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Smith v. Glenns Ferry Highway District Appellant's Reply Brief 2 Dckt. 46180

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOANIE SMITH,

Plaintiff/Appellant/Cross-Respondent,

vs.

GLENNS FERRY HIGHWAY DISTRICT,

Defendant/Respondent/Cross-Appellant.

Docket No. 46180-2018
Elmore Co. Case No. CV-2016-1257

CROSS-APPELLANT'S/RESPONDENT'S REPLY BRIEF

Appeal from the Fourth Judicial District in and for the County of Elmore
The Honorable Nancy Baskin, Presiding

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I. ARGUMENT

A. There is No Right to a Jury Trial under the Idaho Constitution for IPPEA Claims.

1. Smith's "intention of the Framers" argument and citation to territorial statutes miss the mark.

In her reply brief, Smith cites to territorial statutes and argues that this court should apply the "intention of the Framers" as Smith sees it. Doing so would undo over 100 years of precedent. This Court has recently expressed its reluctance to do so absent extraordinary circumstances. *See Eller v. Idaho State Police*, 2019 WL 2240636 at *8 (Idaho, May 24, 2019) ("[w]e will ordinarily not overrule one of our prior opinions unless it is shown to have been manifestly wrong, or the holding in the case has proven over time to be unwise or unjust."). No such circumstances are present here. Quite simply, Smith misreads the statutes and case law she relies upon.

Smith's "intention of the Framers" argument is not compelling. This Court announced the correct interpretation of Article I, § 7 only eight years after the adoption of the Idaho Constitution. *Christensen v. Hollingworth*, 6 Idaho 87 (1898). Smith implies that she is in a better position to determine the Framers' intention than the *Christensen* court, even though two of the three members of that panel were original members of this Court.[1] Smith's argument that this Court's present approach to the jury trial right does not comport with the Framers' intention therefore makes little sense when the rule was set forth by learned contemporaries of the Constitutional Convention. Indeed, the type of jury trial provision included within the Idaho Constitution was well known at the time as "not intended or designated to extend the right of trial by jury, but simply to secure that right as it existed at the date of the adoption of the constitution." *Christensen*, 6 Idaho 87 (citing

[1] The original three justices of this Court were Isaac N. Sullivan, Joseph W. Huston, and John T. Morgan, all of whom began their tenures in the first term of the Supreme Court of Idaho. John Hailey, *The History of Idaho* 334 (1910). Justice Sullivan authored the *Christensen* opinion, and Justice Huston concurred. *See Christensen*, 6 Idaho 87.

relevant cases); *see also State v. Bennion*, 112 Idaho 32, 42 (1986) ("To assume the Framers were unaware of the implications of their language or of the state of the law at the time would be foolhardy."); *Paulson v. Minidoka Cnty. Sch. Dist. No. 331*, 93 Idaho 469, 472 n. 3 (1970) ("Because many of the delegates to the Constitutional Convention were outstanding lawyers in their day, we generally presume that they knew and acted upon such prior and contemporaneous interpretations of constitutional words which they used."). Thus, the intent of the Framers of the Idaho Constitution was only to preserve the right as it existed in 1890.

Contrary to Smith's assertions, Sec. 4369 of the territorial code did not provide an absolute right to a jury trial in all cases involving damages. Instead, it provided for the right to a jury trial in a "certain class of cases." *Fisher v. Bd. of Comm'rs of Bannock Cnty.*, 4 Idaho 381 (1895). It did not provide for the right to a jury trial in all cases in which damages were at issue. Idaho Rev. Stat. § 4369 (1887). Instead, it provided such right only in cases where "recovery of specific real or personal property" was sought, or when money damages were sought "as due upon contract, or as damages for breach of contract, or for injuries." *Id*. Thus, under the plain language of the statute, a jury trial right attached in property recovery, contract, and injury actions only. *See id*. The IPPEA is not within the "certain class of cases" recognized by the statute. This Court has declared that an IPPEA cause of action sounds neither in contract nor tort, but "is purely a statutory remedy against governmental employers." *Van v. Portneuf Med. Cntr.*, 147 Idaho 552, 558 (2009) (*Van I*). Nor does it involve the recovery of specific real or personal property. It therefore is not the type of action identified as having a jury trial right by Sec. 4369.

