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

DALE JOHNSON, an individual,

Plaintiff-Appellant,

vs.

IDAHO DEPARTMENT OF LABOR, AMY HOHNSTEIN, Appeals Bureau Director; MARK RICHMOND, Appeals Hearing Examiner; JANET HARDY, Appeals Hearing Examiner; GEORGIA SMITH, Records Custodian; and John and Jane Does I-V, in their individual and official capacities as employees of the State of Idaho,

Defendants-Respondents.

Supreme Court No. 45911-2018

RESPONDENT'S BRIEF

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER
HONORABLE BARBARA A. BUCHANAN, PRESIDING

IDAHO DEPARTMENT OF LABOR

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STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff-Appellant Dale Johnson ("Johnson" or "Plaintiff") brings this untimely appeal of the district court's dismissal with prejudice pursuant to I.R.C.P. 12(b)(1) of his negligence lawsuit against Defendant-Respondent Idaho Department of Labor ("the Department"), two administrative hearing officers, their supervisor, and a records custodian because of events that occurred during his first level unemployment benefits appeal, namely, the failure to create or maintain an audio recording of the hearing for his second level appeal. This led to a remand order by the Idaho Industrial Commission ("the Commission"). Plaintiff claims the two hearings and period of delay during remand caused him damages in the form of attorney fees incurred during the remand hearings. Although, the Commission ruled in Johnson's favor in its *de novo* review, which was not appealed by the Department, Johnson claims he is entitled to recover tort damages for the delay in his receipt of unemployment benefits, in addition to his alleged attorney fee damages.

Johnson also challenges on appeal the district court's orders on various post-judgment motions he filed in an attempt to overturn the Rule 12(b)(1) dismissal. His appeal from several of those orders, but not from the underlying order of dismissal and judgment, was timely.

B. Course of the Proceedings

Johnson filed his Complaint for Damages and Demand for Jury Trial on March 20, 2017, in the First District Court in Bonner County, Idaho. R., pp.14-20. District

Judge Barbara A. Buchanan was assigned to the case. R., p.14.

On June 21, 2017, the Department entered a special appearance and filed a motion to dismiss for insufficient process and insufficient service of process under I.R.C.P. 12(b)(4) and (5). Augmented R., pp.1-3. At the same time, the Department filed its Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. R., pp.21-22.

A motion to change venue was then filed by the Department on July 3, 2017. R., pp.39-42.

After a continuance requested by Johnson due to a family matter, R., pp.46-48, a hearing was held on September 6, 2017, on the Department's motion to dismiss. R., p.72 (court minutes).

On September 14, 2017, the district court filed its "Memorandum Decision and Order Granting Defendants' I.R.C.P. 12(b)(1) Motion to Dismiss." R., pp.73-89.

That same day, September 14, 2017, judgment was entered against Johnson. R., pp.90-91.

Fourteen days later, September 28, 2017, Johnson filed a motion to reconsider pursuant to Rule 11.2(b) and a motion to allow additional discovery. R., pp.100-103.

On November 8, 2017, a hearing was held on Johnson's motions. R., pp.238-240 (court minutes).

On November 15, 2017, the district court entered its "Memorandum Decision and Order Denying Plaintiff's Motions for Reconsideration and to Allow Additional Discovery," R., pp.248-252, along with its order denying the Department's request for

attorney's fees. R., pp.241-247.

Fourteen days later, on November 29, 2017, Johnson filed a second set of post-trial motions. *See* "Motion for Additional Findings of Fact and Conclusions of Law and Motion to Set Aside Judgment," R., pp.253-256.

A hearing was held on Johnson's second set of post-trial motions on January 31, 2018. R., pp.329-331 (court minutes).

On February 13, 2018, the district court entered its "Memorandum Decision & Order Denying Plaintiff's Motion for Additional Findings of Fact and Conclusions of Law and to Set Aside Judgment." R., pp.332-339.

On March 21, 2018, the district court's "Memorandum Decision and Order Granting Defendants' Second Request for Attorney's Fees" and "Judgment for Attorney's Fees" were entered. R., pp.370-373.

On March 23, 2018, Johnson filed a notice of appeal to the Idaho Supreme Court. R., pp.374-78.

C. Statement of the Facts

The case arises from unemployment benefits proceedings in the Appeals Bureau of the Department and subsequent appeals to the Commission. After an evidentiary hearing on August 5, 2015, before an administrative hearing officer in the Department's Appeals Bureau, and an adverse decision, Johnson appealed to the Commission. Shortly after the appeal was filed, it was discovered that a recording of the August 5, 2015, hearing could not be located.

On August 28, 2015, the Commission remanded the matter to the Appeals

Bureau so another hearing could be held. Johnson did not file a motion with the Commission asking for reconsideration of its remand order, or for an order of the Commission allowing evidence to be taken before the Commission in lieu of a remand.

Two hearings on were held on remand before another administrative hearing officer, and testimony from various witnesses was taken. Johnson was represented by counsel (the same counsel in the instant appeal) during both hearings.

On November 25, 2015, the second hearing officer entered another decision adverse to Johnson. On December 9, 2015. Johnson appealed that decision to the Commission.

Thereafter, the Commission entered a decision finding Johnson eligible for unemployment benefits, which it reaffirmed on reconsideration.

There is no dispute that Plaintiff became aware that a transcript of his August 5, 2015, hearing could not be located at some point before August 28, 2015, the date of the Commission's remand order. Complaint, ¶ 2.3, R., p.16. Thus, any breach of a duty by Defendants necessarily would have occurred before August 28, 2015.

Johnson, because he was represented by undersigned counsel during the two hearings on remand, knew or reasonably should have known of the attorney fee damages he claims to have suffered during remand as a consequence of the alleged breach of duty.

As of November 25, 2015, when the second hearing officer's decision was entered, the period of delay resulting from Defendants alleged negligence ended. Johnson has not pointed to any negligent acts that occurred after that date.

Johnson's negligence claim necessarily accrued on or before November 25, 2015. Johnson did not file a notice of tort claim within 180 days of that date, as required by the Idaho Tort Claims Act ("ITCA"), I.C. §§ 6-901 et seq.

Johnson's knowledge of his alleged attorney fee damages is confirmed by the notice of tort claim he tardily filed with the Idaho Secretary of State on August 25, 2016. The notice of tort claim described Johnson's damages caused by the allegedly negligent handling of his appeal as follows:

> 2. Description of Injury/Damage
>
> Claimant has been forced to incur additional attorneys' fees and costs in retaining counsel to represent him in the second and third hearings, which would not have been necessary but for the Department of Labor's negligence. Further, in the event that Claimant ultimately prevails if or when the Industrial Commission rules upon the Motions for Reconsideration, Claimant has suffered further damage in the delay in payment of benefits as a result of the necessity for a new hearing and subsequent appeal.

