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Berrett v. Clark County School District No. 161 Respondent's Brief Dckt. 46354

IN THE SUPREME COURT OF THE STATE OF IDAHO

RONALD RYAN BERRETT and LANIE BERRETT, Plaintiffs/Appellants, v. CLARK COUNTY SCHOOL DISTRICT NO. 161, Defendant/Respondent.	Idaho Supreme Court Docket No. 46354-2018 Jefferson County Case No. CV-2017-328

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

Honorable BRUCE L. PICKETT, District Judge, Presiding

Jacob S. Wessel
THOMSEN, HOLMAN, WHEILER, PLLC
2635 Channing Way
Idaho Falls, Idaho 83404

Attorneys for Plaintiffs/Appellants

Blake G. Hall
Ryan A. Jacobsen
HALL ANGELL & ASSOCIATES, LLP
1075 S. Utah Avenue, Suite 150
Idaho Falls, ID 83402

Attorneys for Defendant/Respondent

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QUESTIONS PRESENTED

1. Whether the district court properly granted summary judgment to the School District when Appellants alleged a violation of Idaho's Whistleblower Act after Ryan Berrett reported a building code violation that was already known to the School Board.

2. Whether the district court properly granted summary judgment to the School District and denied partial summary judgment to Appellants when Appellants argued Lanie Berrett had a viable claim for termination in violation of public policy as the wife of an alleged whistleblower.

3. Whether the School District should be awarded attorney fees and costs on appeal.

STATEMENT OF THE CASE

Nature of the Case

In this appeal, the Appellants, Ryan and Lanie Berrett, seek review from the Idaho Supreme Court after the district court granted summary judgment to Respondent, Clark County School District No. 161, determining Ryan Berrett was not a whistleblower under Idaho Code § 6-2101, *et seq.* and Lanie Berrett did not have a common law public policy claim. In their complaint, Appellants alleged they were both terminated by the School District in retaliation for engaging in a protected activity under Idaho's Protection of Public Employees Act ("Whistleblower Act").

Course of Proceedings

Appellants filed their initial complaint in this matter on May 9, 2017, requesting an award of damages related to an alleged violation of Idaho's Whistleblower Act. (R. 11–35.) Appellants filed a Motion for Partial Summary Judgment on September 1, 2017, arguing Lanie Berrett had a claim for termination in violation of public policy as the wife of a whistleblower. (Aug. P. 1–3.) The School District filed a Motion for Summary Judgment on August 31, 2017, asserting that no genuine issues of material fact existed in the matter. (Aug. P. 530.) After extensive briefing on

the issues, the district court heard oral argument on both Appellants' and the School District's motions on October 6, 2017 and took the matters under advisement. (T. 1–49.)

The district court granted the School District's motion for summary judgment and denied Appellants' motion for partial summary judgment. On November 22, 2017, the district court issued its *Opinion and Order on Parties' Cross-Motions for Summary Judgment*, dismissing Appellants' claims. (R. 53–74.) Appellants then filed a Motion to Reconsider on November 28, 2017. (Aug. P. 504–516.)

On January 12, 2018, the district court heard oral argument on Appellants' motion to reconsider. (T. 50–113.) After taking that matter under advisement, the district court issued its *Memorandum Decision on Plaintiffs' Motion to Reconsider*, denying in part and granting in part Appellants' motion. (R. 75–115.) In its decision, the district court again determined that Appellants' state law claims failed to present a genuine issue of material fact and that summary judgment on those claims was therefore appropriate. (R. 75–115.) Ultimately, the district court entered judgment on August 1, 2018 dismissing Appellants' case. (R. 116–117.)

Lastly, on September 10, 2018, Appellants filed their Notice of Appeal, indicating their challenge to the district court's dismissal of their state law claims only. (R. 118–121.)

Statement of Facts

Ryan Berrett:

On or about September 22, 2009, Mr. Berrett was hired to perform part-time maintenance duties for the Clark County School District No. 161. In approximately July 2010, Mr. Berrett became the Maintenance Supervisor, still working part-time. Mr. Berrett worked in that capacity at all times relevant to this litigation. In approximately January 2012, the School District received reports from multiple teachers of a propane odor in the school's old gymnasium. (Aug.

P. 563; 575.) Aside from these various teachers, the District Business Manager, Gayle Woods, personally informed the Superintendent, David Kerns, in January 2012 that she had smelled the propane odor. (Aug. P. 189.)

Following these reports, Mr. Kerns immediately notified the School Board of the issue and contacted two different service companies to come out and identify the problem. (Aug. P. 563.) Beginning in January 2012, Mr. Kerns and members of the School Board started working to address the propane issue. (Aug. P. 189; 563; 575.) Mr. Kerns and the School Board were aware that a leak existed in the propane system and that the leak was a building code violation. (Aug. P. 563; 576.) The School District made repeated service calls to both Sermon Electric and High Plains Propane throughout the winter. However, on each occasion, the service companies' instrumentation was unable to identify the source of the known propane leak. (Aug. P. 563; 576.) Because the leak could not be isolated, it could not be fixed. The School Board was aware of the repeated tests because it paid the bills for the testing. (Aug. P. 575.) Mr. Kerns had numerous conversations with Clark County School District Chairwoman, Erin Haight-Mortensen, about the propane leak in the old gymnasium between January 2012 and his departure from the School District in July 2012. (Aug. P. 563; 575–576.)

Mr. Kerns provided the School Board with regular updates on the status of the propane issues. In approximately May 2012, the propane system was pressure tested and it was determined there were numerous micro leaks throughout the pipes, which were small enough that they previously failed to trigger the propane service companies' instrumentation. (Aug. P. 564; 576.) Based on the reported problems identified during the pressure test, Sermon Electric provided an initial estimate of approximately six to seven thousand dollars for the repairs. (Aug. P. 564.) The School District subsequently hired Sermon Electric to perform the repairs on the

joints and pipes of the propane system. Once the repair work had started, it was discovered that none of the joints were holding pressure, and the repair estimate increased substantially as a result. (Aug. P. 564; 576.)

Consequently, in approximately April 2012, a request for public bids for 30,000 gallons of propane and upgrades was prepared and provided to the public. (Aug. P. 564; 576.) During the bidding process, the School District discovered that Alpine Heating & Air owned the existing propane tank and vaporizer. Because the District did not own the tank or vaporizer, High Plains Propane ultimately replaced them with their own equipment. (Aug. P. 564; 576.) The repairs commenced once school was dismissed for summer vacation, and all repairs were completed prior to commencement of the 2012–13 school year. (Aug. P. 564; 576–577.) The total cost to repair the propane system was $36,056.07. (Aug. P. 564; 576–577.) Since the repair, there have been no additional reports of propane odor or complaints with the heating systems in the old gymnasium. (Aug. P. 564; 576–577.)

As maintenance supervisor, Mr. Berrett was tasked with getting the propane leak repaired. Throughout the process of isolating and repairing the leak, Mr. Berrett provided regular status updates to the School Board. On May 17, 2017, Mr. Berrett attended the School District Meeting to discuss progress on the ongoing propane issue. Mike Holden of Sermon Electric also appeared and addressed the School Board. (Aug. P. 564.) Additionally, on or about May 17, 2012, Mr. Kerns met with the School Board in executive session and tendered his resignation. While Mr. Kerns' resignation was accepted, his contract was not terminated. (Aug. P. 565; 578.) Following his resignation, Mr. Kerns remained under contract with the School District as the interim superintendent until either a new superintendent was hired or Mr. Kerns began a new position. Mr. Kerns worked as the interim superintendent through July 2012. (Aug. P. 565; 578.)

