12-27-2018

Johnson v. Deptartment of Labor Appellant's 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

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

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case arises out of the loss of the recording of an unemployment benefits hearing before the Appeals Bureau of the Idaho Department of Labor (hereinafter "Department"), necessitating a remand and an otherwise unnecessary second hearing before the Department, resulting in damages to the Appellant in the form of delayed benefits, attorneys fees, and other damages incurred as a direct and proximate result of the Department's loss of said recording. Following the second hearing, which resulted in another ruling that was adverse to Appellant, Appellant again appealed to the Idaho Industrial Commission, and was ultimately successful. Within one hundred and eighty (180) days from the Industrial Commission's decision, Appellant submitted a formal Notice of Tort Claim, through counsel, seeking damages for the loss of the recording at the initial hearing, and, once denied, Appellant filed the instant suit in the District Court. Complaint 2-5 (Record (R.) at 15-18). However, prior to the formal Notice of Tort Claim, Appellant had also written to various State officials regarding the issue, setting forth in his correspondence elements which would satisfy the Idaho Tort Claims Act ("I.T.C.A."), Idaho Code § 6-905, under *Smith v. City of Preston*, 99 Idaho 618, 621-22, 586 P.2d 1062, 1065-66 (1978). R. at 59-63, 107-11, 153-61, and 181-86. Respondent claims that this correspondence never reached the Secretary of State's office and, therefore, was not properly presented pursuant the I.T.C.A. Third Declaration of Lisa Mason ¶¶ 4-6 (R. at 130-31).

In response to the suit, Respondents moved to dismiss, on the grounds, *inter alia*, that the Notice of Tort Claim was not brought within one-hundred and eighty days from the Department's

last decision against Appellant. *See* Memorandum in Support of I.R.C.P. 12(b)(1) Motion to Dismiss (R. at 23-31). The District Court ultimately granted the Motion, and denied post-judgment motions challenging the same, on the grounds that the tort claim was presented within one-hundred and eighty days of the *Department's* adverse decision (rather than the *Industrial Commission's* favorable decision), and, since there was no proof that Appellant's prior correspondence reached the Secretary of State's Office, the prior correspondence was not properly presented. Memorandum Decision and Order Granting I.R.C.P. 12(b)(1) Motion to Dismiss (hereinafter "First Memorandum Decision") (R. 73-89). It is from the final decision upholding the dismissal that Appellants appeal. However, Appellant did not, and could not, realize whether or not he was damaged, and the extent of his damages, until the date the Industrial Commission issued its ruling in his favor. As such, Appellants submit that the deadline for submitting a Notice of Tort Claim would have began running on that date. Alternatively, Appellants submit that the prior correspondence satisfied the requirements of the Idaho Tort Claims Act.

B. Course of the Proceedings

This matter was filed in District Court on March 20, 2017. Respondents filed their Motion to Dismiss on June 21, 2017, which was heard on September 6, 2017. The Decision granting their Motion was issued on September 14, 2017. Appellants then filed a Motion for Reconsideration on September 28, 2017, which was heard on November 8, 2017. The Decision denying the Motion was issued on November 15, 2017. Appellants then made a Motion for Additional Findings of Fact and Motion to Set Aside the Judgment, again challenging the

Dismissal, on November 29, 2017. That Motion was heard on January 31, 2018, and denied on February 13, 2018. Appellant then timely appealed the same.

C. Concise Statement of the Facts

On or about August 5, 2015, the Idaho Department of Labor Appeals Bureau held a hearing on Appellant's appeal of a denial of unemployment benefits, subsequently issued a decision unfavorable to Appellant. Appellant considered the decision of Mark Richmond, the Hearing Examiner who conducted the hearing and made the decision, to be grossly contrary to the facts presented at the hearing, and his supervisor, Appeals Director Amy Hohnstein, was contacted.

Ms. Hohnstein informed Appellant's wife, Rose Johnson, that she would personally review the audio of the hearing of August 5, 2015. Declaration of Rose Johnson, ¶ 6 (R. at 151). Shortly thereafter, Ms. Hohnstein refused to acknowledge whether or not she listened to the audio or not, and directed Appellant to Appeal if he was not satisfied with the decision. *Id.* At no time was Appellant informed by Ms. Hohnstein that the audio file record was missing. Appellant then requested a copy of the hearing and was informed via IDOL records custodian, Georgia Smith, that it was missing or never recorded, and she apologized for the problem. Appellant's attempt to appeal the decision to the Idaho Industrial Commission was thus remanded, due to the recording of the hearing being missing and no transcript being available from the Idaho Department of Labor. Even though Appellant's wife, Rose Johnson, had transcribed the hearing and offered the recording and transcript to Department of Labor officials,

it was rejected on the grounds that it was not "official," as it was not generated by the Department.

