

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

JUN YU,

Plaintiff/Appellant,

vs.

IDAHO STATE UNIVERSITY, MARK ROBERTS, Individually and in His Official Capacity as a Faculty Member of Idaho State University; SHANNON LYNCH, Individually and in Her Official Capacity as a Faculty Member of Idaho State University; KANDI TURLEY-AMES, Individually and in Her Official Capacity as a Faculty Member of Idaho State University; CORNELIS J. VAN der SCHYF, Individually and in His Official Capacity as a Faculty Member of Idaho State University; ARTHUR C. VAILAS, Individually and in His Official Capacity as a President of Idaho State University and JOHN/JANE DOES 1 through X, whose true identities are presently unknown,

Defendants/Respondents.

Docket No. 46364-2018

Bannock County District Court  
CV-2018-661-OC

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**RESPONDENTS' BRIEF**

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Appeal from the District Court of the Sixth Judicial District for Bannock County  
The Honorable Robert C. Naftz, Presiding

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## I. STATEMENT OF THE CASE

### A. Nature of the Case

Respondents submit this Response brief in opposition to Appellants appeal in which he challenges the Memorandum Decision and Order of the District Court of the Sixth Judicial District, wherein that court granted Respondents' Motion to Dismiss. The District Court dismissed Appellant's Complaint for failure to comply with the Idaho Tort Claims Act, I.C. § 6-901, *et seq.* and for failure to commence his case within the applicable statute of limitations. The District Court did not commit error and properly granted Respondents' Motion to Dismiss.

### B. Statement of Facts and Course of Proceedings Below

Appellant Jun Yu is a citizen of the People's Republic of China. (R., p. 113). In 2008 Appellant enrolled in Idaho State University's (ISU's) Doctoral Clinical Psychology Program. (Id.) By July 2012, Appellant's successful completion of a clinical internship remained in order to satisfy the degree requirements. (Id.) Usually, doctoral students participate in a clinical internship through the Association of Psychology Postdoctoral and Internship Centers (APPIC). (R. p. 526). Unfortunately, Appellant did not match with any APPIC programs and was given an option of constructing his own Non-APPIC internship. (Id.). Appellant constructed an internship with the Cleveland Clinic Center for Autism in Cleveland, Ohio and began his internship in January 2013. (R. pp. 526-527.)

Appellant was dismissed from the Cleveland Clinic internship on April 3, 2013, for failure to progress. (R., P. 527.) On April 4, 2013, Dr. Mark Roberts, Director of Clinical Training, Department of Psychology, at ISU, was informed Appellant had been dismissed from the Cleveland Clinic. (Id.)

Subsequently, after a review of Appellant's professional progress by ISU's Clinical Psychology Graduate faculty, Appellant was dismissed from the ISU doctoral program in clinical psychology on May 3, 2013, for the deficiencies he continually exhibited in clinical settings. (R. p. 527.) Appellant submitted an appeal to the Graduate Faculty of the Psychology Department, which was denied. (Id.) Appellant then submitted an appeal to the Dean of ISU's College of Arts and Letters which was denied. (Id.) Appellant made a final appeal to the Graduate School of ISU and received a letter dated October 2, 2013 from ISU's Graduate School which denied his appeal and informed him his dismissal was effective immediately. (Id.)

Appellant filed a Notice of Tort Claim against Respondent ISU on March 10, 2014, alleging a violation of Title VI and negligent infliction of emotional distress. (R. pp. 495-507). Appellant thereafter initiated an action in the U.S. District Court for the District of Idaho on September 16, 2015 in *Jun Yu v. Idaho State University and John/Jane Does I through X*, Case No. 4:15-cv-00430-REB, alleging violations of Title VI of the Civil Rights Act, deprivation of procedural due process rights under 42 U.S.C. § 1983, and negligent infliction of emotional distress. (R., pp. 283, 215-236). On March 29, 2017, Appellant filed an Amended Complaint in the Federal action alleging, in addition to the original causes of action, deprivation of Appellant's substantive due process rights pursuant to 42 U.S.C. § 1983, promissory estoppel and thirteen (13) counts of breach of contract against Respondent ISU. (R. p.255). Appellant did not name any individuals in his Amended Complaint. (R., p. 528.) Respondent ISU filed its motion for summary judgment in the Federal action and seventeen (17) of the eighteen (18) claims raised by the Appellant were dismissed on Eleventh Amendment grounds. (Id.) Appellant has pursued the seventeen (17) claims dismissed by the Federal court on Eleventh Amendment grounds in the present matter as alleged in the Complaint and Demand for Jury Trial filed on February 21, 2018,

in the Sixth Judicial District of Bannock County against ISU, Mark Roberts, Shannon Lynch, Kandi Turley-Ames, Cornelis J. Van der Schyf and Arthur C. Vailas. (R., pp. 9-82). Appellant alleges a violation of procedural and substantive due process pursuant to 42 U.S.C § 1983, negligent infliction of emotional distress, promissory estoppel, and thirteen (13) counts of breach of contract. (R. pp. 26-40.)

