4-22-2019

Johnson v. Deptartment of Labor Appellant's Reply Brief Dckt. 45911

IN THE SUPREME COURT OF THE STATE OF IDAHO

DALE JOHNSON,

Plaintiff/Appellant,

vs.

STATE OF IDAHO
DEP'T OF LABOR, et al,

Defendants/Respondents.

Supreme Court Docket No. 45911-2018

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District
of the State of Idaho in and for the County of Bonner
the Honorable Barbara A. Buchanan Presiding

JAMES McMILLAN,
Attorney at Law
512 Cedar Street
Wallace, Idaho 83873
For Appellant

DOUG WERTH
Deputy Attorney General
317 W. Main Street
Boise, ID 83735
For Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. STATEMENT OF THE CASE

A. Nature of the Case

The nature of the case from Appellant's standpoint is set forth in Appellant's Opening Brief, on file herein. However, Appellant would note that, while it is accurate that the Department of Labor ("Department") did not choose to appeal the Idaho Industrial Commission's Order in Appellant's favor, both the Department and the Employer (who, up until that point, had not participated in the proceedings) unsuccessfully sought reconsideration of the Industrial Commission's ruling, which is included in the Clerk's Record, at 202 -225. Moreover, Appellant takes issue with Respondent's characterization of his filings as untimely, as will be discussed in further detail hereinbelow.

B. Course of the Proceedings

Likewise, the Course of Proceedings from Appellant's standpoint are set forth in Appellant's opening Brief, and, for sake of brevity, will not be repeated at length herein, but a summary is imperative, including the proceedings of the underlying Department of Labor and Industrial Commission (I.I.C.) proceedings: November 25, 2015 (Department's Denial of benefits); December 9, 2015 (Appeal to I.I.C.); January, 2016 – April 4, 2016 (Briefings of parties in the course of the I.I.C. Appeal); April 29, 2016 (Decision of I.I.C., reversing Department Decisions); May 19, 2016 (Motions filed for Reconsideration by the Department and Employer (represented by Charles Lempesis, who had not previously participated in the proceedings); August 25, 2016 (formal Notice of Tort Claim filed to the Secretary of State); September 26, 2016 (I.I.C. Decision Denying Reconsideration Motions of the Department and

Employer); February 6, 2017 (letter from State Risk Management, denying liability, copied to IDOL/Werth); March 20, 2017 (Complaint to District Court). The dates of the respective filings set forth in Respondent's Brief is accurate and true, and the Register of Action and Clerk's Record speak for themselves with regard to said dates and documents.

C. Concise Statement of the Facts

The fact pattern from Appellant's standpoint is also set forth in the Opening Brief; however, Respondent's recitation of the facts warrants some degree of further discussion.

Initially, Respondent states that "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." Respondent's Brief at 4. This is not accurate. Even if, arguably, the issuance of the hearing officer established the date on which the delay ended, it does not establish when Appellant knew, or reasonably should have known, he had suffered damages due to the delay, nor the extent of the damages, which begins the time period for filing under the Idaho Tort Claims Act. Furthermore, even after Appellant received the Industrial Commission's decision, Respondent created further delay by seeking a reconsideration of the same, on the last date on which to move for a reconsideration under the Industrial Commission's Rule, thus resulting in even *further* delay in obtaining a final decision with regard to Appellant's unemployment benefits and, in doing so, presented what Appellant believes to be inaccurate assertions. R. 265–276 (Department's Motion for Reconsideration. It should also be noted that, in rendering its decision on Reconsideration, the Industrial Commission referred to the transcript prepared by Plaintiff, which was not accepted by

the Department to avoid a second hearing. R. p. 212, 213, 215-216, 218, 220, 223. As such, it would be reasonable to conclude that, not only did the deadline for filing a Notice of Tort Claim begin running at the time of the Industrial Commission's first decision, it actually would have began running when the Industrial Commission issued its decision *denying reconsideration.* However, since Appellant submitted his Tort Claim prior to the decision on reconsideration, that possibility need not be discussed at length.

