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CLERK OF DISTRICT COURT

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Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**AHMAD IHMAID, et ux and ARI KIRA, a  
minor,**

*Plaintiffs,*

vs.

**STATE OF IDAHO, IDAHO STATE POLICE  
(PATROL), et al.**

*Defendants.*

Case No. **CV 2007 4974**

**MEMORANDUM DECISION AND  
ORDER ON SUMMARY JUDGMENT**

**I. BACKGROUND.**

On July 14, 2005, plaintiff Merrill Ihmaid (Merrill) was driving her husband Ahmad Ihmaid (Ahmad) and son (Ari Kira, a minor), all hailing from Bellevue, Washington, south on Highway 95 from Silverwood Amusement Park. Also driving south on Highway 95 that day, Mary Wagner (Wagner) noticed that the car traveling in front of her was driving in an erratic manner, was weaving across two southbound lanes, and drove into the left turn lane for northbound traffic. Wagner called 911 to report what she had observed and stated she would be willing to sign a citation. Trooper Ronald Sutton (Sutton) located the vehicle Wagner had described, the Ihmaids' silver Hyundai, and pulled it over. Sutton prepared a citation for inattentive driving and had it issued by the citizen complainant, Wagner. Merrill alleges Sutton told her if she did not sign the citation, he would arrest her. When Merrill signed the citation, Sutton arrested her because he believed that she would fail to appear pursuant to I.C. § 49-1407(1). The

Ihmaids' car was searched, Merrill was transported to and booked into the Kootenai County jail and searched, and Merrill was released after approximately one-and-one-half to two hours. Merrill states she was not provided *Miranda* warnings at any time.

On July 12, 2007, plaintiffs filed this lawsuit against the Idaho State Police and Idaho State Trooper Sutton, alleging claims of false imprisonment, violation of Merrill's constitutional rights for failure to inform her of her *Miranda* rights, false arrest, negligence, a 42 U.S.C. §1983 claim for excessive force, and claims for negligent and intentional infliction of emotional distress. On April 28, 2008, defendants filed their motion for summary judgment. Oral argument was held August 6, 2008, following which the Court announced its ruling. The Court also stated it would issue a memorandum decision and order due to the number and complexity of the claims and defenses.

## **II. ANALYSIS.**

### **A. Did Sutton Have Authority to Take Merrill Into Custody for a Misdemeanor That Occurred Outside His Presence?**

The misdemeanor of inattentive driving is considered:

a lesser offense than reckless driving and shall be applicable in those circumstances where the conduct of the operator has been inattentive, careless or imprudent, in light of the circumstances then existing, rather than heedless or wanton, or in those case where the danger to persons or property by the motor vehicle operator's conduct is slight.

I.C. § 49-1401(3). Absent certain exceptions, a person may not be arrested for a misdemeanor offense unless the offense was committed or attempted in the presence of an officer. I.C. § 19-603(1); *State v. Simpson*, 112 Idaho 644, 646, 734 P.2d 669, 672 (Ct.App. 1987); *State v. Campbell*, \_\_\_ Idaho \_\_\_, \_\_\_, 185 P.3d 266, 267 (Ct.App. 2008). Presence is determined by the use of all of the officer's senses, combined with his knowledge of the violation. *State v. Carr*, 123 Idaho 127, 130, 844

P.2d 1377, 1380 (Ct.App. 1992). Exceptions to this presence requirement are found in I.C. §§ 49-1405 and 49-1408. Idaho Code § 49-1405 provides that the authority to make an arrest for serious offenses is the same as that upon which to make an arrest for a felony. These serious offenses include: negligent homicide, driving under the influence of alcohol/narcotic drug, failure to stop/give information or render assistance in event of an accident resulting in death or injuries, failure to stop/give information in event of an accident resulting in damage to a vehicle/fixture/other property, reckless driving, or fleeing/attempting to elude an officer. I.C. § 49-1405(1). Idaho Code § 49-1408 provides for the arrest of a nonresident:

Special provisions of this section ...shall govern misdemeanor violations in respect to nonresidents under the circumstances stated.