In late May or early June, 2012, Mr. Berrett published a derogatory Facebook post about Mr. Kerns. (Aug. P. 583–584.) Several students and parents viewed the post and some students commented on the post. (Aug. P. 583–584.) The Facebook post was inappropriate and violated the School District's Policy. (Aug. P. 578.) Mr. Kerns confronted Mr. Berrett about the post to inform him that it needed to be removed, and it was subsequently deleted. (Aug. P. 566.)

At the next meeting with the School Board, Mr. Kerns and the Board discussed the inappropriate Facebook post, and it was determined that because Mr. Berrett violated policy and was an at-will employee termination was appropriate. (Aug. P. 566–567.) On or about June 27, 2012, Mr. Berrett was provided a letter notifying him of his termination. Mr. Berrett's termination was effective on June 30, 2012. The termination letter specifically stated the reason for Mr. Berrett's termination as "insubordination and verbally abusive to the District administration and have ridiculed personnel through social media on the internet." (Aug. P. 571.)

Lanie Berrett:

In January 2007, the School District hired Lanie Berrett to work in the school kitchen. In approximately 2009, Ms. Berrett was promoted to the lunchroom supervisor. (Aug. P. 192; 567.) As lunchroom supervisor, some of her responsibilities were to ensure the kitchen was managed properly, that state-required paperwork was submitted, and that she prepared an annual budget. (Aug. P. 192; 567.) Preparation of and adherence to the annual budget was an essential function of the lunchroom supervisor. For at least three consecutive years, Ms. Berrett exceeded her budget. (Aug. P. 192; 567.) The School Board had allocated $15,000.00 to assist with budget overages in the lunchroom. However, Ms. Berrett's overages were in excess of the $15,000.00 set aside by the School District. (Aug. P. 192; 567.) Ms. Berrett exceeded her budget, above the

$15,000.00 allocation, in 2010 by $22,890.00; in 2011 by $17,612.00; and in 2012 by $47,924.00. (Aug. P. 192; 567.)

Throughout the year, Ms. Woods reminded Ms. Berrett of her budget and the importance of staying within the budget. (Aug. P. 192.) Ms. Woods also informed Ms. Berrett each year after exceeding her budget that this was unacceptable and the practice could not continue. (Aug. P. 192.) The failure to stay within the budget placed a significant strain on the School District because the excess funds had to be removed from the general fund. (Aug. P. 192.) It was also determined that Ms. Berrett had not submitted several required forms to the State of Idaho for approximately three years. (Aug. P. 192.)

In June 2012, the School District discovered that Ms. Berrett had again significantly exceeded her budget for the 2011–12 school year. (Aug. P. 192; 580.) Because of her repeated inability to efficiently run the kitchen, the School District made the decision to terminate Ms. Berrett. (Aug. P. 192; 580.) On or about June 27, 2012, Ms. Berrett was provided a letter notifying her of the termination. The termination letter specifically stated the reason for Ms. Berrett's termination as follows: "[y]ou have consistently overspent the Food Service budget each year, with the amount increasing each time. You also are not performing satisfactorily in your supervisory duties and you have not followed direction from your own supervisor when called upon to make sure District policies and procedures are followed." (Aug. P. 573.)

On or about December 20, 2012, Ryan and Lanie Berrett filed a Complaint and Demand for Jury Trial in federal court, Case No. 4:12-cv-00626-EJL-CWD. (R. 24–35.) On September 30, 2014, the federal district court granted summary judgment on all claims in favor of the School District. (Aug. P. 440–464.) Appellants subsequently appealed the case to the Ninth Circuit, and the case was remanded as to Appellants' state law claims only. (R. 15–18.) Because

no federal law claims existed upon remand, Judge Lodge declined to exercise supplemental jurisdiction and dismissed the case. (R. 19–23.) Appellants then initiated a new case in Idaho State court by filing a complaint in Jefferson County on May 4, 2017. (R. 15–18.) After receiving additional evidence not in the record before the Ninth Circuit, the district court granted summary judgment to the School District and dismissed Appellants' case. This appeal now ensues from the district court's dismissal of Appellants' state law claims only.

STANDARD OF REVIEW

This court reviews a grant of summary judgment *de novo*. Under a *de novo* review, "this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment." *Purdy v. Farmers Ins. Co. of Idaho,* 138 Idaho 443, 445, 65 P.3d 184, 186 (2003). Disputed facts in the matter must be construed in favor of the non-moving party, and "summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Estate of Becker v. Callahan*, 140 Idaho 522, 525, 96 P.3d 623, 626 (2004).

The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. *Finholt v. Cresto*, 143 Idaho 894, 896, 155 P.3d 695, 697 (2007). "A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment." *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 556, 212 P.3d 982, 986 (2009). A plaintiff's case must be anchored in something more than speculation and a mere scintilla of evidence is not enough to create a genuine issue. *Nelson v. Steer,* 118 Idaho 409, 797 P.2d 117 (1990).

To be considered on appeal, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief. I.A.R. 35. A reviewing court looks to the initial brief on appeal for the issues presented on appeal." *Myers v. Workmen's Auto. Ins. Co.*, 140 Idaho 495, 508, 95 P.3d 977, 990 (2004). "A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." *Bolognese v. Forte*, 153 Idaho 857, 866, 292 P.3d 248, 257 (2012) (quoting *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996)). "[I]ssues not raised below but raised for the first time on appeal will not be considered or reviewed." *Krempasky v. Nez Perce Cty. Planning & Zoning*, 150 Idaho 231, 236, 245 P.3d 983, 988 (2010) (quoting *Whitted v. Canyon Cty. Bd. of Comm'rs*, 137 Idaho 118, 122, 44 P.3d 1173, 1177 (2002)).

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S SUMMARY JUDGMENT DECISION BECAUSE APPELLANTS HAVE NOT CHALLENGED THE COURT'S DISMISSAL OF THEIR CLAIMS BASED ON A LACK OF CAUSAL CONNECTION.

In both its summary judgment decision and decision on Appellants' motion to reconsider, the district court analyzed whether there was evidence of a causal connection between Appellants' respective terminations and the alleged protected activity. (R. 68; 71; 109; 112.) In each decision, the district court specifically determined Appellants failed to present sufficient evidence to survive summary judgment as pertaining to causal connection. (R. 68; 71; 109; 112.) The district court specifically announced as follows:

> Over a period of several months, Ryan worked to resolve the issues and provided regular reports to Mr. Kerns and the School Board. Multiple affidavits and their corresponding exhibits support these facts. It was not until approximately five months later, after multiple written and verbal reports were provided that Ryan's employment was terminated. <u>This is a significant amount of time, and the Court concludes that the adverse action taken against Ryan and the alleged protected activity are not causally connected</u>.

(R. 68.) (emphasis added). Based on the district court's accurate analysis, it further stated, "drawing reasonable inferences in favor of the nonmoving party, Ryan's 'termination had nothing to do with the propane issue' or any other protected activity." (R. 69.) The district court similarly determined Lanie Berrett's claim failed for a lack of causal connection. (R. 71; 112.)

Appellants have not challenged the district court's decision with regard to a causal connection and have therefore waived such issue on appeal. "A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." *Bolognese v. Forte*, 153 Idaho 857, 866, 292 P.3d 248, 257 (2012) (quoting *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996)). Here, Appellants have neither cited the lack of causal connection as an issue on appeal nor have they made any argument on such issue in their opening brief. Consequently, this Court need not conduct a review of Appellants' issues on appeal because, even assuming this Court agreed with Appellants on every issue presented in their opening brief, the district court's dismissal of the case must be affirmed where one of the alternative grounds for dismissal is not challenged here.

To be considered by this Court on appeal, an appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief. *See* I.A.R. 35. "A reviewing court looks to the initial brief on appeal for the issues presented on appeal." *Myers v. Workmen's Auto. Ins. Co.*, 140 Idaho 495, 508, 95 P.3d 977, 990 (2004). "This Court will not search the record for error. We do not presume error on appeal; the party alleging error has the burden of showing it in the record." *Bolognese v. Forte*, 153 Idaho 857, 866, 292 P.3d 248, 257 (2012) (quoting *Miller v. Callear*, 140 Idaho 213, 218, 91 P.3d 1117, 1122 (2004)).

