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AT \_\_\_\_\_ O'clock \_\_\_\_ M  
CLERK, 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 BOUNDARY**

<b>STATE OF IDAHO,</b>	)	
	)	Case No. <b>BF CR 2007-558</b>
<i>Plaintiff,</i>	)	
vs.	)	<b>MEMORANDUM DECISION AND</b>
	)	<b>ORDER ON APPEAL</b>
<b>CLARENCE TAMS,</b>	)	
	)	
<i>Defendant.</i>	)	

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**I. INTRODUCTION AND PROCEDURAL HISTORY.**

This is an appeal from the Magistrate Division from the October 17, 2009, Order of Magistrate Judge Justin Julian denying defendant's motion to dismiss, and an appeal from the finding of guilt following court trial on October 17, 2007. Notice of Appeal, p. 1.

On May 3, 2007, defendant Clarence Tams (Tams) was driving a tractor trailer full of cattle from a feedlot in Alberta, Canada, to a meat processing plant in the state of Washington. Tams was driving in Idaho and was stopped at the truck stop near the intersection of Highway 95 and U.S. Highway 2 in an area known as three-mile junction, about three miles North of Bonners Ferry, Idaho. October 17, 2007, Trial Transcript, p. 3, LI. 3-22.

From the truck stop, Tams made a low speed left turn onto U.S. Highway 95, when Officer Donald Moore (Moore) observed a large amount, about 35-40 gallons, of brown

liquid substance, a mixture of cattle urine, manure and rainwater, escape from the trailer onto the highway for about 3-4 seconds for about 15 yards. *Id.*, p. 4, L. 15 – p. 5, L. 6; p. 7, LI. 21-25; p. 6, LI. 3-10. Moore is certain the spillage came from under the trailer and not out the side of the trailer. *Id.*, p. 4, LI. 15-24; p. 12, LI. 15-20. Moore followed Tams south on Highway 95 to Bonners Ferry, through Bonners Ferry and then stopped Tams with his overhead lights at the southern end of Bonners Ferry. *Id.*, p. 8, LI. 14-16; p. 9, L. 25 – p. 26, L. 1. As Tams pulled his tractor trailer to the side of the road, a small amount of brown liquid substance escaped from the trailer onto the highway. *Id.*, p. 9, l. 19 – p. 15, L. 14. This small amount of liquid was located to the side of Tams' trailer on the un-travelled portion of the highway. *Id.*, State's Exhibits 1-6. In between the first and second spill, Moore apparently observed no other liquid being discharged. Moore did not examine the small amount of liquid on the highway at the stop. *Id.*, p. 8, LI. 24-25. Moore did not go back and examine the big spill he first observed. *Id.*, p. 22, LI. 21-25. On his way back to Canada the next day, Tams specifically looked at the site of the big spill and “didn't see anything.” *Id.*, p. 83, LI. 4-25. Tams attributed that to the fact that most of the liquid was water. *Id.*, p. 84, LI. 1-2. Moore opined, based on smell, the liquid was cattle urine and feces. *Id.*, p. 8, L. 22-25. Moore did not observe anyone adjust the drains in the trailer the entire time he followed it. *Id.*, p. 18, L. 2 – p. 19, L. 3.

At that stop on May 3, 2007, Moore cited Tams for “Littering”, for “placing debris upon a public highway”, a violation of Idaho Code § 18-3906. *Id.*, p. 8, LI. 18-22; citation. The debris was the cattle urine and feces. *Id.*, p. 8, LI. 22-23.

It is undisputed that once the cattle are loaded in Canada, the load is sealed by a veterinarian, and Tams is not allowed to break the seal. *Id.*, p. 34, L. 16 – p. 36, L. 25. The seal is put on by the Canadian government and is required by United States federal law.