(2) A peace officer at the scene of a traffic accident may arrest without a warrant any driver of a vehicle who is a nonresident of this state and who is involved in the accident when, based upon personal investigation, the officer has reasonable and probable grounds to believe that the person has committed any offense under the provisions of this title in connection with the accident, and if the officer has reasonable and probable grounds to believe the person will disregard a written promise to appear in court...

I.C. § 49-1408(1) and (2). Clearly, Merrill's actions do not fall within either the I.C. § 49-1405 or § 49-1408 exception to the limitation in I.C. § 19-603(1) that a person be arrested only for offenses committed in an officer's presence. Merrill was cited for inattentive driving, which by its very definition is a lesser offense than reckless driving; thus, she did not commit a "serious offense" under I.C. § 49-1405(1), such that Sutton could arrest her for an offense committed outside his presence. Merrill was not involved in an accident that would have brought her actions within the purview of I.C. § 49-1408(2). The exceptions found in I.C. §§ 49-1405 and 49-1408 do not apply. However, Merrill was not arrested for inattentive driving.

## **B. Was the Arrest of Merrill Pursuant to I.C. § 49-1407(1) Valid?**

Idaho Code § 49-1409 provides that whenever a person is stopped by a peace officer for a misdemeanor traffic violation, and that person is not required to be taken before a magistrate as permitted or required by Title 49, the officer *shall* issue a citation as provided by § 19-3901 and by rule of the Supreme Court. See *State v. Foldesi*, 131 Idaho 778, 781, 963 P.2d 1215, 1218 (Ct. App. 1998) (emphasis added). The Court of Appeals stated:

Thus, for misdemeanor traffic violations, an officer must issue a citation rather than make an arrest unless there exist circumstances under which the arrest is specifically 'required or permitted' under Title 49.

*Foldesi*, 131 Idaho at 782. The applicable circumstances under which arrest is specifically permitted can be found in I.C. § 49-1407. Idaho Code § 49-1407(1) states that when a person is stopped by a peace officer for a misdemeanor violation and the person is not required to be brought before a magistrate, in the discretion of the officer, the person may be given a traffic citation or be taken before the proper magistrate when the person does not furnish satisfactory evidence of their identity or when the officer has *reasonable and probable grounds to believe that the person will disregard a written promise to appear in court*. The discretion an officer has regarding the issuing of a traffic citation and release versus taking the offender without unnecessary delay before a magistrate is very narrow. *Hallstrom v. City of Garden City*, 991 F. 2d 1473, 1478 (9<sup>th</sup> Cir. 1993). Idaho Criminal Rule 5(b) provides that a defendant arrested, whether or not pursuant to a warrant, shall be taken before a magistrate in that judicial district without unreasonable delay; the delay cannot be more than twenty-four hours following the arrest excluding Saturdays, Sundays, and holidays.

Here, Merrill was cited for inattentive driving and, upon signing the citation, was

arrested because of Sutton's belief that she would disregard her written promise to appear in court. It is not in dispute that Sutton told Merrill she must sign the citation as a promise to appear or face arrest. Affidavit of Ronald Sutton, ¶ 21. Merrill stated that she would write a letter to the court because she would be unable to appear, she then reluctantly signed the citation and again stated she would write a letter rather than appear. Affidavit of Merrill Ihmaid, ¶ ¶ 16-19. Upon hearing Merrill's statement for the second time, Sutton took her into custody pursuant to I.C. § 49-1407(1). Affidavit of Ronald Sutton, ¶ 25. The pertinent portions of the discussion, which was recorded, are as follows:

Trooper Sutton: It is, but you have the right to go to court, and if you disagree, which sounds like from what I talked to you before you didn't feel you were driving poorly.

Merrill Ihmaid: No, I thought I was fine.

Trooper Sutton: Come back to court, ah.