Idaho Appellate Rule 35(a)(6) requires that "[t]he argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations

to authorities, statutes and parts of the transcript and the record relied upon." *Taylor v. AIA Servs. Corp.*, 151 Idaho 552, 568, 261 P.3d 829, 845 (2011); *see also Cummings v. Stephens*, 157 Idaho 348, 362, 336 P.3d 281, 295 (2014). For instance, in *Liponis v. Bach*, this Court declined to reach certain issues on appeal because the appellant "failed to support them with either relevant argument and authority or coherent thought." 149 Idaho 372, 374, 234 P.3d 696, 698 (2010). Similarly, in *Hogg v. Wolske*, this Court refused to consider whether an award of attorney fees was error because the appellants failed to properly raise the issue on appeal. 142 Idaho 549, 557–58, 130 P.3d 1087, 1095–96 (2006).

In this case, although one of the district court's grounds for dismissing their case was the lack of a causal connection between their terminations and the alleged protected activity, Appellants have not raised that issue on appeal. This is dispositive. Nowhere in their opening brief have Appellants attempted to argue that the district court was incorrect in determining Appellants' respective terminations were not causally connected to Mr. Berrett's alleged report of the propane leak. It follows that Appellants necessarily concede that the district court's decision was correct in this regard. Because Appellants have waived any ability to now argue causal connection, the district court's decision in that regard must stand and this Court should simply affirm the district court's summary judgment decision.

II. THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' WHISTLEBLOWER CLAIM ON SUMMARY JUDGMENT BECAUSE MR. BERRETT DID NOT ENGAGE IN PROTECTED ACTIVITY.

Although this Court should not consider the issues raised in Appellants' appeal where they have not challenged one of the grounds for dismissal of their case, the School District will address each of the issues in its response brief out of an abundance of caution. Summary judgment was appropriate in this matter because Appellants failed to present a genuine issue of

material fact to support their claim that they were terminated in violation of Idaho's Whistleblower Act. The Idaho Protection of Public Employees Act ("Idaho Whistleblower Act"), I.C. §§ 6-2101 *et seq*., provides "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." I.C. § 6-2101. To be afforded protection under the Act, I.C. § 6-2104 provides in relevant part as follows:

> (1)(a) An employer may not take adverse action against an employee because the employee, or a person authorized to act on behalf of the employee, **communicates in good faith** the existence of any waste of public funds, property or manpower, or a violation or suspected violation of a law, rule or regulation adopted under the law of this state or the United States. Such communication shall be made at a time and in a manner which gives the employer reasonable opportunity to correct the waste or violation.
>
> (b) For purposes of paragraph (a) of this subsection, an employee communicates in good faith if there is **a reasonable basis in fact for the communication**. Good faith is lacking where the employee knew or reasonably ought to have known that the report is malicious, false or frivolous.

I.C. § 6-2104(a) and (b) (emphasis added). Under the Idaho Whistleblower Act, a *prima facie* case for retaliatory discharge required that Appellants establish: (1) the purported communications regarding the propane leak constituted a protected activity; (2) the School District's decision to terminate Mr. Berrett's employment constituted an adverse action; and (3) there was a causal connection between the protected activity and the adverse action. *See e.g. Curlee v. Kootenai Cty. Fire & Rescue*, 148 Idaho 391, 397, 224 P.3d 458, 464 (2008).

In this case, the district court correctly determined Appellants failed to establish a genuine issue of material fact regarding whether Mr. Berrett engaged in a protected activity and whether there was any causal connection between his termination and alleged protected activity. There was no reasonable basis for Mr. Berrett's supposed reporting of a propane leak because the

leak was already known to the School Board and was being addressed by third-party service providers. In fact, Mr. Berrett was tasked as part of his employment with the School District to contact the service providers and resolve the issue. Consequently, Mr. Berrett's alleged report did not constitute protected activity under Idaho's Whistleblower Act.

A. For the first time on appeal, Appellants argue they were harassed, illegally evicted, and received reduced wages in retaliation for reporting a building code violation.

Throughout their opening brief, Appellants improperly allege they were harassed, illegally evicted, and received reduced wages in retaliation for reporting a building code violation. *See* Appellants' Brief, p. 13; 32; 43. Appellants' argument should not be considered by this Court because it was never argued to the district court. Not only was this argument never raised below, it was never pled in this case. In their complaint, the only adverse actions Appellants allege violated Idaho's Whistleblower Act were their terminations. (R. 31–32.) "[I]ssues not raised below but raised for the first time on appeal will not be considered or reviewed." *Krempasky v. Nez Perce Cty. Planning & Zoning*, 150 Idaho 231, 236, 245 P.3d 983, 988 (2010) (quoting *Whitted v. Canyon Cty. Bd. of Comm'rs*, 137 Idaho 118, 122, 44 P.3d 1173, 1177 (2002)).

Unfortunately, it appears Appellants are attempting to bolster their position and garner improper sympathy by fabricating additional alleged adverse employment actions. These newly alleged adverse employment actions should not be considered by this Court. The School District draws attention to this issue because the Court will see that the district court's analysis pertains to Appellants' terminations only. It is important this Court is aware that the district court properly considered termination to be the only alleged adverse action in violation of Idaho's Whistleblower Act because Appellants never argued nor pled there were any other adverse actions. Because it was not argued to the district court, this Court should disregard any argument

from Appellants that they were harassed, illegally evicted, and/or received reduced wages in retaliation for reporting a building code violation.

B. The district court correctly determined the law of the case doctrine does not apply in this case because Idaho courts are not bound by federal court decisions on issues of state law.

The district court properly granted summary judgment to the School District because Mr. Berrett did not engage in protected activity when he purports to have reported a building code violation of which the School Board was already aware. Throughout this case before the district court, and now on appeal, the Appellants continue to erroneously assert that the Ninth Circuit's decision in their prior federal case, Case No. 4:12-cv-00626-EJL-CWD, must be the law of the case here. The district court correctly relied on this Court's precedent in stating, "state district courts are not required to treat federal district or federal circuit court decisions or interpretations of Idaho law as binding." (R. 86.) (citing *State v. McNeely*, 162 Idaho 413, 398 P.3d 146, 148 (2017)). *State v. McNeely* is directly on point here where it addresses whether a district court must follow Ninth Circuit decisions on the same issue of law. Whether Ninth Circuit decisions are binding on Idaho courts is precisely what the district court was faced with in this case. Appellants incorrectly argue that *State v. McNeely* does not apply in this case based upon their continual misstatement of the procedural history, maintaining their new state court case is somehow the same exact case as their prior federal case. Appellants refuse to acknowledge that the federal court dismissed their prior federal case and that the present action is a new case.

Appellants originally filed a lawsuit against the School District in federal court, Case No. 4:12-cv-00626-EJL-CWD. Judge Lodge granted summary judgment on September 30, 2014 in favor of the School District as to all claims and entered judgment. (Aug. P. 440–464.) Appellants subsequently appealed the case to the Ninth Circuit, and the case was remanded for further

proceedings on Appellants' state law claims only. (R. 15–18.) The Ninth Circuit affirmed the federal district court's dismissal of Appellants' federal law claims. Because there had been final judgment on all of Appellants' federal claims, which judgment was affirmed by the Ninth Circuit, Judge Lodge declined to exercise supplemental jurisdiction over state law claims and dismissed without prejudice the only remaining claims. (R. 19–23.) Appellants elected to initiate a new case in Jefferson County on May 4, 2017. They were not required to do so but under 28 U.S.C. § 1367(d) were permitted to bring a cause of action in state court within 30 days without being prejudiced by the applicable statute of limitations. Thus, while final judgment was entered as to Appellants' federal claims, there was no final judgment on Appellants' state law claims at issue in this case.

