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

****

Supreme Court No. 46354-2018

RONALD RYAN BERRETT AND LANIE BERRETT,

Plaintiffs/Appellants,

v.

CLARK COUNTY SCHOOL DISTRICT NO. 161,

Defendant/Respondent.

****

APPELLANT'S BRIEF

Appeal from the District Court of the Seventh Judicial District for Jefferson County.

Honorable Bruce Picket, District Judge, presiding.

****

Counsel for Appellants: Jacob S. Wessel
Thomsen, Holman, Wheiler, PLLC
2635 Channing Way
Idaho Falls, ID 83404

Counsel for Respondent: Blake Hall
Hall, Angell, and Starnes, LLP
1075 S. Utah Ave, St. 150
Idaho Falls, ID 83402

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I. STATEMENT OF THE CASE

a. Nature of the Case.

This is a claim for violation of the Idaho Whistleblower Act Idaho, Idaho Code §§ 6-2101, *et. seq.*, for Clark County School District's termination of its maintenance man, Ronald Ryan Berrett when he reported a building code violation related to a gas smell in the Clark County Highschool, and for violation of Idaho Public Policy for terminating Mr. Berrett's wife, Lanie Berrett, the lunch room supervisor, at the same time.

b. Procedural History.

This matter was originally filed in 2012 in the United States District Court for the District of Idaho in Case 4:12-cv-00626-EJL-CWD Berrett v. Clark County School District No. 161 asserting the following claims under federal law and claims under state law:

Ryan Berrett: 1. Wrongful termination in violation of the Americans with Disabilities Act, 2. Wrongful eviction in violation of the Fair Housing Act, and 3. Wrongful termination in violation of the Idaho whistleblower act.

Lanie Berrett: 1. Wrongful termination in violation of the Americans with Disabilities Act, 2. Wrongful eviction in violation of the Fair Housing Act, and 3. Wrongful termination in violation of Idaho public policy.

On September 30, 2014, the United States District Court for the District of Idaho granted summary judgment to Defendant Clark County School District No. 161 on all claims.

Plaintiffs appealed this decision to the Ninth Circuit Court of Appeals; the Ninth

Circuit reversed and remanded as to Plaintiff Ryan Berrett's state law claim for violation of the Idaho Whistleblower statute and as to Plaitniff Lanie Berrett's state law claim for violation of public policy for terminating her for her husband blowing the whistle on a violation of the building code.

Defendant then moved the Federal District Court to dismiss the state law claims for refiling in State Court because only state law claims remained. The Federal District Court dismissed the claim, and Plaintiff timely filed in Jefferson County, Idaho District Court.

Defendant then filed a motion for summary judgment using virtually the same facts that it had submitted when it filed its motion for summary judgment in Federal Court.

The Court issued its Opinion and Order On Parties' Cross-Motions for Summary Judgment (R. P53) and Judgment of Dismissal (R. P51) in which it disagreed with the Ninth Circuit Court of Appeals and granted summary judgment to Clark County School District on virtually the same facts that were decided differently by the Ninth Circuit Court of Appeals. In addition, the District Court found Plaintiffs' argument for protecting the wife of a whistlelower compelling, but declined to find that firing the wife of a whistleblower contravene's Idaho's public policy for lack of a precedent. (R. P53)

Plaintiffs then filed a Motion to Reconsider, and the Idaho District Court, in its Memorandum Decision on Plaintiff's Motion to Reconsider (R. P75) dismissed all of the state law claims, but resurrected the federal claims that had been dismissed on summary judgment by both the U.S. District Court and the Ninth Circuit Court of Appeals.

The Defendant then filed another Motion for Summary Judgment on the federal claims, and the Idaho District Court granted Summary Judgment on the federal claims as well. The Idaho District Court issued its Final Judgment on August 1, 2018. (R. P116)

Plaintiffs timely filed their Notice of Appeal on September 10, 2018. (R. P118).

c. **Factual Statement.**

The facts in this case are as follows:

1. Clark County School District No. 161 (hereinafter the "School District") hired David Kerns (hereinafter "Kerns") to be its Superintendent starting in the spring/summer of 2008. Kerns held that position until on or about May 17, 2012 when he was forced to resign. (Aug. P. 334) He was the interim Superintendent from on or about May 17, 2012 until August 1, 2012. Kerns had the authority to hire and fire employees until August 1, 2012 (he terminated the Berretts on June 27, 2012). *Kerns Depo.* pp. 38, 48, 52-53, 115, 116, 119. *Affidavit of Ryan Berrett,* ¶ 11. (Aug. P.. 290-293, 307-308).

2. Lanie Berrett (hereinafter "Mrs. Berrett") had been working as a cook in the lunchroom at the time of Kerns' hire, and she applied for a promotion to Food Service Supervisor in May of 2009. Kerns hired Mrs. Berrett for this position starting at the end of the school year in the spring of 2009. Kerns performed annual performance evaluations on Mrs. Berrett. Mrs. Berrett's evaluations were generally good. Mrs. Berrett received annual raises based upon performance in 2009, 2010 , and 2012. She did not receive a raise in 2011 because there was a District wide freeze on all raises for salaried employees. *Kerns Depo.* pp. 61-62, 84-85. (Aug. P. 288, 299-300).

3. Spending more than the lunch room budget had been going on at the School District for years before Mrs. Berrett became lunchroom supervisor. *See Child Nutrition Financial Report.* (B.E.R. 354). In 2009, when Mrs. Berrett took over as lunchroom supervisor, Mrs. Berrett stayed within the budget. *Id.* On May 25, 2010, Kerns evaluated Mrs. Berrett's performance in writing.

Performance Evaluation. (B.E.R. 356). At that time, if there had a been a problem with the lunch room budget, Kerns would have known about it because he received monthly updates on the lunch room budget. *Kerns Depo.* pp. 63-64. (B.E.R. 294). In this performance evaluation, Kerns made no mention of a budget problem, gave an overwhelmingly positive evaluation and even praised Mrs. Berrett for applying for and getting a grant. *Kerns Depo.* p. 65. (B.E.R. 295). In 2011, Kerns did not do a performance evaluation of Mrs. Berrett, and he did not discipline her for any budget problems. *Kerns Depo.* p. 65. (B.E.R. 295). Mrs. Berrett received a raise in 2012. She remembers the performance evaluation for 2012 as being positive, and she was not disciplined. *Affidavit of Lanie Berrett,* ¶ 4. (B.E.R. 350). The District has not provided the written performance evaluation for 2012. The District admits that it knows that it is common practice in other school districts around the State of Idaho to overspend their lunchroom budgets. *Kerns Depo.* p. 72. (B.E.R. 296). Mrs. Berrett was never disciplined for budget overruns until she was fired June 27, 2012 along with her husband, Mr. Berrett. *Kerns Depo.* p. 73, 79. (B.E.R. 297-298). Mrs. Berret applied for and received at least two grants to supplement the lunchroom budget. *Kerns Depo.* p. 74. (B.E.R. 297). Applying for these grants was going above and beyond the duties of the lunchroom supervisor, and no other lunchroom supervisors at the District had ever done this. *Kerns Depo.* p. 80-81. (B.E.R. 298-299). At the time Mrs. Berrett was terminated, she had over fifteen thousand dollars worth of usable food on hand, she didn't waste the food, and she was going into the less costly summer months. *Kerns Depo.* p. 73. *Affidavit of Lanie Berrett,* ¶ 4. (B.E.R. 297, 350). In fact, Mrs. Berrett's replacement was able to use the food that was stored up and not go over budget in 2012. *Defendant's Statement of Facts* ¶ 14. (B.E.R. 102).

4. In the termination letter Kerns sent Mrs. Berrett on June 27th, 2012, the reasons stated

for the termination are overspending the food service budget and unsatisfactory performance. *Kerns Depo.*, Exhibit 10. (B.E.R. 328). Mrs. Berrett had always received positive performance evaluations and had not overspent the Food Service budget in any year. *Affidavit of Lanie Berrett,* ¶ 5. (B.E.R. 350).

5. On June 28, 2010, Lanie Berrett entered into a Residential Lease–Rental Agreement and Deposit Receipt (hereinafter the "Lease") with the District to rent a residential trailer from the school district. *Kerns Depo.*, Exhibit 6. (B.E.R. 319-321). The Lease provided that Lanie Berrett would pay $350.00 per month in rent, but the district actually only charged her $50.00 per month and allowed her and Mr. Berrett to "work off" the rest of the rent each month. *Kerns Depo.* p. 88, *Affidavit of Lanie Berrett,* ¶ 6. (B.E.R. 300, 350). This continued until the spring of 2012 when the District unilaterally decided to discontinue giving Mrs. Berrett this benefit because the District felt it might affect Mr. Berrett's disability status. *Kerns Depo.* p. 90. (B.E.R. 301). This did not affect the District in any way. *Id.* The District did not discuss this with Mr. or Mrs. Berrett before it took away this housing benefit; the District simply stopped giving Mr. Berrett credit for the extra hours that he worked. *Kerns Depo.* p. 91. (B.E.R. 301). Paragraph 23 of the Lease specifically prohibits "discrimination in the . . . financing . . . of housing on the basis of . . . handicap . . ." On June 27th, the district fired both Mr. and Mrs. Berrett. The District claims that one of the requirements to live in the District's housing is that the individual must be a District employee. *Defendant's Statement of Facts*, ¶ 1. (B.E.R. 96). The Lease does not contain this requirement. *See Lease.* (B.E.R. 319-321). When Mr. Kerns terminated Mr. and Mrs. Berrett's employment in letters dated June 27, 2012, he required as follows: "Since you are currently using District housing, you must also vacate that dwelling by Monday, July 9th, 2012 . . ." *Kerns Depo.* Exhibits 10 and 11. (B.E.R. 328-329).