R., p.37 (emphasis added).

The notice of tort claim also described the time and place of Johnson's injury or damage:

> 2. Time and Place Injury or Damage Occurred
>
> It is unknown when the recording was lost. The first hearing took place on August 5, 2015; the Department of Labor's Custodian of Records informed Claimant of the loss of the recording via letter dated August 21, 2015; and the remand was issued on August 28, 2015. A second hearing was held October 22, 2015 and a third hearing was held on November 12, 2015, the appeal was filed on December 9, 2015, and the decision from the Industrial Commission in Claimant's favor was issued on April 29, [2016]. The decision on the Motions for Reconsideration remains pending.

R., pp.37-38.

Finally, when Johnson filed the notice of tort claim, he was able to more than

adequately describe the damages he was claiming, which included the attorney fees he incurred during the remand proceedings, notwithstanding that he was awaiting a decision by the Commission on the motion to reconsider filed by his employer and the Department:

> 5. Amount of Damages Claimed
>
> Attorney's fees and costs incurred between the remand due to the loss of the recording and the filing of the Notice of Appeal following the second hearing are estimated to be approximately $5,000. Delay in benefits is an amount to be determined, and missed mortgage payments, and other bill payments, as a result of the delay have resulted in increased interest and late fees in an amount to be determined.

R., p.38.

It is important to note that the entirety of the period of delay would have ended on November 25, 2015, when the second hearing officer's decision was entered.

On March 20, 2017, Johnson filed a "Complaint for Damages and Demand for Jury Trial" ("the Complaint") on March 20, 2017, alleging that the Department and the other named Defendants were negligent in the handling of his first level appeal to the Department's Appeals Bureau. R., pp.14-20. The Complaint alleges a single cause of action for negligence, and requests unspecified damages exceeding $10,000. Complaint, ¶ 2.9, R., p.18. The Department's allegedly negligent acts are described in Paragraph 2.7 of the Complaint:

> The Department of Labor's failure/neglect to preserve a recording of the August 5, 2015 hearing, the failure/neglect to issue necessary subpoenas [for that hearing] timely, the failure to produce a transcript, (and refusal to utilize Plaintiff's available copy of audio and transcript) and resulting delay was a consequence of negligence by one or more Department of Labor employees.

R., p.17.

Additional facts are discussed below in the argument section of this brief.

ISSUES ON APPEAL

I. Did Johnson fail to timely appeal from the order granting the Department's I.R.C.P. 12(b)(1) motion and judgment, and from the order denying his first set of post-judgment motions, where his notice of appeal was filed more than 42 days after entry of those orders and judgment?

II. Did the district court properly exercise its discretion in denying Johnson's motions under I.R.C.P. 52, 59(e) and 60(b)(6), and in not allowing discovery where there was no genuine issue of material fact and Johnson advanced only speculation and conjecture in support of his motions?

III. Did the district court properly exercise its discretion in denying Johnson's I.R.C.P. 12(b)(1) motion to dismiss where there was no genuine dispute as to when Johnson first incurred his attorney fee damages and when he filed a Notice of Tort Claim with the Idaho Secretary of State?

IV. Should this Court award the Department is costs and attorney fees pursuant to I.C. §§ 12-117(1) and 12-121 where Johnson has doggedly pursued his lawsuit against Defendants without any support in fact or law?

ARGUMENT

I.

Because Johnson's Second Set of Post-Trial Motions Did Not Terminate or Suspend the Time for Filing an Appeal, this Court Does Not Have Jurisdiction to Review the District Court's Initial Order Dismissing this Action Pursuant to Rule 12(b)(1), or the Judgment Entered Thereon, or the District Court's Order Denying Johnson's First Set of Post-Trial Motions

A. Standard of Review

Whether a notice of appeal has been timely filed is a question of law that an appellate court freely reviews. *Goodman Oil Co. v. Scotty's Duro-Bilt Generator, Inc.*, 147 Idaho 56, 58, 205 P.3d 1192, 1194 (2009).

B. Johnson Filed a Timely Appeal from the District Court's February 13, 2018, Order Denying His Second Set of Post-Judgment Motions

The timely filing of a notice of appeal is a *sine qua non* of appellate jurisdiction. A judgment or order that has not been timely appealed "must be automatically dismissed, either upon motion of a party or sua sponte action by the district court." *Smith v. Smith*, 164 Idaho 46, 423 P.3d 998, 1004 (2018), *quoting Vierstra v. Vierstra*, 153 Idaho 873, 877, 292 P.3d 264, 268 (2012); *Goodman Oil Co., supra*; *accord*, I.A.R. 21.

An appeal from an appealable order or judgment of the district court "may be made only by physically filing a notice of appeal with the clerk of the district court within 42 days from the date evidenced by the filing stamp of the clerk of the court." I.A.R. 14(a).

Johnson filed his notice of appeal with the district court clerk on March 23,

2018. R., pp.374-392. This was within forty-two (42) days of the order entered on February 13, 2018, denying his second set of post-judgment motions. *See* "Memorandum Decision & Order Denying Plaintiff's Motion for Additional Findings of Fact and Conclusions of Law and to Set Aside Judgment," R., pp.332-339. Thus, Johnson timely appealed from the district court's February 13, 2018, order.

C. Johnson Failed to Timely Appeal from the District Court's Initial Order Dismissing this Action Pursuant to Rule 12(b)(1) and the Judgment, Both Entered on September 6, 2017, and from the District Court's Order Filed November 15, 2017, Denying His First Set of Post-Judgment Motions

The notice of appeal Johnson filed on March 23, 2018, R., pp.374-392, was filed well beyond the forty-two (42) day jurisdictional period for filing an appeal from the following orders and judgment:

- "Memorandum Decision and Order Granting Defendants' I.R.C.P. 12(b)(1) Motion to Dismiss" filed September 14, 2017, R., pp.73-89;
- "Judgment" entered September 14, 2017, R., pp. 90-91; and
- "Memorandum Decision and Order Denying Plaintiff's Motions for Reconsideration and to Allow Additional Discovery" filed November 15, 2017, R., pp.248-252.

It follows that unless Johnson can show that under Idaho law the time period for appealing from these orders and this judgment was somehow terminated or suspended, this Court has no jurisdiction to review them.