After remand, another hearing was held on or about October 22, 2015, which was conducted more or less in the nature of a status conference, and subpoenas for Appellant's witnesses, but not for the production of documents, were granted. Another hearing was then held on November 12, 2015. However, despite being subpoenaed, one witness who was then a current employee of Appellant's employer appeared to have given an incorrect telephone number, and Paul Norton, an officer of Appellant's employer failed to appear. Appellant was informed at the hearing that Mr. Norton had previously informed the Department of his unavailability, but the Department neglected or failed to pass this relevant information on to Appellant or his counsel when said communication occurred. Separately, the Department allowed ex-parte communication in an eleven-page fax, the entirety of which has not been disclosed to Appellant.

After the conclusion of the hearing the decision from the Department of Labor was ultimately issued, and was, again, not in Appellant's favor. Appellant appealed to the Idaho Industrial Commission, and, ultimately, the Industrial Commission found in his favor in a decision issued on or about April 29, 2016. Both the employer (who, up until that point, had not participated in any of the proceedings below) and the Department then filed a Motion for Reconsideration, which was denied on or about September 26, 2016. R. at 190-225.

During this time, Appellant sent various written communications to a broad variety of State officials, including the Governor's Office, the Attorney General's Office, and the Director

of the Department of Labor. In response to this correspondence, an employee of the Governor's Office by the name of Nick Stout noted as early as January of 2016 that this matter was likely to be litigated. It is unknown where, or to whom, in State Government this correspondence was directed. Comments were made after the letter sent by Appellant to state offices, including the Governor. The State has, thus far, declined to respond to specific questions posed regarding this issue. Declaration of Rose Johnson, *passim.* As such, the only manner in which Appellant may compel responses to his questions, concerning the handling of said correspondence, would be to propound discovery, the opportunity for which was denied by the District Court.

In the interim, after receiving the initial favorable decision from the Idaho Industrial Commission, but prior to receiving a decision on the Motions for Reconsideration, Appellant's counsel sent a formal Notice of Tort Claim to the Secretary of State's Office. In response, Counsel received a letter from the State's insurer, which entirely failed to address the issues raised, and failed to dispute the timeliness of the claim. Affidavit of James McMillan (R. at 226). Appellant then ultimately filed the instant case, which Defendants moved to dismiss, which was ultimately granted by the District Court. In doing so, the District Court held that Appellant's cause of action accrued on the date of the second hearing, and that the prior correspondence was not properly presented to the Secretary of State. See First Memorandum Decision (R. at 73-89). Appellants then moved to reconsider, and moved to alter/amend/set aside the Judgment, in addition to requesting an opportunity to conduct discovery, in order to determine, in part, whether or not Mr. Johnson's prior correspondence had, or should have, been forwarded to the Secretary of State's office, which pertains directly to the presentment issue.

Both motions were denied, with the District Court essentially using the same reasoning. Appellant now appeals.

II. ISSUES PRESENTED ON APPEAL

Appellant presents the following Issues on Appeal:

a. Did the District Court err in granting Respondents' Motion to Dismiss and, in doing so, did the District Court err in weighing evidence and deciding a disputed fact to be decided by a jury; and, in its decision, did it err in determining the date of accrual for the purposes of the Idaho Tort Claims Act and/or err in finding that a valid presentment had not occurred prior to submission of the formal Notice of Tort Claim?

b. Did the District Court err in denying Appellant's Motion for Reconsideration and in denying Appellant's Motion for Additional Discovery?

c. Did the District Court err in denying Appellant's Motion for Additional Findings of Fact and Conclusions of Law?

d. Did the District Court err in Denying Appellant's Motion to Alter or Amend Judgment? and

e. Did the District Court err in denying Appellant's Motion to Set Aside Judgment?

f. Did the District Court err in denying Appellant the Opportunity to Present Testimony at the hearing on his Post-Judgment Motions?

III. ARGUMENT

A. Standard of Review

A Motion to Dismiss which relies upon information outside of the existing record is to be treated as a Motion for Summary Judgment. This Court reviews a grant of Summary Judgment *de novo*. *Taylor v. McNichols*, 149 Idaho 826, 832, 243 P.3d 642, 648 (2010). A Motion for Reconsideration is reviewed pursuant to an abuse of discretion standard. *Antim v. Fred Meyer Stores, Inc.*, 251 P.3d 602, 610 (2011), and a Motion for Additional Findings or to Set Aside are also reviewed pursuant to an Abuse of Discretion standard.

B. The District Court erred in granting Respondents' Motion to Dismiss.

1. Standard for Summary Judgment.

Even though the Motion is presented as a "Motion to Dismiss," since the District Court relied upon information outside of the existing record, the Court treated Defendants' Motion as a Motion for Summary Judgment. In ruling upon a Motion for Summary Judgment, the Court must consider whether or not "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is . . . [a] genuine issue as to any material fact," and whether the Respondents are "entitled to a judgment as a matter of law." Idaho R. Civ. P. 56(c). Further, "[s]tandards applicable to summary judgment require the district court . . . to *liberally* construe facts in the existing record *in favor of the nonmoving party*, and to *draw all reasonable inferences* from the record in favor of the *nonmoving party*." *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991) (emphasis added) (construing Idaho Rule Civil Procedure 56(c), modeled after, and substantially similar to, Federal Rule of Civil Procedure 56(c)).