6. On April 10, 2010, Ronald Ryan Berrett (hereinafter "Mr. Berrett") applied for the job of maintenance supervisor for the District. *Kerns Depo.* p. 91, Exhibit 7. (B.E.R. 301, 322). Mr. Berrett applied for a part-time job because of his disability. *Kerns Depo.* p. 92. (B.E.R. 301). At the time he applied for the job, he had been volunteering at the district for over a year. *Kerns Depo.* pp. 92-93. (B.E.R. 301-302). At the time he applied for the job, the District knew about his disability and considered him to be disabled. *Kerns Depo.* pp. 93-94. (B.E.R. 302). Before Mr. Berrett was hired part time, the same position was filled by a full time, non-disabled individual–Randy Wilson. *Kerns Depo.* pp. 94-97. (B.E.R. 302-303). At the time he was interviewed and hired in April, 2010, Mr. Berrett told Kerns that he was disabled and Kerns assured Mr. Berrett that they would hire him some help for physical duties, and he would only have to call contractors and do light duties. *Affidavit of Ryan Berrett,* ¶ 3. (B.E.R. 331). Kerns knew that Mr. Berrett had problems physically on one side of his body, walks with a limp, has trouble walking and that it was hard for him to climb a ladder. *Kerns Depo.* pp. 99-100. (B.E.R. 303). Mr. Berrett repeatedly asked Kerns to hire help to do the physical labor involved in the job because Mr. Berrett was unable to do it due to his disability. *Kerns Depo.*, p. 100. *Affidavit of Ryan Berrett,* ¶ 4. *Affidavit of Erin Haight-Mortensen,* Exhibit A, p. 2, Doc. No. 20-9. (B.E.R. 303, 331, 155). Despite the requests, Mr. Kerns did not hire anyone else besides Mrs. Berrett to accommodate Mr. Berrett requests. *Kerns Depo.*, p. 100. (B.E.R. 303). Kerns did performance evaluations on Mr. Berrett verbally each year; they were always positive. *Kerns Depo.*, pp. 103-104. (B.E.R. 304). Until the termination letter dated June 27, 2012, Kerns was happy with Mr. Berrett's work performance. *Kerns Depo.*, p. 125. (B.E.R. 310).

7. In January 2012, Mr. Berrett started getting calls every other day about strong odor

of propane in the old gymnasium from business manager (Gayle Woods) and guidance counselor (Lisa Richards). He had High Plains Propane come over to check for a propane smell. They said their instrument did not pick up any propane odor whatsoever. He was still getting calls from the same individuals, so he called Kerns. He told Mr. Berrett that he didn't know what to tell him. He called Kerns again and told him he was going to have Sermon Service and Electric come out, and he was also going to lock the old gym up. Mr. Berrett started going through master blue prints while waiting for Sermon and noticed that the propane tank was supposed to be an 18,000 gallon tank and it was only a 6,000 gallon tank. *Affidavit of Ryan Berrett,* ¶ 6. (B.E.R. 331).

8. In February 2012 Mr. Berrett noticed a unit that sits next to the propane tank. He went to the blue prints and realized that it was a vaporizer. Its purpose is to turn liquid propane into a vapor which is necessary to run propane appliances. He printed out literature on vaporizers and showed the print out to Kerns, but Kerns did not seem concerned. A Sermon technician came to the school. He checked the tank size and calculated how much propane it would take to supply all of the appliances. He said when he got a quotation ready, he would fax it to Mr. Berrett. Mr. Berrett informed Dave Kerns of this and told him he would bring the quotation to him when he got it. *Affidavit of Ryan Berrett,* ¶ 7. (B.E.R. 332).

9. Mr. Berrett got the quotation from Sermon on or about March 13, 2012 and showed it to Kerns. *See Kerns Depo.,* Exhibit 8, (B.E.R. 327). *Affidavit of Ryan Berrett,* Exhibit A. (B.E.R. 339). Kerns wanted to know what they were looking at as far as costs to fix the system. Mr. Berrett told Kerns it would probably be 60 to 100 thousand dollars to fix it so that it would pass code vessel inspection. Kerns said Berrett just needed to keep quiet about it. Mr. Berrett told him again that this was very dangerous, and it could not be ignored. Now that they had Sermon

involved, no one would work on the propane appliances until the problem was fixed. Mr. Berrett told him that if he did not tell the Board of Trustees, Berrett would. Mr. Berrett never heard any more about the problem, so he gave a copy of the quotation to the Chairman of the Board of Trustees (Erin Haight-Mortensen) and told her he had already gone to the Superintendent with the quotation and got the feeling that he did not want to deal with the problem. He also gave her information for emergency funding that was available through the state for dealing with immanent safety hazards. The quotation from Sermon states that the problem with the propane presents a safety hazard and is in violation of ldaho code. *See Kerns Depo.,* Exhibit 8. (B.E.R. 327). *Affidavit of Ryan Berrett,* ¶ 8. (B.E.R. 332-333). This was the very first time anyone at the School District became aware that the propane smell was a violation of the Idaho building code.

10. In April, 2012 Mr. Berrett wrote a monthly Board letter addressed "Propane Issue and Best Way to Remedy Situation," but he never got an ok to move forward on the project. He kept the old gym locked. He told the superintendent he could not or would not unlock it until the propane problem was fixed. Kerns told Mr. Berrett to unlock the gymnasium so that the children could use it. They argued in Berrett's office about it. Berrett asked Kerns if he was willing to damage all the propane appliances and risk possible danger to people's lives in and outside the school. Kerns said he did not know what else to do. Once again Berrett asked if Kerns had looked into the emergency funding. Berrett said that he had looked into it, and it was available but they needed to apply for it. Kerns did not answer and walked away. *Affidavit of Ryan Berrett,* ¶ 9. (B.E.R. 333).

11. In April and May, 2012, leading up the Executive Board meeting of May 17, 2012, the Superintendent called Mr. Berrett several times and threatening his wife's job and also saying bad things about Mrs. Berrett. *Affidavit of Ryan Berrett,* ¶ 10, Exhibit B. (B.E.R. 333, 341-342).

12. On or about May 17th, 2012 the School Board held another executive Board meeting. Mike Holden (Sermon Electric), Randy Mead (manager of High Plains Propane), and Mr. Berrett were called before the Board and asked one at a time if they thought that the Superintendent knew that the propane problem could possibly cause injury to human life. They all said yes. The next day Sherry Mead, who is on the Board, told Mr. Berrett that Kerns had been let go because he ignored the safety issue. They just hoped that he would find another job so they did not have to honor one more year of his contract. *Affidavit of Ryan Berrett,* ¶ 11. (B.E.R. 334).

13. After they testified against Mr. Kerns at the May 17, 2012 board meeting and through June, 2012, Mr. and Mrs. Berrett were harassed almost daily by the Superintendent, Business Manager, and some School Board Members. They said Mrs. Berrett was over budget. She did a complete inventory and had around 12 to 15 thousand dollars worth of useable stock. Kerns told her that it does not look good for a manager to have leftover inventory even though it could be used for summer school and for the next year. *Affidavit of Ryan Berrett,* ¶ 13. (B.E.R. 334).

14. On June 18, 2012, Mr. Berrett wrote a Facebook post and sent it to members of the school board to report the District's unwillingness to accommodate his disability, frustration over his benefits for housing being cut because of his disability, and to express his frustration over the retaliation against him for pointing out the safety concern and code violation of the propane tank. *Affidavit of Ryan Berrett,* ¶ 16, Exhibit C. (B.E.R. 334-335, 343).

15. Kerns was forced to resign by the school board after the testimony of Mr. Berrett, Holden, and Mead, but he stayed on as interim superintendent until a new superintendent could be hired. *Kerns Depo.,* pp. 116-117. (B.E.R. 307-308).

16. After he resigned, but while he was waiting for his replacement, Superintendent

Kerns terminated both Mr. an Mrs. Berrett by letters dated June 27th, 2012. *Kerns Depo.*, Exhibits 10 and 11.(B.E.R. 328-329).

17. In the termination letter Kerns sent Mr. Berrett on June 27th, 2012, one of the reasons stated for the termination is that Mr. Berrett was not "keeping lights replaced and in working order" and was not performing his duties satisfactorily. *Kerns Depo.*, Exhibit 11. (B.E.R. 329). Mr. Berrett was terminated for his inability to change light bulbs and his inability to keep up with the physical duties of the job without an accommodation. *Id.*

18. In the termination letter Kerns sent Mr. Berrett on June 27th, 2012, one of the reasons stated for the termination is that Mr. Berrett was insubordinate. The only instance of insubordination referred to by either party is Mr. Berrett's refusal to unlock the old gymnasium for safety reasons. *Kerns Depo.*, Exhibit 11. (B.E.R. 329).