*Id.* Only a veterinarian may break the seal. *Id.* Tams must essentially drive the load of cattle non-stop to the slaughterhouse in the Tri-Cities. In his briefing, Tams claims: “The floor drains cannot be opened while the trailer is loaded with the cattle do [due] to risk of an animal putting a leg down the drain resulting in injury to the animal.” Appeal Brief, p. 4. Tams takes issue with Judge Hardin’s finding that: “Using a cane to move those cattle aside and open that drain because if a mixture of urine, feces, and water comes out of that vehicle onto the roadway is going to significantly increase any stopping distances...”, is not supported by the record. *Id.*, pp. 12-13. Judge Hardin did make such a finding. October 17, 2007, Trial Transcript, p. 94, LI. 20-25. Such a finding is supported, as Tams testified that he could have opened the floor drains. *Id.*, p. 79, LI. 20-22. However, Tams also testified as to *how* he could do this. Tams testified it is not at all safe, and it would involve coming down from the top of the trailer through two levels of trailer packed with animals. *Id.*, p. 72, L. 18 – p. 73, L. 11. It is not safe because you are essentially placing yourself in a confined area with a bunch of animals. *Id.* Tams has only done this on one occasion in his career, and that was with the help of someone else. *Id.* What is beyond dispute is that Tams did nothing at any time to adjust the floor drains. *Id.*, p. 79, LI. 16-19.

On July 10, 2007, Tams filed a Motion to Dismiss. That matter was briefed and affidavits were filed. At the conclusion of the September 11, 2007, oral argument, Judge Justin Julian denied Tams’ Motion to Dismiss.

A court trial was held on October 17, 2007, before Judge Quentin Hardin. At the end of the State’s case, Tams moved for a judgment of acquittal. *Id.*, p. 25, LI. 16-23. Judge Hardin denied that motion to dismiss, stating that I.C. § 18-3906 and I.C. § 18-101 do not require criminal negligence in the sense that his behavior must be reckless or heedless or wanton”; “all it requires is the willfulness which may be an indifference to the safety or

rights of others.” *Id.*, p. 26, Ll. 15-19.

At the conclusion of that court trial, Judge Hardin found Tams guilty of “Littering” and imposed fine and costs in the amount of \$100.00, and imposed two days on the Sheriff’s Labor Program or four actual days in jail. Tams elected the Sheriff’s Labor Program, but posted an appeal bond and Judge Hardin stayed execution of the sentence pending this appeal.

The next day, October 18, 2007, Tams filed his Notice of Appeal. The appeal was assigned to District Judge Steve Verby. On May 2, 2008, Tams filed his Appeal Brief. On May 30, 2008, the State filed Respondent’s Appeal Brief. On August 6, 2008, Tams filed Appellant’s Rebuttal Brief. At that point, nothing further happened and no oral argument was scheduled.

The next event evidenced in the file was the January 9, 2009, Order of Reassignment, assigning the undersigned District Judge for purposes of the appeal. On March 10, 2009, this Court scheduled oral argument for April 27, 2009. Later in the day on March 10, 2009, the parties stipulated to waive oral argument and have the matter submitted on the briefs. On April 17, 2009, this Court ordered the oral argument waived and the matter submitted on the briefs. Accordingly, the matter is now at issue.

In Tams’ Notice of Appeal, he raises six issues: 1) Judge Julian erred in denying his motion to dismiss by finding Idaho Code § 18-3906 applies to animal waste falling upon a public highway; 2) the Court [unspecified which court] erred in failing to find Idaho Code § 18-3906 violates the Interstate Commerce Clause; 3) Judge Julian erred in finding without any evidence in the record that local government had a superseding interest in requiring livestock haulers engaged in interstate/international commerce to modify equipment; 4) Judge Hardin’s finding at trial that Tams intentionally or carelessly permitted