On April 2, 2018, Respondents filed Defendants' Motion to Dismiss and Defendants' Memorandum in Support of Motion to Dismiss for failing to comply with the Idaho Tort Claims act prior to initiating suit, Appellant's claims were filed beyond the statute of limitations, and Appellant fails to state a claim for relief. (R. pp. 111-129.) Appellant filed a response claiming he did not have to file a notice of claim because his claims were brought pursuant to 42 U.S.C. § 1983, his claims sound in contract, he commenced his case within the applicable statute of limitations, and he stated a claim for relief. (R. pp. 285-307.) The District Court granted Respondents' Motion to Dismiss. (R. pp. 525-539.) In doing so, the District Court held that Appellant failed to comply with Idaho Tort Claims Act with regard to tort actions brought against the individually named Respondents (R. p. 534,538-539); Appellant's tort claim against Respondent ISU was time-barred (Id. at 538-539); Appellant's claims sounding in contract were time-barred (Id.); and Appellant's claims brought under 42 U.S.C. § 1983 were time-barred (Id.).

### **C. Standard of Review**

In reviewing the district court's order granting a motion to dismiss, the standard of review is that same that is used in summary judgment. *Gibson v. Ada County*, 142 Idaho 746, 751 (2006)). Summary judgment is appropriate when the pleadings, depositions, affidavits and admission on file show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Id.*

## I. ADDITIONAL ISSUES PRESENTED ON APPEAL

In addition to the issues presented on appeal by the Appellant Yu, the Respondents are entitled to an award of attorney fees pursuant to I.C. § 12-121 for the Appellant's pursuit of this appeal which has been brought and pursued unreasonably and without foundation.

## III. ARGUMENT

### A. The District Court Properly Held Appellant's Tort Claim Was Barred for Failure to Comply with the Idaho Tort Claims Act and/or Was Barred by the Statute of Limitations.

Appellant's argument regarding his first issue on appeal is pursued unreasonably and without foundation. Although Appellant concedes that his tort claim for negligent infliction of emotional distress against Respondents Mark Roberts, Shannon Lynch, Kandi Turley-Ames, Cornelis J. Van der Schyf, and Arthur C. Vailas was properly dismissed (App. Brief p. 13.), he argues that the District Court dismissed "all [his] claims as not complying with the Idaho Tort Claims Act..." (App. Brief p. 7, *see also* p. 1) (emphasis in original). He argues further, in detail, that his procedural and substantive due process claims brought pursuant to 42 U.S.C. § 1983 and his claims that sound in contract, including his claim brought under the theory of promissory estoppel, are not subject to the Idaho Tort Claims Act. (App. Brief pp. 9-13.)

Appellant's argument is without merit as the District Court made no such holding. (R. pp. 525-539.) Consistently, Appellant makes no reference to the District Court's Memorandum Decision and Order where such conclusions were reached. In fact, the District Court explicitly states "The Defendants do not dispute that the Plaintiff's breach of contract claims and his allegations of promissory estoppel are independent causes of action in contract, not subject to the Idaho Tort Claims Act...Claims that arise from contract are exempt from the ITCA." (R. pp.

534-535 n. 49.) Additionally, the District Court cites *Overman v. Klein*, 103 Idaho 795 (1982), which Appellant quotes, at App. Brief p. 10, in support of his argument that the Idaho Tort Claims is inapplicable to causes of action brought under 42 U.S.C. § 1983. (R. pp. 534 n. 46-47.) Although the District Court did not cite *Overman* for the same purpose as Appellant, Respondents assume that the District Court is aware of the content of the cases it cites in opinions.

In arguing that the District Court erred in its application of the Idaho Tort Claims Act, Appellant surprisingly fails to argue that the District Court erred in dismissing his negligent infliction of emotional distress claim against ISU. While Respondents believe the District Court properly dismissed Appellant's claim, they will address the argument should such an argument be presented in Appellant's reply, by Appellant at oral argument, or presumed by this Court in efforts at due diligence as it is unclear if Appellant believes that his negligent infliction of emotional distress claim is "derivative" of his 42 U.S.C. § 1983 claims as alleged in his Response to Defendants' Motion to Dismiss Plaintiff's Complaint. (R. pp. 292-293.)