Further, the right contained in Sec. 4369 was not absolute; the case could properly be referred to a master or referee for decision, bypassing a jury entirely. Idaho Rev. Stat. § 4369 (1887) ("an issue of fact must be tried to a jury, unless … a reference is ordered"); *see also* Black's

Law Dictionary 1393 (9th ed. 2009) (defining "reference"). How then Smith contends this statute provided for an absolute and "inviolate" right to a jury trial is unclear. Sec. 4369 expressly stated that all other causes of action "must be tried by the court." Idaho Rev. Stat. § 4369 (1887). Therefore, only those particular causes of action identified in the statute had an attendant jury trial right, subject to referral to a master or referee for decision. *Id.* This does not provide the historical basis for the right to a jury trial under the IPPEA that Smith claims.

Nor did Sec. 4398 require a jury trial in all actions involving an award of damages. It merely provided that "[w]hen a verdict is found for the plaintiff… the jury must also find the amount of the recovery." Idaho Rev. Stat. § 4398 (1887) (emphasis added). Only juries enter verdicts. *See id.*; *see also* Idaho Rev. Stat. § 4394 (1887) ("When the jury, or three-fourths of them, have agreed upon their verdict…"); I.R.C.P. 52 (judges issue findings of fact and conclusions of law, not verdicts). Thus, Sec. 4398 merely contemplated that when a case was tried to a jury under Sec. 4369, the jury determined the amount of damages.[2] It did not independently contemplate the right to a jury trial.

Smith incorrectly calls *Fisher* and *Neal* claims for "lost wages." (Appellant's Reply Br. 14.) Neither *Fisher* nor *Neal* involved lost wages. *Fisher* involved per diem[3] set by statute owed a county commissioner when performing official duties on behalf of the county. *Fisher*, 4 Idaho 381. *Neal* was a breach of contract case brought by an attorney against a drainage district, based upon a statute providing for the expenditure of attorney fees at the formation of a district. *Neal v. Drainage Dist. No. 2 of Ada Cnty.*, 42 Idaho 624 (1926). Perhaps more importantly, *Neal* was directed towards whether a contract provision acted as a jury waiver. *Id.* The IPPEA is not an

[2] Smith fails to explain how this statute would function under her reading if the right to a jury trial was waived or the case referred. Would a court be required to empanel a jury solely to determine damages?

[3] "per diem, n. (1812) 1. A monetary daily allowance, usu. to cover expenses." Black's Law Dictionary 1251 (9th ed. 2009). Per diem is not wages.

analogous cause of action to either of these two cases. Again, an IPPEA cause of action is neither a contract action nor a tort action, but "is purely a statutory remedy against governmental employers." *Van I*, 147 Idaho at 558. That Sec. 4369 applied in *Fisher* and *Neal* does not answer whether the IPPEA would have fallen within the "certain class of cases" to which the jury trial right attached under Sec. 4369.

Finally, Article V, § 1, which abolished the distinctions between actions at law and suits in equity, does not mandate that all factual issues in every case be tried to a jury, as Smith argues. Instead, Article V, § 1 of the Idaho Constitution has been interpreted consistently with Article I, § 7. *Thomas v. Schmelzer*, 118 Idaho 353, 361 (Ct. App. 1990). Thus, Article V, § 1 preserves only the right to trial as it existed at common law. *Id.* Under Smith's reading of Article V, § 1, every case involving a dispute of fact must go to a jury. (Appellant's Reply Br. 13.) This would include divorce cases (civil actions with highly contentious factual disagreements), dram shop cases (civil actions with factual disputes as to whether a dram shop negligently provided alcohol to an obviously intoxicated person), and tax refund cases (civil actions where the valuation of property is in dispute). However, this is not the case. *Rudd v. Rudd*, 105 Idaho 112, 116 (1983) (divorce); *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 398 (1999) (dram shop liability); *Coeur d'Alene Lakeshore Owners & Taxpayers, Inc. v. Kootenai Cnty.*, 104 Idaho 590, 596 (1983) (tax refund suits). Instead, Article V, § 1 and Article I, § 7 are read in harmony. Both Article I, § 7 and Article V, § 1 are therefore still quite valid and in force.