19. In the termination letter Kerns sent Mr. Berrett on June 27th, 2012, one of the reasons stated for the termination is that he "ridiculed personnel through social media on the Internet." *Kerns Depo.*, Exhibit 11. (B.E.R. 329). The Facebook post cited by Defendant as a reason for Mr. Berrett's termination is yet another request for an accommodation, a complaint about the housing discrimination, and a complaint about the District's failure to address the unsafe propane issue. The post, dated June 18 (2012) states in pertinent part: "I have ran the maintenance Department for Clark county school district for 2 years by myself, without any help even though I have asked for it every year. . ." and "I am very disabled and I have done this job by myself for 800.00 a month and I feel I should not have to take a 300.00 decrease in pay" and "I strongly feel this out of retaliation because our Administration did not want to address an issue that could have endangered the lives of children." *Affidavit of Erin Haight-Mortensen,* Exhibit A, p. 2, Doc. No. 20-9. (B.E.R. 155). The

Berretts were fired nine days after Mr. Berrett posted this and the school board, through its member Erin Haight-Mortensen, received it. *Affidavit of Erin Haight-Mortensen,* ¶ 19, *Kerns Depo.* Exhibits 10 and 11. (B.E.R. 149-150, 328-329).

20. Kerns fired the Berretts one month after Mr. Berrett testified before the School Board that Kerns knew that the propane problem could possibly cause injury to the students, which testimony resulting in Mr. Kerns being forced to resign. (B.E.R. 333-334).

21. On December 20, 2012 the Berretts filed their Complaint and Demand for Jury Trial in the United States District Court for the District of Idaho in Case 4:12-cv-00626-EJL-CWD Berrett v. Clark County School District No. 161 alleging the following causes of action: (1) That the District terminated the Berretts' employment in violation of public policy; (2) that the District terminated Berretts" employment in violation of the American with Disabilities Act (ADA); (3) that the District terminated the Berretts' employment in violation of the Idaho Whistleblower Act, Idaho Code § 6-2101; and (4) that the District raised the rent and evicted the Berretts from their housing in violation of the Fair Housing Act. (R. P11-P35).

22. The United States District Court dismissed Plaintiffs' claims on summary judgment, and then Plaintiffs appealed to the Ninth Circuit Court of Appeals.

23. Regarding Plaintiff Ronald Ryan Berrett's whistleblower claim, the Ninth Circuit Court of Appeals held as follows: "Mr. Berrett established a prima facie case of retaliatory conduct by presenting evidence that: he engaged in protected activity by reporting "a violation or suspected violation of law, " Idaho Code § 6-2104(1)(a); he suffered an "adverse action" when he was terminated, *id.* § 6-2103(1); and the "close relation in time" between them, among other factors, suggests he may have been fired for reporting the propane issue. *Curlee v. Kootenai Cty.*

Fire & Rescue, 148 Idaho 391, 397 (2008). This is sufficient to create a genuine issue of material fact to survive summary judgment. Id. At 396 (holding that the McDonnell Douglas burden-shifting framework does not apply to claims under the Idaho Whistleblower Act at the summary judgment stage). Memorandum, p.2, Exhibit A to the Affidavit of Jacob S. Wessel in Support of Plaintiff's Motion for Partial Summary Judgment.

24. Regarding Plaintiff Lanie Berrett's claim for wrongful termination in violation of public policy, the Ninth Circuit Court of Appeals held as follows: "[T]he court failed to address Ms. Berrett's common law claim for termination in violation of public policy–that is, firing her in retaliation for her husband's statutorily protected whistleblower activity–and should consider on remand whether this claim also survives summary judgment." Memorandum, p.2, Exhibit A to the Affidavit of Jacob S. Wessel in Support of Plaintiff's Motion for Partial Summary Judgment. (Aug. P. 30).

25. The facts pertaining to the Berretts' termination are contained in the record that was before the Ninth Circuit Court of Appeals (Aug. pp. 45-492). In a nutshell, the facts as contained in the Record and the affidavit of Ronald Ryan Berret in Support of Motion for Partial Summary Judgment, filed herein are as follows:

a. The Berretts both worked for Clark County School District in Dubois, ID; Mr. Berrett was the district maintenance man, and his wife was the lunchroom supervisor.

b. At the start of 2012, there were complaints of a strong propane smell in the old gymnasium.

c. Mr. Berrett called Sermon Electric to come figure out the problem; Mike Holden from Sermon Electric gave him a bid to fix a propane tank that was unsafe and had building

code violations. See exhibit attached to Affidavit of Ronald Ryan Berrett in Support of Motion for Partial Summary Judgment.

d. Mr. Berrett delivered this bid to Superintendent Kerns; Kerns told Mr. Berrett to keep quiet about it. Wessel Affidavit, (Aug. pp. 332-333), ¶ 8-9.

e. Mr. Berrett refused to keep quiet about it because he feared for the safety of the school children; Mr. Kerns and Mr. Berrett argued about Berrett's safety concerns; Mr. Berrett went over his head, and reported the problems to the school board. Wessel Affidavit, (Aug. pp. 332-333), ¶ 8-9.

f. From that time until he terminated the Berretts, Superintendent Kerns harassed the Berretts on a daily basis including trying to get them to quit by reducing Mr. Berrett's wages and raising the rent on their housing. Wessel Affidavit, (Aug. p. 333), ¶ 10.

g. In the spring of 2012, Mr. Berrett went before the school board along with propane contractors and reported that Kerns refused to address the propane problem which was endangering the safety of the children. Wessel Affidavit, (Aug. p. 334) ¶ 11.

h. On or about May 17, 2017, school board member Sherry Mead told the Berretts that the school board was terminating Kerns for his failure to act on the propane issue, but kept him on until they could find a new superintendent. While the board was trying to find a new superintendent, Kerns reduced Mr. Berrett's pay, and then he fired him and Mrs. Berrett and evicted them from their district owned home in May, 2012 in violation of their lease agreement. Wessel Affidavit, (Aug. p. 334) ¶ 11, May 17, 2012 calender entry, (Aug. p. 342), (Aug. p. 350), ¶ 6.

26. After the case was remanded to the United States District Court, Defendant moved

for the case to be dismissed and refiled in Idaho State Court because only state claims remained. Plaintiffs opposed the removal to state court because they feared it would mean redoing all of the work already done in the federal court. In reply, Defendant made the following statements in an attempt to convince Judge Lodge to remove the case to Idaho State Court:

a. "Throughout their briefing on this issue, Plaintiffs maintain that the parties would, for some reason unbeknownst to Defendant, be compelled to "start this case over" from the very beginning if this Court were to decline jurisdiction. Plaintiffs' assertion is false, and misleading at best. While it is true Plaintiffs will be required to refile the case in Idaho state court, the state court would then be in a position to quickly proceed to the merits of the remaining state law whistleblower claim." Reply Memorandum in Support of Defendant's Motion for Court to Decline Jurisdiction pg 3, Exhibit B to Wessel Affidavit. (Aug. p. 494)

b. "In the event this case is filed in Idaho state court, the parties will not be required to redo what has already been done. Rather, the parties would simply proceed forward on the remaining state law claim."*Id.* p. 4.

c. "...they again point to the false premise that they do not wish to "start over" in state court and undergo additional delays. There is nothing unfair to either party in declining to retain jurisdiction over the remaining state law claim in this matter. **Both parties would be placed in the same position.** As has been addressed herein."*Id.* p. 4 paragraph C (emphasis added).

27. Based upon the above arguments, the United States District Court dismissed the Plaintiffs' federal complaint without prejudice pursuant to 28 USC § 1367 (c) for filing in state court. (Aug. pp. 659-663).

28. On May 9, 2017, Plaintiffs timely filed a Complaint and Demand for Jury Trial in

Jefferson County, Idaho in which they cited the Court's jurisdiction 28 USC § 1367 (d) and attached the original Federal Complaint as their allegations. Plaintiffs also attached a copy of Judge Lodge's decision to remove the case to State Court.

29. On September 1, 2017, Plaintiffs filed a motion for summary judgment asking the Idaho District Court to rule on the Ninth Circuit Court of Appeals' question: does firing the spouse of a whistleblower violate Idaho public policy. The facts related to that motion are as follows (Aug. p. 1 -p. 3):

a. In its Answer to Complaint and Demand for Jury Trial, Defendants submitted their 14th Affirmative Defense that "Defendant has not engaged in any conduct that would violate or be contrary to public policy."

b. With the exception of Defendants' 14th Affirmative Defense, all of Defendant's defenses were disposed of in summary judgment in the Federal Courts.

c.. The Ninth Circuit Court of Appeals held that the reason Defendant fired Ryan and Lanie Berrett is in dispute and is a question of fact for a jury.

d. A question of law and of first impression in Idaho is now before this Court whether firing the spouse of a whistleblower in retaliation for the whistleblowing violates the public policy of Idaho.[1]

e. 12 of the 45 current employees and employees who worked for defendant in

[1]A finding that firing a spouse for blowing the whistle is not dispositive of Lani Berrett's claims and damages because there still remains a question of fact whether Ryan was acting on behalf of himself and his wife or whether Ryan was damaged by the firing of him and his wife.