animal waste to be discharged upon the public right of way is not supported by the record; 5) Judge Hardin erred in finding that Tams had the option available to him and the duty to leave the right of way onto private property where the drains could be opened and the waste discharged onto private property off the public right of way; and 6) Judge Hardin erred in failing to require the prosecution to prove each element of the crime, including criminal intent or criminal negligence beyond a reasonable doubt. Appeal Brief, pp. 4-5. In Appellant's Rebuttal Brief, Tams argues for the first time that there is no evidence that the Idaho Transportation Department posted notices of this littering statute, Idaho Code § 18-3906(1), as required by that statute. Appellant's Rebuttal Brief, p. 1. While this issue was never mentioned in the record, and thus the State failed to prove an element of this offense, this issue was raised for the first time in Tams' Rebuttal Brief. Failure of an appellant to raise an issue in the appellant's initial brief, precludes review by the appellate court. *Rhead v. Hartford Ins. Co.*, 135 Idaho 446, 452, 19 P.3d 760, 766 (2001).

## **II. STANDARD OF REVIEW.**

The scope of appellate review on an appeal to the district court from the magistrate's division shall be the same as review from the district court to the Supreme Court. I.R.C.P. 83(u). In an action originally heard in a magistrate's court, the district court should adhere to the well recognized rule that findings based on substantial and competent, though conflicting, evidence will not be set aside on appeal. *Hawkins v. Hawkins*, 99 Idaho 785, 589 P.2d 532 (1978). Findings of fact will not be disturbed if they are supported by substantial and competent evidence. *Rhead v. Hartford Ins. Co.*, 135 Idaho 446, 448, 19 P.3d 760, 762 (2001). This Court will freely review whether the magistrate court's conclusions of law correctly stated the legal rules or principles and correctly applied those rules to the facts found. *Id.* This Court is free to draw its own legal conclusions from the

facts presented. *Id.*

### III. ANALYSIS.

#### A. Applicable Statutes.

Idaho Code § 18-3906 reads:

**Placing debris on highways. – (1)** If any person shall willfully or negligently throw from any vehicle, place, deposit or permit to be deposited upon or alongside of any highway, street, alley or easement used by the public for public travel, any debris, paper, litter, glass bottle, glass, nails, tacks, hoops, cans, barbed wire, boards, trash or garbage, lighted material, or other waste substance, such persons shall, upon conviction thereof, be punished by a fine not exceeding three hundred dollars (\$300) or by imprisonment in the county jail not exceeding ten (10) days. \* \* \* The Idaho transportation department is directed to post along state highways at convenient and appropriate places, notices of the context of said law.

Idaho Code § 18-7031, which makes it a misdemeanor for any person to deposit debris on public or private property, uses the same language (“...any debris, paper, litter, glass bottles, glass, nails, tacks, hooks, cans, barbed wire, boards, trash, garbage, lighted material or other waste substances...”). Idaho Code § 18-101(1) reads:

The word “willfully” when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

See *State v. Poe*, 139 Idaho 885, 88 P.3d 704 (2004). Idaho Code § 18-101(2) reads:

The words “neglect,” “negligence,” “negligent,” and “negligently,” import a want of such attention to the nature of probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.

#### B. A Mixture of Cattle Urine, Feces and Rain is not “Debris”.

This Court has not been cited to any statutory definition of “debris”. This Court has not found a statutory definition of the word “debris” on its own. According to Webster’s Ninth New Collegiate Dictionary, (1983), p. 329, debris is defined as: “to break into pieces”,

“the remains of something broken down or destroyed”, or “an accumulation of fragments of rock.” A mixture of cattle urine and feces does not comport with any of these definitions of “debris.”