Further, in light of the District Court's denial of Appellant's Motion for Additional Discovery, Respondent Department, believed to be acting on the advice of the same counsel who is representing it in the instant case, and who represented the Department during the course of the Industrial Commission appeal, continued to engage in obstreperous behavior by either failing to respond adequately to Appellant's public records requests with regard to documents concerning the Department's handling of his unemployment claim, or quoting unreasonably exorbitant prices for labor and copying. R. 314 - 315. Therefore, Appellant disagrees with the assertion that there are not subsequent acts on the part of, or on behalf of, the Department with which he takes issue.

With regard to the remaining facts from Appellant's perspective, Appellant will refer to those as set forth in his Opening Brief, and in course of his Argument below.

III. ARGUMENT

A. The Second Set of Post-Trial Motions Did Terminate or Suspend the Time for Filing an Appeal.

Respondent first argues that the second set of Post-Judgment Motions, and, likewise, this Appeal, were not timely filed. Respondent's Brief at 9-14. This entire argument turns upon whether or not the deadline for the filing of Motion that qualifies under Idaho Rule of Civil Procedure 59(e) is likewise extended by the filing of a Motion for Reconsideration, which, unquestionably, extends the deadline for the filing of an Appeal.

The nature of a Rule 59(e) Motion is discussed by this Court in the case of *First Sec. Bank v. Neibaur*, 98 Idaho 598, 603, 570 P.2d 276, 281 (1977). In the *Neibauer* case, this Court made several significant holdings: (1) That a Motion, even it it may be brought under Rule 60(b) or otherwise, may be treated as being brought under Rule 59(e) if it is brought within the time limits; and (2) that one of the purposes of a Motion under 59(e) is "to correct errors both of fact and law that had occurred in its proceedings." and "[provide] a mechanism to circumvent appeal." *Id.*

Given, then, that a Rule 59(e) Motion is a substitute for an appeal, allowing the District Court to correct its own errors to avoid the necessity of the time and expense involved in an appeal, the other principles applicable to an appeal logically follow. This would mean that, since the Motion for Reconsideration extended the deadline for the appeal, it likewise extended the deadline for a Rule 59(e) Motion. A Rule 59(e) Motion also tolls the deadline for appeal, *id.*, and so, therefore, the instant appeal, filed within forty-two days from the denial of the 59(e) Motion is timely.

In support of its Motion to Dismiss, Respondents cite to the case of *Dunlap v. Cassia Memorial Hospital*, 134 Idaho 233, 999 P.2d 888 (2000). However, there are several important

distinctions between *Dunlap* and the Instant Case: (1) In *Dunlap*, the second Motion to Reconsider was brought *following* a Motion treated as a Rule 59(e) Motion. *Id.* at 235. Notwithstanding the fact that Rule 11(a)(2)(B) expressly excludes a Rule 59(e) order from Reconsideration, procedurally, there is a distinct difference between the two Motions: A Motion to Reconsider is intended to allow the Court to reconsider a pre-judgment Order, which would include an Order Granting Summary Judgment, and, therefore, must be brought within fourteen days of the Judgment following said order. (2) In *Dunlap*, the second Motion was not denied on its merits, it was *stricken*. *Id.* at 234. Once the Motion was stricken, any possible tolling effect it may have had on further proceedings would, necessarily, disappear. In this case, Appellant's second set of post-trial Motions were denied, with timeliness being one of the grounds for the denial. Finally, (3) in *Dunlap*, the Appellants did not raise the District Court's Order striking the second Motion for Reconsideration as an issue on appeal. *Id.* at 236. Thus, the issue of its possible timeliness and the correctness of the District Court's grant of the Motion to Strike, were not properly before this Court. In this case, Appellant directly raises the denial of the Motions as an issue on Appeal.

Therefore, for these reasons, the District Court erred in its determination that the second set of post-judgment motions were untimely, and in its opinion that the time for appeal began to run from the denial of the first Motion for Reconsideration. As such, the District Court's decision denying the Motions should be REVERSED, the matter remanded, and this Court should consider Appellant's argument on the merits of the Order dismissing the case at the District Court level.