2017 (26.666%) have family members who also worked for Defendant Clark County School District in 2017. *Affidavit of Ryan Berrett,* ¶ 4. (Aug. p. 22).

30. After Plaintiffs filed their Motion for Summary Judgment, the Defendant filed its Motion for Summary Judgment using essentially the same facts and affidavits that it submitted to the US District Court and the Ninth Circuit Court of Appeals in this case. See Affidavit of Jacob S. Wessel in Response to Defendant's Motion for Summary Judgment, Exhibit A: (Aug. pp. 123-258).

31. The only difference in the affidavits is that now, as opposed to when the affidavits were filed in the Federal Court, the affidavits all contain a one-sentence statement that the school board was aware that the propane problem was a building code violation; there is no foundation for this statement and no evidence of how they would have known it was a building code violation without having the bid from Sermon Electric dated March 12, 2012 and addressed to Mr. Berrett that Mr. Berrett gave to the school board after Mr. Kerns told Berrett to keep quiet about it. See exhibit attached to Affidavit of Ronald Ryan Berrett in Support of Motion for Partial Summary Judgment and Wessel Affidavit, (Aug. pp. 332-333), ¶8-9, and exhibit A, (Aug. p. 339).

32. The Idaho District Court Denied Plaintiffs' Motion for Summary Judgment and granted Defendant's Motion for Summary Judgment, essentially overruling the findings of the Ninth Circuit Court of Appeals. (R. P53-P74)

33. Plaintiffs then filed a Motion to Reconsider, and the Idaho District Court dismissed all of the state law claims, but resurrected the federal claims that had been dismissed on summary judgment by both the U.S. District Court and the Ninth Circuit Court of Appeals. (R. P75-P115)

34. The Defendant then filed another Motion for Summary Judgment on the federal claims, and the Idaho District Court granted Summary Judgment on the federal claims as well and issued a judgment dismissing all claims. (R. P116-P117)

II. ISSUES ON APPEAL

The Berretts will address the following issues on appeal:

1. The District Court erred in denying the Berretts' Motion for Partial Summary Judgment.

   A. Firing the spouse of a whistleblower is against Idaho's public policy

2. The District Court erred in granting the School District's Motion for Summary Judgment.

   A. The Defendant should be estopped from taking a position contrary to the position it took before the U.S. District Court.

   B. The Law of the Case applies here, so Mr. Berrett is entitled to a jury trial on his whistleblower claim.

   C. It was err for the District Court to take judicial notice that the smell of gas is automatically a building code violation.

   D. The statement of a school board member is a statement of a party opponent, and it is not hearsay.

3. The Berretts are seeking and are entitled to an award of costa and attorneys fees on appeal pursuant to Idaho Code §§ 6-2106(5) and 12-121.

III. STANDARDS OF REVIEW

"In an appeal from an order granting summary judgment, this Court's standard of review is the same as that used by the trial court in ruling on the motion." *Summers v. Cambridge Joint Sch. Dist. No. 432*, 139 Idaho 953, 955, 88 P.3d 772, 774 (2004). "Under Idaho Rule of Civil Procedure (IRCP) 56, summary judgment is proper '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.' " *Edged In Stone, Inc. v. Nw. Power Sys., LLC*, 156 Idaho 176, 180, 321 P.3d 726, 730 (2014) (quoting I.R.C.P. 56(c)). "If the evidence reveals no disputed issues of material fact, then summary judgment should be granted." *ParkWest Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013). "The Court should liberally construe all disputed facts in favor of the non-moving party." *Edged In Stone,* 156 Idaho at 180, 321 P.3d at 730. "Inferences that can be reasonably made from the record are made in favor of the non-moving party." *Hoagland v. Ada Cnty.*, 154 Idaho 900, 907, 303 P.3d 587, 594 (2013).

"[W]hen the district court grants summary judgment and then denies a motion for reconsideration, 'this Court must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment.' This means the Court reviews the district court's denial of a motion for reconsideration de novo." *Bremer, LLC v. E. Greenacres Irrigation Dist.*, 155 Idaho 736, 744, 316 P.3d 652, 660 (2013) (*quoting Fragnella v. Petrovich,* 153 Idaho 266, 276, 281 P.3d 103, 113 (2012))." *PHH Mortgage v. Nickerson,* 160 Idaho 388, 374 P.3d 551, (2016).

I.R.C.P. 54(d)(1)(A) states "costs shall be allowed as a matter of right to the prevailing party

or parties, unless otherwise ordered by the court." A prevailing employee is entitled to an award of reasonable costs and attorney fees pursuant to Idaho Code §§ 6-2106(5) and 12-121 and reasonable costs on appeal pursuant to I.A.R. Rules 40 and 41.

IV. LEGAL ARGUMENT

Idaho has decided that protecting governmental employees from termination for reporting infractions of rules, regulations, or laws pertaining to public health, safety, and general welfare is such an important policy that it warranted a statute. Allowing an employer to circumvent this statute by the threat of firing the employee's spouse would frustrate the purpose of this statute and discourage employees from reporting these violation. Furthermore, about 27% of this Defendant's employees would be chilled from taking advantage of the statute for fear of their spouse being terminated – like Lanie Berrett was terminated. This would be a clear hindrance to public safety. Therefore, Idaho public policy should be extended in Idaho to protect the immediate family members or at least the spouse of a whistleblower.

This matter was originally filed in Federal Court. The Defendant filed its motion for summary judgment, and the Ninth Circuit Court of Appeals determined there is a genuine question of material fact and that Plaintiffs are entitled to a jury trial on Plaintiff Ronald Ryan Berrett's claim for violation of the Idaho Whistleblower statute.

On Lanie Berrett's claim for violation of public policy, the Ninth Circuit held as follows: "[T]he court failed to address Ms. Berrett's common law claim for termination in violation of public policy – that is, firing her in retaliation for her husband's statutorily protected whistleblower activity – and should consider on remand whether this claim also survives summary judgment." *Wessel*

Affidavit, Exhibit A, pg 2. (Aug. P. 665)

Plaintiffs ask this Court to decide whether Ms. Barrett's claim for violation of public policy survives summary judgment. This is a matter of first impression in Idaho: Does firing the spouse of a whistleblower (who also works for the governmental agency) in retaliation for her husband blowing the whistle on safety and building code violations, violate the public policy of the State of Idaho? The whistleblower is protected under Idaho Code §§ 6-2101, *et. seq.*, but Idaho has never decided whether its public policy protects family members of whistleblowers. However, every jurisdiction that has taken up this issue has found that public policy does protect family members.

The effect of not protecting family members would be to invalidate the statute because it would allow the employer to indirectly retaliate against a whistleblower by directly hurting him financial in firing his spouse. This would cause a chilling effect where no one with a spouse or family member working for the employer would dare blow the whistle for fear of a spouse losing their job. This would specifically effect Clark County School District employees because approximately 27% of employees of the District currently have a family member also employed by the district.

Under the Law of the Case Doctrine, this Court should adhere to the rulings made by the Ninth Circuit Court of Appeals. Plaintiffs are entitled to a jury trial on Mr. Berrett's whistleblower claims, and Plaintiffs are also entitled a jury trial on Mrs. Berrett's public policy claims if this Court finds a public policy protecting her under Idaho law. (Aug. P. 666)

A. The District Court Erred in Denying Appellant's Motion for Summary Judgment.

The Ninth Circuit Court of Appeals reversed the finding of the Federal District Court and

remanded for trial on Plaintiff Ronald Ryan Berrett's whistleblower claim and remanded for the District Court to determine whether Idaho public policy protects the spouse of a whistleblower. After the Federal District Court dismissed the complaint for filing in State Court, the Plaintiff filed their motion for summary judgment asking the District Court to determine whether Idaho Public Policy protects the spouse of a whistleblower from being fired because of her spouses protected activity. The Idaho District Court erred by focusing on the language of the statute and not on public policy, and while the District Court found the Berretts' argument to be compelling, it declined to rule in the Berretts' favor. (R. P111). It found that the legislature should make public policy. (R. P112). This particular public policy is a matter of first impression in Idaho.

1. The Retaliatory Firing of the Spouse of a Whistleblower Violates the Public Policy of Idaho

In *Ray v. Nampa School Dist. 131*, the Idaho Supreme Court held that an electrician for a school district could not be terminated for reporting electric code violations to the state inspector because this violates the public policy of Idaho. The court held that "[e]ven when an employee is an at-will employee the employer cannot exercise his right to discharge that employee when the motivation for doing so violates or contravenes public policy. *MacNeil v. Minidoka Memorial Hosp.*, 108 Idaho 588, 701 P.2d 208 (1985); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977). " *Ray v. Nampa School Dist. 131*, 120 Idaho 117, 814 P.2d 17, (1991). The Ninth Circuit Court of appeals held that there is a question of fact whether Lanie Berrett was fired because her husband reported safety and code violations to the school board. *Wessel Affidavit,* Exhibit A. (Aug. P. 665). The motivation for firing her was to retaliate against her husband for reporting the safety and code violations. The Idaho whistleblower statute sets forth the important public policy

that the statute is meant to protect. When Idaho enacted the whistleblower statute (formally called "Idaho Protection of Public Employees Act") , Idaho Code §§ 6-2101, *et. seq.*, it articulated the purpose of the Act as follows: "The legislature hereby finds, determines and declares that government constitutes a large portion of the Idaho workforce and that it is beneficial to the citizens of this state to protect the integrity of government by providing a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation." Idaho Code § 6-2101. Lanie Berrett is in the need of the protection of this Act because she experienced adverse action from Defendant as a result of her husband reporting safety violations and the violations of a law or regulation – the building code.

