645.

by Defendant Idaho State Police on August 31, 2018, and is incorporated by reference as though fully set forth herein. For purposes of responding to Appellant Eller's Opening Brief, however, and because of certain liberties which Plaintiff has taken in his Statement of Facts, the following points warrant further mention.

In describing the Sloan Investigation, Plaintiff stated that while Corporal Carmack "did not believe that Johnson's BAC was a causal factor in the crash, Klitch disagreed and believed that alcohol *had to be the cause* of the crash." *See* Plaintiff Eller's Opening Brief, p. 4 (citing Tr., p. 756; Tr. 08.17.17, pp. 35-37) (emphasis added). It should be noted that Cpl. Carmack acknowledged that he initially believed that Mr. Johnson's blood alcohol content was a "causational factor," and he had listed it as such in one of his previous draft reports[2]. *See* Tr., p. 35, ll. 9-16. It was only when Carmack was questioned whether he could "prove" that alcohol "caused the crash" that he amended his report. *See* Tr., p. 35, ll. 17-25. As to Plaintiff's contention that Sgt. Klitch "believed that alcohol had to be the cause of the crash," Plaintiff has misstated the record. The section of Sgt. Klitch's testimony to which Plaintiff has cited involved testimony over his consternation at not being called during the preliminary hearing, and he testified: "I couldn't believe things were going that way. I felt Linville would not call me as a witness because he disagreed that I thought alcohol was *a factor* in a crash..." Tr., p. 756, ll. 14-18. At no point did Sgt. Klitch testify that alcohol was the sole factor in causing the crash, as has been represented by Plaintiff.

[2]Interestingly, Plaintiff's citation to the earlier "draft" report at p. 6 of his Opening Brief refers to a version which omitted Carmack's original belief that alcohol was a "causational factor."

Plaintiff has further stated that based upon his assisting Sgt. Klitch in interviewing Deputy Sloan, as well as "other information Eller learned about the crash," he "supported Carmack's conclusion that Johnson's BAC was not a causal factor in the crash..." Plaintiff Eller's Opening Brief, p. 4. Plaintiff testified at trial, however, that when he testified at the preliminary hearing he had not yet read Cpl. Carmack's report (*see* Tr., p. 502, ll. 2-5), and that he did not know what Captain Richardson or Lt. Col. Kelley had "asked" Carmack to modify (Tr., p. 502, ll. 9-15).

According to Plaintiff, his only involvement in the Sloan Investigation was assisting Sgt. Klitch in interviewing Deputy Sloan, attempting to download airbag data, and then testifying at the preliminary hearing (*see* Tr., p. 500, ll. 15-25), despite his almost non-existent involvement in the investigation. Moreover, he testified that while the alcohol findings were "an important thing to have" in the report, and that alcohol was clearly present, his "opinion" was ultimately based on his refusal to rely upon a single BAC result and say that it was "what caused the crash." *See* Tr., p. 358, l. 9 through p. 359, l. 5. In short, rather than stating unequivocally that alcohol was not a *causal factor* in the crash, as is suggested in his Statement of Facts, the sum of Plaintiff's testimony was simply that he could not prove that it "caused" the crash.

Plaintiff's suggestion that other ISP personnel were attempting to force a false conclusion into the finished report is simply incorrect. Not only did Sgt. Klitch plainly state that he believed alcohol was a factor, there was also testimony that other causative factors were being discussed with Cpl. Carmack. For example, Carmack testified that when he was called in to meet with Captain Richardson and Lt. Col. Kelley, they also discussed the fact that Mr. Johnson had made a left turn

in front of an approaching emergency vehicle. *See* Tr., p. 49, l. 18 through p. 50, l. 11. Also worth noting is Plaintiff's testimony that he was not a part of the meetings where Lt. Col. Kelley and Captain Richardson discussed the causative factors with Cpl. Carmack. *See* Tr., p. 502, ll. 19-23. Furthermore, there was never any testimony or evidence contradicting the information which was added to Cpl. Carmack's "Revised Final Report" as set forth at Plaintiff Eller's Opening Brief, p. 6. In fact, Plaintiff testified during trial that "we all agreed that having the alcohol–the only thing we varied on was my suggestion was not to just leave one blood result in the Sloan investigation....[A]ll of the blood results should be in that." Tr., p. 492, ll. 8-15. There was also no evidence disputing the fact that Mr. Johnson initiated a left turn as Deputy Sloan approached with his lights and siren activated. Plaintiff, however, refused to acknowledge any statutory authority requiring a turning driver to first make sure that his movement can be made with safety. *See* Tr., p. 509, l. 6 through p. 511, l. 10.

Plaintiff has also pointed to certain testimony at trial concerning the circumstances surrounding the preliminary hearing. *See* Plaintiff Eller's Opening Brief, p. 7. There, he states that "ISP's response to Carmack's and Eller's testimony was immediate." *Id.* While the trial testimony cited by Plaintiff refers to comments made in response to Cpl. Carmack's preliminary hearing testimony, it says nothing about being in response to testimony offered by Plaintiff during the preliminary hearing. In fact, Lt. Col. Kelley testified during trial that he was not sure that Plaintiff was testifying that day during the preliminary hearing or not. *See* Tr., p. 525, ll. 4-7.

II.
ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Additional Issues On Appeal.

In addition to the issues raised by Defendant ISP in connection with its appeal, the following issues are presented by Plaintiff on appeal:

(1) Did the District Court err by ruling as a matter of law that the Whistleblower Act precludes an award of compensatory damages for emotional distress injuries?

(2) Did the District Court err in finding that ISP had not waived its right to raise the cap issue under Section 6-926 by waiting to raise it until after a verdict was returned?

(3) If this Court finds no waiver, should the case be remanded to the District Court with direction to apply the governing law by making findings pursuant to Idaho Rule of Civil Procedure 49(a) regarding how many occurrences caused Eller to suffer emotional distress? And,

(4) Is Eller entitled to costs and attorney fees and costs on appeal pursuant to Idaho Appellate Rule 40 and 41 and the Whistleblower Act?

B. Costs And Fees On Appeal.

Pursuant to Idaho Appellate Rules 35(a)(5), 40, and 41(a), Defendant contends that it is entitled to an award of the costs and attorney fees incurred on Plaintiff's appeal. These contentions are supported by Idaho Code Section 6-2107 and Idaho Rule of Civil Procedure 54(e)(1).

Idaho Appellate Rule 40 states that costs "shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." Defendant is unaware of any other provision of law that would forbid its recovery of costs should it prevail on appeal. Defendant further submits that if its appeal is successful, and Plaintiff is unable to prevail on his own

appeal, it should be deemed the prevailing party and therefore entitled to recover its attorney fees incurred in this action. Therefore, Defendant respectfully requests this Court award its costs and fees on appeal.