The District Court properly dismissed Appellant's negligent infliction of emotional distress cause of action as the claim is time-barred. Respondent ISU dismissed Appellant from its Clinical Psychology Department Doctoral program on May 3, 2013. (R., p. 119.) Respondent ISU denied Appellant's final appeal for reinstatement by letter dated October 2, 2013. (Id).

Appellant filed a Notice of Tort Claim against Respondent ISU only on March 10, 2014 setting forth claims of a violation of Title VI, which is not at issue in the present action, and negligent infliction of emotional distress. (R., pp. 506-507.) The Idaho Tort Claims Act

provides that a governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts. I.C. § 6-903(a). It requires that

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

*Id.* at § 6-905. While Respondents contend Appellant’s negligent infliction of emotional distress claim arose on May 3, 2013, making Appellant’s Notice untimely, an alleged accrual date of October 2, 2013 still renders Appellant’s tort claim barred by the statute of limitations.

Appellant initiated an action in the U.S. District Court for the District of Idaho on September 16, 2015 alleging a violation of Title VI of the Civil Rights Act, deprivation of his procedural due process rights under 42 U.S.C. § 1983, and negligent infliction of emotional distress. (R., pp. 283, 215-236). On March 29, 2017, Appellant filed an Amended Complaint in the Federal action alleging an additional fifteen (15) causes of action against Respondent ISU. (R., pp. 114-115). Respondent ISU moved for summary judgment against Appellant in the federal action and seventeen (17) of the eighteen (18) claims were dismissed on Eleventh Amendment grounds with only the Title VI claim remaining. (R., p. 115.)

Appellant filed a Complaint and Demand for Jury Trial on February 21, 2018, reasserting seventeen (17) causes of action dismissed in the Federal action, including a claim for negligent infliction of emotional distress, against Respondent ISU and others. (R. 9-82). The Idaho Tort Claims act provides that “[n]o claim or action shall be allowed against a governmental entity or its employee unless the claim has been presented and filed within the time limits prescribed by this act.” I.C. § 6-908. It further states that such actions “shall be forever barred, unless an action

is begun within two (2) years after the date the claim arose or reasonably should have been discovered, whichever is later.” *Id.* at § 6-911.

Here, Appellant was clearly aware that his negligent infliction of emotional distress claim arose by at least October 2, 2013. Accordingly, Appellant was required to bring an action for his tort claim by October 2, 2015, nearly two and one half (2 ½) years before this action was filed. As conceded by Appellant, state law claims brought in Federal court, dismissed on Eleventh Amendment grounds are not tolled, and do not relate back to a Complaint filed in Federal Court. *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 548 (2002); (R. pp. 296 n. 10, 299). As such, Appellant’s tort claim against Respondent ISU is time-barred.

Although the District Court dismissed Appellant’s tort claim against Respondent ISU for failure to comply with the statute of limitations, it came to that conclusion by applying Idaho Code § 5-219(4) which governs actions for personal injuries. (R. p. 12). A cause of action is deemed to "accrue" at the time of the occurrence, act or omission complained of. I.C. § 5-219(4). That statute however, provides the same limitation period of two years for bringing an action. *Id.* Accordingly, the District Court properly dismissed Appellant’s negligent infliction of emotional distress claim.

**B. The District Court Properly Held Appellant’s Section 1983, Contract, and Promissory Estoppel Claims Were Barred by the Applicable Statutes of Limitation.**

The pleadings and records on file support the District Court’s decision granting Respondent ISU’s Motion to Dismiss Appellant’s Complaint when he commenced his case beyond the statutes of limitation on all his claims. As discussed above, Respondents contend Appellant’s claims accrued on May 3, 2013 when he was dismissed from ISU’s doctorate program, but even assuming an accrual dates of October 2, 2013, when ISU denied Appellant’s final appeal for reinstatement, Appellant’s claims are still time-barred.

Appellant filed this action on February 21, 2018, alleging violations of his procedural and substantive due process rights pursuant to 42 U.S.C. § 1983, negligent infliction of emotional distress, promissory estoppel, breach of contract claims. (R., pp. 9-82.) As discussed above, Appellant's tort claim was properly dismissed. Accordingly, Respondents will address Appellant's remaining claims in this section.