The gossamer thread upon which Johnson attempts to construct such an outcome is the "Motion for Additional Findings of Fact and Conclusions of Law and Motion to Set Aside Judgment" he filed on November 29, 2017. R., pp.253-256. Because this motion containing his second set of post-trial motions, was filed within

14 days of the district court's order denying his first set of post-trial motions, R., pp.248-252, Johnson tries in desperation to bootstrap his second set of motions to the first, even though his second set of post-trial motions was filed more than two months after entry of judgment. R., pp.90-91, 253-256.

The analysis of the district court, which found Johnson's argument to be unsupportable, is correct. Johnson's first round of post-trial motions captioned "Motion for Reconsideration and Motion to Allow Additional Discovery" did in fact terminate the period for filing an appeal. Idaho Appellate Rule 14(a) states in part:

> The time for an appeal from any civil judgment or order in an action is terminated by the filing of a timely motion which, if granted, could affect any findings of fact, conclusions of law or any judgment in the action (except motions under Rule 60 of the Idaho Rules of Civil Procedure or motions regarding costs or attorney's fees) . . . .

Johnson's motion to reconsider sought an order from the court "pursuant to Idaho Rule of Civil Procedure 11.2(b) RECONSIDERING its Order dismissing this matter." R., p.101. The Idaho Rules of Civil Procedure allow such a motion if brought "within 14 days after final judgment." I.R.C.P. 11.2(b)(1).

Because Johnson's motion to reconsider was filed within 14 days of judgment and, if granted, could have affected the district court's findings of fact, conclusions of law or judgment, it terminated the time for appeal under I.A.R. 14. However, the motion to reconsider only terminated the time to appeal until November 15, 2017, the date that the district court denied the motion. R., pp.248-252. As of that date, the time for Johnson to file an appeal from the judgment began to run anew. I.A.R. 14(a) (where a motion terminates the time for an appeal, "the appeal period for all

judgments or orders commences to run upon the date of the clerk's filing stamp on the order deciding such motion").

Thus time period to appeal began running on November 15, 2017, and 14 days later, on November 29, 2017, Johnson filed a second set of post-trial motions. *See* "Motion for Additional Findings of Fact and Conclusions of Law and Motion to Set Aside Judgment," R., pp.253-256. As with Johnson's earlier motion to reconsider, the question then turns to whether this second set of post-trial motions terminated the appeal period. This question depends on whether the motions filed on November 29, 2017, were timely filed and were motions that "if granted, could affect any findings of fact, conclusions of law or any judgment in the action." I.A.R. 14(a).

The district court determined that Johnson's Rule 52(b) motion for additional findings and fact and conclusions of law did not terminate the time for appeal because the motion was not timely filed. A court "may amend its findings, or make additional findings, and may amend the judgment accordingly" pursuant to a Rule 52(b) motion, but only if the motion is "filed no later than 14 days after the entry of judgment." I.R.C.P. 52(b) (emphasis added). A motion must be timely filed to terminate the time for appeal. Rule 14(a) states in part:

> The time for an appeal from any civil judgment or order in an action is terminated by the filing of **a timely motion** which, if granted, could affect any findings of fact, conclusions of law or any judgment in the action. . . .

(Emphasis added.)

The district court then properly denied Johnson's motion to alter or amend its findings because Rule 52(a)(4) expressly states that a court is not required to make

findings or enter conclusions "when ruling . . . on a motion under Rule 12 or 56." Thus, Johnson's challenges to the adequacy of the court's findings in ruling on the Department's Rule 12(b)(1) motion to dismiss and Johnson's motion to allow discovery under Rule 56(d) were immaterial.

Johnson's November 29, 2017, "Motion for Additional Findings of Fact and Conclusions of Law and Motion to Set Aside Judgment" also stated that it was being brought pursuant to Rule 60(b). R., p.253. Such a motion does not terminate the time for an appeal. Rule 14(a), the rule providing for termination of the appeal time for certain "timely motion[s]," by its own terms does not apply to "motions under Rule 60 of the Idaho Rules of Civil Procedure."

The district court then pointed out that, to the extent Johnson was attempting to terminate the time for appeal by casting his November 29, 2017, motion as a Rule 59(e) motion to alter or amend a judgment, *see, e.g.,* R., p.282 (Johnson's memorandum in support of additional findings), such a motion also would have been untimely. Rule 59(e) states, "[a] motion to alter or amend the judgment must be filed and served no later than 14 days after entry of the judgment." That did not occur here. The motion was filed more than two months later.

Because the appeal clock began to run again on November 15, 2017, when the district court denied Johnson's first round of post-trial motions. R., pp.248-252, the time for Johnson to appeal from the order granting the Department's Rule 12(b)(1) motion and the judgment, and the district court's order denying his first set of post-trial motions, expired on December 27, 2017. R., p.336.

Johnson filed his notice of appeal to this Court on March 23, 2018. R., pp.374-78.

The only two orders of the district court that were entered within 42 days of the filing of Johnson's notice of appeal these order, the only ones within the jurisdiction of the Court on appeal, are the district court's "Memorandum Decision & Order Denying Plaintiff's Motion for Additional Findings of Fact and Conclusions of Law and to Set Aside Judgment" filed on February 13, 2018, R., pp.332-339, and the district court's "Memorandum Decision and Order Granting Defendants' Second Request for Attorney's Fees" entered on March 21, 2018. R., pp.370-373. Through conscious choice or, perhaps, oversight, Johnson can no longer challenge the district court's award of attorney fees to the Department because he did not raise the district court's attorney fee order as an issue in his opening brief.

Thus, of the issues raised by Johnson on appeal in his opening brief, the only issues over which this Court has jurisdiction must relate solely to the district court's denial of his November 29, 2017, "Motion for Additional Findings of Fact and Conclusions of Law and Motion to Set Aside Judgment." R., pp.253-256. Of course, this Court also has jurisdiction to review the issue whether the Department should be awarded its costs and attorney fees incurred on appeal. The district court's granting the Department attorney fees stated that Johnson's second set of post-trial motions "were clearly untimely and had absolutely no merit," and left the court with an "abiding belief" that they had been brought "frivolously, unreasonably, or without foundation." R., p.365.

II.

The District Court Did Not Abuse Its Discretion in Denying Johnson's November 29, 2017, Motions under Rules 52(a), 52(b), 59(e) and 60(b)(6) of the Idaho Rules of Civil Procedure

A. Standards of Review

To the extent that Johnson raised below an I.R.C.P. 52(a) challenge to the district courts findings, which is disputed and would appear somewhat anomalous under the facts of this case, an appellate court will not reweigh the evidence or disturb the findings unless "clearly erroneous," viz. unless they are not "supported by substantial and competent evidence." *Phillips v. Gomez*, 162 Idaho 803, 806, 405 P.3d 588, 591 (2017).