III.
ARGUMENTS AND AUTHORITY

A. Standard Of Review.

Questions of law are reviewed by this Court *de novo*. *State, Dept. of Finance v. Resource Service Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997). The standard of review for statutory interpretation is also well-settled in Idaho. The interpretation of a statute is a question of law, over which the Supreme Court exercises free review. *See Fields v. State*, 149 Idaho 399, 400, 234 P.3d 723, 724 (2010); *State v. Hart*, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001). Interpretation of a statute "begins with an examination of the statute's literal words." *Idaho Conservation League, Inc. v. Idaho State Dep't of Agric.*, 143 Idaho 366, 368, 146 P.3d 632, 634 (2006). Where the language of a statute is plain and unambiguous, courts give effect to the statute as written, without engaging in statutory construction. *See State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999). In construing a statute, "this Court will not deal in any subtle refinements of the legislation, but will ascertain and give effect to the purpose and intent of the legislature, based on the whole act and every word therein, lending substance and meaning to the provisions." *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990).

B. The Plain Language Of The IPPEA Specifies The Types Of Recoverable Relief, And Makes No Provision For An Award Of Non-Economic Damages.

Plaintiff's primary contention on appeal is that the District Court erred in ruling that non-economic damages are recoverable under the IPPEA. In support of his position, he argues that I.C. § 6-2105 defines "damages" to mean, in essence, any and all actual damages for any "injury or loss" attributable to a violation of the Act. In so arguing, Plaintiff relies upon not only an incorrect interpretation of the IPPEA's damage provisions, but also certain case law which is clearly distinguishable from the issues present here. Plaintiff further attempts to distinguish this Court's analysis in *Wright v. Ada County*, 160 Idaho 491, 376 P.3d 58 (2016), the application of which necessarily leads to the conclusion that non-economic damages are not an available remedy under the IPPEA.

1. The Express Terms Of The IPPEA Limit The Types Of Damages Recoverable.

Plaintiff's first point of contention is that the "plain, usual and ordinary meaning" of Idaho Code, § 6-2105 provides that "compensatory emotional distress damages are an available remedy under the Whistleblower Act." *See* Appellant Eller's Opening Brief, p. 18. He goes on to argue that Section 6-2105, in defining "damages," includes "actual damages" within that definition, and then extends that definition to include damages for emotional distress. *See id.* Plaintiff then argues that Section 6-2105 can and should be read independent of Section 6-2106, in which the Legislature proceeded to delineate the items of damage which a district court could award for a violation of the IPPEA. Despite the position taken and the authorities relied upon by Plaintiff on appeal, all of which

are distinguishable on their face, the plain language of the IPPEA simply does not afford such an interpretation. A brief analysis of Section 6-2106 illustrates the fallacy in Plaintiff's argument.

In describing the types of remedies which a court is allowed to award in rendering a judgment for actions in violation of the IPPEA, the Legislature provided as follows:

> A court, in rendering a judgment brought under this chapter, may order *any or all of the following*:
>
> (1) An injunction to restrain continued violation of the provisions of this act;
> (2) The reinstatement of the employee to the same position held before the adverse action, or to an equivalent position;
> (3) The reinstatement of full fringe benefits and seniority rights;
> (4) The compensation for lost wages, benefits and other remuneration;
> (5) The payment by the employer of reasonable costs and attorneys' fees;
> (6) An assessment of a civil fine of not more than five hundred dollars ($500), which shall be submitted to the state treasurer for deposit in the general fund.

I.C. § 6-2106 (emphasis added).

In short, the phrase "any or all of the following" contains no modifiers, and is expressed in the disjunctive. Notably absent is any language indicating that the remedies set forth in § 6-2106 "may include," or that the remedies "include, but are not limited to" those specifically identified. Rather, the Legislature expressly limited the available remedies to "any or all of" those contained within that subsection. Also conspicuously absent is any reference to non-economic damages, or any other form of damages that reasonably could be construed as non-economic damages. Instead, after stating that "damages" under the IPPEA means "damages for injury or loss caused by" a violation, and indicating that an employee alleging a violation of the IPPEA "may bring a civil action for

appropriate injunctive relief or actual damages, or both" within the prescribed time, the Legislature then went on to delineate the specific damages which may be awarded.

A statute must be interpreted according to its plain and unambiguous meaning. This Court has repeatedly reiterated the importance of that legal principle, and also "consistently adhered to the primary canon of statutory construction that where the language of the statute is unambiguous, the clear expressed intent of the legislature must be given effect and there is no occasion for construction.'" *Worley Highway Dist. v. Kootenai County*, 98 Idaho 925, 928, 576 P.2d 206, 209 (1978)(quoting *State v. Riley*, 83 Idaho 346, 349, 362 P.2d 1075, 1076–77 (1961)). Furthermore, "where a statute or constitutional provision is plain, clear, and unambiguous, it 'speaks for itself and must be given the interpretation the language clearly implies.'" *Moon v. Investment Board*, 97 Idaho 595, 596, 548 P.2d 861, 862 (1976) (quoting *State v. Jonasson*, 78 Idaho 205, 210, 299 P.2d 755, 757 (1956)). This principle is fundamental and binding on all Idaho courts as "[the courts] must follow the law as written." *Herndon v. West*, 87 Idaho 335, 339, 393 P.2d 35, 37 (1964). Notably, in a case where the Whistleblower Act was actually being addressed, this Court noted that words and/or provisions should not be added into a statute because the Court is "reluctant to second-guess the wisdom of a statute and has been *unwilling to insert words into a statute that the Court believes the legislature left out*, be it intentionally or inadvertently." *Wright v. Ada Cty*., 160 Idaho 491, 498, 376 P.3d 58, 65 (2016)(emphasis added)(citing *Manary v. Anderson*, 176 Wash.2d 342, 292 P.3d 96, 103 (2013) ("Where the legislature omits language from a statute, intentionally or inadvertently, the Supreme Court will not read into the statute the language that it believes was omitted.")

Here, the language of I.C. § 6-2106 is unambiguous, first in the language limiting the remedies which may be included in a judgment brought under the IPPEA, and also in its exclusion of non-economic damages. The legislature specifically codified the remedies allowed under the Act, including monetary damages that may be awarded in a judgment, and none of those provisions are ambiguous or could in any way be construed to somehow incorporate non-economic damages. The Idaho legislature excluded non-economic damages from the statute, and Idaho Code § 6-2106 must be enforced according to its plain and unambiguous terms. Therefore, even though the jury determined that there was a violation of the IPPEA, and even though it found that the violations of the IPPEA also caused Plaintiff emotional distress, non-economic damages are not recoverable for that violation *under the statute*. Instead, Plaintiff was permitted to, and indeed sought to recover those damages through the appropriate means–a claim for negligent infliction of emotional distress. The Legislature's decision to omit non-economic damages from Section 6-2106 did not deprive Plaintiff of any other available remedies. The Legislature did, however, plainly indicate those types of damages recoverable under the statute, and its decision to limit the available remedies to those specifically set forth may not be second-guessed by the courts.

2. <u>The Case Law Relied Upon By Plaintiff In Seeking Non-Economic Damages Under The IPPEA Is Distinguishable</u>.