While it is true that an Idaho appellate court's decision becomes the law of the case and would become binding on the district court in the same case, those are not the facts here. Idaho state courts are simply not bound by federal court decisions, and federal courts are not bound by state court decisions. Indeed, the Ninth Circuit has recognized that even in the same case federal courts are not bound by state court decisions. *See Preaseau v. Prudential Ins. Co. of Am.*, 591 F.2d 74, 79 (9th Cir. 1979). In *Preaseau*, the case originated in California state court but was subsequently removed to federal court. *Id*. Prior to removal, the state court denied the defendant's motion for summary judgment. *Id*. However, once removed to federal court, the defendant again moved for summary judgment, which the federal court granted. *Id*. On appeal, the Ninth Circuit determined a federal court is not bound by a state court's decision. *Id*. Likewise, here the district court was not bound by a federal court's decision. The issues here pertain to interpretation of state law only. There is no doubt the district court was in a better position than a federal court to decide and interpret matters governed by state law.

Idaho courts routinely apply the law of the case doctrine to "maintain consistency and avoid reconsideration of matters once decided *during the course of a single continuing lawsuit*...." *State v. Dunlap*, 155 Idaho 345, 375–76, 313 P.3d 1, 31–32 (2013) (quoting *Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005)) (emphasis added). The law of the case doctrine provides that "upon an appeal, the Supreme Court, in deciding a case presented[,] states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal...." *Stuart v. State*, 136 Idaho 490, 495, 36 P.3d 1278, 1283 (2001) (quoting *Swanson v. Swanson*, 134 Idaho 512, 515, 5 P.3d 973, 976 (2000)). This Court recognizes at least two exceptions to the law of the case doctrine—first, when there is an intervening change in the law, and second, when additional facts are presented to the court. *See e.g. State v. Dunlap*, 155 Idaho 345, 375–76, 313 P.3d 1, 31–32 (2013) ("Courts have recognized an exception to the doctrine based upon intervening changes in the law"); *see also Swanson v. Swanson*, 134 Idaho 512, 516, 5 P.3d 973, 977 (2000) ("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").

Here, the district court correctly recognized this case is not the same as Appellants' previous federal case that was dismissed. In its memorandum decision, the district court specifically stated:

> This new case was filed in a separate jurisdiction from Plaintiffs' earlier case, and was assigned a new case number (Jefferson County case no. CV-2017-0328). Although Plaintiffs assert that the case filed in Jefferson County is the *same case*, it is not. As quoted above, the Idaho Supreme Court has previously announced that the law of the case only applies "in that particular case." Based on the Court's reasoning and analysis the two cases are different and separate. Therefore, the law of the case does not apply.

(R. 85–86.)

Moreover, even if the law of the case doctrine did extend beyond the case in which the ruling was made, the doctrine is not applicable here because the School District submitted additional evidence to the district court. Where additional facts were brought before the district court, such circumstances serve as an exception to the law of the case doctrine. The district court correctly held the facts presented in this case are not substantially the same as those presented in Appellants' previous federal case, stating:

> …the Defendant has filed new affidavits. These affidavits offer facts not before the federal district court or the Ninth Circuit Court of Appeals. Specifically, these affidavits state that the District was aware of the propane leak in January and recognized it was a building code violation; even though it was unable to isolate the cause or source of the leak.

(R. 88–89.) In making its determination in the federal case, the Ninth Circuit was bound by the record before it on appeal. In this new case in state court, the district court was certainly not bound by the appellate record in the prior federal case. The Ninth Circuit's determination on appeal of Appellants' prior federal case was based on the fact that the appellate record failed to differentiate between *knowledge of the propane leak* and *knowledge of a violation of law*. Although the School District believes this distinction amounts to mere semantics, it nonetheless provided the district court with multiple affidavits that demonstrate the School District was not only aware of the propane leak, but also that the propane leak was a building code violation. Because this case is not the same as Appellants' prior federal case and the district court had additional evidence before it, the district court correctly determined the law of the case doctrine cannot apply.

Lastly, the doctrine of *res judicata* does not apply to Appellants' whistleblower claim because there had never previously been a final judgment on the issue. Appellants have made

clear in their opening brief that they lack understanding as to when *res judicata* applies. "*Res judicata* is comprised of claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel)." *Hindmarsh v. Mock,* 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). Here, it appears Appellants erroneously argue that issue preclusion should apply to their whistleblower claim. Issue preclusion bars relitigation of an issue previously determined when:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a ***final judgment*** on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Berkshire Investments, LLC v. Taylor, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012) (emphasis added). All of these elements are required for issue preclusion to apply in a matter.

In this case, there was no final judgment on the merits in the prior federal case pertaining to Appellants' whistleblower claims. Appellants chose to file a new complaint in state court, and the district court had a record before it different from the record before the court in Appellants' prior federal case. The School District presented additional facts and evidence in the form of affidavits that the district court properly considered in its summary judgment decision.

C. The district court was correct in finding Mr. Berrett did not engage in a protected activity because the School District was already aware the propane leak was a building code violation.

Appellants' whistleblower claim was properly dismissed on summary judgment because Mr. Berrett did not engage in a protected activity. Protected activities under Idaho's Whistleblower Act include reporting "the existence of any waste of public funds, property or manpower, or a violation or suspected violation of a law, rule or regulation adopted under the law of this state, a political subdivision of this state or the United States." I.C. § 6-2104. Thus, in

order to have engaged in a protected activity, Appellants must have communicated in good faith a "violation or suspected violation of a law, rule or regulation." The undisputed facts of this case demonstrate Mr. Berrett did not communicate in good faith a violation or suspected violation of law because his alleged reporting of the propane leak was already well-known to the School District, and the District was aware the leak was a building code violation. Consequently, the district court properly granted summary judgment.

Because the building code violation was already widely known to the School District and efforts were underway to remedy the issue at the time Appellants allege Mr. Berrett reported the issue, Appellants cannot succeed with their argument that Mr. Berrett in fact engaged in protected activity under the statute. "[M]erely reporting publicly available information" does not constitute a protected activity. *Clarke v. Multnomah Cty.*, 303 F. App'x 512, 512–13 (9th Cir. 2008). The undisputed facts of this case demonstrate the School District knew about the propane leak months before the termination of Appellants' employment and that the School Board was aware the propane leak was a building code violation and was taking steps to remedy the issue. Because the building code violation was known to the School District, there was no reasonable basis for Mr. Berrett's alleged report.

The facts presented to the district court show Ms. Woods and other teachers reported smelling propane odor in the old gymnasium as early as January 2012. (Aug. P. 189; 563; 575.) Upon notice of the issue, Mr. Kerns immediately notified the School Board and set out to remedy the problem. (Aug. P. 563.) Beginning in January 2012, Mr. Kerns and members of the School Board were working to address the propane issue because they were aware that the leak in the propane system was a building code violation. (Aug. P. 189; 563; 575.) Throughout the winter multiple service calls were made by both Sermon Electric and High Plains Propane in an effort to

identify the source of the leak. Unfortunately, despite relying on professionals, the School District was initially unable to isolate the source of the leak. (Aug. P. 563; 575.) The School District remained aware of the propane issue over the course of the next few months due to conversations Mr. Kerns had with Ms. Mortensen as well as the School Board making payments for the multiple service calls. (Aug. P. 189; 563; 575.) During this period, Mr. Berrett was also tasked with resolving the propane leak issue, and he provided regular status reports to the School Board. (Aug. P. 196–230.) As the district court noted in its memorandum decision, although Appellants conveniently neglect to ever mention Mr. Berrett's regular progress reports, they have not disputed the authenticity of the letters provided to the School Board. (R. 76.)