The same standard of review applies to Rule 52(b) motions. *Johnson v. Edwards*, 113 Idaho 660, 661–662, 747 P.2d 69, 70–71 (1987).

"[A] Rule 59(e) motion to amend a judgment is addressed to the discretion of the court. An order denying a motion made under Rule 59(e) to alter or amend a judgment is appealable, but only on the question of whether there has been a manifest abuse of discretion." *Pandrea v. Barrett*, 160 Idaho 165, 171, 369 P.3d 943, 949 (2016), *quoting Barmore v. Perrone*, 145 Idaho 340, 344, 179 P.3d 303, 307 (2008), *quoting Coeur d'Alene Mining Co. v. First Nat'l Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990).

A motion under I.R.C.P. 60(b) will be reviewed under the abuse of discretion standard. "A district court does not abuse its discretion when it '(1) correctly

perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason.'" *Agrisource, Inc. v. Johnson*, 156 Idaho 903, 914, 332 P.3d 815, 826 (2014), *quoting O'Connor v. Harger Constr., Inc.*, 145 Idaho 904, 909, 188 P.3d 846, 851 (2008).

B. The District Court Properly Denied Johnson's Motions under Rule 52(a), Rule 52(b) and Rule 59(e)

The district court properly Johnson's motions under Rule 52(a),[1] Rule 52(b) and Rule 59(e) for the reasons discussed *supra*.

Johnson's Rule 52(b) and Rule 59(e) motions were not filed within 14 days of the judgment and, therefore, were untimely. I.R.C.P. 52(b) (motion must be "filed no later than 14 days after the entry of judgment"); I.R.C.P. Rule 59(e) ("motion to alter or amend the judgment must be filed and served no later than 14 days after entry of the judgment").

Johnson's Rule 52(a) challenges to the adequacy of the court's findings in ruling on the Department's Rule 12(b)(1) motion to dismiss and Johnson's motion to allow discovery under Rule 56(d) were immaterial because the district court, in the first instance, was not required to make findings. I.R.C.P. 52(a)(4) (court not required to make findings or enter conclusions "when ruling . . . on a motion under Rule 12 or

[1] The Department argued below, and continues to argue in this appeal that Johnson did not file a motion under Rule 52(a) because his motion expressly stated it was brought pursuant to Rule 52(b). See I.R.C.P. 7(b)(1)(B) (motions must "state with particularity the grounds for the relief sought including the number of the applicable civil rule, if any"). However, even he is found to have made a Rule 52(a) motion below, the motion was properly denied.

56").

C. The District Court Properly Denied Johnson's Rule 60(b)(6) Motion Because He Failed to Demonstrate Sufficient Grounds Under the Rule For Setting Aside the Judgment

Under Rule 60(b)(6) of the Idaho Rules of Civil Procedure, "a court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: . . . (6) any other reason that justifies relief." However, a Rule 60(b) motion "does not affect the judgment's finality or suspend its operation."

Johnson's Rule 60(b)(6) motion was filed on November 29, 2017. In ruling upon the motion, the district court noted that the Department had objected to the declaration of Rose Johnson because its averments were irrelevant, involved speculation and were not based upon personal knowledge. The district court agreed. "Memorandum Decision & Order Denying Plaintiff's Motion for Additional Findings of Fact and Conclusions of Law and to Set Aside Judgment," p.6, n.1, R., p.337. The district court did not abuse its discretion in doing so, or in denying Johnson's request to present testimony.

The granting or denial of a Rule 60(b) motion is discretionary:

> A district court's decision to grant or deny a I.R.C.P. 60(b) motion is within the district court's discretion. *Dawson v. Cheyovich Family Trust,* 149 Idaho 375, 380, 234 P.3d 699, 704 (2010). A district court does not abuse its discretion when it "(1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason." *O'Connor v. Harger Constr., Inc.,* 145 Idaho 904, 909, 188 P.3d 846, 851 (2008).

Agrisource, Inc. v. Johnson, 156 Idaho at 914, 332 P.3d at 827.

A Rule 60(b)(6) motion may not be granted unless "unique and compelling

circumstances" have been demonstrated:

> An aggrieved party may obtain relief from a final judgment by making a motion to the trial court under I.R.C.P. 60(b). Such a motion should not be used, however, as a substitute for a timely appeal. *Johnston v. Pascoe,* 100 Idaho 414, 420, 599 P.2d 985, 991 (1979) (citations omitted). For that reason, although the court is vested with broad discretion in determining whether to grant or deny a Rule 60(b) motion, its discretion is limited and may be granted only on a showing of "unique and compelling circumstances" justifying relief. *Matter of Estate of Bagley,* 117 Idaho 1091, 1093, 793 P.2d 1263, 1265 (Ct.App.1990) (*citing Puphal v. Puphal,* 105 Idaho 302, 669 P.2d 191 (1983)).

Miller v. Haller, 129 Idaho 345, 348–49, 924 P.2d 607, 610–11 (1996).

This Court has explained that, while Rule 60(b)(6) is a catchall for the rule, it "was not intended to allow a court to reconsider the legal basis for its original decision" and that "[d]iscovery of new legal theories does not constitute grounds for bringing a 60(b) motion." *First Bank & Tr. of Idaho v. Parker Bros.*, 112 Idaho 30, 32, 730 P.2d 950, 952 (1986).

In the case at bar, Johnson's Rule 60(b)(6) was nothing more than a belated request for the district court to reconsider its original decision. Johnson did not demonstrate "unique and compelling circumstances" that justified disturbing the finality of the district court's judgment.

The district court carefully considered and then rejected all of Johnson's specious arguments:

> This Court recognizes that its determination of whether to grant or deny the plaintiff's Rule 60(b) motion is discretionary; and in making its determination, the Court has considered the plaintiff's motion, [and the memoranda and declarations filed in support], together with the oral argument of counsel . . . .

> Upon consideration thereof, this Court finds, first, that the Rule 60(b)(6) motion is improper to the extent the plaintiff is trying to re-litigate the substance of his negligence claim and challenge the findings of fact and conclusions of law made by this Court in its original [decision and order] . . . .
>
> Second, the plaintiff has offered in support of his 60(b)(6) motion the mere speculation that the IDOL's request for a $150 fee in order for the plaintiff "to obtain records and internal communications" as "possibly indicating the existence of many hundreds of pages of records that have not been disclosed in the course of" the plaintiff's unemployment benefits proceedings. *Declaration of Dale Johnson*, at ¶ 1. Mr. Johnson is speculating that the $150 fee is an "[e]xtraordinarily high cost for a response to my public records request, [and] further indicate[s] that there may [sic] significant relevant evidence that the Defendants are not disclosing in this case." *Id.* at ¶ 5. This speculation by the plaintiff does not demonstrate "unique and compelling circumstances" required for this Court to set aside the Judgment pursuant to 60(b)(6). The plaintiff's issues with the IDOL and other state government agencies about public records are irrelevant to this case and a Rule 60(b) motion is not available as a remedy for disputes over public records requests.