Not only is the language of the statute clear and unambiguous, but clearly controlling case law also supports the District Court's finding that non-economic damages were not available under the IPPEA. On appeal, Plaintiff has relied upon a number of cases in support of his continuing effort

to obtain non-economic damages under the IPPEA. Among those are: *Brown v. City of Caldwell*, 2012 WL 4522728 (D. Idaho Oct. 1, 2012); *O'Dell v. Basabe*, 119 Idaho 796, 810 P.2d 1082 (1991); and *Paterson v. State*, 128 Idaho 494, 915 P.2d 724 (1996). The District Court considered substantially similar arguments below, and ultimately concluded that Plaintiff's reliance upon those "authorities" was misplaced. *See* R., pp. 584-586.

Plaintiff first argues that *O'Dell* stands for the proposition that "actual damages" must be construed to include *all* losses "caused by the conduct at issue." *See* Appellant Eller's Opening Brief, p. 19 (citing *O'Dell*, 119 Idaho at 811; 810 P.2d at 1097). He then argues that in *Paterson*, this Court "implicitly concluded that the IHRA's 'actual damage' language includes 'compensatory [emotional distress] damages." *Id.* (citing *Paterson*, 128 Idaho at 503, 915 P.2d at 724) (bracketed language inserted by Plaintiff). First, both of the cases upon which Plaintiff relies for this argument were brought under the Idaho Human Rights Act ("IHRA"), Idaho Code § 67-5901, *et seq*, not the IPPEA. Even though the IHRA also uses the phrase "actual damages" in defining what may be recovered thereunder, the key distinction to be drawn between those cases and the matter now before this Court is that the IHRA also states that the remedies available under that chapter "*may* include, *but are not limited to*" the items set forth therein. *See* I.C. § 67-5908(3) (emphasis added). Had the Legislature included such language in Section 6-2106, the analysis here would be different[3]. The fact remains,

[3]It should also be noted that the Legislature clearly contemplated the issue of whether tort damages could be sought as a part of a claim brought pursuant to the Idaho Human Rights Act, and specifically provided that the filing of an administrative complaint with the Idaho Human Rights Commission would also satisfy the requirements of the Idaho Tort Claims Act. *See* I.C., § 67-5907A (stating that "Compliance with section 67-5907(1), Idaho Code, satisfies the notice requirements of sections 6-905 and 6-906, Idaho Code...."). By enacting Section 67-5907A, the Legislature clearly

however, that rather than identifying certain *permissive* remedies–as was the case under the IHRA–the Legislature expressly limited the available remedies "*under this chapter*" (i.e., the IPPEA) to "any or all of *the following*", namely, the six items of damage set forth in § 6-2106. Given the disparity which exists between the language of the IHRA, which was at issue in both *O'Dell* and *Paterson*, and that contained in the IPPEA, this Court should give no weight to Plaintiff's argument that "actual damages" should be interpreted in a similar fashion. Indeed, this Court should–as Plaintiff suggests–give the Legislature's words their plain and ordinary meaning, and conclude that non-economic damages are not an available remedy under the IPPEA.

Further support for Defendant's position may be found in a decision from this Court which actually involved the IPPEA. In *Wright, supra*, this Court was asked to determine whether the IPPEA precluded a plaintiff from bringing an independent cause of action for negligent infliction of emotional distress. *See Wright*, 160 Idaho at 501-502, 376 P.3d at 68-69. After noting that § 6-2106 establishes that the six items of damages are the "kinds of relief a court *may* order in rendering a judgment *under the chapter*," this Court went on to observe that despite the limiting language contained in the statute, there was nothing which would preclude a plaintiff from also bringing an independent cause of action for negligent infliction of emotional distress. *See id*., 160 Idaho at 501, 376 P.3d at 68 (emphasis in original). In other words, this Court expressly determined that the language of § 6-2106 "lists the relief available for *judgments under the chapter*; it does nothing to

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meant to include tort damages within the scope of the IHRA, including damages for emotional distress, while the IPPEA makes no such allowance, further indicating that the Legislature intended to exclude tort damages under that statute.

limit the relief available under other, independent causes of action." *Id.* (emphasis in original). Simply put, the *Wright* Court clearly recognized the separation which the legislature intended in limiting the relief available under the IPPEA from that available under other causes of action, and by emphasizing that separation, the Court inherently determined that even if acts which would constitute a violation of the IPPEA also caused emotional distress, there existed an "independent cause of action" through which those remedies could be sought. *See id.*

Plaintiff also cites to *Brown v. City of Caldwell* for the proposition that Sections 6-2105 and 6-2106 should be construed together, and that "nothing in the Whistleblower Act 'restricts plaintiffs from seeking non-economic or other special damages.'" *See* Appellant Eller's Opening Brief, pp. 23-24 (citing *Brown*, 2012 WL 4252728 at *1 (D. Idaho Oct. 1, 2012). First, *Brown* is not controlling authority. Secondly, to the extent that the *Brown* decision is offered as persuasive, it should be noted that it pre-dated *Wright v. Ada County* by nearly four full years. As the District Court noted in addressing Plaintiff's argument, the *Brown* court "stated two correct statutory interpretation standards," but ultimately found that *Brown* "conflicts with the Idaho Supreme Court's decision in *Wright*," and that it was "not consistent with Idaho law...." *See* R., pp. 584-585. While the *Wright* Court indeed considered both Idaho Code Section 6-2105 and 6-2106 together, it also drew a clear distinction between "relief available for *judgments under the chapter*" and those available "under other, independent causes of action." *Wright*, 160 Idaho at 501-502, 276 P.3d at 68-69 (emphasis in original). Thus, with all due respect to Judge Winmill, the District Court properly applied binding precedent and correctly determined that Plaintiff's insistence that Section 6-2105 inherently expands

the list of remedies enumerated at Section 6-2106 "would effectively render [the latter] null by ignoring the six types of relief that the Legislature listed." *See* R., p. 585.

Based on the relevant and controlling case law discussed above, the District Court clearly did not err in determining that non-economic damages are not recoverable under the IPPEA. This Court has already recognized that Section 6-2106 lists the exclusive remedies available under the IPPEA. As such, this Court need not analogize authorities addressing the IHRA in order to determine that non-economic damages simply are not available under "*this chapter*"–Section 6-2106.