Accordingly, this Court's longstanding interpretation of both Article I, § 7 and Article V, § 1 comports with the intent of the Founders. The right to a jury trial is properly analyzed as whether such right was enforceable as to rights, remedies, and actions triable by jury under common law or territorial statutes at the time of the adoption of the Idaho Constitution in 1890.

Because the IPPEA is a new, distinct cause of action against governmental employers, no right to a jury trial attaches.

2. *Eller* does not answer the jury trial right question.

This Court's decision in *Eller*, allowing a plaintiff to seek non-economic damages under the IPPEA, does not provide Smith the right to a jury trial. While *Eller* stated that "[t]his list expands the relief which a claimant may receive to include mainly equitable remedies that a court may order independently of a jury," *Eller*, 2019 WL 2240636 at *7, the jury trial right was not before the Court in that case. *Eller* was tried to a jury. *See id.* at *1. However, that does not mean there is a right to a jury trial. *See* I.R.C.P. 39(c). As stated in GFHD's opening brief, the existence of a jury trial right is still an open question, and *Eller* did not answer the question. *See id.* at *8 ("The *Wright* court did not face the issue presented here and it was not argued to the Court in the same way as it was in this case."). Accordingly, *Eller's* statement about the court awarding additional remedies under the IPPEA should be confined to those cases where a jury trial is held under I.R.C.P. 39(c).

3. IPPEA remedies are equitable in nature.

As argued in GFHD's opening brief on cross-appeal, the lack of a right to a jury trial under the IPPEA obviates the need for this Court to determine whether IPPEA remedies are legal or equitable in nature. (Respondent's Br. 19.) However, assuming that this Court must reach a decision on this issue, it should follow Ninth Circuit precedent in determining that IPPEA remedies—as in federal employment statutes—are equitable in nature.[4]

[4] "[T]his Court looks to federal law for guidance in the interpretation" of the IHRA. *Fowler v. Kootenai Cnty.*, 128 Idaho 740, 743 (1996). It follows then that federal case law on the nature of damages applies in the present case, as *Eller* looked to IHRA remedies provisions, *Eller*, 2019 WL 2240636 at *7, which then look to federal interpretation.

Again, the IPPEA expressly provides that "[a] court" determines the remedies to award to a successful plaintiff. I.C. § 6-2106.[5] Federal employment statutes provide that remedies under those statutes—including damages—are equitable in nature. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 853 n. 3 (2001); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 415–16 (1977); *Clemens v. Centurylink Inc.*, 874 F.3d 1113, 1116 (9th Cir. 2017); *Teutscher v. Woodson*, 835 F.3d 936 (9th Cir. 2016); *Traxler v. Multnomah Cnty.*, 596 F.3d 1007, 1011 (9th Cir. 2010); *Lutz v. Glendale Union High Sch., Dist. No. 205*, 403 F.3d 1061, 1069 (9th Cir. 2005). And whatever racial bias justifications for a bench trial in Title VII racial discrimination cases, such justifications would not be present in ADA, FMLA, and Rehab Act in removing remedies from a jury.[6] Yet federal courts have not made any such statement. Those justifications are simply not relevant when determining the nature of particular remedies available under employment statutes.