B. The District Court Erred in Granting the Motion to Dismiss.

Having discussed the issue concerning timeliness, the remaining discussion bears upon the merits upon the District Court's grant of the Dismissal, and denial of the post-judgment Motions. If the District Court was erroneous in its grant of the Motion to Dismiss, then, it follows, that it abused its discretion in the denial of the Motion for Reconsideration and remaining post-judgment Motions. As such, much of the following Argument will echo the arguments raised in Appellant's Opening Brief.

1. Accrual of Appellant's Cause of Action for Negligence.

Initially, the District Court held that Appellant's cause of action accrued on the date of the second Appeals Bureau decision (November 25, 2015) and, therefore, began the one-hundred-eighty (180) day period on that date. Memorandum Decision at 14. (R. at 86). However, said decision was not favorable to Appellant. Therefore, while attorneys' fees from the second hearing could have been determined at that point, the significant additional financial damages resulting from the delay in the payment of benefits could *not* have been determined at that point, as it had not yet been determined that Mr. Johnson *was* going to be entitled to benefits. Also, Appellant could not have anticipated the representations and subsequent conduct of the Department during and following the proceedings before the Industrial Commission, which further prolonged the matter. As a small example, in Respondent's May 19 (and amended May 20, 2016), Motion for Reconsideration, the Department, submitted to the I.I.C., provably untrue statements, with the apparent expectation that they rely upon the same. The I.I.C. was not misled

and, in its denial of the Motions, expressed apparent disapproval and displeasure. (Record at 211).

Moreover, at that point, the incurred damages which Mr. Johnson could determine with any degree of certainty were growing borrowed funds for living expenses and attorneys' fees and costs. Mr. Johnson, as the, then, non-prevailing party, may likely have only been entitled to bring a cause of action solely for attorneys' fees as damages. It was not until he received the Industrial Commission's decision on or about April 29, 2016, that Mr. Johnson discovered that he suffered additional damages in the form of a delay in payment of benefits. Declaration of Dale Johnson, ¶ 2 (R. at 57).

Unlike in the case of an intentional tort, a cause of action for negligence does not accrue until the Plaintiff has suffered actual damage as a direct and proximate result of said negligence. *See, e.g., Stephens v. Stearns*, 106 Idaho 249, 254, 678 P.2d 41, 46 (1984) ("it is axiomatic that in order to recover under a theory of negligence, the plaintiff must prove actual damage."). Until the favorable Industrial Commission decision of April 29, 2016, Appellant had no way of knowing if, in fact, he would be entitled to damages as a result of the delay in the grant of benefits, let alone the extent of said damages. The Idaho Court of Appeals has also held that "a claimant 'discovers' his claim against the governmental entity only when he becomes fully apprised of the injury or damage and of the governmental entity's role. The question of when the claimant should have discovered the governmental entity's role is a question of material fact which, if genuinely disputed, is inappropriate for determination on Summary Judgment." *Carman v. Carman,* 114 Idaho 551, 553, 758 P.2d 710, 712 (Ct. App. 1988). Laying aside, for a

moment, the fact that, even at *this* point, absent further discovery, the full extent of the governmental entity's role is unclear, Mr. Johnson did *not* and *could* not have become fully apprised of the injury or damage until the issuance of the favorable Industrial Commission decision, at the earliest. Therefore, the District Court erred in its determination that Appellant's cause of action accrued at the time of the unfavorable Department of Labor decision in November of 2015.

While there are instances in which this Court and the Court of Appeals have held that the cause of action accrues at the time of the occurrence, such as *Ralphs v. City of Spirit Lake* 98 Idaho 225, 560 P.2d 1315 (1977) and *Mallory v. City of Montpelier*, 126 Idaho 446, 885 P.2d 1162 (Ct. App. 1994), these cases may be distinguished on the basis that they involved personal injuries in which the nature of the injury was, to a great extent, clear at the time of the incident, or shortly thereafter. The Plaintiff in *Ralphs* was clearly aware that he had been attacked and injured at the time of the occurrence, and the Plaintiff in Mallory was clearly aware that she had fallen and injured herself at the time of the occurrence, and could have filed immediately. In *this* case, however, Mr. Johnson could *not* have filed a claim seeking damages for the delay in payment of his unemployment benefits either immediately upon discovering the loss of the recording, nor upon the issuance of the second unfavorable decision, as he did not know that there would *ever* be any benefits paid until the Industrial Commission made that determination.