Merrill Ihmaid: I'm not coming back to Idaho to Court.

Trooper Sutton: Okay.

Merrill Ihmaid: Unless someone wants to pay me for that.

Trooper Sutton: Well, we don't pay you for that.

Merrill Ihmaid: That's impossible.

\* \* \*

Merrill Ihmaid: What's the fine?

Trooper Sutton: I don't set a fine on it. That's why you'll have to contact the court.

They may make you come back once, as a requirement, to Coeur d'Alene, to Kootenai County court.

Merrill Ihmaid: I'm not coming back here.

Trooper Sutton: Okay, well, if you don't you'll have a warrant for your arrest, so.

Merrill Ihmaid: Not if I never come back here.

Trooper Sutton: Well, then they'll suspend your license. I'm saying, come take care of it, okay.

Merrill Ihmaid: I mean that's just, that's just insane.

Trooper Sutton: Okay, I need you to sign there as a promise to appear in court.

Merrill Ihmaid: What if I don't sign it?

Trooper Sutton: If you don't sign it I'll take you to jail right now, I,

Merrill Ihmaid: Are you serious, right?

Trooper Sutton: I'm not b-s-ing you, I'm just telling you how the law works.

\* \* \*

[Ihmaid signs the citation]

Trooper Sutton: You're going to appear on this?

Merrill Ihmaid: I am not going to appear. I'll, I'll write them a long letter.

Trooper Sutton: Okay.

Merrill Ihmaid: I'll write the judge a letter.  
Trooper Sutton: Okay. Well if you're not willing to appear, go ahead, turn around and put your hands behind your back.  
Merrill Ihmaid: No, just.  
Trooper Sutton: and I'll place you in custody.  
Merrill Ihmaid: just, just. No, I mean  
Trooper Sutton: No, no, turn, turn around.  
Merrill Ihmaid: I'll appear. I will. I'll appear.  
Trooper Sutton: Turn around.  
Merrill Ihmaid: I'll appear.  
Trooper Sutton: Turn around, Turn around.  
Merrill Ihmaid: I didn't understand, I  
Trooper Sutton: Put your hands behind your back.  
Merrill Ihmaid: I apologize. I didn't understand. Oh, my son's crying. I, I didn't understand, honey.  
Trooper Sutton: Get in the car, get in the car.  
Merrill Ihmaid: Come on.  
Trooper Sutton: Get in the car.  
Merrill Ihmaid: Don't cry, it's okay, it's okay, sweetie. I didn't understand. I thought that I could, I could, that I could write a letter and pay my fine.  
Trooper Sutton: You have to appear in court. That's why I've  
Merrill Ihmaid: I'll  
Trooper Sutton: (to adult passenger) I'll come talk to you in a minute.  
Merrill Ihmaid: I'll absolutely appear. I did not understand.  
Trooper Sutton: Okay, I explained that to you several times.

Affidavit of Michele A. Robbins, pp. 4-6.

Merrill argues she was arrested because of her written promise to appear, via her signature on the citation, which was coerced and that forcing her to sign the citation, and that Sutton then used that signature as the basis for his arrest. Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 7. Merrill argues Sutton's failure to simply serve the citation (without Merrill's signature) violates Idaho Misdemeanor Criminal Rule 5(c).

Idaho Misdemeanor Criminal Rule 5(c) states that if a defendant fails or refuses to sign the written promise to appear, a peace officer *may* serve the citation on the defendant by personal delivery and indicate the service on the face of the citation. I.M.C.R 5(c). Clearly, this is discretionary upon the officer.

The ability to arrest for a misdemeanor arises in this particular case under I.C. § 49-1407(1). The ability to arrest under that statute is independent of what happens vis-à-vis I.M.C.R. 5(c) and the person signing the citation or the officer serving the citation without the person's signature. Under I.M.C.R. 5(c), an officer may request a person to sign the written promise to appear in court. If the person refuses to sign, the officer may simply serve the citation on the person, and the officer notes that personal service on the citation with the officer's signature. It is Idaho Code § 49-1407(1) that allows an officer to arrest a person (the statute actually reads "taken before a magistrate" rather than "arrested"): "when the person does not furnish satisfactory evidence of identity or when the officer has reasonable and probable grounds to believe the person will disregard a written promise to appear in court."