"Memorandum Decision & Order Denying Plaintiff's Motion for Additional Findings of Fact and Conclusions of Law and to Set Aside Judgment," p.7, R.,p.338 (citing I.C. § 74-115 as the "sole remedy" for someone aggrieved by the response to a public records request).

The district court did not abuse its discretion in denying Johnson's Rule 60(b)(6) motion and its decision should be upheld.

III.

The District Court Properly Granted the Department's Rule 12(b)(1) Motion to Dismiss Because Johnson Did Not Timely Present and File a Notice of Tort Claim With the Idaho Secretary of State as Required by the Idaho Tort Claims Act

A. Standard of Review

The district court reviewed Johnson's Rule 12(b)(1) motion under the heightened standard applied to motions for summary judgment. *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 934–35, 303 P.3d 617, 621–22 (2013), describes the standards of review as applied to a Rule 12(b)(1) motion that is treated as a motion for summary judgment:

> When reviewing an order for summary judgment, the standard of review for this Court is the same standard as that used by the district court in ruling on the motion. Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Fuller v. Callister*, 150 Idaho 848, 851, 252 P.3d 1266, 1269 (2011) (*quoting Castorena v. Gen. Electric*, 149 Idaho 609, 613, 238 P.3d 209, 213 (2010)). "However, the nonmoving party cannot rely on mere speculation, and a scintilla of evidence is insufficient to create a genuine issue of material fact." *Bollinger v. Fall River Rural Elec. Co-op.*, Inc., 152 Idaho 632, 637, 272 P.3d 1263, 1268 (2012). "The date when a cause of action accrues is a question of law to be determined by this Court where no disputed issues of material fact exist." *Harris v. State, ex rel. Kempthorne*, 147 Idaho 401, 405, 210 P.3d 86, 90 (2009). "This Court exercises free review over questions of law." *Fuller*, 150 Idaho at 851, 252 P.3d at 1269.

B. Johnson's Failure to Timely File a Notice of Tort Claim Is a Proper Basis for Dismissing His Action Pursuant to Rule 12(b)(1)

A Rule 12(b)(1) motion "is rooted in the unique nature of the jurisdictional question." *Madsen v. Idaho Dep't of Health & Welfare,* 116 Idaho 758, 761, 779 P.2d 433, 436 (Ct. App. 1989). A district court has "broader power to decide its own right to hear the case than it has when the merits of the case are reached." *Id. quoting Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981), *cert. denied,* 454 U.S. 897

(1981). "Jurisdictional issues, whether they involve questions of law or of fact, are for the court to decide." *Id.* (*citing* same). "Moreover, because jurisdiction is a threshold question, judicial economy demands that the issue be decided at the outset rather than deferring it until trial, as would occur with denial of a summary judgment motion." *Id.* (*citing* same).

The timely filing of a notice of tort claim under the ITCA is similar in many respects to the administrative exhaustion requirement in other contexts such as the Idaho Human Rights Act. I.C. §§ 67-5901 et seq. Whether or not the timely filing of a notice of tort claim is labeled as "jurisdictional," it cannot be reasonably disputed that the legislature intended the timely filing of a notice of tort claim as a condition precedent to filing of a negligence lawsuit against the State. The words of Idaho Code § 6-908 are clear:

> No claim or action shall be allowed against a governmental entity or its employee unless the claim has been presented and filed within the time limits prescribed by this act.

Idaho courts have consistently interpreted the language of I.C. § 6–908 to mean that compliance with the notice requirement of the ITCA is a mandatory and must occur before suit can be filed. *Madsen v. Idaho Dep't of Health & Welfare*, *supra, citing McQuillen v. City of Ammon*, 113 Idaho 719, 747 P.2d 741 (1987); *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982); *Smith v. City of Preston*, 99 Idaho 618, 586 P.2d 1062 (1978); *Independent School Dist. of Boise v. Callister*, 97 Idaho 59, 539 P.2d 987 (1975).

The question whether a claim has been timely presented and filed is a question

of law that goes to the heart of the legal right of a plaintiff bring an action against the state. Therefore, this issue is appropriate for disposition under Rule 12(b)(1).

C. Johnson Failed to Comply with the Idaho Tort Claims Act, Specifically Idaho Code § 6-905; Because of This, His Complaint Was Properly Dismissed

Under Idaho Code § 6-905, all tort claims against the State that fall within the ITCA must be presented to and filed with the Idaho Secretary of State within 180 days from the date the claim "arose or reasonably should have been discovered." Section 6-905 reads:

> ***All claims*** against the state arising under the provisions of this act and all claims against an employee of the state for any act or omission of the employee within the course or scope of his employment ***shall be*** *presented to and filed with the secretary of state within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later.*

(Emphasis added.)

The State is defined as "the state of Idaho or any office, *department*, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof." Idaho Code § 6-902(1) (emphasis added). Because the Department is a department of the State, it falls within the purview of the ITCA.

The purposes of the notice of claim requirement under the ITCA are to: (1) save needless expense and litigation by providing opportunity for amicable resolution of differences among parties; (2) allow authorities to conduct a full investigation into the cause of the injury in order to determine the extent of the state's liability, if any; and (3) allow the state to prepare defenses. *Driggers v. Grafe*, 148 Idaho 295, 297, 221 P.3d 521, 523 (Ct. App. 2009); *citing Pounds v. Denison,* 120 Idaho 425, 426–27,

816 P.2d 982, 983–84 (1991).

The language in Idaho Code § 6-905 is mandatory. When it is read together with Idaho Code § 6-908, it is apparent, and the Court has held that the failure to comply with the notice requirement bars a suit, regardless of how legitimate its underlying claim might be. *Driggers*, 148 Idaho at 297, 221 P.3d at 523; *see also Avila v. Wahlquist*, 126 Idaho 745, 748, 890 P.2d 331, 334 (1995).