Moreover, in hearing a Motion for Summary Judgment, "it is *not* the judge's function to weigh the evidence, but to determine *whether there is a genuine issue for trial.* There is [an]

issue for trial [if] there is sufficient evidence favoring the non-moving party *for a jury to return a verdict for that party*." *Nelson v. Steer*, 118 Idaho 409, 410, 797 P.2d 117, 118 (1990) (emphasis added, internal quotations and citations removed). The First Circuit further explained the term "genuine" as being "sufficiently open-ended to permit a *rational factfinder to resolve the issue in favor either side*." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1995). In the same case, it further defined "material" as "a fact that has the capacity to sway the outcome of the litigation under the applicable law." *Id.* To put it another way, as the summary judgment standard is often explained, summary judgment is appropriate only if "reasonable minds cannot differ" as to the position offered by the moving party, based upon the evidence available in the record.

Since, based upon the evidence currently in the record, a rational trier of fact could reasonably find that (1) Appellants did not discover their cause of action until the receipt of the Industrial Commission's decision on April 29, 2016; and/or (2) that Appellant's prior correspondence with the Department of Labor, and other State agencies, qualified as a valid presentment of a Tort Clam under *Smith v. City of Preston*, Summary Judgment was not proper in this case.

2. 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. First Memorandum Decision at 15 (R. at 87). 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, including presenting discredited and refuted testimony and information to the Industrial Commission (the Industrial Commission, by way of its denial of the Motion for Reconsideration, accepted Appellant's evidence and testimony over those of Respondent). *See* R. at 260-76 (Respondent's Motion for Reconsideration before the Industrial Commission *and* R. at 190-225 (Industrial Commission's decisions). Respondent's Motions for Reconsideration filed to the Commission further prolonged the matter, and it should be noted that Respondent's current counsel's representation of the Department began following that date, along with his participation in advising the Department on Appellant's public records requests.

Moreover at the point claimed by Respondent as the accrual date, November 25, 2015, the only incurred damages which Mr. Johnson could determine with any degree of certainty were 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 177)

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.

3. 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* First Memorandum Decision at 12 (R. at 84). However, this Court has recognized 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 153-57). *See also* Declaration of Dale Johnson, Exhibit A (R. at 107-11) (correspondence from Dale Johnson dated December of 2015). 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. 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 possible, 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 177-79, 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.

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 oder. 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 100-03.

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, R. at 248-52. 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 (R. at 310-11); Declaration of Rose Johnson, ¶ 10 (R. at 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 "hundreds" of depositions being scheduled, Declaration of Dale Johnson, ¶ 5, (R, at 311), despite the fact that Appellant never made such an absurd and irrational request. Respondent was similarly incorrect in its statement to the District Court that there was no duty for the Department to preserve records. *Id.* Idaho Code § 72-1368(6) clearly requires and details Department's duties to preserve all records. 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 (R. at 311); Declaration of Rose Johnson, Exhibit B (R. at 154-57, 292-305). 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.

Finally, was the District Court in procedural error in allowing Respondent Counsel to make out of order rebuttal statement in the November 8, 2017 hearing after Appellant gave closing argument – and while subsequently not inviting Appellant to counter the out of order rebuttal? Appellant's counsel had argued that, pursuant to the "some damage"rule, Appellant had no cause of action until Appellant had discovered the full extent of his damages, while the District Court allowed Respondent to continue to provide further argument after Appellant, the then-moving party, to submit his argument, as is shown by the transcript on file herein.

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). 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.*

In denying Appellant's Motion, one of the bases on which the District Court's decision is the issue of timeliness. 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 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)(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, ¶ 9. (R. at 312) 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. (R. at 314-15).

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 in order to provide 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: (1) 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 as 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.

E. The District Court Erred in Denying Appellant the Opportunity to Present Testimony at the Hearing.

Finally, the District Court did not allow Appellant to provide testimony at the hearing on the Post-judgment Motions, even though the Notice of Hearing reserved the right to do so, and a Notice had also been provided prior to the hearing. *See* Court Minutes (R. at 330-31); Notice of Intent to Present Testimony and Evidence. (R. at 236). This denied Appellant to opportunity to refute Respondent's discussion and characterization of the contents of Appellant's supporting declarations and the need for further discovery. As such, this matter should be vacated and remanded for those reasons as well.

IV. CONCLUSION

WHEREFORE, in the interest of justice and 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 21st day of December, 2018.

JAMES McMILLAN,

/s/ James McMillan
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of December, 2018, I caused to be served a true and correct copy of the foregoing to the following by the method indicated below:

Doug Werth	____ U.S. Mail
Deputy Attorney General	____ Overnight Mail
317 W. Main Street	____ Hand Delivered
Boise, Idaho 83735	____ Facsimile to: (208) 334-6125
Attorney for Defendants	_X__ Odyssey/Efile

__/s/ James McMillan__
James McMillan