Sutton's position is that a person's refusal to sign the citation is grounds to arrest that person for an offense not committed in his presence. Affidavit of Ronald Sutton in Support of Motion for Summary Judgment, p. 3, ¶ 21. At oral argument, this Court indicated it was not persuaded by that interpretation. At oral argument, the Court indicated its interpretation was the arrest in that situation could not occur unless the predicate citation had been signed by the person (the written promise to appear in court). Upon further analysis, this Court is persuaded that Sutton's interpretation is correct, that an officer need not first secure the written promise via their signature on the citation. This Court is convinced the proper interpretation of I.C. § 49-1407(1) is simply that the officer have a reasonable belief that the person would disregard a written promise *if* one were procured. That reasonable belief could arise from a refusal of the person to sign the citation, and such refusal to sign the citation would certainly be some evidence of their refusal to appear in court. This Court is now convinced that the

person's signature, the "written promise", need not be procured first before an officer later forms a reasonable belief the person will disregard a written promise to appear in court.

All of this is somewhat academic, as Sutton *did* procure Merrill's signature, her written promise to appear in court. That signature alone is some evidence that cuts against Sutton's claimed reasonable belief that Merrill would not appear in court. It was before and just after she gave her signature that Merrill indicated quite clearly, that she was not intending to come back to court in Idaho. At that point in time, Sutton had "reasonable and probable grounds to believe [Merrill] would disregard a written promise to appear in court." However, once Sutton began placing the handcuffs on Merrill, she became contrite and compliant with the requirement to return to Idaho. While handcuffs often have that effect, the "overall situation" here creates a jury issue. Sutton is essentially asking the Court to hold that once Merrill gave her indication she would not return, Sutton had the absolute right to arrest her, even though quite clearly after the point of being handcuffed, Merrill changed her tune. The "overall situation" is this is the mother of a minor child, driving her husband and that child home from Silverwood while on vacation. There was no indication of prior criminal history, no indication of impaired driving, simply inattentive driving. Merrill was stubborn, but then once Sutton began handcuffing, Merrill became compliant and promised to appear. This Court finds it is a jury issue as to whether her complaint and contrite attitude and subsequent promise to appear, changes Sutton's initial "reasonable and probable grounds to believe the person will disregard a written promise to appear in court."

It was not improper for Sutton to direct Merrill to sign the citation or face arrest. Again, that is academic, because Merrill *did* sign the citation. Merrill was arrested for

her statements that she would not appear. At that point in time, I.C. § 49-1407(1) allows Sutton to arrest Merrill. However, there is a jury issue as to the events during and following handcuffing changed Sutton's "reasonable and probable grounds to believe the person will disregard a written promise to appear in court." In the light most favorable to Merrill, summary judgment is inappropriate on this issue as questions of material fact remain and the moving party, defendants, have not established that they are entitled to judgment as matter of law. There is an issue of fact as to whether Sutton's arrest of Merrill was valid.

Plaintiffs claim that because Merrill signed the citation under Sutton's threat that if she didn't she'd be arrested, somehow equitably estops Sutton from acting on Merrill's statements that she would not appear in court. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 10. The argument is that Sutton made a false representation when he said he could arrest her if he didn't sign the citation. *Id.* This Court finds such to not be a false representation. The argument continues that Merrill relied on Sutton's statement (that he could arrest her if she didn't sign) when she signed the citation. That might be true. However, the last requirement for estoppel, that "the party asserting estoppel (Merrill) relied upon the misrepresentation or concealment to her prejudice", is not even addressed by plaintiffs in their brief. In essence, Merrill would be arguing that she relied upon Sutton's false statement that he could arrest her if she didn't sign, so she signed, and based her subsequent oral refusal to appear in court upon her written promise to appear in court. That makes no sense. Defendants are entitled to summary judgment on the issue of equitable estoppel.