Finally, two other issues are worth noting. If Plaintiff's argument is taken to its logical end, and a party was allowed to pursue non-economic damages for emotional distress under both the IPPEA and the tort of negligent infliction of emotional distress, there would be a significant risk of a double recovery. Generally speaking, a plaintiff should not be entitled to "double recovery" or "double damages." *See Schneider v. Farmers Merchant, Inc.*, 106 Idaho 241, 245, 678 P.2d 33 (1983)(reduction of judgment in order to prevent double recovery was appropriate); *see also McEnroe v. Morgan*, 106 Idaho 326, 333 P.2d 595, 602 (Ct. App. 1984)(party not entitled to an award "[t]hat would result in a double recovery"). Of even greater concern, if the Court were to allow non-economic damages for emotional distress under the IPPEA, a plaintiff would be able to circumvent an entire body of well-settled law in Idaho. As this Court has long held, "[i]n order to recover damages for emotional distress, the well-established law in Idaho clearly requires that emotional distress be accompanied by physical injury or physical manifestations of injury." *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 835, 801 P.2d 37, 42 (1990). *See also*, *Bollinger v. Fall*

River Rural Elec. Co-op., Inc., 152 Idaho 632, 642, 272 P.3d 1263, 1273 (2012))(citing *Johnson v. McPhee*, 147 Idaho 455, 466, 210 P.3d 563, 574 (Ct.App.2009); *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank*, 119 Idaho 171, 177, 804 P.2d 900, 906 (1991)). This rule is intended to differentiate between the valid claims and the meritless claims as it "is designed to provide some guarantee of the genuineness of the claim in the face of the danger that claims of mental harm will be falsified or imagined." *Czaplicki v. Gooding Joint Sch. Dist. No. 231*, 116 Idaho 326, 332, 775 P.2d 640, 646 (1989)(citing *Hatfield v. Max Rouse & Sons Northwest*, 100 Idaho 840, 851, 606 P.2d 944 (1980)). If non-economic damages for emotional distress were allowed under the IPPEA, Plaintiff could avoid altogether the physical manifestation of harm requirement, which would be not only contrary to numerous decisions of this Court that have reiterated and imposed the "physical manifestation" requirement, but it would also be inconsistent with the fundamental legal principle that requires a plaintiff to prove his cause of action in the manner articulated and intended by both the Legislature and the courts. A litigant should not be provided with an avenue to avoid having to prove an element essential to his case in chief by piecing together two separate causes of action.

C. The District Court Did Not Err In Reducing The Jury's Verdict Pursuant To Idaho Code, § 6-926.

Plaintiff makes two arguments in claiming that there was error in the application of the statutory damage caps required under the Idaho Tort Claims Act, I.C. § 6-901 *et seq.* First, he insists that the District Court's reduction should be reversed and the original verdict of $1.5 Million restored, or alternatively that the matter should be remanded to the District Court for further findings

of fact. His argument in favor of reversal is that Defendant waived the damage cap by not asserting it as an affirmative defense, and his argument in favor of remand is that the District Court must make factual determinations as to the number of occurrences for purposes of calculating the number of caps which should apply.

1. If The District Court Erred In Determining The Number Of Occurrences For Purposes Of The Idaho Tort Claims Act, It Did So In Finding More Than One Occurrence.

The issue of what constitutes an "occurrence," and why the actions allegedly taken by the Defendant in retaliation against Plaintiff for his participation in the Sloan Investigation constituted–as the District Court stated–an ongoing, "*continuing* condition that result[ed] in personal injury" (*see* R., p. 644), has already been briefed by Defendant ISP in it's own Appellant's Brief, filed August 31, 2018. In the interest of avoiding the duplication of lengthy briefing which would unnecessarily burden the Court and counsel, that analysis is incorporated by reference as though fully set forth herein. It is sufficient to note here that even though the District Court referred to separate "adverse actions" in its December 12, 2017 Memorandum Decision and Order, each of the "acts" to which it referred were part of what Plaintiff described as a larger course of alleged retaliation, which Defendant submits constituted a single occurrence in this matter.

Again, without waiving any additional argument set forth in ISP's Appellant's Brief, a brief discussion of the pertinent appellate authority warrants mention in response to Plaintiff's claim that there were multiple adverse actions, each constituting a separate "occurrence." In the absence of any controlling case law defining an "occurrence" within the context of the ITCA, the Court may turn

to other cases in which the Idaho appellate courts have interpreted the same term. In *Idaho Counties Risk Management Program Underwriters v. Northland Insurance Companies*, 147 Idaho 84, 205 P.3d 1220 (2009), the insurance policy at issue defined the term "occurrence" as "an accident or happening or event *or a continuous or repeated exposure to conditions which result in personal injury* or damage to property during the policy period." *Id.* at 88 (emphasis added). The policy further noted that "*[a]ll* personal injuries to one or more persons and/or property damage arising out of an accident or happening or event or a continuous or repeated exposure to conditions *shall be deemed to be one occurrence*." *Id.* (emphasis added). The Court's conclusion echoes the language contained in the ITCA, which states that the entire exposure of a governmental entity "*shall not be enlarged*," irrespective of "the number of liable employees or the theory of *concurrent or consecutive torts* or tortfeasors or of a sequence of accidents." I.C. § 6-926(3) (emphasis added).

The Idaho Court of Appeals had reached a similar conclusion over twenty years earlier. There, the Court was asked to determine whether multiple incidents of damage, produced by a series of repetitive events, would constitute a single "occurrence." *See Unigard Ins. Co. v. U.S. Fid. & Guar. Co.*, 111 Idaho 891, 728 P.2d 780 (Ct.App. 1986). Of particular interest in this case is the *Unigard* Court's following observation:

> 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. The courts have directed attention to the relationship among the acts causing injury and to the temporal and spatial proximity of the injuries themselves....[T]he approach that we find most useful for cases of the present type, has been termed the "functional event" or "continuous process" test. *It*

> *focuses not upon the individual events of damage but upon the underlying cause. The critical inquiry is whether or not the damage-causing process was continuous and repetitive*.

Unigard, 111 Idaho at 893 (emphasis added).

The term "continuing tort" has also been used to define a harm "inflicted over a period of time," which "involves a wrongful conduct that is repeated until desisted." *Curtis v. Firth*, 123 Idaho 598, 604, 850 P.2d 749, 755 (1993) (citing 54 C.J.S. Limitations of Actions § 177, at 231 (1987)). Bearing that definition in mind, the *Curtis* Court determined that the theory of consecutive torts fittingly applied to actions involving claims of negligent infliction of emotional distress:

> By its very nature this tort will often involve a series of torts over a period of time, rather than one single act causing severe emotional distress. For that reason we recognize the concept of continuing tort ... should be extended to apply in other limited contexts, including ... negligent infliction of emotional distress.

Curtis, 123 Idaho at 604, 850 P.2d at 755.

Here, the conduct allegedly causing Plaintiff's emotional distress was the "pattern" of continuous and ongoing retaliatory conduct to which he claims he was subjected by Defendant. While the district court's focus was on the individual "adverse actions" taken, there can be no doubt that those "actions" were at all times presented and argued by Plaintiff as a continuous pattern of retaliation. As such, and because all of the alleged adverse actions were part of a claimed retaliatory process, this Court should find that it was a single occurrence. Such a conclusion would also maintain the Legislature's clear and stated intent that the governmental entity's exposure "shall not be enlarged" by consecutive or concurrent wrongful acts. *See* I.C., § 6-926(3).