Johnson's negligence claim "arose or reasonably should have been discovered," I.C. § 6-905, on or before the date of the second Appeals Examiner's decision, November 25, 2015. On that date, he was fully aware of the Department's alleged negligence – the missing transcript and all of the other facts relating to supposed improprieties occurring during the Appeals Examiner proceedings. Johnson also was aware of, "or reasonably should have discovered," on or before that date the attorney fees he incurred during the two hearings on remand that occurred because of the alleged negligence. The district court found that the period of delay resulting from the lost recording of the August 5, 2015, "was from August 5th to November 25, 2015, when the second Appeals Bureau decision was issued." "Memorandum Decision and Order Granting Defendants' I.R.C.P. 12(b)(1) Motion to Dismiss," R. p.85. Johnson's cause of action accrued on or before November 25, 2015. Johnson admitted as much in his memorandum supporting reconsideration when his counsel wrote to the court: "*at the time of the second unfavorable decision [November 25, 2015], the only damages which Mr. Johnson could determine with any degree of certainty were attorneys' fees and costs*." R., p.168 (emphasis added)

It is undisputed that Johnson's Notice of Tort Claim was presented more than 180 days after November 25, 2015. Therefore, Johnson failed to timely file his Notice of Tort Claim.

Accordingly, the district court's order granting the Department's Rule 12(b)(1) motion to dismiss should be affirmed.

D. Johnson's Argument That His Cause of Action Did Not Accrue Until He Learned of the Industrial Commission's Decision on the Unemployment Benefits Appeal Is Supported By Neither Fact Nor Law

Johnson states that because he did not know the full extent of his damages, his cause of action did not accrue on November 25, 2015. This position is supported by neither fact nor law.

In the analogous area of statutes of limitation, Idaho cases hold that the clock starts to run on filing a claim when "some damage" has occurred. *Stephens v. Stearns*, 106 Idaho 249, 254, 678 P.2d 41, 46 (1984), *quoting* W. Prosser, Handbook of the Law of Torts § 30 (4th ed. 1971).

On or before November 25, 2015, Johnson knew of the actions of the Department that he alleges were negligent, and he also had actual knowledge of "some damage" – the attorney fees he incurred during the second Appeals Examiner proceedings. The fact that he believed that he might incur additional damages occurring thereafter is of no moment. This point was made clear in *Ralphs v. City of Spirit Lake*, 98 Idaho 225, 227-28, 560 P.2d 1315, 1317-18 (1977), where the Idaho Supreme Court rejected a similar argument:

> Here, it is clear that on the date of the incident plaintiff Ralphs was aware that he had been attacked, assaulted and battered, that the Chief

> of Police was allegedly negligent in permitting the attack and that the city of Spirit Lake was negligent in employing a man of Newton's alleged characteristics and in failing to discharge him. The fact that plaintiff Ralphs became at a later time aware of additional injuries or damages is not sufficient to excuse his earlier knowledge of the alleged wrongful act of the physical assault upon him caused by the then existing alleged negligence of Newton and the city of Spirit Lake.

Id.

The period of delay caused by the alleged negligence of Defendants was finite: it had a beginning and end. That end was November 25, 2015. Thus, any cases involving a "continuing tort," *e.g., Curtis v. Firth*, 123 Idaho 598, 604, 850 P.2d 749, 755 (1993), are inapposite. *See Johnson v. McPhee*, 147 Idaho 455, 463-64, 210 P.3d 563, 571-72 (Ct.App. 2009).

Any allegedly negligent conduct by the Defendants ceased on November 25, 2015. That fact cannot be denied and has not been controverted. There was no tortious conduct that continued thereafter, and Johnson himself admits that he suffered "some damage" by that date. This is not a continuing tort case.

E. Johnson's Emails and/or Letters Complaining About Department Employees Were Not Notices of a Tort Claim

Johnson attempts to avoid the inevitable result of his untimely filing of a Notice of Tort Claim by arguing that various emails and/or letters should suffice as a notices of tort claims, namely an email to Appeals Bureau administrator Amy Hohnstein, a letter to a deputy attorney general assigned to the Department, and a constituent grievance he sent to Idaho's Governor and the Director of the Department on December 6, 2015. After the district court's decision dismissing Johnson's Complaint, Johnson or his wife communicated with various state offices. From what

is essentially an internal note to file entered by a constituent services individual at the Governor's office, Johnson asserts that his constituent complaint should have the legal force of a notice of tort claim.

There are a number of glaring and fatal defects with this argument. First, the staff member's note to file dated February 15, 2016, said only "Case is in litigation. Will close." This note simply reflected that Johnson's grievance was indeed in litigation before the Commission on Johnson's appeal from the Appeals Examiner's decision. Reason and common sense do not support conflating a note to file such as this with the presentment of a tort claim notice to the Idaho Secretary of State's Office. To do so would be contrary to the purposes of the ITCA. Second, Johnson's December 6, 2015, grievance letter to the governor and the director fails to meet the statutory requirements of a notice of tort claim; it does not even come close. It contains no claim for a specific amount of damages and omits most of the other elements required by statute. I.C. § 6-907. Third, Johnson advances no law supporting the novel assertion that an office of state government or the director of a state agency has a duty to forward constituent letters – or even bona fide notices of tort claim – to the Idaho Secretary of State's Office, or for the even more radical and preposterous suggestion that a deputy attorney general has an obligation to assist an individual in perfecting a negligence claim against a state agency that is his client.

Finally, the most important uncontroverted fact is that the Idaho Secretary of State's Office never received any letter or other document relating to this matter until August 25, 2016, when it received Johnson's Notice of Tort Claim. No matter how

much supposition and conjecture Johnson can attempt to muster about state employees of the Department, the governor's office, and elsewhere, or about who did what with the documents he sent complaining about the handling of his unemployment benefits matter, only the Idaho Secretary of State's Office matters, because that is where the ITCA mandates tort claim notices to be presented.

The Third Declaration of Lisa Mason renders irrelevant and immaterial all of Johnson's supposition and conjecture because she states under penalty of perjury that nothing was received by the Idaho Secretary of State's Office relating to this case prior to August 25, 2016. Her declaration states:

> 3. On June 16, 2017, September 1, 2017, and again today I reviewed the files of the Secretary of State's Office and searched for any records or documents relating to: (a) the Notice of Tort Claim that was filed with the Secretary of State's Office on August 25, 2016, by Dale Johnson and his attorney James McMillan alleging negligence on the part of the State of Idaho ("the Notice of Tort Claim"); (b) the lawsuit of Dale Johnson v. State of Idaho, Department of Labor, et al., filed in the First Judicial District of the State of Idaho, Bonner County Case No. CV-17-423 ("the Lawsuit"); and (c) the letter dated December 6, 2015, from Dale Johnson addressed to: "State of Idaho; Public Officers of Accountability Butch Otter; Gov and Ken Edmunds; Gov Appointed the Department" which letter is attached hereto as Exhibit A ("Exhibit A"). (A copy of the Notice of Tort Claim is attached to my initial declaration herein.)
>
> 4. The Secretary of State's Office did not receive any documents relating to the Notice of Tort Claim, or have actual or constructive knowledge of any of the events described therein, prior to the presentment of the Notice of Tort Claim to it on August 25, 2016. On October 4, 2017, Deputy Attorney General Doug Werth forwarded to me a copy of the [Second] Declaration of Dale Johnson dated September 28, 2017, which had attached to it a copy of a letter dated December 6, 2015, from Dale Johnson addressed to: "State of Idaho; Public Officers of Accountability Butch Otter; Gov and Ken Edmunds; Gov Appointed the Department" ("Exhibit A").