Following a pressure test performed by Sermon Electric, it was ultimately discovered that there were small micro leaks at the pipefittings and that significant repairs to the system were necessary. (Aug. P. 564; 576.) Once the location and extent of the leak was identified, the School District requested public bids for the work. Sermon Electric was subsequently awarded the contract and commenced work on the system immediately after the end of the 2011–12 school year. Sermon Electric completed the repairs prior to the commencement of the 2012–13 school year. The School District paid approximately $36,000.00 for the repairs. (Aug. P. 564; 576–577.) When viewing these facts in a light most favorable to Appellants, the evidence does not support an allegation that Mr. Berrett reported a violation of law that was previously unknown to the School District and/or ignored by the District. The uncontroverted evidence establishes the School District was aware of the propane leak for months prior to Appellants' termination, retained the services of professionals to identify the source of the leak, and had repairs performed in a timely fashion. Thus, there was no reasonable basis for Mr. Berrett's alleged report, and summary judgment was appropriate. Just as the district court stated:

> It is beyond believable that an employee could be charged with solving a problem (even a building code or safety violation), provide regular progress reports to his employer, discuss the viability of proposed solutions with superiors, and then, after being fired, use those same activities to substantiate claim of retaliatory discharge. This is especially true when the employee was charged with fixing a problem already known to the employer. Certainly, the statute offers protection to employees who report "a violation or suspected violation of 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 School District already knew about the problem and was trying to fix it. Therefore, Ryan has failed to establish that these discussed actions constituted protected activity.

(R. 65.)

Lastly, Mr. Berrett's alleged disclosure could not have been made in good faith as required by Idaho's Whistle Blower Act when he knew the School District was aware of the propane leak and was diligently working to remedy the problem. Because Mr. Berrett's disclosure did not "blow the whistle" where the School District was already undisputedly aware of the building code violation and was taking steps to remedy the issue, Mr. Berrett's alleged disclosure is not protected and was not made in good faith. Consequently, Appellants were unable to survive summary judgment, and the district court properly dismissed the claim.

D. The district court correctly determined there is no evidence of a causal connection between Mr. Berrett's termination and his alleged communication of a building code violation.

This Court need not conduct a review of whether the district court correctly determined there was no causal connection between Mr. Berrett's termination and alleged protected activity because Appellants have not challenged the district court's decision in that regard. However, in the event the Court does review this matter, the facts show Appellants failed to show a causal connection between Mr. Berrett's report of a building code violation—which had already been reported by others, was known by the School District, and efforts were under way to remedy the issue—and his subsequent termination. The facts unequivocally reveal that Mr. Berrett was

terminated for violating the School District's policy due to his insubordination and verbal abuse towards Mr. Kerns. (Aug. P. 571.) The mere coincidence in time between Mr. Berrett's alleged protected activity and his termination, without more, was insufficient to surpass summary judgment. Although circumstantial evidence may be used to establish a causal connection between an employee's protected activity and an adverse employment action, "there must be something more than pure speculation or conjecture" to provide a reasonable inference of causation. *Curlee v. Kootenai Cty. Fire & Rescue*, 148 Idaho 391, 397, 224 P.3d 458, 464 (2008). "To establish causation, [an employee] 'must show [s]omething **more than merely a coincidence in time** between protected activity and an adverse employment action.'" *West v. Wayne Cty.*, 672 F. App'x 535, 542 (6th Cir. 2016) (emphasis added). In *West*, the Sixth Circuit determined that although the plaintiff's termination followed in close proximity to his alleged protected activity, without additional circumstantial evidence, such close proximity "furnishes us with nothing more than speculation." *Id*. Consequently, summary judgment was affirmed in *West* because the plaintiff could not create a genuine issue of material fact of a causal connection with proximity in time alone. *Id*. at 543.

Additionally, even if an employee is able to establish a *prima facie* case of retaliation, including causal connection, the defendant is then permitted to articulate its non-retaliatory reason for termination. *See e.g. Brown v. City of Caldwell*, No. 1:10–cv–536–BLW, 2012 WL 892232, at *6–7 (D.Idaho 2012) (applying the *McDonnell Douglas* balancing test at the summary judgment stage to an IPPEA claim); *Hatheway v. Bd. of Regents of Univ. of Idaho*, 155 Idaho 255, 263–64, 310 P.3d 315, 323–24 (2013) (applying the *McDonnell Douglas* balancing test at the summary judgment stage to an IHRA claim). "When the *McDonnell Douglas* analysis is applied to cases involving retaliatory discharge under a whistleblower statute, the test is as

follows: (1) the plaintiff must establish a prima facie case of retaliatory conduct for an action protected by the relevant whistleblower statute; (2) once the plaintiff demonstrates a prima facie case, the defendant is obligated to produce evidence which, if taken as true, would permit the conclusion that there was a non-retaliatory reason for the adverse action; and (3) if the defendant articulates a legitimate non-retaliatory reason for discharge, then the burden shifts to the plaintiff to prove by a preponderance of the evidence that the reason the defendant offers is a pretext for retaliatory conduct." *Summers v. City of McCall*, 84 F. Supp. 3d 1126, 1137–38 (D. Idaho 2015) (quoting *Curlee*, 224 P.3d at 463 (citation omitted)). "The purpose of applying the '*McDonnell Douglas* division of intermediate evidentiary burdens' is 'to bring the litigants and the court expeditiously and fairly to [the] ultimate question.'" *Hatheway*, 155 Idaho at 263–64 (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093–94, 67 L.Ed.2d 207, 215 (1981)).

In this case, Appellants failed to establish a *prima facie* case of retaliation because there is no causal connection between Mr. Berrett's alleged protected activity and his termination. As the district court noted:

> Over a period of several months, Ryan worked to resolve the issues and provided regular reports to Mr. Kerns and the School Board. Multiple affidavits and their corresponding exhibits support these facts. It was not until approximately five months later, after multiple written and verbal reports were provided that Ryan's employment was terminated. This is a significant amount of time, and the Court concludes that the adverse action taken against Ryan and the alleged protected activity are not causally connected.

(R. 68.) (emphasis added). Based on the district court's accurate analysis, it further stated, "drawing reasonable inferences in favor of the nonmoving party, Ryan's 'termination had nothing to do with the propane issue' or any other protected activity." (R. 69.) At no time was Mr. Berrett ever disciplined or treated improperly for providing status updates on the propane

issue to the School Board. In fact, the evidence establishes that the School Board actively worked with Mr. Berrett to address and repair the problem. Based on the record, there is no reasonable inference that would link the propane leak to Mr. Berrett's termination in June 2012. The approximate five-month delay before Mr. Berrett's termination shows there is a lack of proximity in time. As in *West*, even if Mr. Berrett's termination had occurred in close proximity to the discovery of the propane leak, mere proximity in time is insufficient by itself for a jury to reasonably infer a causal connection. Appellants did not present any evidence beyond the timing of Mr. Berrett's termination. Such proximity in time cannot establish a genuine issue of fact regarding causal connection, and Appellants' claim therefore fails at summary judgment.

Regardless, even if Appellants had presented sufficient evidence of a causal connection, the School District had a legitimate non-retaliatory reason for terminating Mr. Berrett's employment. Indeed, the reasons for Mr. Berrett's termination were clearly documented in his letter of termination. (Aug. P. 571.) Given Mr. Berrett's conduct and behavior, and his failure to comply with the School District's policy, no reasonable juror could conclude his termination was for any reason other than those clearly communicated in the letter of termination. (Aug. P. 557; 571.) There is no valid explanation supporting Appellants' assertion that Mr. Berrett had engaged in any protected activity under the Idaho Whistleblower Act. There is, however, ample evidence to support the School District's stated reasons for Mr. Berrett's termination. Accordingly, the district court properly concluded there was no genuine issue of fact related to Appellants' Idaho Whistleblower claim.