This case is more akin to the situation in *Farber v. State*, 102 Idaho 398, 630 P.2d 685 (1981). The ongoing nature of the proceedings are more analogous to an ongoing "project", or

continuing tort rather than a single injury that may have become aggravated at a later date. In *Farber*,the Court stated that:

> The purposes of I.C. § 6-905 are to (1) save needless expense and litigation by providing an opportunity for amicable resolution of the differences between 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. Unless the contract and all of the acts performed pursuant to the contract have been completed, it would be difficult for the state to determine the nature or extent of its liability or prepare a defense to any claim. Furthermore, if parties can present the state with a complete and definite claim for damages arising from the continuing tort, then the state may attempt a settlement on the basis of clearly ascertainable facts. If we were to adopt a contrary view, settlements would either be based on pre-completion, speculative damages, or would have to await the completion of the project. A strict or literal interpretation of the notice requirements of the ITCA would result in denying the legitimate claims of those who have suffered injury at the hands of the state, without furthering in the least the legislative purposes behind the statute.

Farber, 102 Idaho at 401-02, 630 P.2d at 688-89. As in *Farber*, if the Court were to have required Appellant to bring a claim immediately upon the second unfavorable decision, and the claim were to settle, said settlement would likewise be "based on pre-completion, speculative damages or would have to await completion" of the appeals process, which would frustrate the policy behind the Idaho Tort Claims act as laid out by the Idaho Supreme Court in that decision.

Therefore, this Court should VACATE the decision of the District Court with regard to the date on which the period in which to file the Notice of Tort Claim accrued, and REMAND accordingly.

2. Presentment.

Alternatively, a rational trier of fact could reasonably find that Appellant's prior correspondence with the Department of Labor and the State of Idaho satisfies the requirements of

the Idaho Tort Claims Act. The District Court held, in its original decision, that it was "undisputed" that the prior correspondence was never directed to the Secretary of State, and essentially interprets *Turner v. City of Lapwai*, 157 Idaho 659, 339 P.3d 544 (2014) as creating a strict requirement that the Notice, whether entitled as such or not, be received by the Secretary in order to satisfy the terms of the ITCA. See Memorandum Decision at 12. However, this recognizes that, if the Notice is subsequently presented to the Secretary, the Presentment requirement is satisfied. *CNW, L.L.C. v. New Sweden Irrigation District*, 161 Idaho 89, 383 P.3d 1259 (2016).

This Court's decisions in *Turner* and *CNW* leave two important questions unanswered: (1) If the Notice is received by an employee other than the Secretary prior to the expiration of the 180 day deadline, but said employee does not deliver it until after the expiration of the deadline, is the presentment requirement satisfied upon receipt of the employee or the Secretary; and (2) do State or Subdivision employees have a duty to present claims that could reasonably interpreted as Tort Claims, providing notice of potential litigation, to the Secretary for processing? In *CNW*, the claim was immediately presented to the Secretary, and so the Presentment requirement was held to be satisfied. In Turner, the claim was presented to the Mayor and a City Councilman, elected officials who arguably have no duty or authority to address the claim. This case falls in between *CNW* and *Turner* – Mr. Johnson's correspondence was presented to State employees who have a duty to direct received correspondence to the appropriate person or department, rather than being directed to officials who have no duty or

ability to process the same. As such, in light of the policy behind the ITCA as set forth in Farber hereinabove, that the answer to both questions should be in the affirmative.