Contrary to Smith's assertion, this Court has found that Idaho employment statutes have expressed a clear preference for the remedy of reinstatement. *O'Dell v. Basabe*, 119 Idaho 796, 812 (1991). For example, the IHRA provides that front pay may only be awarded when reinstatement is not possible. *Id.* This Court has previously applied *O'Dell*'s remedies analysis to the IPPEA, including recently. *Eller*, 2018 WL 2240636 at *8; *Smith v. Mitton*, 140 Idaho 893, 900 (2004). Therefore, when a plaintiff requests front pay damages for termination under the IPPEA, as Smith did here, the court must determine that reinstatement is not possible for front pay

[5] And even assuming that there is a right to a jury trial under the IPPEA, removing the remedies from the jury does not violate the right to a jury trial. *Kirkland v. Blaine Cnty. Med. Cntr.*, 134 Idaho 464, 468 (2000) ("We can discern no logical reason why a statutory limitation on a plaintiff's remedy is any different than other permissible limitations on the ability of plaintiffs to recover in tort actions.")

[6] Incidentally, Smith argues inconsistently that juries are both the last bastion of freedom from government overreach and also horribly biased and unable to provide individuals a fair trial. (Appellant's Reply Br. 6, 17.) GFHD would simply ask the Court to ignore hyperbole and resolve this case based on an interpretation of the law, consistent with longstanding precedent in Idaho.

to be awarded. *O'Dell*, 119 Idaho at 812.[7] From a public policy standpoint, this makes sense. The state, through its employment statutes, does not incentivize individuals to not work. *See Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1347 (9th Cir. 1987) ("front pay is intended to be temporary in nature. An award of front pay does not contemplate that a plaintiff will sit idly by and be compensated for doing nothing."); *see also Anderson v. Gailey*, 100 Idaho 796, 801 (1980) ("The discharged employee has a duty to mitigate [her] losses."). The IPPEA should not be interpreted as allowing a plaintiff to decline or choose to not seek reinstatement (when possible and appropriate) in favor of an award of front pay damages. Accordingly, if it must address the issue at all, this Court should find that the IPPEA remedies in this case are equitable in nature.

B. Rule 39, not Rule 38, Applies to this Case.

Smith misreads Rules 38 and 39 and the effect of a demand for a jury trial where there is no right. Smith also erroneously cites to a number of sections of Rule 38 for the procedural requirements of converting a jury trial to a court trial. However, since there is no right to a jury trial, Rule 39 is the applicable rule for the use of a jury in this case. Rule 38 provides that "[o]n any issue triable of right by jury, a party may demand a jury trial…," I.R.C.P. 38(b), and "[a] proper demand may be withdrawn only if the parties consent." I.R.C.P. 38(d). It therefore follows that when there is no right to a jury trial, the parties do not need to consent to the withdrawal of a demand for a jury trial. Rule 38 also provides that a party "is considered to have demanded a jury

[7] If there is a right to a jury trial, the court decides the equitable issue of reinstatement separately. *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 248 (1993). In doing so, the court first determines the equitable issues. *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 290 (1991). However, there is no right to have a jury re-determine issues which are already decided by a trial court exercising its equitable jurisdiction. *Pulley*, 125 Idaho at 248. Herein lies the problem. A court must first determine whether to reinstate the plaintiff. To do so, it must determine whether the IPPEA has been violated, as the court cannot order reinstatement without a violation. *See* Idaho Code § 6-2106. Once the court determines violation or no violation, the jury may not re-determine the issue. Thus, all that remains for a jury is the award of damages. However, if the court determines that there was a violation and that reinstatement is appropriate, the issue of front pay is necessarily taken away from the jury as well.

trial on all the issues so triable." I.R.C.P. 38(c). Thus, under its plain terms, Rule 38 applies only when there is a right to a jury trial.

On the other hand, Rule 39 provides that "[t]he trial on all issues so demanded must be by jury, unless: … (2) the court on motion or on its own finds that on some or all of those issues that is no right to a jury trial." I.R.C.P. 39(a). It also states that "[i]n an action not triable of right by a jury, the court, on motion or on its own: (1) may try any issue with an advisory jury; or (2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right." I.R.C.P. 39(c). Thus, under its plain terms, the jury procedure of Rule 39 applies when there is no right to a jury trial.