### **C. Is Sutton Entitled to Qualified Immunity?**

In evaluating whether an officer is entitled to qualified immunity the United States

Supreme Court requires that it be determined as a threshold matter whether, in the light most favorable to the plaintiff, the facts alleged show that the officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Here, that issue is whether the arrest at issue was proper. As indicated immediately above, that is a jury question.

A warrantless arrest is unlawful unless it is supported by probable cause. *State v. Kysar*, 116 Idaho 992, 993, 783 P.2d 859, 860 (1989) (reasonable or probable cause for an arrest exists where the officer possesses information that would lead a person of ordinary care and prudence to believe or entertain an honest or strong suspicion that the person arrested is guilty.) If the violation of a constitutional right can be made out on a favorable view of the plaintiff's submissions, the next question is whether the right at issue is clearly established. *Saucier*, 533 U.S. at 201. The contours of the right must be sufficiently clear that a reasonable officer would understand that what he was doing would violate the right. *Anderson v. Creighton*, 483 U.S. 635 (1987).

It is without question that the right to be free from warrantless arrests not supported by probable cause is a clearly established right. *Kysar*, 116 Idaho at 993; *State v. Pannell*, 127 Idaho 420, 425, 901 P.2d 1321, 1326 (1995). The issue before this Court on summary judgment is whether, in the light most favorable to Merrill, Sutton would have believed his conduct was lawful. An issue of fact remains as to whether Sutton had reasonable and probable grounds to believe Merrill would disregard her written promise to appear in court. Because this is a disputed material fact, summary judgment is inappropriate on this issue.

#### **D. Did Sutton use Excessive Force?**

The United States Supreme Court has determined that whether an officer used

excessive force in arresting an individual is to be determined under the objective reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 388 (1989). Factors to consider are: (1) the severity of the crime, (2) whether the suspect poses an immediate threat to officers or others, and (3) whether the suspect is actively resisting or attempting to flee. Merrill argues that any use of force in an unlawful arrest is excessive and cites *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953). In *Anderson*, the Court states:

The officer making the arrest must not subject the person to any more force or restraint than is necessary for such arrest and detention; (citations omitted); and he is guilty of assault and battery if he uses unnecessary and excessive force.

*Anderson*, 73 Idaho at 345. Defendants argue there is no established rule which would prohibit Sutton from using the force he did in arresting Merrill. Memorandum in Support of Defendants' Motion for Summary Judgment, p. 15. In the light most favorable to the non-moving party, Merrill, whether or not Sutton used excessive force is a question for the trier of fact and cannot be resolved on summary judgment.

#### **E. Plaintiffs' Federal Law Claims?**

Merrill argues her rights were violated because she was never read her *Miranda* rights, she was searched and booked into jail, the vehicle was searched, and because she, her husband, and their child were discriminated against in violation of 42 U.S.C. § 1983. Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, pp. 12-13, 15, and 19.

##### **1. Are Defendants Entitled to Summary Judgment on Plaintiffs' Fifth Amendment violation claim?**

The Fifth Amendment, applied to the states via the Fourteenth Amendment, provides that no person shall be compelled to be a witness against himself. U.S.

CONSTITUTION amend. V. The privilege against self-incrimination protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. *Kastigar v. U.S.*, 406 U.S. 441, 445, 92 S.Ct. 1653 (1972). In *Chavez v. Martinez*, the Supreme Court held that the act of coercing a statement from a suspect is not in and of itself a violation of the Fifth Amendment upon which a § 1983 claim could be predicated. 538 U.S. 760, 123 S.Ct. 1994 (2003). In order for the Fifth Amendment to be implicated, a suspect must have been compelled to be a witness against himself in a criminal case and that there is no criminal case until “legal proceedings” have been initiated at the earliest. *Id.* at 766-767.