The crux of Appellant's appeal with regard to the issue of whether the District Court erred in finding Appellant's claims were barred by applicable statutes of limitation rests on his contention of the accrual date for his claims that sound in contract and claims brought pursuant to 42 U.S.C. § 1983. Although ISU dismissed appellant from its doctoral program in clinical psychology on May 3, 2013 and denied his final appeal for reinstatement on October 2, 2013 (R. p. 527), Appellant argues that his thirteen (13) breach of contract claims, promissory estoppel claim, and procedural and substantive due process claims accrued on or about March 13, 2016. There is no basis in law that supports Appellant's asserted accrual date. In fact, the date represents the time period that Appellant received reports from his retained experts.

Appellant initiated an action in the Federal court on September 16, 2015 alleging a violation of Title VI of the Civil Rights Act, deprivation of his procedural due process rights under 42 U.S.C. § 1983, and negligent infliction of emotional distress. (R., pp. 283, 215-236). After which, Appellant claims "he began searching academia to secure the services of experts... who would support [his] allegations of a violation of Title VI." (App. Brief, p. 16.) He further alleges that he received the reports of his retained experts on March 13, 2016 through March 26, 2016. (*Id.* at 17.) "Armed with this newly acquired knowledge, [Appellant] sought leave of the court to amend the Federal Complaint to add the facts to sustain the additional counts of: (1) Breach of Contract, (2) Violation of [Appellant's] Substantive Due Process Rights, and (3)

Promissory Estoppel.” (*Id.* at 18.) Based on his claim of actions taken after filing his Federal action and the fact that the Federal District Court granted appellant leave of court to amend his Complaint, Appellant argues, in an extraordinary leap from logic, that the Federal Court ruled that Appellant’s claims accrued between March 13, 2016 and March 26, 2016 without citing to the record. (App. Brief, p. 14).

The District Court found Appellant made the required showing of diligence in filing his motion to amend after reviewing the discovery produced and reviewing his experts’ opinions. (R., p. 271.) The District Court found good cause existed to allow the amendment to the complaint because Appellant moved to amend within a relatively short time after receiving Respondent ISU’s discovery which enabled him to allege additional causes of action. (R., p. 272.) The District Court further found there was no evidence of bad faith or undue delay by Appellant. (R., p. 273.) However, the District Court did not hold in its Memorandum Decision and Order on Appellant’s motion to compel that his cause of action began to accrue on March 26, 2016. (R., pp. 271-273). In fact, there is no mention by the Court in its order when Appellant’s cause of action accrued.

As discussed below, Appellant’s argument is untenable.

**1. *Contract and Promissory Estoppel Claims***

In addition to arguing, that the District Court improperly utilized the wrong accrual date, Appellant also argues the District Court erred in applying the four-year statute of limitations on oral contracts set forth in Idaho Code § 5-217 and should have applied the five-year statute of limitation set forth in Idaho Code § 5-216 to all his contract claims with the exception of his alleged promissory estoppel claim. (App. Brief p. 23.) Appellant’s contention is incorrect.

While a contract may exist between Appellant and Respondent ISU, Appellant does not point to the existence of an express contract. (*Id.* at n. 11.) Further, Idaho case law suggests that if a contract does exist between Appellant and Respondent ISU, it is an implied contract. *Wickstrom v. N. Idaho Coll.*, 111 Idaho 450, 452 (1986) (citing *Peretti v. Montana*, 464 F. Supp. 784, 786 (D. Mont. 1979)) (“...the principal relationship between a college and its students is contractual... the general nature and terms of the agreement are usually implied, with specific terms to be found in the university bulletin and other publications; custom and usages can also become specific terms by implication.”). “Oral or implied contracts have a four year statute of limitations.” *Freiberger v. Am. Triticale*, 120 Idaho 239, 242 (1991) (citing Idaho Code Ann. § 5-217). Accordingly, the District Court properly relied on I.C. § 5-217 in applying the statute of limitations for Appellant’s contract claims alleged in the Complaint.

The statute of limitations does not begin to run until the cause of action accrues on the breach of contract. *Spence v. Howell*, 126 Idaho 763, 770 (1995). When the breach occurs is a factual question to be determined by the Court, which looks to the record to determine if there is sufficient and competent evidence to support the findings. *Id.* Here, the last possible date of accrual was October 2, 2013, the date Appellant’s last appeal was denied and he was formally dismissed from the doctorate program. (R., p. 538.)

Appellant’s contention that the date of accrual for his contract claims was on or about March 13, 2016 is without merit. An alleged contract between Appellant and Respondents could only be breach by one of the parties, it was not breach when Appellant’s retained experts had a chance to file their final reports with Appellant.