> 5. I have searched the records of the Secretary of State's Office and prior to October 4, 2017, the office had not received Exhibit A or any copy thereof, in whole or in part; and prior to the presentment to the Secretary of State's Office on August 25, 2016 of the Notice of Tort Claim, the Secretary of State's Office had not received any letter or documentation of any kind relating to, or describing any of the events within, the Notice of Tort Claim.
>
> 6. The first document or other record of any kind received by the Secretary of State's Office relating to the events described in the Notice of Tort Claim was the Notice of Tort Claim itself, which was received by the Secretary of State's Office on August 25, 2016.

Declaration of Lisa Mason, pp.2-3, R., pp.129-131.

A party opposing summary judgment "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(c). Further, summary judgment proceedings are decided based on admissible evidence, *Path to Health, LLP v. Long*, 161 Idaho 50, 54, 383 P.3d 1220, 1224 (2016), not supposition and conjecture.

There is no genuine issue of material fact concerning the facts recited under oath in Lisa Mason's declarations. There is no genuine issue of material fact as to the date that Johnson first filed his Notice of Tort Claim with the Idaho Secretary of State. It was filed on August 25, 2016. This presentment and filing was untimely. Consequently, the district court properly granted the Department's Rule 12(b)(1) motion and properly denied Johnson's motion for reconsideration and request for discovery.

The presentment issue in this appeal is guided by *CNW, LLC v. New Sweden Irrigation District,* 161 Idaho 89, 383 P.3d 1259 (2016), where this Court held that "the presentment requirement . . . is satisfied when the notice of tort claim is

delivered to an employee or agent of the governmental entity *who then delivers the notice to the clerk or secretary*." (Emphasis added.) Here, the two letters attached to Johnson's declaration, and the letter to the Governor and the director were not delivered to the Idaho Secretary of State within the 180 day period.

It should be noted that the standards for reviewing Johnson's first motion to reconsider are the same as those applied in reviewing the district court's decision dismissing his case pursuant to Rule 12(b)(1). In his motion to reconsider, Johnson failed to present any new facts or legal arguments calling into question the district court's accurate legal analysis of this case.

Johnson also asserted below that he "requires an opportunity to conduct additional discovery in order to determine the existence and handling of this [third] letter, and other documents submitted to the State." Motion for Reconsideration, p.2, ¶ 2, R., p.101. The threshold question relating to the third letter and any other document is whether the Idaho Secretary of State received any such letter or document within the 180 day presentment period. Obviously, Johnson was in possession of all the information he needed to make an averment concerning all documents he sent to government employees and officials since, after all, he was the one who would have sent them. Moreover, what documents the Department received and when they were received was beside the point; what matters was the date of receipt of any documents by the Idaho Secretary of State. The Third Declaration of Lisa Mason answers the relevant inquiry and no amount of discovery by Johnson is going to change that. She declared under penalty of perjury that the Idaho Secretary

of State received no such documents within the relevant time period. That fact is uncontroverted. So Johnson could show he sent 100 letters to the Department and, even then, those letters would be irrelevant because none of them found their way to the Idaho Secretary of State within the time frame required by the ITCA.

Johnson also asserted in his motion to reconsider, *without substantiation or specificity* that his damages were "ongoing and continuous" and that his negligence claim "did not accrue until the issuance of the Industrial Commission's decision which brought the matter to a close." Motion for Reconsideration, p.3, ¶ 4, R., p.102. Johnson cited no materials to support his naked damages assertion. I.R.C.P. 56(c)(3). Again, Johnson did not need discovery to determine the extent of his alleged damages. It is undisputed that: (1) if a tort occurred, it occurred when the Industrial Commission remanded Johnson's matter for further proceedings before an Appeals Examiner; and (2) all the facts necessary to argue duty, breach, proximate cause and damages were known, or reasonably knowable, to Johnson when he filed his second appeal to the Industrial Commission.

Johnson also suggested below, again, without any substantiation or explanation other than a nebulous suggestion of possible spoliation, that he "believes further clarification and discussion with regard to presentment and continuing tort issues, [as] well as the inclusion of [unspecified] additional information and documents from the underlying Department of Labor and Industrial Commission cases, *could prove instructive to the Court herein*." Motion for Reconsideration, p.2, ¶ 3, R., p.101 (emphasis added). A motion for reconsideration must do more than

simply suggest that there may be additional information that "could prove instructive."

In the case of *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 294 P.3d 1111 (2012), this Court explained and re-affirmed its prior reasoning in *Jenkins v. Boise Cascade Corp.*, 141 Idaho 223, 108 P.3d 380 (2005), as follows:

> In *Jenkins,* the plaintiff requested additional time to respond to a motion for summary judgment because the case was complex and there were outstanding requests for written discovery and depositions. *Id.* at 238, 108 P.3d at 385. In the supporting affidavit, the plaintiff's attorney stated that "he believed the discovery would produce additional documents and testimony supporting the Jenkins' theories, and that he required the opportunity to use the responses and testimony in additional discovery in order to thoroughly respond to summary judgment." *Id.* This Court held that the district court did not abuse its discretion in denying the motion because "the affidavit ... did not specify what discovery was needed" to properly respond to the summary judgment motion, "and did not set forth how the evidence he expected to gather through further discovery would be relevant to preclude summary judgment." *Id.* at 239, 108 P.3d at 386. Similarly, in *Taylor v. AIA Services Corporation,* the district court denied a plaintiff's Rule 56(f) motion for additional time to conduct discovery. 151 Idaho 552, 572, 261 P.3d 829, 849 (2011). The court ruled that the plaintiff had more than a year to conduct discovery and that the motion did not set forth what relevant information the plaintiff needed or provide a "reasonable basis to believe additional discovery will produce new or relevant information not previously disclosed...." *Id.* This Court affirmed the district court's decision, noting that the plaintiff had failed to rebut "the district court's finding that he failed to point to any information or document that may be relevant to" his opposition to the motion for summary judgment. *Id.*

Boise Mode, LLC, *supra*, 154 Idaho at 104–05, 294 P.3d at 1116–17. *See also* I.R.C.P. 56(d) (requiring a nonmovant to show "by affidavit or declaration that, *for specified reasons*, it cannot present facts essential to justify its opposition") (emphasis added). The cases of *Jenkins* and *Boise Mode, LLC* and I.R.C.P. 56(d) all support the district court's denial of Johnson's motion to reconsider.