Defendants’ argument that plaintiffs cannot assert a *claim for damages* under 42 U.S.C. § 1983 for Sutton’s failure to provide *Miranda* warnings because she was never compelled to be a witness against herself in a criminal proceeding is well taken. Sutton’s failure to provide Merrill with *Miranda* warnings does not give rise to a violation of her Fifth Amendment right against self-incrimination. As a matter of law, the privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Conduct by law enforcement may ultimately impair that right, but a constitutional violation occurs only at trial. *Chavez*, 538 at 767; *Withrow v. Williams*, 507 U.S. 680, 692, 113 S.Ct. 1745 (1993) (describing the Fifth Amendment as a “trial right”).

Because no criminal legal proceedings were commenced, summary judgment for the defendants is proper as to plaintiffs’ claim for violation of her Fifth Amendment rights, there exists no dispute as to questions of material fact and defendants are entitled to judgment as a matter of law.

## 2. Are Defendants Entitled to Summary Judgment on Plaintiffs' Fourteenth Amendment Claims of Unlawful Search and Seizure?

Merrill argues that the Fourteenth Amendment protects her, and all citizen of the United States, from unlawful searches and seizures. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 13. Presumably, Merrill is referring to Fourth Amendment protections applied to the states via the Fourteenth Amendment. Warrantless searches are *per se* unreasonable under the Fourth Amendment, subject to a few specifically established, well-delineated exceptions. *Katz v. U.S.*, 389 U.S. 347, 356, 88 S.Ct. 507 (1967). The stop of a vehicle constitutes seizure of its occupants and is therefore subject to Fourth Amendment restraints. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1395-6 (1979). Although a vehicle stop is "limited in magnitude compared to other types of seizures, it is nonetheless a 'constitutionally cognizable' intrusion and therefore may not be conducted 'at the unbridled discretion of law enforcement officials.'" *Prouse*, 440 U.S. at 661. A vehicle stop is limited in scope and duration and is therefore analyzed under the principles set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). *Prouse*, 440 U.S. at 653. The two narrowly drawn, recognized exceptions to the warrant requirement of the Fourth Amendment arguably applicable here are the search incident to a lawful arrest exception and the automobile exception. See *e.g.*, *State v. Veneroso*, 138 Idaho 925, 929, 71 P.3d 1072, 1076 (Ct. App. 2003).

Here, Merrill argues the search of a person and their property is invalid and violative of constitutional rights when based on an unlawful arrest, and a search incident to arrest can not be valid if the underlying arrest was without a warrant and without probable cause. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 14. Defendants argue the arrest pursuant to I.C. § 49-1407(1)

was valid and that a search incident to that arrest cannot violate the Constitution.

Defendants' Reply Memorandum, p. 11. Ultimately, whether the arrest was valid and based on probable cause remains in dispute.

As an alternate ground, the automobile exception provides a police officer the authority to search an automobile and the container in it where the officer has probable cause to believe the automobile contains evidence of a crime. *State v. Gallegos*, 120 Idaho 894, 898, 821 P.2d 949, 953 (1991). Since the crime was inattentive driving, Sutton had no probable cause to believe that Merrill's car contained evidence of a crime. Because questions of fact remain, summary judgment is not appropriate on this issue.

### **3. Is Defendant Sutton Entitled to Summary Judgment on Plaintiffs' 42 U.S.C. § 1983 action?**

Merrill argues that her rights were violated with regard to the search, seizure and arrest by Sutton under 42 U.S.C. § 1983. Plaintiffs' Memorandum In Opposition to Defendants' Motion for Summary Judgment, p. 15. Defendants argue that they are entitled to immunity under § 1983 because the search, seizure and arrest were lawful and in no way based on plaintiffs' nationality. Defendants' Reply Memorandum, p. 11. 42 U.S.C. § 1983 states that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