E. None of Appellants' secondary arguments set forth in their opening brief have any effect on the district court's summary judgment decision.

1. Estoppel.

Appellants erroneously argue that the School District somehow made an "opposite argument" to the district court than it did to the federal court in Appellants' prior federal case that was dismissed. While Appellants argue the School District should have been estopped from seeking summary judgment in this matter, the record clearly shows the School District has never taken contradicting positions. Upon even a cursory review of the briefing before the federal district court on whether Appellants' state law claims should be heard in state court, it is evident that the School District simply refuted Appellants' argument that they would be required to start their case over in state court if the federal case were dismissed. (Aug. P. 494.) In response, the School District correctly pointed out that the parties would be placed in the same position. (Aug. P. 494.) The discovery process had already been completed and there would be no need to undergo discovery again.

The School District further pointed out that the parties would be able to proceed forward on the remaining state law claim. (Aug. P. 494.) By seeking summary judgment in Appellants' new state court case there was nothing contradictory in the School District's position. Indeed, had the Appellants' federal case not been dismissed, the School District certainly would have moved for summary judgment on Appellants' remaining state law claims and would have presented the federal district court with the additional evidence it presented to the district court in this case. Consequently, there is no basis for the School District to be estopped from obtaining summary judgment in this matter.

2. Kerns Affidavit.

Appellants erroneously argue that Mr. Kerns' deposition testimony contradicts his sworn affidavit. The district court properly considered all of the evidence presented below and correctly determined Mr. Kerns' deposition testimony was immaterial to the court's analysis. It mattered not whether Mr. Kerns had recognized the propane leak was a safety concern. The district court specifically held as follows:

> Plaintiffs also rely upon deposition testimony in which Dave Kerns admits that he was unaware that the propane leak was a safety issue or that the propane tanks were not in compliance with building code or that he was unconcerned that the leak posed a safety threat. Neither of these are material. As stated in the affidavits, the District was already aware that a building code violation existed somewhere in the system and it was working to isolate it…. Protection under the act is triggered when an employee reports a "violation of a law, rule or regulation" not a "safety" issue. Therefore, it is immaterial whether Mr. Kerns recognized the propane problem as a safety concern for purposes of the Act.

(R. 92–93.) (emphasis added). The School District provided the district court with undisputed affidavits of David Kerns, Gayle Woods, and Erin Haight-Mortensen. In each of those affidavits, the affiants testified that they were aware the propane leak was a building code violation. Although the School District made repeated service calls to both Sermon Electric and High Plains Propane throughout the winter, the service companies' instrumentation was unable to identify the source of the known propane leak. (Aug. P. 563; 576.) Appellants attempt to equate not knowing the source of the leak with not knowing of a leak. This is simply incorrect. While the School District was aware of the propane leak, it was unable to repair the leak until it had been isolated. As the district court correctly determined, it is immaterial whether Mr. Kerns recognized the propane leak was a safety issue.

3. Judicial Notice.

It is clear from the district court's summary judgment decisions that it never took judicial notice that a smell of gas is automatically a building code violation. In arguing the district court improperly took judicial notice, Appellants state:

> 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.

See Appellants' Brief, p. 36 (emphasis added). Appellants' argument is patently false. The district court did not take judicial notice, but rather relied upon the uncontroverted testimony of David Kerns, Gayle Woods, and Erin Haight-Mortensen. The district court specifically determined:

> …the District provided affidavits from Gayle Woods, Dave Kerns, and Erin Haight-Mortensen. These affidavits each contain a similar statement which indicates the District was "aware that the leak in the propane system was a building code violation." As the affidavits point out, the exact cause of the odor or the leak was unknown but it is evident everyone involved knew it was a problem and they were actively working to solve it. Solving the problem was difficult because the source or cause of the propane smell, or leak, could not be isolated.

(R. 92.) (emphasis added). The district court's analysis demonstrates it relied upon the sworn affidavits provided by the School District, which affidavits constituted undisputed evidence in the record. The district court's analysis was proper, and summary judgment was appropriate.

4. Hearsay Statement.

Lastly, Appellants argue the district court erred by not considering the alleged statement of School Board Member, Sherri Mead, contained in Mr. Berrett's affidavit. In Mr. Berrett's affidavit, he stated, "According to school board member Sherri Mead . . . the school board

terminated Kerns based upon [Ryan's] testimony." (R. 93.) In their opening brief, Appellants fail to make any argument as to how this statement would have any effect on the district court's summary judgment decisions. While the district court determined the statement was inadmissible hearsay, it further held that even when considering the statement, it did not affect the court's analysis. With respect to the alleged statement of Sherri Mead, the district court stated as follows:

> Plaintiffs argue that Ms. Mead's statement is not hearsay under Idaho Rules of Evidence 801(d)(2) because it is an admission of a party opponent. This is incorrect…. Plaintiffs have proffered nothing that dictates Sherri Mead was speaking as the District's representative, that the District manifested agreeance or adopted her statement as truth; or that Ms. Mead was authorized to make the statement, was acting within the scope of her agency or employment, or was a co-conspirator. Therefore, the Court cannot conclude that Ms. Mead's statement regarding Dave Kern's termination is anything but inadmissible hearsay.
> …
>
> Even if the statement proffered by Plaintiffs was not hearsay, or Plaintiffs had obtained an affidavit from Sherri Mead or taken her deposition these would have little bearing on the issues presented in this case. Ryan has never asserted that he was fired because Mr. Kerns was fired…. Therefore, whether Sherri Mead told Ryan that Mr. Kerns was terminated based on something Ryan stated at the Board meeting is immaterial to the Court's analysis.

(R. 93–94.) While the district court correctly determined the alleged statement of Sherri Mead could not be considered an admission of a party opponent because it failed to satisfy the requirements of Rule 801 of the Idaho Rules of Evidence, the alleged statement is immaterial and has no bearing here. As the district court carefully noted, Appellants have never alleged they were terminated because Mr. Berrett caused Mr. Kerns' termination. Because the alleged statement of Sherri Mead is inadmissible hearsay and immaterial to the issues in this case, the district court did not err in granting summary judgment.

III. THE DISTRICT COURT PROPERLY DISMISSED LANIE BERRETT'S ALLEGED COMMON LAW TORT CLAIM BECAUSE THERE IS NO CAUSE OF ACTION FOR THIRD-PARTY RETALIATION.

Summary judgment pertaining to Appellants' claim that Lanie Berrett was terminated as a result of Mr. Berrett's protected activity under the Idaho Whistleblower Act was appropriate because the claim is moot where Mr. Berrett did not engage in any protected activity. As the district court correctly determined, "[b]ecause Ryan does not qualify for protected status under the Act, Lanie cannot claim it as his spouse either." (R. 70.) Even if Mr. Berrett had engaged in protected activity, Appellants' alleged common law tort claim must fail because there is no third-party retaliation claim in Idaho and there is no evidence of a causal connection between Mr. Berrett's purported activity and Ms. Berrett's termination.

While the Ninth Circuit's opinion is not binding on this Court, it remains significant to note that Appellants' assertion that 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" is patently false. *See* Appellants' Brief, p. 21. In its opinion, the Ninth Circuit simply stated that the federal district court did not sufficiently address Ms. Berrett's common law tort claim. (R. 16.) In this case, the district court fully considered Ms. Berrett's alleged common law tort claim and properly dismissed the claim.

A. The district court correctly determined there is no third-party retaliation claim in Idaho and that reading words into the whistleblower statute would invade the province of the legislature.