This Court has allowed documents to stand as satisfying the Notice requirement, even if they do not follow a specific form, so long as their contents substantially comply. *Smith v. City of Preston*, 99 Idaho 618, 621-22, 586 P.2d 1062, 1065-66 (1978). In this case, the Johnsons received an explicit admission from a State employee that their prior correspondence indicated Mr. Johnson's intent to litigate this issue as early as January of 2016. Declaration of Rose Johnson, Exhibits A and B (R. at 153-157). At that point, the State was clearly on notice of potential litigation, and had the opportunity to begin to prepare for the same. Having received and acknowledged this notice, Appellant submits that the State employee then not only had a duty to, but possibly may have, passed the information on to the appropriate and necessary personnel and channels, including the Secretary of State's Office, to be processed as a Tort Claim. To hold otherwise would lead to absurd results and frustrate the purpose of the statute. (see Appellant's letter to Gov. and Attorney General and/or Idaho Department office, Dec., 2015). For example, if State or Subdivision employees were held not to have a duty to send what they recognize as possible tort claims to the appropriate authority, the State could essentially immunize itself from tort liability by directing its mailroom staff and receptionists to hold all notices of tort claims for 181 days, thus creating a *de facto* personal service requirement. This was clearly not the Legislature's intent. As such, the District Court was in error in determining that a presentment either had not taken place, or that the lack of presentment directly to the Secretary of State, under these particular facts, failed to satisfy the requirements of the I.T.C.A.

Finally, given the fact that the State clearly admits that, as early as January of 2016, it had notice that litigation was inevitable (as per Johnson's December, 2015and 2017 letter, pp 108 and 181 in record), its false assurances that Mr. Johnson's complaints would be properly addressed, and Mr. Johnson's reliance upon said assurances as set forth in his Declaration, (R. at 312), Exhibit A p. 59,60 Letter Exhibit B p. 62,63, and Exhibit A, p. 181, 182, 184. the State should be held to be ESTOPPED from asserting lack of notice as a defense.

C. The District Court erred in Denying Appellant's Motion for Reconsideration and in denying Appellant's Motion for Additional Discovery.

In the course of its denial of Respondent's first Motion for Fees and Costs, the District Court recognized that this case is "very unusual", and that it was "reasonable" for Appellant to conclude his date of accrual of April 29, 2016 (Decision denying IDOL Fees, Record at 246):

> This was a very unusual case--one need only consider the sequence of events. . .
>
> Finally, on appeal of that second decision, the Industrial Commission, on April 29, 2016, reversed the IDOL's decision and awarded Mr. Johnson benefits. As such, the Court finds that it was not unreasonable for Mr. Johnson to believe-albeit incorrectly-that April 29, 2016, was the date the clock began to run on the filing of his Notice of Tort Claim; and because a decision was issued on that date, there was a reasonable basis in fact...

This conclusion (based upon the District Court and State's joint opinion), essentially, amounts to an admission of a finding that a reasonable trier of fact could have reasonably concluded that Appellant should have discovered his cause of action on April 29, 2016. Having come to this conclusion, the District Court had the opportunity to reverse its prior grant of Defendants' Motion to Dismiss pursuant to Appellant's Motion for Reconsideration, discussed below.

Following the grant of Respondents' Motion to Dismiss, Appellant timely filed for reconsideration. "A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment, but not later than fourteen (14) days after the entry of final judgment." Idaho R. Civ. P. 11(a)(2)(B). "When considering a motion for reconsideration under Rule 11(a)(2), the district court should take into account any new facts, law, or information presented by the moving party that bear on the correctness of the district court's interlocutory order. However, new evidence is not required and the moving party can re-argue the same issues in addition to new arguments." *Arregui v. Gallegos-Main*, 153 Idaho 801, 808, 291 P.3d 1000, 1007 (2012) (internal quotations and citations omitted); see also *Johnson v. Lambros*, 143 Idaho 468, 472, 147 P.3d 100, 104 (Ct. App. 2006) ("the case law in applying Rule 11(a)(2)(B) permits a party to present new evidence when a motion is brought under that rule, but does not require that the motion be accompanied by new evidence."). Appellant, by way of the same Motion, sought additional discovery, in order to address the issues as to whether the Johnsons' repeated correspondence to the State either had been, or should have been, directed to the Secretary of State for treatment as a Tort Claim. Record, at 312 #7, letter ex A p. 59,60 letter ex B p. 62,63, and ex A p. 181, 182, 184.