2. The Damage Cap Provided Under Idaho Code, Section 6-926 Is Not An "Avoidance," But Rather A Limitation On Liability, And Thus Was Not An Affirmative Defense Required To Have Been Raised Before Trial.

Plaintiff next argues that the liability limits imposed under the ITCA are an "avoidance or affirmative defense" which were waived because they were not timely raised. *See* Appellant Eller's Opening Brief, pp. 33-40. In so doing, Plaintiff has cited to several federal decisions, but as will be explained in greater detail below, those cases are inapplicable to the statutory provision now before this Court. Defendant submits, on the other hand, that the damage cap mandated by I.C. § 6-926 is jurisdictional, and therefore not subject to waiver by a government defendant's failure to plead or assert it as an affirmative defense.

While there is authority addressing this issue in other jurisdictions, Defendant has been unable to identify any appellate authority specifically addressing this issue in Idaho. That said, the clear and unambiguous language contained in the statute would appear to be dispositive, stating as follows:

> If any judgment or judgments, including costs and attorney's fees that may be awarded, are returned or entered, and in the aggregate total more than five hundred thousand dollars ($500,000)...whether in one (1) or more cases, *the court shall reduce the amount of the award or awards, verdict or verdicts, or judgment or judgments in any case or cases within its jurisdiction* so as to reduce said aggregate loss to said applicable statutory limit....

I.C. § 6-926(1) (emphasis added).

The Legislature provided further insight into the applicability of the damage limitation when it unequivocally stated: "*In no case shall any court* enter judgment, or *allow any judgment to stand*,

which results in the limit of liability provided in this section to be exceeded *in any manner or respect.*" I.C. § 6-926(4) (emphasis added). It would certainly seem that, given the compulsory order of the Legislature, a judicial reduction of "any judgment" which exceeds the limit of liability must be made *regardless* of whether or not a party raises the issue prior to judgment.

Despite the clear legislative requirement for reduction, since Plaintiff nevertheless maintains that the damage cap is an affirmative defense, it makes sense to first look at Idaho Rule of Civil Procedure 8(c), which states:

> (1) In general. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:
>
> (A) accord and satisfaction;
> (B) arbitration and award;
> (C) assumption of risk;
> (D) contributory or comparative responsibility;
> (E) duress;
> (F) estoppel;
> (G) failure of consideration;
> (H) fraud;
> (I) illegality;
> (J) injury by fellow servant;
> (K) laches;
> (L) license;
> (M) payment;
> (N) release;
> (O) res judicata;
> (P) statute of frauds;
> (Q) statute of limitations;
> (R) waiver; and
> (S) discharge in bankruptcy.

Id. R. Civ. P. 8(c) (2017).

Rule 8 also contains language which plainly states that allegations relating to damages are not deemed admitted if they are not denied, even where a "responsive pleading is required." *See* Id. R. Civ. P. 8(b)(6) ("An allegation, *other than one relating to the amount of damages*, is admitted if a responsive pleading is required and the allegation is not denied") (emphasis added). It thus appears that the "residual clause" found at Rule 8(c) is nevertheless subject to the preceding section, which acts to specifically exclude allegations regarding the amount of damages from those defenses which are deemed waived if not pled. The United States Court of Appeals for the Ninth Circuit addressed a similar provision under the Federal Rules of Civil Procedure, and noted that Rule 8(b)(6) "specifies that averments as to the *amount* of damage which defendant does not deny in his answer are not deemed admitted." *See Taylor v. United States*, 821 F.2d 1428, 1433 (9th Cir. 1987). As the *Taylor* Court further explained, this "provision indicates that the Federal Rules do not consider limitations of damages affirmative defenses, which, by contrast, must be pleaded," since "[u]nlike affirmative defenses listed in Fed. R. Civ. P. 8(c), [the statutory provision] limits, but does not bar recovery for noneconomic damages." *Id.* As a result, the government was not required to raise the liability limitation against governmental entities prior to trial in order to assert its protection.

The Idaho Supreme Court has identified the elements of an affirmative defense as follows:

> An affirmative defense is "[a] defendant's assertion raising *new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim,* even if all allegations in the complaint are true."

Fuhriman v. State, Dept. of Transp., 143 Idaho 800, 153 P.3d 480 (2007) (citing Blacks Law Dictionary, 186 (2nd Pocket Ed. 2001)) (emphasis added). This definition is in accord with

surrounding jurisdictions as well. *See Webb ex rel. Webb v. Clark County School Dist.*, 125 Nevada 611, 619 (2009) ("Allegations must be pleaded as affirmative defenses if they raise 'new facts and arguments that, if true, will defeat the plaintiff's ... claim, even if all the allegations in the complaint are true") (citing *Clark Cty. Sch. Dist. v. Richardson Const. Co., Inc.*, 123 Nevada 382, 393 (2007); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2nd Cir. 2003)).

According to Charles Wright and Arthur Miller, leading commentators on the federal rules, certain criteria must be evaluated when determining whether a matter not otherwise specified in Rule 8(c) should be considered an affirmative defense, chief among which are "surprise" and "fairness." *See* C. Wright & A. Miller, Federal Practice and Procedure § 1271 (1969). With respect to the surprise factor, Wright and Miller note the following:

> Since *an affirmative defense will defeat plaintiff's claim* if it is accepted by the court, Rule 8(c), by requiring defendant to plead his defense or risk waiving it, also serves the purpose of giving the opposing party notice of the defense and an opportunity to argue why his claim should not be *barred completely*.

Wright & Miller § 1270 (Supp. 1987) (emphasis added).

Affirmatively pleading the tort liability cap in this matter would not have affected either the evidence adduced at trial, or the discovery required of either party in developing the true state of facts. The limitation on liability at issue here is set forth at I.C. § 6-926, and it applies to all tort claims against governmental entities. Moreover, since the damage cap was not enacted to defeat claims in their entirety, but rather solely to limit the amount of liability which the State must face, one would be hard pressed to argue that it operates as an affirmative defense.

Turning then to the second factor, that of fairness, Wright and Miller have described it as:

> a short-hand expression reflecting the judgment that all or most of the relevant information on a particular element of a claim is within the control of one party or that one party has a unique nexus with the issue in question and therefore the party should bear the burden of affirmatively raising the matter.

Wright & Miller, § 1271. As one court has noted, the "evidence adduced at trial, or control of that evidence is unaffected by a failure to plead the cap...." *See Snyder v. City of Minneapolis*, 441 N.W.2d 781, 788 (1989). Furthermore, the "plaintiff is, or ought to be, well aware of the special nexus between the municipality and the damage cap." *Id.* Having applied the framework set forth above by Wright and Miller, the *Snyder* Court then determined that "the cap on municipal liability is *not an affirmative defense,*" but is instead "a statutory rule of law that trial courts are *obliged to impose* whenever damages exceed the statutory limit." *Id.* (emphasis added).