Section 1983 provides a cause of action for anyone who is deprived of the right secured by the United States Constitution or federal law by a person acting under the color of

state law. *Bryant v. City of Blackfoot*, 137 Idaho 307, 314, 48 P.3d 636, 643 (2002). Material questions of fact remain surrounding what was meant by what Sutton said after the arrest of Merrill. Merrill argues that although the initial stop was not based on ethnicity, her arrest was; Sutton asked for a review of Ahmad Ihmaid to determine if he was involved in terrorism and referred to Ahmad Ihmaid's middle initial as "M as in Mustafa." Affidavit of Michele Robbins, p. 7-8. It is without question that Sutton acted under the color state law in the instant case, but it is for a trier of fact to determine whether he deprived plaintiffs of the rights secured by the United States Constitution or federal law.

Local governments can be sued directly under section 1983 where a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" deprives an individual of his or her constitutional rights. *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2036 (1978). Governmental entities may also be sued if their unofficial custom works a constitutional deprivation. *Id.* However, a governmental entity cannot be held liable under section 1983 for *respondeat superior*. *Id.* at 691. Therefore, the governmental entity can only be held liable if the actions conducted pursuant to its official policies or customs caused a constitutional deprivation. See e.g. *Limbert v. Twin Falls County*, 131 Idaho 344, 347, 955 P.2d 1123, 1126 (Ct.App.1998)). Here, any liability would have to be based on the Idaho State Police Procedure Patrol Operations Handbook, see Affidavit of Clark Rollins, Exhibit A, but plaintiffs have not made a section 1983 claim against the State of Idaho or the Idaho State Patrol. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 19.

Because only Sutton is being sued under section 1983, whether he is entitled to

immunity for the section 1983 claim turns on whether the arrest, search and seizure were violative of plaintiffs' constitutional rights and whether a reasonable officer would understand that what he was doing would violate those rights. See, *Anderson v. Creighton*, 483 U.S. 635 (1987). These questions of fact are not properly resolved at summary judgment.

### **C. Plaintiffs' State Law Claims.**

#### **1. Did Defendants Unlawfully Imprison and Detain Merrill?**

False imprisonment is the unlawful violation of the personal liberty of another. I.C. § 18-2901. The true test of false imprisonment is not the extent of the restraint or the means by which the restraint is accomplished, but rather the lawfulness of it. *Griffin v. Clark*, 55 Idaho 364, 373, 42 P.2d 297, 301 (1935). False imprisonment does not require actual force or threats; injury to a person, character, or reputation; that the act be committed with malice or wrongful intention; or that the act be under the color of law, it only requires that an individual is restrained of liberty against his or her will. *Id.* Thus, in the instant case, whether Merrill was unlawfully imprisoned turns on the lawfulness of the arrest, which remains a question for the trier of fact.

#### **2. Are Defendants Entitled to Summary Judgment on Merrill's Claims for Intentional/Negligent Infliction of Emotional Distress?**

Idaho recognizes the tort of negligent infliction of emotional distress and requires that there must be a breach of a recognized legal duty to support such a claim. *Nation v. State Dept. of Correction*, 144 Idaho 177, \_\_\_, 158 P.3d 953, 967 (2007).

Importantly, negligent infliction of emotional distress requires a showing of physical injury or manifestation of such injury. *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990). In *Czaplicki v. Gooding Joint School Dist.*, 116 Idaho 326, 332, 775 P.2d 640, 646 (1989), the Idaho Supreme Court found that where plaintiff's complaint

and affidavit described emotional injuries that manifested in physical symptoms such as severe headaches, occasional suicidal thoughts, sleep disorders, reduced libido, fatigue and stomach pains, the allegations were enough to raise an issue of fact which would require trial on that issue. Here, plaintiffs allege crying uncontrollably upon mention of the incident, having trouble eating, that the incident has affected their relationship, that Merrill has sought counseling, that Ari Kira was physically upset at the time of the incident and expressed fear for his parents when they had to return to Idaho, that Ari Kira expresses fear for the police in general, and the tearing up of photos of the trip by Ari Kira as physical manifestations of emotional distress. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 22. In the light most favorable to plaintiffs, based on *Czaplicki*, these allegations suffice to raise an issue of fact.