Finally, Johnson in his motion for reconsideration stated that he "believes that the issues concerning possible spoliation of evidence on the part of the Defendants warrant further discussion." Motion for Reconsideration, p.2, ¶ 3, R., p.101. Again, like the averments described above, this was pure supposition unsupported by anything of substance. Johnson was in the exact same position as the nonmoving party in Jenkins who merely "believed the discovery would produce additional documents and testimony supporting the Jenkins' theories, and that he required the opportunity to use the responses and testimony in additional discovery in order to thoroughly respond to summary judgment."

Following the reasoning of Jenkins and Boise Mode, LLC, it is respectfully submitted that the district court properly exercised its discretion and denied Johnson's motion to reconsider.

IV.

This Court Should Award the Idaho Department of Labor its Attorney Fees and Costs on Appeal Pursuant to I.C. §§ 12-117(1) and 12-121

Idaho Code § 12-117(1) provides as follows:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

A court may award a prevailing party attorney fees if provided for by any statute or contract. I.R.C.P. 54(e)(1). The determination of the prevailing party is

within the court's discretion, and will be reviewed for an abuse of discretion. *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 159 Idaho 813, 830, 367 P.3d 208, 225 (2016) (*Syringa II*) (*quoting Hobson Fabricating Corp. v. SE/Z Const.*, LLC, 154 Idaho 45, 49, 294 P.3d 171, 175 (2012)).

An award to the Department of its attorney fees in this appeal under Idaho Code § 12-117 is appropriate because of Johnson's complete disregard of the plain and unambiguous text of the Idaho Rules of Civil Procedure. The reasons set forth in the district court's order granting attorney fees apply with equal force on appeal. There was no good faith argument by Johnson for a modification of existing law; rather, Johnson simply disregarded the plain text of the Idaho Rules of Civil Procedure.

Two recent cases from this Court support an award of attorney fees under Idaho Code § 12-117. In *Jayo Development, Inc. v. Ada County Board of Equalization*, 158 Idaho 148, 345 P.3d 207 (2015), the legal dispute focused on the application of a property tax exemption provided by Idaho law. The Idaho Supreme Court held that the plain, unambiguous language of the statute did not entitle the appellant to the property tax exemption. *Id.*, 158 Idaho at 153, 345 P.3d at 212. This was contrary to the appellant's argument that it qualified under the plain language of the exemption. *Id.*, 158 Idaho at 151, 345 P.3d at 210. In addressing the respondent's request for attorney fees under Idaho Code § 12-117, this Court held that the appellant pursued the appeal unreasonably. *Id.*, 158 Idaho at 154, 345 P.3d at 213. It explained that "[i]n instances where parties to appeals before this Court have advanced arguments based upon a disregard for plain language, we have found them to have acted without

a reasonable basis in law." *Id.* citing *Idaho Wool Growers Ass'n, Inc. v. State*, 154 Idaho 716, 724, 302 P.3d 341, 349 (2012); *Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005).

Similarly in *Arnold v. City of Stanley*, 158 Idaho 218, 345 P.3d 1008 (2015), the Arnolds filed suit under the Open Meetings Law's private right of action for "[a]ny person affected by a violation of" the Open Meetings Law. *Arnold*, 158 Idaho at 220, 345 P.3d at 1010. The Idaho Supreme Court, agreeing with the district court, held that the Arnolds lacked standing to challenge a violation of the Open Meetings Law under the plain, unambiguous language of the statute creating a cause of action. *Id.*, 158 Idaho at 223, 345 P.3d at 1013. The Court then turned to the city's request for attorney fees under Idaho Code § 12-117. The Idaho Supreme Court explained that it did not typically award attorney fees in matters of first impression, but also related that "the purpose of I.C. § 12-117 is to serve as a deterrent to groundless or arbitrary action and to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges." *Id.*, 158 Idaho at 224, 345 P.3d at 1014 (citation omitted) (quotation marks omitted) (alteration omitted). The Court acknowledged the theory advanced by the Arnolds, and indicated that they may have reasonably pursued this theory in the district court, but they did not reasonably pursue it in the Idaho Supreme Court. *Id.* The plain language of the statute was "clear enough that [the Court] believe[d] the Arnolds' appeal was made without a reasonable basis in fact or law." *Id.* As the Court remarked, "[a]sserting

that an appeal involves a matter of first impression is not a 'free pass' to bring an appeal based on unreasonable arguments." *Id.*

Jayo Development and *Arnold* support an award of attorney fees on appeal. Johnson throughout this litigation and on appeal has acted without a reasonable basis in law or fact.

Another basis for awarding attorney fees or appeal to the Department is Idaho Code § 12-121. As of March 1, 2017, Idaho Code § 12-121 provides that in any civil action, "the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued, or defended frivolously, unreasonably or without foundation." 2017 Idaho Sess. Laws. Ch. 47; *see also Hoffer v. Shappard*, 160 Idaho 868, 883, 380 P.3d 681, 696 (2016) (seemingly recognizing that whatever law was in effect as of March 1, 2017, as to Idaho Code § 12-121 would apply to all cases that had not become final as of that date). Under this standard, the Court looks at "whether the losing party's position is so plainly fallacious as to be deemed frivolous, unreasonable, or without foundation." *Doble v. Interstate Amusements, Inc.*, 160 Idaho 307, 308-09, 372 P.3d 362, 363-64 (2016) (citations omitted) (internal quotation marks omitted).

For purposes of Idaho Code § 12-121, the Department is a party. Johnson, as discussed above, had no reasonable basis in law or fact for bringing this appeal.

The Department should be awarded its reasonable attorney fees under Idaho Code §§ 12-117(1) and 12-121.

CONCLUSION

Based upon the foregoing, it is respectfully requested that the decisions of the district court be affirmed, and that this Court enter its order awarding the Department its reasonable attorneys fees on appeal.

Respectfully submitted,

/s/ Doug Werth
DOUG WERTH
Deputy Attorney General
Idaho Department of Labor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th of March, 2019, I caused to be served a true and correct copy of the foregoing by the following method to:

Attorney for Plaintiff-Appellant

James McMillan
Attorney at Law
512 Cedar Street
Wallace, ID 83873

☐ U.S. Mail
☐ Hand Delivery
☐ Certified Mail
☒ iCourt E-File

/s/ Patricia Paulin
PATRICIA PAULIN
Legal Secretary