Though the questions of whether the statutory tort liability cap should be treated as an affirmative defense, and whether it should be deemed waived if not pled or otherwise raised before trial do not appear to have been addressed by the Idaho appellate courts, a number of jurisdictions have addressed those very issues. For example, following the passage of the Oregon Tort Claims Act–which like Idaho also contains a limitation on the amount of liability for which a governmental entity may be held responsible–the Oregon Court of Appeals was asked to decide "whether the statutory dollar limitation is waived if it is not asserted before judgment." *See Espinosa v. Southern Pac. Transp. Co.*, 50 Or.App. 561, 563, 624 P.2d 162, 163 (1981). In Oregon, like Idaho, "sovereign immunity enjoys constitutional status," and as a result "only the legislature can waive that

immunity." *See Espinosa*, 624 P.2d at 167. Within that framework, the *Espinosa* court held that the "limitation is part and parcel of the liability (i.e., the waiver of immunity) and is, therefore, jurisdictional. The [defendant's] *failure to assert the limitation before judgment was not a waiver*." *Id.* (emphasis added).

Because the issue of the claimed liability limit was jurisdictional, and because "the jurisdiction of the court may be taken either before or after judgment," invocation of the damage cap was timely and not waived. *See id. See also, State Highway Dept. v. Pinner*, 531 S.W.2d 851, 858 (Tx.App. 1975) ("Appellee contends appellant waived the $100,000 limit of the Tort Claims Act by not pleading and urging it. We disagree. It cannot be waived....Appellee's only cause of action is because of and through the Texas Tort Claims Act. She must accept its limitations along with its rights and benefits").

More recently the Supreme Court of Nevada has addressed similar claims, and has consistently determined and/or upheld the finding that its Tort Claims Act cap on damages is not, and indeed cannot be, waived for failing to raise the cap as an affirmative defense. In similar fashion to the decisions cited above, the Nevada court found as follows:

> As a preliminary matter, we conclude that, although CCSD did not assert the statutory damages cap below, *the limitation cannot be waived*. Under the doctrine of sovereign immunity, generally, Nevada and its political subdivisions enjoy blanket immunity from tort liability. The Legislature, however, has waived this immunity on a limited basis. One such limitation allows a party to recover up to $50,000 against Nevada or a political subdivision in tort damages in certain situations. *Because the statutory cap functions automatically as a damage limitation* up to $50,000 in tort recovery against the State and its political subdivisions, *CCSD had no duty to assert the damage limitation as an affirmative defense.*

Clark County School Dist. v. Richardson Const. Co., Inc., 123 Nevada 382, 389-90 (2007) (emphasis added).

Following the *Richardson* Court's decision, the Clark County School District was once again before the Supreme Court of Nevada facing a similar claim regarding waiver of certain immunities. *See, e.g., Webb ex. Rel. Webb v. Clark County School Dist.*, 125 Nevada 611, 218 P.3d 1239 (2009). There, the Court once again discussed its earlier rationale, determining:

> *Richardson Construction* stands for the proposition that when Nevada and its political subdivisions are afforded protection from suit under the doctrine of sovereign immunity, and the Legislature waives immunity but limits the amount of liability, then *the limitation cannot be waived, even if the defending party fails to raise it.* Thus, unlike an immunity defense that can be waived if not affirmatively pleaded, if the Legislature has placed a statutory cap on sovereign liability, *the award cannot exceed the amount proscribed by the statute*.

Webb, 125 Nevada at 620 (emphasis added).

Finally, the above-cited courts' refusal to deem a failure to raise statutory tort damage caps prior to judgment as a waiver is also consistent with other statutes containing damage limitations. For example, discussing the Compensatory Damages Amendment set forth at 42 U.S.C. § 1981a, the United States District Court for the District of Connecticut stated:

> [T]he ... statutory cap is evident on the face of the statute as a Congressional limitation on the court's power to award damages to a Title VII plaintiff. No plaintiff claiming damages under Title VII can complain of unfair surprise, prejudice, or lack of opportunity to respond when confronted with the CDA's limitation of damages, because the limitation is part of the same statutory scheme under which the plaintiff has brought his or her claim.

Oliver v. Cole Gift Centers, Inc., 85 F.Supp.2d 109, 112 (D.Conn. 2000). Based upon that analysis, the court concluded: "For the reasons set out above, we hold that the statutory cap set out in § 1981a(b)(3) is not an affirmative defense and is not waivable." *Id.* Here, as in *Oliver*, and as in *Espinosa, supra,* the limitation is "part and parcel" of the very statute which enabled Plaintiff to bring his tort claim against ISP, a finding specifically noted by the District Court in support of its decision. *See* R., p. 640 ("nothing prevented Plaintiff from researching and discovering Idaho Code section 6-926 on his own initiative, particularly in light of its mandatory nature and the fact that *it is part of the ITCA that Plaintiff brought his NIED claim under*") (emphasis added).

Plaintiff has cited to a number of federal decisions which he claims hold that the opposite result should obtain. He relies chiefly upon the United States District Court for the District of Maryland's decision in *Westfarm Associates, Ltd. v. International Fabricare Institute,* 846 F.Supp. 439 (D. Md. 1993), where the court held that the Maryland Tort Claims Act limitation on governmental liability "constituted an avoidance under Federal Rule of Civil Procedure 8(c)." *See* Appellant Eller's Opening Brief, p. 35. He then cites to several cases from the First and Fifth Circuit Courts of Appeal upon which the *Westfarm* Court based its decision as further support for his argument. *See id.*, p. 36 (citing *Jakobsen v. Massachusetts Port Auth.*, 520 F.2d 810 (1st Cir. 1975); *Ingraham v. United States*, 808 F.2d 1075 (5th Cir. 1987); and *Simon v. United States*, 891 F.2d 1154 (5th Cir. 1990)).

Turning first to the *Westfarm* decision, which is in no way binding on this Court, it should be noted that the court's decision in that instance was based in substantial part on Fed. R. Civ. P.

8(c), which it held "requires that the defendant include in its answer certain enumerated defenses and 'any other matter constituting an avoidance or affirmative defense.'" *See Westfarm*, 846 F.Supp. at 439. However, the *Westfarm* Court ignored the plain language of then-Rule 8(d) (now Rule 8(b)(6)), which specifically carved defenses based upon the amount of damages to be awarded from those defenses which are waived if not raised. In addition, the cases relied upon by the *Westfarm* court addressed statutory schemes which are separate and distinct from the type of immunity afforded to governmental entities under the Idaho Tort Claims Act. Instead, the statutes at issue in those cases were analogous to the kind of tort reform limitations codified at Idaho Code, Section 6-1603. For example, the decisions in both *Ingraham* and *Simon* dealt with state statutes designed to limit the amount of damages which could be recovered exclusively in medical malpractice actions, and in both instances, the Fifth Circuit narrowly addressed those statutes within the context of Rule 8©, with no reference in either case to the language of Rule 8(b)(6). *See Ingraham*, 808 F.2d at 1078-79, *Simon*, 891 F.2d at 1156. In *Jakobsen*, the plaintiff's claims had been brought against the Massachusetts Port Authority, which the court found was "an entity with an existence apart from that of the Commonwealth," and the statute at issue in that matter "was meant to be an exclusive remedy" for injuries to commuters. *See Jakobsen*, 520 F.2d at 814-15.