Appellants cannot establish a valid common law claim for termination of Ms. Berrett's employment in violation of Idaho's public policy. Ms. Berrett was an at-will employee who was terminated as the lunchroom supervisor because she was unable to fulfill the essential functions of the position. Idaho has never adopted a common law cause of action for third-party retaliation,

and Ms. Berrett failed to present a genuine issue of material fact here. "The public policy exception to the employment at-will doctrine limits the employer's right to discharge an employee without cause when the discharge would violate public policy. The purpose of the exception is to balance the competing interests of society, the employer, and the employee in light of modern business experience." *Crea v. FMC Corp.*, 135 Idaho 175, 178, 16 P.3d 272, 275 (2000). "The public policy exception has been held to protect employees who refuse to commit unlawful acts, who perform important public obligations, or who exercise certain legal rights or privileges." *Sorensen v. Comm Tek, Inc.*, 118 Idaho 664, 668, 799 P.2d 70, 74 (1990).

To determine whether the public policy exception applies to at-will employees, courts use a two-part inquiry, analyzing: "1) whether there is a public policy and 2) whether the employee's behavior is protected under the public policy exceptions." *Hardenbrook v. United Parcel Serv., Co.*, No. CV07-509-S-EJL, 2009 WL 4798049, at *5 (D. Idaho Dec. 8, 2009) (citing *Thomas v. Med. Ctr. Physicians, P.A.*, 138 Idaho 200, 208, 61 P.3d 557, 565 (2002)). For instance, in *Crea* this Court first determined that the plaintiff's conduct fell within the purview of the public policy exception, where the plaintiff had disclosed a cover-up of environmental contamination. *Crea*, 135 Idaho at 178. Next, in analyzing whether the plaintiff was protected, this Court found there was no link beyond speculation between termination and the protected activity. *Id.* As in *Crea*, the district court considered first whether a public policy was at play and then, second, whether the Appellants' conduct was protected under the public policy exception.

Here, it is undisputed that Ms. Berrett did not engage in any kind of protected activity. Rather, Ms. Berrett's claim would necessarily be a third-party claim, where she has never alleged to have engaged in protected activity. Idaho has never adopted a common law cause of action for third-party retaliation, and summary judgment was therefore appropriate. Recognizing that Idaho

has never allowed a third-party retaliation claim, Appellants attempt to paint the picture that all other jurisdictions have allowed third-party claims when faced with this issue. Appellants' picture is simply inaccurate and misleading. The majority of cases Appellants cite in support of their argument that a third-party claim should be recognized in this case pertains either to Title VII or First Amendment cases, rather than whistleblower cases. Significantly, in recognizing a third-party retaliation claim under Title VII, the United States Supreme Court looked to the language of the statute to determine whether it allowed for such a claim. *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177 (2011). There, the Court explained that the use of the term "person aggrieved" demonstrated broad application and that "if Congress had intended "person aggrieved" to mean only "the employee who engaged in the protected activity," it would have used the phrase " 'person claiming to have been discriminated against' rather than 'person claiming to be aggrieved.' " *Id*.

Third-party retaliation claims are recognized when they are based upon and brought pursuant to a statute. For instance, a third-party retaliation claim was not recognized when the language of the statute did not afford protection to third parties. *Gibbs v. Norfolk S. Ry. Co.*, No. 3:14-CV-587-DJH, 2015 WL 4273208, at *4–5 (W.D. Ky. July 14, 2015). In that case, the plaintiff alleged he was retaliated against because another individual had engaged in protected activity under the whistleblower provision of the Federal Railroad Safety Act (the "FRSA"). *Id*. The court declined to recognize a third-party retaliation claim because the language of the FRSA's whistleblower provision did not encompas third parties. *Id*. In analyzing *Thompson*, the court determined:

> [T]he outcome of *Thompson* turned on the specific language of the Title VII antiretaliation provision, which is broader than the FRSA provision upon which [plaintiff's] claim is based. The person retaliated against in that case was not Thompson, but his fiancée. *See* 562 U.S. at 178. Because Thompson was

> "aggrieved by" the retaliation, however, he was permitted to sue. Unlike Title VII, which provides a cause of action to "a person claiming to be aggrieved ... by the alleged unlawful employment practice," 42 U.S.C. § 2000e–5(f)(1), FRSA authorizes an enforcement action only by "[a]n employee who alleges discharge, discipline, or other discrimination" in violation of the Act. 49 U.S.C. § 20109(d)(1). The *Thompson* Court noted that if Congress had intended "person aggrieved" to mean only "the employee who engaged in the protected activity," it would have used the phrase " 'person claiming to have been discriminated against' rather than 'person claiming to be aggrieved.' " 562 U.S. at 177. FRSA's antiretaliation provision is much closer to the language suggested by the *Thompson* Court than the broad wording of Title VII.

Although the issue in this matter has not been addressed by Idaho's appellate courts, other jurisdictions have declined to recognize common law whistleblower claims. *See* e.g. *Austin v. Healthtrust, Inc.*, 967 S.W.2d 400 (Tex.1998). In declining to allow common law whistleblower claims, the Texas Supreme Court reasoned that "[t]he adoption of a general common-law whistleblower cause of action would have undercut the many distinctions drawn by the Legislature among the various statutory whistleblower causes of action." *City of Midland v. O'Bryant*, 18 S.W.3d 209, 215–16 (Tex. 2000) (quoting *Austin*, 967 S.W.2d at 402).

Likewise, here, allowing a common law whistleblower claim would undercut Idaho's whistleblower statute. Not only do Appellants seek a common law whistleblower claim on behalf of Ms. Berrett, but they further wish to maintain a third-party whistleblower claim, where she has never alleged to have engaged in protected activity. Idaho has never adopted a common law whistleblower cause of action nor has it ever adopted a common law third-party retaliation claim and should not do so now when Idaho already has a statute protecting individuals who engage in whistleblowing activity.

As in *Thompson* and *Gibbs*, where third-party retaliation claims were only recognized if they were encompassed within the applicable statutory provisions, here, Ms. Berrett cannot have

a third-party claim because it does not fall within the purview of Idaho's whistleblower statute. The United States Supreme Court's decision in *Thompson* demonstrates that third-party retaliation claims are recognized only when the claim is encompassed within the language and framework of an applicable statute. Here, Ms. Berrett's claim does not fall within Idaho's whistleblower statute, and the claim therefore fails and was properly dismissed.

Further, Appellants incorrectly argue the district court "erred by focusing on the language of the statute and not on public policy." *See* Appellants' Brief, p. 21. While it is true the district court analyzed whether Ms. Berrett was entitled to protection under the act, it further addressed whether any other Idaho law protected Ms. Berrett. Specifically, the district court stated, "[s]pouses of employees who engage in protected activity are not protected under the Act *or any related Idaho law or policy*." (R. 111.) (emphasis added). In deciding this, the district court recognized that Idaho has never adopted a common law whistleblower cause of action nor has it ever adopted a common law third-party retaliation claim, and that allowing such a claim here would invade the province of the legislature. Indeed, the district court declared, "the Idaho Supreme Court has not previously extended protection to an employee's spouse as a matter of public policy and the Court is unwilling to do so now." (R. 111.) Further, the district court stated:

> This Court consistently applies statutes as written and it is not persuaded that this is a situation where an exception or an addition to the statute is appropriate as a matter of public policy. If the Idaho legislature desires to extend protection to spouses of employees under the whistleblower statute it may do so. This court is not persuaded that it should enlarge the protection already made available by the legislature. The Idaho legislature may do so if it believes such protection is appropriate.

(R. 112.) The district court conscientiously chose not to create a new cause of action for Ms. Berrett where one does not exist, and its decision was proper.

B. The district court correctly determined there is no evidence of a causal connection between Ms. Berrett's termination and Mr. Berrett's alleged communication of a propane leak.