Accordingly, Appellant had four years to commence his action with the last date to commence his action October 2, 2017. However, Appellant commenced his action on February 21, 2018, beyond the four-year statute of limitations for his contract claims.

## **2. *Due Process Claims Brought Pursuant to Section 1983***

In federal civil rights cases, courts look to the state statute of limitations for personal injury actions in the forum state. *See Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). In Idaho, that statute of limitations is found in Idaho Code § 5-219, which provides a two (2) year limitations period.

Federal law, however, controls questions relating to accrual of federal causes of action. *E.g., Elliott v. City of Union City*, 25 F.3d 800, 801-02 (9th Cir. 1994) (9th Cir. 1994.) *See also Newcomb v. Ingle*, 827 F.2d 675, 678 (10th Cir. 1987) (overruling *Clulow v. Oklahoma*, 700 F.2d 1291 (10th Cir.1983) and *DeVargas v. Montoya*, 796 F.2d 1245 (10th Cir.1986)). It is settled that a civil rights action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. *Kimes v. Stone*, 84 F.3d 1121, 1128 (9th Cir. 1996); *Genty v. RTC*, 937 F.2d 899, 919 (3d Cir. 1991); *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 810 (5th Cir. 1991); *Ching v. Mitre Corp.*, 921 F.2d 11, 14 (1st Cir. 1990); *Kline v. N. Tex. State Univ.*, 782 F.2d 1229, 1232 (5th Cir. 1986).

Again, Appellant's contention that the date of accrual for his Section 1983 claims was on or about March 13, 2016 is without merit. Appellant, at best, misinterprets the standard for accrual for Section 1983 claims. For such a claim, the statute of limitation began to run when Appellant knew of his alleged injury which is the basis for this action, i.e. dismissal. The statute of limitations is not tolled until a plaintiff can name his or her causes of action, as argued by

Appellant. Additionally, Appellant has pointed to no case law which proposes that Section 1983 claims are tolled until a plaintiff retains experts and completes discovery.

The District Court viewed the facts in favor of Appellant and properly held the last possible date of accrual is October 2, 2013. (R., p.538.) Appellant had two years from October 2, 2013, to commence his action on his claims for alleged violations of his procedural and substantive due process rights claims. Appellant filed his Complaint on February 21, 2018, well beyond the two-year statute of limitation. (R. p. 538.) The District Court properly relied upon Idaho Code § 5-219 in determining the statute of limitations for Appellant's procedural and substantive due process claims. (R., p. 537.) There is no genuine issue of material fact that the Complaint in this case was filed on February 21, 2018, beyond the two-year statute of limitation and the District Court did not commit error in applying the two-year statute of limitation of Idaho Code § 5-219.

**C. The Respondents Are Entitled to an Award of Costs and an Award of Attorney Fees Under I.C. § 12-121.**

Should Respondents prevail, they request an award of their costs, as provided by I.A.R. 40, and an award of attorney fees as allowed by I.A.R. 41, and as provided by I.C. § 12-121.

An award of attorney fees on appeal under I.C. § 12-121 is proper where the Court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, and without foundation. *Elec. Wholesale Supply Co. v. Nielson*, 136 Idaho 814, 828, 41 P.3d 242, 256 (2001). Where an appeal turns on a question of law, an award of attorney fees under I.C. § 12-121 is proper if the law is well-settled and the appellant has made no substantial showing that the district court misapplied the law. *Id.* at 828. When the appeal disputes the trial court's factual findings, which are supported by substantial although conflicting evidence, the appeal is considered frivolous and an award of attorney fees is proper. *Id.*

Appellant's arguments on appeal are the same arguments he made to the District Court which generally lack a basis in law or are misrepresentations of Orders issued by the Federal District Court and the District Court. Because he did not succeed in forum shopping, Appellant is also disputing the District Court's factual findings when no credible conflicting evidence exists. Appellant's pursuit of this appeal is unreasonable and without foundation as the law is well settled on the issue of statute of limitations when commencing actions in state court. The Appellant has made no showing the District Court misapplied the law. Therefore, Respondents are entitled to an award of attorney fees on appeal under I.C. § 12-121.

#### **IV. CONCLUSION**

The decision and judgment of the District Court granting Respondents motion to dismiss should be affirmed. Respondents respectfully request the Court award attorney's fees and costs on appeal.

Respectfully Submitted this 30<sup>th</sup> day of January 2019.

KELLY LAW, PLLC

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Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30<sup>th</sup> day of January, 2019, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

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