The District Court denied the Motion for Reconsideration, largely upon the same reasoning as in its grant of the Motion to Dismiss. The District Court then summarily denied Appellant's Motion for Additional Discovery, without setting forth its reasoning for doing so. Memorandum Decision Denying Motion for Reconsideration, Record at 248 - 251. For the reasons set forth in the preceding section, given that the District Court was in error in granting

Respondents' Motion to Dismiss, the District Court likewise abused its discretion in denying Appellant's Motion for Reconsideration.

With regard to the denial of the Motion for Additional Discovery, Respondent had filed its Motion to Dismiss at an early stage of the case, prior to Appellant having an opportunity to conduct adequate Discovery. Appellant attempted, throughout the course of the proceedings, to continue to investigate in order to gather relevant information that may be in the hands of Respondents, including seeking the disclosure of various documents and information that would reveal how, in fact, his prior correspondence with the Department should have been handled, which bears directly upon Plaintiff's alternative theory that there may have been a "presentment" of a tort claim based upon said correspondence. Declaration of Dale Johnson, ¶ 1; Declaration of Rose Johnson, ¶ 10. (R. at 310-11 and 289).

At Oral Argument on Appellant's Motion for Reconsideration, counsel for Respondents (who also represented the Department during Plaintiff's Appeal to the Industrial Commission, and who has been advising the Department with regard to Plaintiff's records requests), stated that Plaintiff's request for the opportunity for discovery could result in "a hundred" depositions being scheduled, Declaration of Dale Johnson, ¶ 5 (R. at 310-11), Transcript p 49, lines 22-23, despite the fact that Appellant never made such an absurd and irrational request. Further, in response to a records request by Plaintiff, the Department quoted a fee in the amount of approximately one-hundred-fifty dollars ($150), which indicates that it would require the production of records in excess of one-hundred (100) pages and/or two (2) hours of staff work (but without an itemization of the number of excess pages or hours). Idaho Code § 72-104(10). Moreover, the Department's

responses have been often non-responsive and/or indicate confusion over Plaintiff's requests. Declaration of Dale Johnson, ¶ 1; Declaration of Rose Johnson, Exhibit B. (R. at 310-11 and 292-305).[1] Taken together, this indicates that there may be significant relevant evidence available, that may possibly expose the Respondents to further liability, in Respondents' possession, that may only be compelled to be disclosed via the Discovery process.

D. The District Court Erred in Denying Appellant's Subsequent Post-judgment Motions.

Following the denial of Reconsideration, Appellant filed a Motion for Additional Findings of Fact and Conclusions of Law, based upon its lack of the same in its denial of Appellant's Motion for Additional Discovery, as well as a Motion to Set Aside the Judgment under Idaho Rule of Civil Procedure 60(b), which may also be treated as a Motion to Alter/Amend under Rule 59(e). *First Sec. Bank v. Neibaur*, 98 Idaho 598, 603, 570 P.2d 276, 281 (1977). On of the purposes of a Motion under 59(e) is "to correct errors both of fact and law that had occurred in its proceedings." and "[provide] a mechanism to circumvent appeal." *Id.*

In denying Appellant's Motion, one of the bases on which the District Court's decision is the issue of timeliness. (R. at 333-34). However, in light of the fact that: (1) a Motion for Reconsideration tolls the time for appeal; and (2) a motion under Rule 60(b) may also be

[1] It should be noted that, during the course of the hearing on Appellant's Motions, counsel for Respondent attempted to urge the District Court to downplay, or disregard, Mrs. Johnson's declarations, erroneously stating that her statements are "irrelevant or they involve speculation or they involve statements where there's no showing of personal knowledge on behalf of - by Mrs. Johnson. So I would respectfully request that this Court either not consider those parts of the declaration or alternatively give that declaration little, any, weight." (Transcript, at 9-7, lines. 2-12). Previously, Mrs. Johnson spoke directly with counsel for Respondent, prior to the filing of the Instant Case, and, thus, he should be aware of the degree of her personal knowledge as to the matters to which she is testifying in her Declaration.