Because there is no right to a jury trial under the IPPEA, Rule 39, not Rule 38, was the proper rule for the District Court to apply in proceeding. While Smith argues that GFHD "stipulated to actually *doing* a trial by jury," (Appellant's Reply Br. 4) (emphasis in original), the stipulation was that of procedure, and because Rule 39 applied, GFHD did not require Smith's blessing to withdraw its consent.[8] Nor did the district court require a motion to try the case with an advisory jury; the court "on its own" could determine that there was no right to a jury trial. I.R.C.P. 39(a)(2). And GFHD is not bound by its demand for a jury trial (any more than Smith is), as such demand was not a "proper demand" under Rule 38.

Implicit in Smith's argument is that the district court did not have the authority to reconsider the jury trial setting contained within the scheduling order. However, Rule 39 gives the court, "on its own," the authority to try a case as the finder of fact with an advisory jury. I.R.C.P. 39(a). To do so, the district court need only "find[] that on some or all of those issues there is no

[8] *State v. Hansen*, 127 Idaho 675 (Ct. App. 1995), on which Smith relies, involves a challenge to a specific juror. It has nothing to do with challenging the right to a jury trial, and is therefore inapplicable to the present case.

right to a jury trial." I.R.C.P. 39(a)(2). There is no good cause requirement. *Id*. Nor is there a timing requirement. *Id*. A motion is not required. *Id*. A court may sua sponte determine that there is no right to a jury trial for a particular cause of action, and then may try it without a jury. To the extent that the dicta in *KDN Mgmt.* prohibits a district court from altering a scheduling order under Rule 38, it does not apply to that ability under Rule 39, which expressly grants a district court the authority "on its own" determine that there is no right to a jury trial. I.R.C.P. 39(a)(2); *see also KDN Mgmt., Inc. v. WinCo Foods, LLC*, 164 Idaho 1 (2018). And once the district court exercised its authority to determine whether a jury trial right exists, it then had the authority to try the case without a jury, with an advisory jury, or to a jury with the parties' consent. I.R.C.P. 39(c). It is not, however, bound by the consent of the parties. *Id*.

Smith's main complaint appears to be that because jury trials are regularly conducted as a matter of habit in IPPEA cases, the District Court should have just followed along, rather than engage in any actual analysis and refinement of Idaho law. The parties' stipulation to a jury trial was based upon this longstanding habit. However, a trial court, under certain circumstances, may properly relieve a party from a stipulation which it has entered. *Reding v. Reding*, 141 Idaho 369, 373 (2005). A stipulation entered into improvidently may be set aside for good cause where enforcing it "would work an injustice," *Call v. Marler*, 89 Idaho 120, 127 (1965), and "where the parties would be put in the same position as before the stipulation was entered." *Burnett v. Jayo*, 119 Idaho 1009, 1013 (Ct. App. 1991); *see also Koepl v. Ruppert*, 29 Idaho 223 (1916). Smith's attempt to compare GFHD's conduct to *Annest* is inappropriate. *Annest* dealt with a plaintiff attempting to repudiate a stipulation upon which judgment was entered, not one based upon an unanswered question of law, raised prior to trial. *Annest v. Conrad-Annest, Inc.*, 107 Idaho 468, 470 (1984).

Good cause is simply "a legally sufficient reason." Black's Law Dictionary 251 (9th ed. 2009). The district court plainly deemed the existence of an open, unanswered question of constitutional law to be sufficient "good cause" for permitting GFHD to raise the jury trial argument in its Trial Brief and withdraw its stipulation. As previously noted, IPPEA claims have been pleaded, scheduled, and tried as if the jury trial is a matter of right. And Smith was still able to present her case to the jury after the district court relieved GFHD of its stipulation. The district court merely reserved the question of the effect of the jury's verdict until the parties had greater time to explore the constitutional questions raised in GFHD's Trial Brief. Smith was still in the same position as before the stipulation was entered: with an uncertain jury trial right and a scheduled jury trial.