This Court need not conduct a review of whether the district court correctly determined there was no causal connection between Ms. Berrett's termination and Mr. Berrett's alleged protected activity because Appellants have not challenged the district court's decision in that regard. However, in the event the Court does review this matter, the facts show Ms. Berrett was not terminated as a result of any activity of Mr. Berrett. Rather, her termination was based entirely on her inability to perform the requisite functions of her duties as the lunchroom supervisor.

One of the essential functions of the lunchroom supervisor is to prepare a budget and adhere to that budget during the school year. (Aug. P. 192; 567.) For at least three consecutive years, Ms. Berrett exceeded her budget. (Aug. P. 192; 567.) Although the School Board had allocated $15,000.00 to assist with budget overages in the lunchroom, Ms. Berrett exceeded her $15,000.00 budget allocation in 2010 by $22,890.00; in 2011 by $17,612.00; and in 2012 by $47,924.00. (Aug. P. 192; 567.) Throughout the year, Ms. Woods reminded Ms. Berrett of her budget and the importance of staying within the budget. (Aug. P. 192.) Ms. Woods also personally informed Ms. Berrett each year after exceeding her budget that this was unacceptable and the practice could not continue. (Aug. P. 192.) The failure to stay within the budget placed a significant strain on the School District because the excess funds had to be removed from the general fund. (Aug. P. 192.) Ms. Berrett's inability to competently manage the kitchen and stay within the budget was the sole reason for her termination. (Aug. P. 573.)

It was discovered in June 2012 that Ms. Berrett had again significantly exceeded her budget in the 2011–12 school year. (Aug. P. 192; 580.) Because of her continual inability to

efficiently manage the kitchen, the School District made the decision to terminate Ms. Berrett. (Aug. P. 192; 580.) On or about June 27, 2012, Ms. Berrett was provided a letter notifying her of her termination. Ms. Berrett's termination was effective on June 30, 2012. (Aug. P. 573.) The termination Letter specifically stated the reason for Ms. Berrett's termination as follows: "[y]ou have consistently overspent the Food Service budget each year, with the amount increasing each time. You also are not performing satisfactorily in your supervisory duties and you have not followed direction from your own supervisor when called upon to make sure District policies and procedures are followed." (Aug. P. 573.) Ms. Berrett was not terminated as a result of Mr. Berrett's involvement in the propane leak. Rather, her termination was based entirely on her inability to perform the requisite functions of her duties as the lunchroom supervisor. (Aug. P. 567–568; 579–580.) Exceeding the annual Food Service budget was unsatisfactory and her failure to remedy the issue even after being consistently informed that the practice was unacceptable necessitated her termination. Of note, Ms. Berrett's replacement did not exceed the budget despite having the same amount as Ms. Berrett. (Aug. P. 580.)

The School District has submitted ample evidence of the reason for Ms. Berrett's termination, which reason does not violate public policy. Terminating an at-will employee for repeatedly exceeding the allotted budget certainly does not violate public policy. Appellants now conveniently attempt to create an issue by alleging Ms. Berret never exceeded the lunchroom budget. Appellants misstate the facts of this case with respect to Ms. Berrett exceeding her budget as the lunchroom supervisor. They now assert to this Court that Ms. Berrett "had not overspent the Food Service budget in any year." *See* Appellants' Brief, p. 5. This portrayal of the facts is disingenuous as Ms. Berrett conceded in her deposition that she exceeded her annual budget each year. (Aug. P. 561.) Specifically, Ms. Berrett testified as follows:

Q. And you were given this document terminating you?

A. Yes, sir.

Q. In the second line it says that you have consistently overspent the food service budget each year, with the amount increasing each time. That's a true statement?

A. Yes, sir, it is.

Q. Why did you consistently overspend the food service budget each year?

A. Because we are a small school district…

. . .

Q. You don't dispute that you overspent the food service budget each year, correct?

A. No, I don't.

(Aug. P. 561.) As demonstrated by Ms. Berrett's own testimony, when viewed in a light most favorable to Appellants, it cannot be disputed that she consistently overspent the food services budget as lunchroom supervisor and that a legitimate reason therefore existed for her termination. There is simply no evidence in the record to support a claim that Ms. Berrett was terminated as a result of Mr. Berrett's involvement in the propane leak, and summary judgment was appropriate.

C. The Appellants' alleged common law tort claim must fail because they did not provide notice of their claim as required by the Idaho Tort Claims Act, Idaho Code § 6-906.

Appellants allege that Ms. Berrett was terminated as a result of Mr. Berrett's involvement with the propane leak. Although Ms. Berrett is not protected under Idaho's Whistleblower Act, Appellants argue she has a viable common law tort claim. Even if this were true, the common law claim must fail because Appellants did not comply with the notice requirement of the Idaho Tort Claims Act. Pursuant to I.C. § 6-906, Appellants were required to file notice of their

common law tort claim "within one hundred eighty (180) days from the date the claim arose…." The District's Business Manager, Gayle Woods, has testified that although she received the original summons and complaint in this matter, she never received a notice of tort claim. (Aug. P. 187.) In their complaint, Appellants did not allege the School District had ever been given notice of a tort claim. (R. 11–35.) Failure to file a notice of tort claim acts as a bar to any further action. *McQuillen v. City of Ammon,* 113 Idaho 719, 722, 747 P.2d 741, 744 (1987). "Compliance with the Idaho Tort Claims Act's notice requirement is a mandatory condition precedent to bringing suit, the failure of which is fatal to a claim, no matter how legitimate...." *Cobbley v. City of Challis,* 138 Idaho 154, 157, 59 P.3d 959, 962 (2002) (quoting *McQuillen,* 113 Idaho at 722). While this argument was presented to the district court, it did not reach the issue based on the fact it dismissed the claim on other grounds. However, because Appellants never filed a notice of tort claim with the School District, their alleged common law claim was properly dismissed.

ATTORNEY FEES AND COSTS ON APPEAL

Pursuant to Idaho Appellate Rule 41, the School District seeks an award of attorney fees and costs in accordance with Idaho Code § 12-117, § 12-121, and/or Idaho Code § 6-918. Section 12-117 provides for a municipal entity to recover attorney fees when "the party against whom the judgment is rendered acted without a reasonable basis in fact or law." Section 6-918 provides for an award of costs and fees where the prevailing party demonstrates "by clear and convincing evidence, that the party against whom or which such award is sought was guilty of bad faith in the commencement, conduct, maintenance or defense of the action." Idaho Code § 6-918A. These sections provide that a school district is entitled to an award of attorney fees on appeal inasmuch as the appeal has been maintained frivolously, in bad faith, and without

foundation in fact or law. Case law demonstrates an appeal is deemed frivolous when a party fails to make a legitimate showing that the district court misapplied the law. *Bowles v. Pro Indiviso, Inc*., 132 Idaho 371, 973 P.2d 142 (1999).

Further, the School District seeks an award of costs and reasonable attorney fees pursuant to Idaho Code § 6-2107. Section 6-2107 provides that "[a] court may also order that reasonable attorneys' fees and court costs be awarded to an employer if the court determines that an action brought by an employee under this chapter is without basis in law or in fact." Here, Appellants have filed their appeal without making a "legitimate showing" that the district court misapplied the law, and their appeal is without a reasonable basis in law or fact. Attorney fees and costs on appeal are therefore warranted.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court affirm both the district court's *Opinion and Order on Parties Cross-Motions for Summary Judgment* and *Memorandum Decision on Plaintiffs' Motion to Reconsider* as pertaining to Appellants' state law claims at issue in this appeal.

Dated this 24th day of April, 2019.

BLAKE G. HALL

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 24th day of April, 2019, by the method indicated below:

Jacob S. Wessel, Esq.
THOMSEN, HOLMAN, WHEILER, PLLC
2635 Channing Way
Idaho Falls, ID 83404

[X] iCourt

BLAKE G. HALL