considered pursuant to Rule 59(e) which, in turn, pursuant to *Neibaur*, is a method to avoid appeal at the District Court level, the logical conclusion would be that the Motion for Reconsideration tolled the time in which to file a Motion under Rule 59(e) as well. Since Appellant's Post-judgment Motions were filed within fourteen (14) days of the District Court's decision denying said motions, the post-judgment Motions, as well as the instant appeal, were timely filed. Otherwise, the District Court again erred in affirming its prior decisions based upon its previous reasoning, for the reasons set forth hereinabove.

Further, Appellant has set forth sufficient grounds to set aside the judgment, pursuant to Idaho Rule of Civil Procedure 60(b)(3) and (6) for "unique and compelling circumstances." *See, e.g. Maynard v. Nguyen*, 152 Idaho 724, 726, 275 P.3d 589, 591 (2011). Deprived of the ability to conduct further Discovery, Appellants attempted to continue investigate the existence of possible additional evidence in this case by submitting public records requests to the Department. Declaration of Dale Johnson, ¶ 7. (R. at 179). As set forth in the Declarations of Plaintiff and his wife, the Department, apparently acting pursuant to the advice of the same counsel as is representing it in the instant case, has consistently delayed its responses, claimed a lack of understanding, and sought fees for the requested copies, without specifying the number of pages in excess of one-hundred or hours in excess of two that would justify these additional charges. *Id.*, Exhibit A.

Coupled with the representations of Respondent's counsel that allowing discovery could result in depositions of a large number of witnesses, this indicates that there may be a significant body of evidence that may assist Appellant in showing that the prior correspondence, if not

actually directed to the Secretary of State's Office, at the very least should have been under pertinent rules and procedures. Further, the representation of the Department on Appellant's unemployment claim at the Industrial Commission stage, its handling of Appellant's records requests, and the instant litigation, by the same counsel places Respondent in a very unique position to choose the information to which Appellant has access, whereas the Department essentially has unfettered access to any and all documents concerning Appellant that are relevant to this case. Without the ability to obtain the possible evidence in the possession of the Department, Appellant was, and is, at a very significant disadvantage, to the extent that the inability to access said evidence provides sufficient grounds under Rule 60(b)(6)'s general provisions to re-open this case. Therefore, the District Court was likewise in error in denying Appellant's Motion to Set Aside Judgment, and this Court should REVERSE and REMAND this matter to the District Court accordingly.

Since: (a) Appellant did not know the extent of his damages and, therefore, discover a cause of action for Negligence until April 29, 2016 at the earliest, the date on which the Idaho Industrial Commission issued its decision in Appellant's favor; (b) alternatively, Appellant's body of previous correspondence to the State of Idaho qualify as "tort claims" for the purposes of the Idaho Tort Claims Act and, if discovery were possible, could be determined, at a minimum, as being of such of a nature that it should have been forwarded to the Secretary of State for consideration as a tort claim; (c) the State's acknowledgment of Appellant's intent to litigate in response to said correspondence should estop the State from asserting lack of notice as a defense; and (d) the fact that the District Court wrongfully denied Appellant its opportunity to conduct

further discovery in order to support the aforementioned arguments, the District Court was in error in granting Respondents' Motion to Dismiss and denying Appellant's post-judgment motions.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, the District Court's judgment herein should be REVERSED and the matter REMANDED for further proceedings and a jury trial, as demanded in the Original Complaint.

DATED this 22d day of April, 2019.

JAMES McMILLAN,

/s/ James McMillan
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the the 22d day of April, 2019, I caused to be served a true and correct copy of the foregoing to the following by the method indicated below:

Doug Werth
Deputy Attorney General
317 W. Main Street
Boise, Idaho 83735
Attorney for Respondents

____ U.S. Mail
____ Overnight Mail
____ Hand Delivered
____ Facsimile to: (208) 334-6125
__X__ E-file/Odyssey

/s/ James McMillan
James McMillan