Plaintiff has also cited to selected cases from the Tenth Circuit Court of Appeals, as well as the United States District Court for the Eastern District of Pennsylvania. However, in *Bentley v. Cleveland County Bd. of County Comm'rs*, 41 F.3d 600 (10th Cir. 1994), the court noted that there was controlling authority by which it was bound, holding that both qualified and absolute immunity

were affirmative defenses. There is no such controlling authority here, and as explained more fully above, the Ninth Circuit and the appellate courts in several of our adjoining states have all routinely held that the opposite is true. Plaintiff's reliance upon *Racher v. Westlake Nursing Home Limited Partnership*, 871 F.3d 1152 (10th Cir. 2017) is equally unavailing. The statute at issue there was a state-law damage cap analogous to Idaho Code, § 6-1603. As the *Racher* Court noted, where the state court has not directly addressed the issue, the presiding court must determine how the state legislature intended the law to be applied. Here, the Legislature's mandate clearly states that "in no case" shall the courts allow any judgment to stand which results in the limit of liability provided at Section 6-926 to be exceeded. Equally clear is the language of Rule 8(b)(6), which specifically excludes defenses as to the amount of damages from those which must be raised or be waived.

Finally, Plaintiff has cited to *Sanderson-Cruz v. United States*, 88 F.Supp.2d 388 (E.D. Pa. 2000) in support of his argument that Section 6-926 is an affirmative defense. *See* Appellant Eller's Opening Brief, pp. 37-38. As with the other federal decisions upon which he relies, however, the *Sanderson-Cruz* decision is inapposite. There, the statute at issue, the Pennsylvania Motor Vehicle Financial Responsibility Law, operated as a complete bar to relief, and was therefore deemed to constitute an affirmative defense. Here, the liability limitations imposed by the Legislature at Section 6-926 are not such a bar to relief, but rather operate solely to limit the liability which may be incurred by a governmental entity. As noted above, an affirmative defense is an "assertion raising new facts and arguments that, if true, will defeat the plaintiff's...claim." *See Fuhriman*, 143 Idaho at 803. Similarly, the limitation on liability now at issue falls within the "allegation...relating to the amount

of damages" which are expressly excluded from what the Rules define as an affirmative defense. As such, this Court should find, as have the Oregon and Nevada Courts cited above, that Defendant had "no duty to assert the damage limitation as an affirmative defense," and that the ISP's alleged "failure to assert the limitation before judgment was not a waiver" *See Clark County School Dist.*, 123 Nevada at 390; *Espinosa*, 624 P.2d at 167.

D. Application Of The Idaho Tort Claims Act's Damage Cap Does Not Require A Specific Finding Of Fact, Nor Should The District Court Be Required To Enter Specific Findings Of Fact Concerning The Number Of Alleged Occurrences.

Finally, Plaintiff argues that even if this Court determines that the liability limit under the ITCA is not an affirmative defense–and was therefore not waived by Defendant–that the matter should be remanded to the District Court for "findings of fact pursuant to Idaho Rule of Civil Procedure 49(a)(3)." *See* Appellant Eller's Opening Brief, p. 40. For the reasons discussed more fully below, his request for alternative relief should be rejected for several reasons. First, Plaintiff waived his right to a determination of issues not encompassed in the Special Verdict. Secondly, Plaintiff failed to raise this issue before the lower court, and this Court has unequivocally stated that it will not decide issues presented for the first time on appeal. Third, no additional findings of fact are needed from the District Court, because even if this Court determines that there was more than one "occurrence" for purposes of Section 6-926, Judge Baskin's December 12, 2017 Memorandum Decision and Order included her determination on that issue[4].

[4]In making this argument, Defendant does not concede that there was more than one occurrence, based upon the analysis in the preceding section.

1. Plaintiff Has Waived His Right To A Factual Determination On The Number Of Occurrences Which Formed The Basis For The Jury's Verdict.

As a preliminary matter, Plaintiff suggests that the District Court's December 12, 2017 Memorandum Decision and Order "attempted to avoid disturbing the Jury's findings," presumably "out of respect for Idaho's long recognition that a 'right of a trial by jury shall remain inviolate.'" *See* Appellant Eller's Opening Brief, p. 40. Plaintiff then argues that the District Court erred when it indicated that it was "not aware of any legal basis under which it had the authority to make [a specific finding on the number of *occurrences* the jury found] in order to construe the jury's verdict." *See id.*, p. 41; R., p. 647 (emphasis added). The "legal basis" for such a finding, according to Plaintiff, is set forth at Id. R. Civ. P. 49(a)(3). While it is true that Rule 49(a)(3) allows for such a factual determination by the trial court, that allowance is not without its procedural prerequisites. The Rule states as follows:

> A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury *unless, before the jury retires, the party demands its submission* to the jury. If the party does not demand submission, the court *may* make a finding on the issue. *If the court makes no finding*, it is *considered to have made a finding consistent with its judgment* on the special verdict.

Id. R. Civ. P. 49(a)(3) (2018) (emphasis added).

As the Rule itself clearly provides, a party's "right to a jury trial" on a particular issue of fact may be waived if the party fails to timely demand its submission. A similar issue was addressed long ago by this Court, when it noted that "a party must demand the submission of issues of fact to the jury which the court omits from the special verdict. If no such demand is made, the parties waive the

right to a jury determination of issues excluded from the special verdict." *Briscoe v. Nishitani*, 105 Idaho 175, 178, 667 P.2d 278, 281 (1983) (disavowed on other grounds at *Country Ins. Co. v. Agricultural Development, Inc.*, 107 Idaho 961, 695 P.2d 346 (1984)). Here, as in *Briscoe*, Plaintiff made no objection to the content of the special verdict form, particularly as it pertained to the special interrogatory on damages[5]. *See* R., p. 1413, ll. 1-9. As such, he waived his right to have the jury make factual determinations as to the number of occurrences. Further, although Plaintiff suggests that it was the failure of Defendant to assert the liability limit under Section 6-926 until after the verdict had been rendered that gave rise to this issue, as the District Court found, "nothing prevented Plaintiff from researching and discovering Idaho Code section 6-926 on his own initiative, particularly in light of its mandatory nature and the fact it is *part of the ITCA that Plaintiff brought his NIED claim under*. Thus, to the extent that Defendant's Motion has taken Plaintiff by surprise, Plaintiff shares some responsibility." R., p. 640 (emphasis added).