The public policy exception has been protected in Idaho on several occasions. *E.g., Watson v. Idaho Falls Consol. Hosps., Inc.*, 111 Idaho 44, 720 P.2d 632 (1986) (protecting participation in union activities); *Ray v. Nampa Sch. Dist. No. 131*, 120 Idaho 117, 814 P.2d 17 (1991) (protecting reports of electrical building code violations); *Hummer v. Evans*, 129 Idaho 274, 923 P.2d 981 (1996) (protecting compliance with a court issued subpoena). This Court has also indicated that the public policy exception would be applicable if an employee were discharged, for example for refusing to date her supervisor, for filing a worker's compensation claim, or for serving on jury duty. *Sorensen [v. Comm Tek, Inc.],* 118 Idaho [664] at 668, 799 P.2d [70] at 74 [(1990)] (citations omitted). *Thomas*, 138 Idaho at 208, 61 P.3d at 565.

"The determination of what constitutes public policy sufficient to protect an at-will employee from termination is a question of law." *Van v. Portneuf Medical Center*, 147 Idaho 552, 561, 212 P.3d 982, 991 (2009). "Once the court defines the public policy, the question of whether the public

policy was violated is one for the jury." Id. *Venable v. Internet Auto Rent & Sales, Inc.*, 156 Idaho 574, 578–79, 329 P.3d 356, 360–61 (2014). The Idaho legislature has already made clear that there is a public policy in Idaho that government employees must be protected against retaliation for reporting safety violations and violations of law. Encouraging reporting these types of violations is especially important in a school where our children's safety is at issue. It is therefore this Court's duty to decide whether Idaho has an interest in protecting the spouse of a whistleblower from being terminated in retaliation for her husband reporting these types of violations.

Permitting Lanie Berrett's dismissal would have a chilling effect on the public policy by discouraging the conduct of reporting safety violations and violations of law. *See Teachout*, 584 N.W.2d at 303 (public policy to report suspected child abuse implicated when employee is terminated for good faith intent to report child abuse); *Lara*, 512 N.W.2d at 782 (permitting discharge for conduct which conforms to public policy would create a chilling effect on public policy by indirectly forcing employees to forego the conduct); *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 684-85 (Iowa 1990) (public policy for employees to file workers' compensation claim implicated when employee is terminated after receipt of workers' compensation benefits); *Niblo v. Parr Mfg.*, 445 N.W.2d 351, 353 (Iowa 1989) (public policy for employees to file workers' compensation claim is implicated when employee is terminated for threatening to file claim). **In Lara, we said Employers cannot be permitted to intimidate employees into foregoing the benefits to which they are entitled in order to keep their jobs. To hold otherwise in this context would create a chilling effect by permitting an employer to indirectly force an employee to give up certain statutory rights.** Lara, 512 N.W.2d at 782. **Thus, when** the conduct

of the employee furthers public policy or **the threat of dismissal discourages the conduct, public policy is implicated.** *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 283–84 (Iowa 2000) (emphasis added). If this Court sets the precedent that it is perfectly okay to fire the spouse of a whistleblower in retaliation for reporting these safety and code violations, any employee with a spouse also employed by the governmental entity would think twice about reporting these violations. The purpose of the statute and policy to encourage reporting these violations would by chilled and the desired conduct of reporting violations of law, waste, and safety violations would be discouraged.

The chilling effect of allowing the spouse of a whistleblower to be fired in retaliation would be especially significant in the case of this Defendant. Clark County School District No. 161 has a high percentage of employees that have spouses or relatives that also work for the school district. About 27% of the employees of the district have relatives (mostly spouses) that work for the district. *See Affidavit of Ronald Ryan Berrett,* ¶ 4 and Exhibit A. Without public policy protecting their spouses and relatives, the intent of the Idaho Whistleblower statute would be frustrated for these employees of Defendant. As a result, our governmental funds, buildings, and our children would be less safe in Dubois, Idaho. In addition, the affect of such a bad precedent would endanger our children throughout the State of Idaho. No other jurisdiction that this researcher has found, when taking up this issue, has found that there is not a public policy protecting the spouse of a whistleblower. It would be extremely bad policy for Idaho to be the first.

2. All other Jurisdictions when Faced with this Issue have Found retaliation against family members to be a Violation of Public Policy.

a. Federal Courts on Americans with Disabilities Act Claims

In *E.E.O.C. v. Nalbandian Sales, Inc.,* 36 F. Supp. 2d 1206, 1212 (E.D. Cal. 1998), the

federal court in California found that the ADA encompasses third-party reprisal claims. "In order to plead an actionable third-party reprisal claim pursuant to § 2000e–3(a), Plaintiff must allege: (1) that a relative or friend was engaged in statutorily protected expression; (2) resulting adverse employment action; and (3) a causal link between the protected expression and the adverse action. *Thurman v. Robertshaw Control Co.*, 869 F.Supp. 934, 941 (N.D.Ga.1994) (citing Mandia v. ARCO Chemical Co., 618 F.Supp. 1248, 1250 (W.D.Pa.1985))." *Id.*

b. Kansas State Courts

The Kansas State Courts have articulated the reasoning behind their holdings that retaliation against the spouse of a whistleblower violates Kansas' public policy:

> "[A]llowing an employer to retaliate against one spouse because the other spouse has reported infractions of rules, regulations, or laws pertaining to public health, safety, and general welfare would frustrate an important public policy. Therefore, we conclude a spouse shall be protected from termination by an employer in retaliation for the actions of the other spouse in reporting infractions of rules, regulations, or laws pertaining to public health, safety, and general welfare.

Moyer v. Allen Freight Lines, Inc., 20 Kan. App. 2d 203, 210–11, 885 P.2d 391, 396 (1994)

c. Federal Courts in Title VII Cases

In Title VII cases, federal courts have held that retaliation against a relative of an employee who is part of a protected class states a claim upon which relief can be granted. *See EEOC v. Ohio Edison Co.,* 7 F.3d 541, 543–44 (6th Cir.1993) ("We agree ... that a plaintiff's allegation of reprisal for a relative's antidiscrimination activities states a claim upon which relief can be granted under Title VII."); *Whittaker v. Northern Ill. Univ.*, 2003 WL 21403520 at (N.D.Ill.2003) ("The Seventh Circuit, however, has assumed, though it has not specifically held, that an employee is protected from retaliation under Title VII based on the protected activities of

that employee's spouse."); *Gonzalez v. N.Y. State Dept. of Correctional Services,* 122 F.Supp.2d 335, 346–47 (N.D.N.Y.2000) ("[B]ecause plaintiff alleges to have suffered adverse employment action by defendants because of her husband's complaints of discrimination, she has standing to assert a Title VII claim.") *See McKenzie v. Comcast Cable Commc'ns, Inc*., 393 F. Supp. 2d 362, 380 (D. Md. 2005)

d. First Amendment Claims

Often in First Amendment retaliation cases, the government is claimed to have retaliated against the plaintiff for her own speech; but the First Amendment may also be violated where the speech that invoked the government's retaliatory response was not made by the plaintiff herself, but rather by a person in a close relationship with the plaintiff, and the government retaliated against the plaintiff for her perceived association with the other person and that person's speech. *See, e.g., Adler v. Pataki,* 185 F.3d 35, 45 (2d Cir.1999) (holding that "retaliatory discharge based solely on [protected speech] by one's spouse is actionable under the First Amendment"); *Talley v. Brentwood Union Free Sch. Dist.*, 2009 WL 1797627, at *6 (E.D.N.Y. June 24, 2009) (Hurley, J.) (citing Adler to uphold claim of retaliation against a daughter for her father's speech); *Cain v. Tigard–Tualatin Sch. Dist.* 23J, 262 F.Supp.2d 1120, 1127 (D.Or.2003) (Haggerty, C.J.) (upholding claim that defendant's retaliatory "conduct was motivated by [plaintiff's] association with his parents' speech"); *Agostino v. Simpson*, 2008 WL 4906140, at *5 (S.D.N.Y. Nov. 17, 2008) (Seibel, J.) (claim "alleging that Defendants took adverse action against Plaintiff in retaliation for [his father's] First Amendment activities"); *Serena H. v. Kovarie*, 209 F.Supp.2d 453, 458 (E.D.Pa.2002) (Brody, J.) (upholding "First Amendment claim

[that] [the plaintiff] was retaliated against based upon her *1303 mother's exercise of free speech"); *cf. Thompson v. N. Am. Stainless*, LP, —U.S. ——, 131 S.Ct. 863, 867, 178 L.Ed.2d 694 (2011) ("We have little difficulty concluding that if [plaintiff's allegations that the defendant terminated his employment in retaliation for his fiancée's filing of a charge with the EEOC] are true, then [the defendant's] firing of [plaintiff] violated Title VII."). *Lewis v. Eufaula City Bd. of Educ.*, 922 F. Supp. 2d 1291, 1302–03 (M.D. Ala. 2012).