It is understandable how Judge Hardin could conclude that a mixture of cattle urine and feces *could* be a “waste substance” as enumerated in I.C. § 18-3906. But if that were the case, it would be the only *liquid* in that statutory list of: “debris, paper, litter, glass bottle, glass, nails, tacks, hoops, cans, barbed wire, boards, trash or garbage, lighted material, or other waste substance”. While Moore cited Tams for “Littering”, that word is not found in I.C. § 18-3906. That same dictionary defines “litter” as: “trash, wastepaper, or garbage scattered about (trying to clean up the roadside)”. Webster’s Ninth New Collegiate Dictionary, (1983), p. 698. No liquids are mentioned in that definition of litter. That same dictionary defines “substance” in several ways, but the most applicable is: “physical material from which something is made or which has discrete existence”. Webster’s Ninth New Collegiate Dictionary, (1983), p. 1176. This Court finds “waste substance” as used in Idaho Code § 18-3906, given the definition of “debris”, the definition of the word “littering” (since Moore used both of those words), and the definition of the word “substance”, prohibits a solid, something that remains on the road if thrown out by a driver (or permitted to be deposited by the driver), and which can be picked up. This Court finds “waste substance” as used in Idaho Code § 18-3906 does not include a liquid which, if spilled, is essentially impossible to pick up.

Tams’ argument is that Idaho Code § 18-3906 and its list of prohibited items from being thrown, placed or deposited from a vehicle: “debris, paper, litter, glass bottle, glass, nails, tacks, hoops, cans, barbed wire, boards, trash or garbage, lighted material, or other waste substance”, contemplate combustible items (debris, paper and litter, boards, trash or

garbage, lighted material), or items that would hurt vehicles on the road (glass, nails tacks, hoops, cans, barbed wires). Appeal Brief, pp. 5-7. Tams argues the rule of *ejusdem generis*, that “general and specific words in a statute which are associated together, and which are capable of an analogous meaning take color from each other, so that the general words are restricted to a sense analogous to the less general.” *Id.*, p. 6, citing 73 AmJur2d 407. The doctrine of *ejusdem generis* has been adopted in Idaho. In *State v. Kavajecz*, 139 Idaho 482, 486, 80 P.3d 1083, 1087 (2003), the Idaho Supreme Court stated:

The doctrine of *ejusdem generis*, a rule of statutory construction that finds “where general words of a statute follow an enumeration of persons or things, such general words will be construed as meaning persons or things of like or similar class or character to those specifically enumerated,” is pertinent in this case. *State v. Hart*, 135 Idaho 827, 831, 25 P.3d 850, 854 (2001).

While there is merit in Tams’ argument that Idaho Code § 18-3906 would prohibit only combustibles or sharp items that would harm tires, this Court finds the stronger application of the doctrine of *ejusdem generis* to be that Idaho Code § 19-3906 only prohibits solids and not liquids. The two enumerated descriptors in Idaho Code § 19-3906 that might apply in this case are “debris” (used specifically by Moore in issuing the citation) and “waste substance” (used by Judge Hardin at trial). Under the doctrine of *ejusdem generis*, a mixture of cattle urine, feces and rain, is not “debris” (as described by Moore in issuing the citation, October 17, 2007, Trial Transcript, p. 8, Ll. 18-22; citation), nor is it a “waste substance” (as described by Judge Hardin at the conclusion of Tams’ trial). *Id.*, p. 95, L. 6.

This statutory construction is an issue of law over which this Court has free review. *Rhead v. Hartford Ins. Co.*, *supra*, 135 Idaho 446, 448, 19 P.3d 760, 762. On this point, the decision of Judge Hardin (*Id.*, p. 96, L. 6) and Judge Julian are reversed. September 11, 2007, Transcript, p. 19, L. 1 – p. 20, L. 1. This Court specifically finds that a mixture of cattle urine, feces and rain, is not “debris” or a “waste substance” as set forth in Idaho Code

§ 18-3906.

**C. Tams' Conduct Was Not Willful or Negligent.**

The State argued to Judge Hardin:

Um, it seems to me that he was negligent. That – absent negligence given the Officers testimony this doesn't happen with other vehicles he is seeing out there that are just like this vehicle. This doesn't happen. How else can he explain it. So there are many times in the law where negligence can be proven by facts and circumstances. You don't have to have an expert witness, you don't have to go all over the truck. It's just because when common sense, you look at it and the situation and what others in the same or similar situation have encountered and this deviates substantially from that then somebody has done something wrong and that's what has happened here and that's why I submit that he's guilty.