Plaintiff further appears to argue that it is incumbent upon the trial court to address "facts that are essential to a party's claim" whether the party demands submission of the issue or not. *See* Appellant Eller's Opening Brief, p. 42 (citing *Milligan v. Continental Life & Accident Co.*, 91 Idaho 191, 196-97, 418 P.2d 554, 559-560 (1966). While the *Milligan* Court indeed upheld the trial court's exercise of discretion in making findings not originally submitted to the jury, Plaintiff's reliance upon that case is misplaced. As indicated above, Rule 49(a)(3) *allows* a district court to make

[5]It should also be noted that the Special Verdict Form proposed by Plaintiff made no attempt to inquire whether there had been more than one "occurrence" giving rise to his claim for non-economic damages. *See* R, pp. 1714, 1716.

findings on issues not submitted to the jury, it does not require it. The Rule contains permissive language (i.e., "the court *may*"), but further provides that if no such finding is expressly made, the trial court is deemed to have made such a finding, which is reflected in its *judgment* on the special verdict. *See* Rule 49(a)(3) (emphasis added). The judgment ultimately entered here reflects that the District Court found no more than two "occurrences." Plaintiff's argument further assumes that Judge Baskin did not make a final determination as to the number of occurrences, but it should be noted that his argument in that regard is based upon comments by the District Court regarding the number of potential "adverse actions it found under the IPPEA," not the number of "occurrences". *See* R., p. 647, n. 5.

Plaintiff's failure to demand that the issue of how many occurrences gave rise to his claims for negligent infliction of emotional distress constitutes a clear waiver of his right to have the jury determine that issue. Further, Plaintiff should be charged equally with knowledge of the liability limits imposed under the ITCA–the very statute under which his emotional distress claim was brought. Thirdly, while the District Court was permitted to make specific factual determinations on issues which may not have been encompassed within the special verdict, it was not obligated to do so. Rather, by entering the Amended Judgment after the issue was fully briefed and argued by the parties, the Court is, according to Rule 49(a)(3), "considered to have made a finding consistent with its judgment." That judgment, in this case, reflects the District Court's determination "[b]ased upon the Special Verdict form...that the jury found two occurrences took place." *See* R., p. 648.

2. Plaintiff Failed To Raise The Issue Of Further Factual Findings With The District Court, And This Court Should Not Decide Issues Raised For The First Time On Appeal.

This Court has previously indicated that, as a general matter, it "will refrain from considering issues not raised on appeal." *See State, Dept. of Health and Welfare v. Housel*, 140 Idaho 96, 100, 90 P.3d 321, 325 (2004) (citing *Clark v. State, Dept. of Health & Welfare*, 134 Idaho 527, 529 n.1, 5 P.3d 988, 990 n. 1 (2000)). Similarly, it is well-settled in Idaho that "review on appeal is limited to those issues raised before the lower tribunal and that an appellate court will not decide issues presented for the first time on appeal." *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 131, 176 P.3d 126, 136 (2007) (citing *Balser v. Kootenai County Bd. of Comm'rs*, 110 Idaho 37, 40, 714 P.2d 6, 9 (1986)).

Here, not only did Plaintiff fail to raise the issue of whether he was entitled to a factual determination pursuant to Id. R. Civ. P. 49(a)(3) in his Notice of Appeal or his Amended Notice of Appeal, but he also failed to raise that issue with the District Court. No demand for a determination regarding the number of occurrences was made before the jury retired, and indeed Plaintiff's own proposed special verdict form sought no specific findings as to what actions of Defendant may have caused his alleged emotional distress. Defendant therefore objects to the untimely inclusion of the request for alternate relief contained in Appellant Eller's Opening Brief, on the grounds that it was not properly raised in either his initial or his Amended Notice of Appeal, nor was the issue raised below, and as such it should not be considered for the first time on appeal.

3. The December 12, 2017 Memorandum Decision And Order Of The District Court Included The Additional Findings Of Fact Plaintiff Now Seeks.

As indicated above, after the jury's verdict had been rendered, Defendant sought a reduction in accordance with I.C. § 6-926. There, Defendant argued that there had been but a single "occurrence" under the ITCA. Plaintiff was afforded the opportunity to respond, and he fully briefed and argued the issue. After careful consideration, the District Court entered its December 12, 2017 Memorandum Decision and Order on the parties' various post-trial motions, and ultimately concluded that the Special Verdict supported a finding that there had been two "occurrences," reduced the verdict accordingly and entered its Amended Judgment based upon the same. In short, the District Court has already done what Plaintiff now seeks in his alternative prayer–made its own factual determination as to what the evidence may have supported at trial.

E. Plaintiff Is Not Entitled To Costs Or Fees On Appeal.

Idaho Appellate Rule 40 states that costs "shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." Defendant is unaware of any other provision of law that would forbid its recovery of costs should it prevail on appeal. Therefore, Defendant respectfully requests this Court award its costs as the prevailing party.

Furthermore, an award of attorney fees pursuant to Idaho Code § 6-2107 is appropriate when an employee brings an action under the IPPEA with no basis in law or fact. IDAHO CODE, § 6-2107.

IV.
CONCLUSION

For the reasons set forth above, in response to Plaintiff Eller's pending appeal, Defendant ISP respectfully requests the following:

1. That this Court affirm the District Court's decision and hold that emotional distress damages are not available under the Idaho Protection of Public Employees Act.
2. That this Court affirm the District Court's determination that Defendant ISP did not waive the limitation on governmental entity liability set forth at Idaho Code, § 6-926, and that a reduction of the jury's verdict was required under the statute.
3. That this Court deny Plaintiff's request for remand for additional factual determinations under Rule 49(a)(3) on the grounds that Plaintiff has waived his right to such relief.
4. That Defendant ISP be awarded its reasonable costs and attorney fees on appeal.

DATED this 2nd day of October, 2018.

BRASSEY CRAWFORD, PLLC

By: /s/ Andrew C. Brassey
Andrew C. Brassey, Of the Firm
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of October, 2018, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Erika Birch T. Guy Hallam, Jr. Strindberg & Scholnick, LLC 1516 W Hays St Boise, ID 83702 *Attorneys for Plaintiff*	____ ____ ____ ____ X	U.S. Mail, postage prepaid Hand-Delivered Overnight Mail Facsimile E-File
Michael J. Kane Michael Kane & Associates, PLLC 4355 W Emerald St., Ste. 190 Boise, ID 83706	____ ____ ____ ____ X	U.S. Mail, postage prepaid Hand-Delivered Overnight Mail Facsimile E-File
Marty Durand Herzfeld & Piotrowski, PLLC PO Box 2864 Boise, ID 83701	____ ____ ____ ____ X	U.S. Mail, postage prepaid Hand-Delivered Overnight Mail Facsimile E-File
Stephen Kohn National Whistleblower Center PO Box 25074 Washington, DC 20027	____ ____ ____ ____ X	U.S. Mail, postage prepaid Hand-Delivered Overnight Mail Facsimile E-File
Rebecca Rainey Fisher Rainey Hudson 950 W Bannock St., Ste. 630 Boise, ID 83702	____ ____ ____ ____ X	U.S. Mail, postage prepaid Hand-Delivered Overnight Mail Facsimile E-File

/s/ Andrew C. Brassey
Andrew C. Brassey