Intentional infliction of emotional distress, in turn, requires: (1) that the conduct at issue be intentional or reckless, (2) that the conduct be extreme and outrageous, (3) that there be a causal connection between the wrongful conduct and the emotional distress and (4) that the emotional distress be severe. *Curtis v. Firth*, 123 Idaho 598, 601, 850 P.2d 749, 751 (1993). Courts have required very extreme conduct before awarding damages for the intentional infliction of emotional distress. *Edmondson v. Shearer Lumber Prods.*, 139 Idaho 172, 180, 75 P.3d 733, 741 (2003). And even where conduct is unjustifiable, it does not necessarily rise to the level of being atrocious and beyond all possible bounds of decency, such that an average member of the community would find it outrageous. *Id.*

Whether a defendant's conduct is so extreme and outrageous to allow recovery is a matter of law and can properly be determined on summary judgment. *Edmondson*,

139 Idaho at 180, 75 P.3d at 741. Even if arresting Merrill is found impermissible by the jury under I.C. § 49-1407(1), and even if a jury finds the search of plaintiffs' vehicle pursuant to that arrest was wrongful, the conduct of Sutton is simply not extreme or outrageous. All Sutton did was transport and book Merrill. There is nothing presented to the Court to show he engaged in any extreme or outrageous conduct in so doing. Even if crying uncontrollably upon mention of the incident, having trouble eating, and tearing up photos of the trip are manifestations of severe emotional distress, no damages are awarded in the absence of extreme and outrageous conduct by a defendant. *See, Edmondson*, 139 Idaho at 179. This Court finds as a matter of law, no extreme or outrageous conduct on the part of Sutton. Accordingly, plaintiffs' intentional infliction of emotional distress claims against defendants fails, and defendants are entitled to summary judgment on those claims.

### **3. Does I.C. § 6-904 Provide Immunity from Liability to Defendants?**

Defendants argue that Sutton is immune from liability under I.C. § 6-904 because there has been no showing that he acted with malice or criminal intent. Defendants' Reply Memorandum, p. 12. Plaintiffs argue that the absence of authority or probable cause for the arrest constitutes intentional commission of a wrongful act or malice. Plaintiffs' Memorandum In Opposition to Defendants' Motion for Summary Judgment, p. 21.

Idaho Code § 6-904 states that a governmental entity and its employees, acting within the course and scope of their duties without malice or criminal intent, are not liable for claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. I.C. § 6-904(3). Malice under this section means

actual malice, the commission of a wrongful or unlawful act without legal justification or excuse and with ill will. *Anderson v. City of Pocatello*, 112 Idaho 76, 731 P.2d 171 (1986). Thus, actual malice requires a wrongful act without justification combined with ill will. *Evans v. Twin Falls County*, 118 Idaho 210, 216, 796 P.2d 87, 93 (1990).

Defendants argue that there was no showing of malice by Sutton. Plaintiffs argue Sutton's use of derogatory and discriminatory language in dealing with plaintiffs is clear evidence of malice on Sutton's part. Plaintiffs have arguably set forth facts from which one may infer ill will on the part of Sutton. Therefore, a grant of summary judgment is improper.

### III. CONCLUSION AND ORDER.

**IT IS HEREBY ORDERED**, for the reasons stated above, summary judgment on the issues of: (1) the alleged violation of plaintiffs' Fifth Amendment rights, that Merrill was never read her *Miranda* rights, (2) the intentional infliction of emotional distress claim, and (3) plaintiffs claim of estoppel under I.C. § 49-1407(1); is GRANTED. As to all other issues, summary judgment is DENIED.

Entered this 8th day of August, 2008.

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John T. Mitchell, District Judge

#### Certificate of Service

I certify that on the \_\_\_\_\_ day of August, 2008, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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