B. The District Court Erred in Granting the School District's Motion for Summary Judgment.

The Ninth Circuit Court of Appeals found that there is a question of fact wether the School District terminated Mr. Berrett in violation of the Idaho Whistleblower Statute, Idaho, Idaho Code §§ 6-2101, *et. seq.*. (Aug. P. 666). The School District chose not to appeal this decision, but after the case was moved to state court, the School District filed the exact same motion that it had filed in federal court, but changed one sentence in each of its supporting affidavits.

1. The School District Should be Estopped from making the opposite argument it made to the Federal District Court in order to get this case moved to State Court.

In its memorandum in support of its motion for the U.S. District Court to decline jurisdiction the Defendant stated as follows:

> Throughout their briefing on this issue, Plaintiffs maintain that the parties would, for some reason unbeknownst to Defendant, be compelled to "start this case over" from the very beginning if this Court were to decline jurisdiction. Plaintiffs' assertion is false, and misleading at best. While it is true Plaintiffs will be required to refile the case in Idaho state court, the state court would then be in a position to quickly proceed to the merits of the remaining state law whistleblower claim.

Reply Memorandum in Support of Defendant's Motion for Court to Decline Jurisdiction pg 3, Exhibit B to Wessel Affidavit. (Aug. P. 494)

> In the event this case is filed in Idaho state court, the parties will not be required to redo what has already been done. Rather, the parties would simply proceed forward on the remaining state law claim.

Id. p. 4.

> ...they again point to the false premise that they do not wish to "start over" in state court and undergo additional delays. There is nothing unfair to either party in declining to retain jurisdiction over the remaining state law claim in this matter. **Both parties would be placed in the same position.** As has been addressed herein.

Id. p. 4 paragraph C (emphasis added). (Aug. P. 494)

Defendant's attempts to rehash claims that were already decided completely contradicts the statements Defendant made to the U.S. District court in its Motion for that court to relinquish jurisdiction of the case to the Idaho State Court.

This is equally true regarding the affidavits Defendant submitted in an attempt to convince this Court to re-decide whether Plaintiffs are entitled to a trial on their whistleblower claim. The Defendant should be estopped from taking the opposite position now.

2. The Law of the Case Applies here.

The Ninth Circuit's *Memorandum* (Exhibit A to the Affidavit of Jacob S. Wessel in Support of Plaintiff's Motion for Partial Summary Judgment Aug. P. 665) provides in the footnote on the first page as follows: "This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3." Ninth Circuit Rule 36-3(a) provides as follows: "**Not Precedent.** Unpublished dispositions and orders of this Court are not precedent, except when

relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." The *Memorandum* is the law of this case, is res judicata, and must be followed.

The Idaho Supreme Court has long held that the "[j]udgment of a proper court puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by consent of parties, and is not only binding on them, but on courts and juries, ever afterwards, as long as it shall remain in force and unreversed." *Village of Heyburn v. Security Savings & Trust Co.*, 55 Idaho 732, 49 P.2d 258, (1935). That court held that "a judgment of a court of competent jurisdiction is conclusive of the parties and their privies as to any question actually or directly in issue, which was passed upon or determined by the court. (*South Boise Water Co. v. McDonald*, 50 Idaho 409, 296 P. 591; *Rogers v. Rogers*, 42 Idaho 158, 243 P. 655; *Marshall v. Underwood,* 38 Idaho 464, 221 P. 1105.)" *Id.*

In addition, the doctrine of res judicata prohibits this court from re-deciding the Defendant's motion. The Idaho Supreme court held that "[i]n the first opinion the district court correctly observed that substantially all of Stuart's claims had been raised in the direct appeal, *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985), and thus were res judicata." *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216, (1990). Again, the Idaho Supreme Court upheld the decision of an appeals court on remand: "In Alumet I, the Court of Appeals found that the lease agreement between the parties contained an implied covenant to actively mine the leased property. *Alumet v. Bear Lake Grazing Co.*, 112 Idaho 441, 732 P.2d 679 (Ct.App.1986). The time for appeal on this issue has long passed and it is, therefore, res judicata as to the implied covenant to mine in this particular case. *See Boundary County, Idaho v. Woldson,* 144 F.2d 17 (9th Cir.1944), cert. den., 324 U.S. 843, 65 S.Ct.

678, 89 L.Ed. 1405 (1945). As we stated in *Insurance Assocs. Corp. v. Hansen*, 116 Idaho 948, 782 P.2d 1230 (1989): Accordingly, the facts having been decided, they are final, they have become the law of the case, and the Court of Appeals' pronouncement must be adhered to, both in the trial court and on subsequent appeal. *Id.* at 116 Idaho 950-51, 782 P.2d at 1232-33; *see also Airstream, Inc. v. CIT Fin. Servs., Inc.*, 115 Idaho 569, 768 P.2d 1302 (1988); *Barker v. Fischbach & Moore, Inc.*, 110 Idaho 871, 719 P.2d 1131 (1986); *Suitts v. First Security Bank of Idaho*, 110 Idaho 15, 713 P.2d 1374 (1985). We therefore hold as the law in this case, that the lease agreement between the parties contains an implied covenant to actively mine the leased premises." *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 946, 812 P.2d 253, (1991). The Defendant has chosen not to appeal the decision of the Ninth Circuit Court of Appeals and instead petitioned for this matter to be remanded to state court to resolve the remaining issues. The Ninth Circuit's opinion is now the law of this case and is res judicata as to all of those issues ruled upon by the Ninth Circuit. The Motion for Summary Judgment has been ruled upon by the Ninth Circuit, so it would be improper for this Court to re-decide those issues.

The Ninth Circuit's *Memorandum* represents years of work done by both parties. Based upon the size of the Record before it and upon the oral argument the parties underwent in Seattle, Washington in March of 2017, the Ninth Circuit undoubtedly had all of the information it needed to competently rule on Defendant's motion for summary judgment. Indeed, the Ninth Circuit ruled in favor of Defendant on some claims related to the ADA and FHA, and it ruled in favor of Plaintiffs on the claims at issue in this matter. It would be contrary to the doctrines of law of the case and res judicata for this Court to reevaluate the decisions already made in this case. If

the Defendant wants to open up all issues for another review by the Idaho District Court, Plaintiffs are willing to do so as long as they also get another chance to convince this Court that all of their claims, including their ADA and FHA claims survive summary judgment. This would be the only equitable way to redo the work that has already been done, but it is not the appropriate way to handle this matter. The case law is clear that the doctrines of law of the case and equitable estoppel do not allow another bite of the apple.

In its Order and Opinion on Parties' Cross-Motions for Summary Judgment (R. P59) , Idaho District Court correctly cited the Idaho law on the doctrine of Law of the Case. The Idaho Court of Appeals stated in relevant part: "Where an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals as long as the facts are substantially the same." *Sun Valley Ranches Inc. v. Prairie Power Co-op, Inc.*, 124 Idaho 125, 129 856 P.2d 1292, 1297 (Idaho Ct. App. 1993). The Court then cites to an Idaho Supreme Court decision, *State v. McNeely,* 118 Idaho 104, 106, 794 P.2d 1160, 1162 for the proposition that the Law of the Case doctrine is the same as *stare decisis*, requiring the decision to be treated as merely persuasive authority and not binding. Plaintiffs request that this Court reconsider this interpretation of the *McNeely* decision. (R. P61)

In *McNeely*, an Idaho District Court was asked to decide whether to suppress statements made by McNeely to Detective Zane Jensen after finding that the *Miranda* warnings given to McNeely did not adequately advise him of his rights. The District Court stated that it felt "compelled" to follow the pronouncements of the Ninth Circuit in prior *Miranda* decisions, **not decisions regarding McNeely.** The question the Idaho Supreme Court decided in *McNeely* is

whether a District Court must follow other Ninth Circuit's decisions on the same issue of law -- basically whether Ninth Circuit law is precedent in Idaho. *McNeely* has no application to the doctrine of the Law of Case. The question now before this Court is an entirely different question -- must this Court follow decisions by the Ninth Circuit in this exact case. The Idaho Supreme Court cases that Plaintiffs cited in their briefing, and the Idaho Court of Appeals decision that this Court cited in its opinion are about the Law of the Case -- when an appellate court makes a decision, courts in the same case are bound by that decision unless a timely appeal is filed. *McNeely* does not address the Law of the Case doctrine.

Again, after Plaintiff pointed the error of using *McNeely* to analyze this issue on the basis of *stare decisis,* instead of the basis of the correct doctrine of Law of the Case, the Idaho District Court again cited to *McNeely* in its Memorandum Decision on Plaintiffs' Motion to Reconsider. (R. P86, footnotes 69-72). This was error.

Even if it was proper for the Court to reevaluate the Ninth Circuit's decision, the affidavits show that there is at least a genuine question of material fact whether Kerns terminated the Berretts, reduced their pay, and illegally evicted them from their home in retaliation for their reporting of building code and safety violations to the school board over the superintendent's objection and instruction to keep quiet about the violations.