This is not a case of GFHD attempting to get a mulligan at trial. GFHD raised an objection to a jury trial on damages prior to trial, based on research conducted on damages under the IPPEA. The district court empaneled a jury, and reserved for after trial the decision as to the effect of the jury's findings. Both Smith and GFHD understood this would be the case prior to trial. (*See* Tr. vol. 1, p. 21, l. 6:10–8:18.) Smith is now apparently unhappy with the district court and blames GFHD for raising the legitimate point that the right to a jury trial is unclear. Unlike the situations present in *Reid Bros.* and *Fuller*, this case does not present a procedural history of waiting to raise the issue for the first time after trial. Instead, GFHD recognized the value of trying the case with an advisory jury empaneled. (R. Vol. I, p. 378.) GFHD's request was consistent with I.R.C.P. 1. If the district court had found no right to a jury trial but had tried the case without a jury, the risk was that this Court could remand for a second trial with a jury if it found a procedural or legal defect. Thus, GFHD's consent to an advisory jury was for a proper purpose: judicial economy. It sought neither a second bite at the apple, nor a drawn out process contrary to Rule 1. GFHD merely sought

to raise an issue of significant constitutional importance in the manner that would least interfere with the proceedings in this case.

Accordingly, there was nothing procedurally deficient with the District Court's determination of the jury trial right question. The only thing deficient with the District Court's decision was treating the jury's verdict on back pay as binding over the objection of GFHD.

C. GFHD is not Challenging the Jury's Factual Findings; it is Challenging the District Court's Failure to Apply its own Findings of Fact to the Back Pay Damages Award.

Smith argues that GFHD is seeking to challenge the jury's findings of fact. Not so. Essentially, this dispute can be boiled down into a single question: With regard to damages, is the court or the jury the proper finder of fact? As stated above, since there was no right to a jury trial, the district court was the proper finder of fact for damages. However, because the district court was the proper trier of fact as to damages, the district court erred in failing to apply its findings of fact to the judgment it entered. (*See* Respondent's Br. at 25 ("The District Court's conclusion that the jury's award of front and back pay were "based on a set of circumstances that has no basis in the evidence introduced at trial" is supported by evidence adduced at trial.") (quoting R. 757).) Thus, despite Smith's attempt to misframe GFHD's argument, this Court need only focus on whether the right to a jury trial exists. If there is no right to a jury trial, the district court's findings of fact must be applied. If there is a right to a jury trial, the jury's verdict must be applied.

Quite simply, the district court's findings of fact were supported by substantial and competent evidence. When the trial judge is the trier of fact, its findings will not be disturbed on appeal unless they are clearly erroneous. *American Pension Servs., Inc. v. Cornerstone Home Builders, LLC,* 147 Idaho 638, 641 (2009). However, this Court reviews a bench trial for "whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions

of law." *Id*. at 640. The district court's findings were not clearly erroneous. As set forth in GFHD's opening brief, the district court's findings on damages were supported by substantial and competent evidence. (*See* Respondent's Br. 24–26.) However, it was the district court's conclusions of law—that it did not have the authority to disagree with the advisory jury on back pay—that was incorrect. As stated above, the district court was the proper trier of fact on the issue of back pay damages, and its conclusions of law as to the amount of back pay damages it entered in the judgment was error.

II. CONCLUSION

GFHD respectfully requests this Court reverse the district court's refusal to enter a back pay award consistent with the district court's findings of fact, and remand this case back to the district court with the instruction to do so. The judgment should otherwise be affirmed.

DATED this 27th day of June, 2019.

NAYLOR & HALES, P.C.

By: ***/s/ Tyler D. Williams***
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of June, 2019, I electronically filed the foregoing with the Clerk of the Court using the iCourt system which sent an electronic notice to the following registered participant:

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☒ E-File and Serve

/s/ Tyler D. Williams
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