3. Even if the Law of Case did not Apply there are Questions of Fact remaining, so Summary Judgment would not be appropriate.

a. The newly Filed Affidavit of David Kerns Contradicts itself and his Deposition Testimony

In its Reply Memorandum in Opposition to Plaintiffs' Motion for Partial Summary

Judgment, p.2, ¶ 2-3, (Aug. P. 615). Defendant states as follows:

> 3. Significantly, during oral argument the Ninth Circuit focused its questioning on whether there was any evidence in the record before it that the District was aware the propane leak was a violation of law. *See* Hall Aff., Ex. A, 28: 20-32:27.[2]
> 4. Defendants had submitted multiple affidavits containing undisputed evidence that the District was aware of the propane leak beginning well before Mr. Berrett alleges to have "blown the whistle" in March of 2012. Indeed, the District was aware of the propane leak beginning in January of 2012 and was diligently striving to remedy the issue. *See* Woods Aff., ¶ 7; Haight-Mortensen Aff., ¶ 5; Kerns Aff., ¶ 3.

Id.

The affidavits of David Kerns, Gayle Woods, and Erin Haight-Mortensen were submitted to the US District Court and are part of the Record that was before the Ninth Circuit. The affidavits Defendant submitted to the Idaho District Court each are identical to the ones in the Ninth Circuit record (regarding the whistleblower claim) with the exception of one sentence Defendant has now added to the affidavits. The added sentence is similar in each of the three affidavits; in Kerns' affidavit it states, "Beginning in January 2012, we were working to address the propane issue because I, along with the board, was aware that the leak in the propane system was a building code violation." (Compare the Aug. P. 126, § 8 of the original Affidavit of David Kerns filed on November 20, 2013 with Aug. P. 563, § 3 of the new Affidavit of David Kerns filed on September 14, 2017.) It is clear that Defendant realized, after losing before the Ninth Circuit, that it was missing an element of its defense: it needed to prove that it knew of the building code violation before Berrett reported it. It simply added this fact, although it contradicts the original affidavits, to try to convince this Court to essentially overrule the Ninth Circuit. Unfortunately for Defendant,

[2]Defendant is actually asking this Court to review the oral argument before the Ninth Circuit Court of Appeals and overrule them. The fact that Defendant is submitting this shows that it thinks the federal case is the same case and has precedential value, ie. law of the case and res judicata.

this new sentence contradicts both the sentence after it in the paragraph and the sworn deposition testimony of Mr. Kerns.

In Kerns' new affidavit, Kerns states in paragraph 3 that the District was "**aware that the leak in the propane system** was a building code violation." Then, in the same paragraph, he states that "[t]hroughout the winter we had repeated service calls from both Sermon Service & Electirc ("Sermon Electric") and High Plains Propane. On each occasion, **neither companies' instrumentation was able to identify any propane leaks.**" Kern Affidavit, p. 2, ¶ 3 (emphasis added), (Aug. P. 563). How could Kerns and the District be aware of propane leaks when no instrumentation could identify any propane leaks? This last sentence was also in Kerns' original affidavit before the Ninth Circuit. (Aug. P. 126) It is clear from this apparent contradiction that the District did not even know there was a leak in the propane system, let alone that there was a building code violation before Berrett presented the District with the letter stating that there was a code violation.

Further, the new sentence in these affidavits, contradicts Kerns' sworn deposition testimony. On November 19, 2013, Plaintiffs took the deposition of Superintendent David Kerns. In referring to conversations between Plaintiff Ronald Ryan Berrett and Mr. Kerns, Kerns stated as follows:

> Q. Did he express concerns about the safety of the gym?
> A. I don't remember his specific concerns about the safety, but he was worried about the propane.
> Q. Okay. Were you still using the old gymnasium?
> A. We continued to use it through the month of February and then decided to close it after that.
> Q. And why did you decide to close it?
> A. The appliances just weren't working, and it was very cold.
> Q. Just it was cold?
> A. Yeah.

Q. Was it (sic) at any time a safety issue in your mind?
A. Not that I'm aware of.
Q. Were you aware that the propane tanks met the Idaho Code?
A. No. I did not.
Q. Did you become aware that the propane tanks were not up to code at some point?
A. Ryan brought up the problem with the vaporizer.

Deposition of David Kerns, pp. 105, l. 16 -106, l. 15 Exhibit A to Wessel Affidavit. (Aug. P. 305).

The Idaho District Court should have declined to re-decide Defendant's Motion for Summary Judgment pursuant to the doctrines of law of the case and res judicata, but even if the Idaho District Court did not err in re-deciding whether there is a question of fact on Plaintiffs' whistleblower claim, there remain significant questions of fact on all elements of Plaintiff's claim, so Plaintiffs are entitled to a jury trial on this claim.

The Idaho District Court, wanting to grant summary judgment to the School District, dealt with the above contradictions in the School District's new affidavits by essentially taking judicial notice that the smell of gas automatically means that there is a building code violation. This was error.

b. The District Court erred by taking judicial notice that the smell of gas is automatically a building code violation.

The District Court's disagreement with the Ninth Circuit Court of Appeals' finding that there is a genuine question of fact whether Mr. and Mrs. Berrett were terminated for blowing the whistle on a building code violation basically boils down to its opinion that Mr. Berrett is not a whistleblower because any time the smell of gas is present, there must be a building code violation. This was not based upon any evidence; it was simply the District Court's opinion or "judicial notice." Taking judicial notice in this situation was error.

The Idaho District Court seemed to understand that a violation of Idaho law triggers a whistleblower action, and simply a "propane problem" would not be enough to trigger the statute. In oral argument on Plaintiff's Motion to Reconsider, the Plaintiff's attorney and the Idaho District Court had an exchange regarding this standard:

"THE COURT: I think the term was "violation of law," not exactly the propane problem; correct?

MR. WESSEL: Right. Not a – a propane problem that was a violation of Idaho Code. It has to – because there has – to trigger the statute, it can't just be that we know of a problem. It has to be a violation of Idaho Code.

THE COURT: Correct."

(Tr. 99).

The Court clearly knew that a violation of law was needed for a whistleblower action to commence. Knowledge of a propane smell was not enough. Therefore, in order to grant summary judgment to the School District, the Idaho District Court needed to find that the School District not only knew about a propane problem from the odor, but also knew that this odor was a building code violation. Having no evidence in its record, the only way to do this was to take judicial notice that a propane odor is a building code violation.

Idaho Rules of Evidence Rule 201 (b) defines the kinds of facts that may be judicially noticed as follows: "The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." In *Brazier v.*

Brazier, 111 Idaho 692, 726 P.2d 1143, (App. 1986), the parties offered no evidence regarding the likely evolution of the children's needs or parental resources. Rather, the magistrate, acting sua sponte, stated in his memorandum decision that "[a]s [the children] reach their teenage years it will undoubtedly become more expensive to maintain them regardless of inflation." In *Brazier*, the appellant argued that in essence, the judge "took judicial notice, as a matter of common knowledge, that it cost[s] more to raise children who are ages 14 and 12 and that a child's needs are more expensive at those ages than for children who are only six and eight." *Brazier*, 111 Idaho at 700.

The Appeals Court held that "[j]udicial notice is a mechanism enabling a judge to excuse the party having the burden of establishing a fact from producing formal proof of that fact. E. CLEARY, McCORMICK ON EVIDENCE § 328 (1984). The mechanism has its limits. A judicially noticed fact must be free from reasonable dispute because it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot readily be questioned. I.R.E. 201; *see generally City of Lewiston v. Frary*, 91 Idaho 322, 420 P.2d 805 (1966)." The court found that while the magistrate's argument about the costs of children going up with age is plausible, they are "not prepared to say it would be beyond dispute in every case." *Brazier*, 111 Idaho at 700. The court then reversed the part of the magistrate judge's decision that provided a future adjustment of child support. *Id.*

Mr. Berrett stated in his affidavit that he investigated a propane smell in the gym at the school; he called Mike Holden of Sermon Service and Electric to come check it out, and Mr. Holden sent a letter (Aug. P. 339) to Mr. Berrett describing the reasons that the propane system was in violation of Idaho Building Code. (It had been originally constructed with a propane tank that is at

least 3 times too small for the system). Mr. Berrett then presented this letter to Superintendent Kerns. Kerns told Berrett to keep quiet about it. Berrett then went over Kern's head to the school board to report the building code violation. In its Memorandum Decision on Plaintiff's Motion to Reconsider, pp. 31-32, the Idaho District Court found that Mr. Berrett was not a whistleblower. The Idaho District Court held:

> Certainly, the statute offers protection to employees who report "*a violation or suspected violation of a law*" and it is undisputed that the propane leak was a violation of law; however, there was nothing to report for purposes of the Act because the District already knew about the problem and was working to fix it. Therefore, Ryan has failed to establish that any of the actions described above constituted protected activity.

(R. P105-P106).

The Idaho District Court repeatedly refers to "propane leaks" in its opinion, but this misstates the record. For example in the Affidavit of David Kerns, ¶¶ 8 and 10, Mr. Kerns states as follows:

> 8. In approximately January 2012, I became aware of several reports of a propane **odor** in the old gymnasium. Among other teachers, the District Business manager, Gayle Wood, specifically stated that she smelled the propane **odor**. I immediately notified the School Board of the issue and we called out service companies to identify the problem. Throughout the winter we had repeated service calls from both Sermon Service & Electric ("Sermon Electric") and High Plains Propane. **On each occasion, neither companies' instrumentation was able to identify any propane leaks.** Because the problem could not be isolated, it could not be fixed. . . .
>
> 10. In approximately May 2012, Sermon Service & Electric performed a pressure test on the propane system to determine where the problem existed. It is my understanding that Sermon Service & Electric was able to determine that there were small micro leaks at the pipefittings. It was also determined that various other upgrades to the system were necessary.

(Aug P. 126) (Emphasis Added).

Despite the Idaho District Court's repeated claims throughout its Memorandum Decision on Plaintiff's Motion to Reconsider that the School District knew about "propane leaks" as early as January, 2012, the record is undisputed that the School District did not find any "leaks" until May, 2012. This was three months after Mr. Berrett approached Mr. Kerns with the letter from Mike Holden of Sermon Service and Electric dated March 12, 2012 when Mr. Kerns told Berrett to keep quiet about the building code violation involving the propane tank that had been too small when installed. (Aug. P. 339). It is undisputed in the record that this letter represented the very first time the School District found out that the propane odor violated Idaho law. Mr. Kerns said as much in his deposition testimony. (Aug. P. 305).

It appears that the District Court felt that "smell of gas equals building code violation" is a fact generally known in Idaho. When the District Court was asked in oral argument which provision of the building code was violated, the District Court judge did not know.

> MR. WESSEL: And so for the first time in your record, in their record, the first time they found out about this violation of Idaho Code is that March 12th letter to Ryan Berrett that he gave to Mr. Kerns. And –
> THE COURT: Well, but that's – and I guess that was part of the question. The argument is is propane in a school gym a violation of law? People knew about that in January.
> MR. WESSEL: Right.
> THE COURT: Now, they didn't know that it was a violation of law that the tank was too small. I think your argument that it occurred – or the vaporizer, specifically.
> But I guess my question is the clarifying part of this is that the violation of law was known when the propane was in the gym. I mean, if there was a propane – if we smelled propane in this courtroom right now –
> MR. WESSEL: Uh-huh.
> THE COURT: – I'm going to assume that's a violation of law to have a propane leak in an open courtroom while we're trying to hold court.
> MR. WESSEL: But what Idaho Code is it a violation of?
> THE COURT: I don't know. I would be happy to look it up.

MR. WESSEL: No. You would have to calla professional to tell you that this is violating the code, the building code. You know, you wouldn't know that's a violation. And, in fact, Mr. Hall repeats over and over, again we knew of a propane leak in January.
THE COURT: Right.
MR. WESSEL: All they knew was a propane smell. And they had people coming in and they could find no leak.

(TR. p. 99. l. 8- p. 100 l. 18).

THE COURT: I guess that's where I am struggling, because it's a violation to have propane in a school gym. I mean, I don't have to look – and if I'm on a school board, and I'm in a gym and I smell propane, I don't need to look up the state statute to say, "This is a problem. This is a violation." And to start acting upon it. And, I guess, that's my question.
MR. WESSEL: Well, I mean, this is summary judgment.
THE COURT: True.
MR. WESSEL: And so we have an affidavit (sic) from Mr. Kerns saying that he didn't know that it was an Idaho Code Violation until Ryan told him.
THE COURT: Okay

(TR. p. 106, ll. 4-17).

Neither the School District nor the Idaho District Court have pointed to any specific provision of the Idaho Building Code or Idaho Law that is violated by the smell of propane in a school gym. On the other hand, in his letter to Ryan Berrett dated March 12, 2012, Randy Mead of Sermon Service and Electric stated that "[p]er July 1, 2011, tank has not been legal and brought up to code." (Aug. P. 339). The first time anyone at the School District saw this letter was when Mr. Berrett took it to Kerns and then to the School Board when Kerns told Berrett to keep quiet about it.

It appears that the Idaho District Court is conflating a building code violation with a maintenance issue. A leaky pipe that does not leak at the time of installation has either corroded over time or was damaged in some way. This means that it needs to be repaired, replaced, tightened, or adjusted. It does not automatically mean that it violates some law. By analogy, one could look to other services that could fail. If the light doesn't come on in your house, is it automatically a

building code violation? If your faucet drips, is it automatically a building code violation? If your gas fireplace doesn't turn on, is it automatically a building code violation? I think the answer to these questions is emphatically a "maybe." It is not common knowledge whether these things violate some law, so it would be improper for a court to take judicial notice that they do. It would especially be improbable to believe that members of a school board, who are not trained in the law or the building code, would know that this odor violated the building code. This is especially true when the Superintendent (who made the decision to fire Mr. and Mrs. Berrett) testified in his deposition that he did not know the smell was a building code violation until Mr. Berrett told him so. (Aug. P. 305).

Furthermore, even if the District Court could take judicial notice that the smell of gas is automatically a building code violation, (which is improper), the School District asked Mr. Berrett to testify during a school board meeting about Mr. Kerns' failure to protect the safety of the school children. On or about May 17th, 2012 the School Board held another executive Board meeting. Mike Holden (Sermon Electric), Randy Mead (manager of High Plains Propane), and Mr. Berrett were called before the Board and asked one at a time if they thought that the Superintendent knew that the propane problem could possibly cause injury to human life. They all said yes. The next day Sherry Mead, who is on the School Board, told Mr. Berrett that Kerns had been let go because he ignored the safety issue. They just hoped that he would find another job so they did not have to honor one more year of his contract. This statement is supported by a contemporaneous calendar provided by Mr. Berrett in his affidavit. *Affidavit of Ryan Berrett,* ¶ 11. (Aug. P. 334), Exhibit "B" (Aug. P. 342).

The Idaho District Court found that Sherry Mead's statement that the School Board asked Kerns to resign based upon Mr. Berrett's testimony regarding Kerns' refusal to address the propane smell is hearsay. The Idaho District Court erred in finding that Sherry Mead's statement is hearsay.

c. A statement of a school board member is not hearsay.

I.R.E. Rule 801(d)(2) provides that statements of a Party-Opponent are not hearsay if "[t]he statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E)."

Here, this statement of a school board member is being offered against the School District and was made by a school board member who is (A) an individual in a representative capacity and/or (D) the party's agent or employee on a matter within the scope of that relationship and while it existed. Therefore, under the last paragraph in Rule 801, the statement must be considered. It was therefore error for the Idaho District Court to refuse to consider this statement.

Idaho case law supports considering Sherry Mead's statement. In *McGill v. Frasure,* 117 Idaho 598, 790 P.2d 379 (Ct. App. 1990), the Court of Appeals found that a statement made by a bouncer at a bar could be admitted as an admission of a party opponent under Rule 801. A school board member has a least as much authority to speak for the School District as a bouncer has to speak for the bar. Indeed, if a school board member is not an agent of a school district, it is hard to imagine who would be a school district's agent. Sherry Mead's statement should have been considered. If it had been considered, the evidence would be that Mr. Berrett testified before the School Board that Kerns had ignored a violation of the building code and told Mr. Berrett to keep quiet about the propane problem, which resulting in Kerns being asked to resign. Then, within the next two weeks, while the School District was waiting to hire a new superintendent, Kerns raised the Berretts' rent, harassed the Berrett's constantly, evicted the Berretts from their home in violation of the lease agreement, and fired both Mr. and Mrs. Berrett.

C. Attorney Fees and Costs on Appeal

As the prevailing party, Berretts are entitled to an award of reasonable attorney fees on appeal pursuant to Idaho Code §§ 6-2106(5) and 12-121 and reasonable costs on appeal pursuant to I.A.R. Rules 40 and 41.

V. CONCLUSION

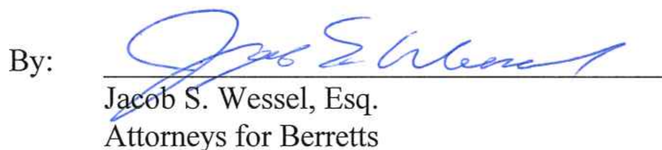
Finding that it does not violate Idaho's public policy fire the spouse of a whistle blower would frustrate the purpose of the whistle blower statute, Idaho Code §§ 6-2101, *et. seq.*, because no government employee that had a spouse also working for the same employer would dare blow

the whistle for fear of legal retaliation against their spouse. The Idaho Supreme Court should declare the termination of the spouse of a whistleblower to be against Idaho public policy.

A three member panel of the Ninth Circuit Court of Appeals found that whether Mr. and Mrs. Berrett were terminated for blowing the whistle on a violation of the building code presents a genuine issue of fact for a jury. The Idaho District Court then essentially found, pursuant to the Idaho summary judgment standard, that no reasonable person could find what the Ninth Circuit Court of Appeals found. This was error, and this case should be remanded for a jury trial on its merits.

DATED this 2nd day of April, 2019.

THOMSEN HOLMAN WHEILER, PLLC

By: 

Jacob S. Wessel, Esq.
Attorneys for Berretts

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 2nd day of April, 2019, I caused two true and correct copies of the foregoing **APPELLANTS' BRIEF** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

BLAKE G. HALL
SAM L. ANGELL
HALL ANGELL & ASSOCIATES, LLP
1075 S UTAH AVE, STE 150
IDAHO FALLS, ID 83402

[X] Mail
[X] Efile/ICOURT

THOMSEN STEPHENS LAW OFFICES, P.L.L.C.

By:
Jacob S. Wessel, Esq.

JSW
9500\Appeals\001 Appellants' Brief