*Id.*, p. 93, L. 12 – p. 94, L. 7. That argument ignores the testimony of Moore that the liquid did not slosh out the side of the trailer, and it ignores the uncontradicted testimony of Goodfellow and Tams that an animal must have stepped on a drain. That argument also ignores the fact that apparently there were at least two other similar “conceptually related cases” the State was prosecuting. September 11, 2007, Hearing on Defendant's Motion to Dismiss, Tr. p. 1, Ll. 3-15. In any event, Judge Hardin found:

I have reviewed Idaho Code 18-3906 and I've also listened to the testimony that the truck is sealed. But frankly if it's raining that hard, so it's filling that truck so it's going to slosh out uh I think there may be an obligation to find some farm pasture, some shipping point, some place where cattle are loaded. Using a cane to move those cattle aside and open that drain because if a mixture of urine, feces, and water comes out of that vehicle onto the roadway is going to significantly increase any stopping distances. If it sloshes out of that truck on a corner and somebody on a two wheel conveyance comes around that corner even at a lawful speed they are going to go down. Uh I have to say I am persuaded beyond a reasonable doubt that in the context of 18-3906 you are guilty of littering. A person who shall willfully or negligently permit to be deposited upon or alongside any highway used by the public for public travel a waste substance. \* \* \* But exhibits 3 and 4 show that material obviously came out of the sides of that vehicle. If it did it while stopping it'll do it while it's going threw corners and that can constitute a significant hazard to other members of the motoring public and I would find that does constitute the willful indifference to the safety or tights of other members of the motoring public.

*Id.*, p. 94, L. 17 – p. 95, L. 16. This ignores the testimony of Moore. Moore testified he saw nothing that caused the trailer to spill. *Id.*, p. 16, Ll. 9-10. Moore testified Tams drove cautiously, only travelling 25 miles per hour in a 35 mile per hour zone. *Id.*, p. 19, L. 18 – p. 20, L. 8; p. 21, Ll. 6-20. Moore also testified:

Q. Now when you came up to the intersection did you notice anything?

A. Yes sir.

Q. What?

A. I observed a cattle truck with Alberta license plate, making a left hand turn off of Highway 2 onto southbound Highway 95. As the truck was making its turn I observed a large amount of liquid coming from the underneath of the trailer by the rear wheels.

Q. Was – did any of this liquid appear to be coming from the sides of the truck.

A. No sir.

*Id.*, p. 4, Ll. 15-24. While at the time he stopped Tams, Moore seems to say the liquid came out of the side of the vehicle (*Id.*, p. 11, Ll. 11-24), Moore again clarified that the big spill **did not** come from the side of the vehicle. *Id.*, p. 12, Ll. 15-20.

The only evidence is that for this amount of liquid to come out of the trailer, one of the cattle must have stepped on a floor drain. Testimony of Brian Goodfellow, October 17, 2007, Trial Transcript, p.31, Ll. 10-19; p. 33 Ll. 7-20; p. 38, Ll. 6-19; p. 50, Ll. 10-21.

Goodfellow testified:

...probably because an animal stepped on the floor just right close to the corner of something and with the flexing of the floor. This is a little bit more rigid and it's not a fool proof method.

*Id.*, p. 52, Ll. 2-7. Tams testified the same, that the discharge was consistent with an animal stepping on the drain. *Id.*, p. 84, L. 1 – p. 85, L. 3. That being the case, how fast or slow Tams was driving is irrelevant. Tams simply has no control of where any one of these several animals places one of its four feet at any given moment.

Tams testified:

Q. Just a – two final questions. Is there anything that you intentionally did or failed to do that – that you know of that cause the uh slippage or – or uh discharge manure from your trailer?

A. There is nothing I can do other than have absolutely no hole, crack that it would have to be sealed.

Q. And is that something that is available in the industry at this point in time?

A. They don't make them like that. You need to – you have to have a clean out.

*Id.*, p. 86, Ll. 5-13.

Judge Hardin stated the actions of Tams “does not require criminal negligence in the sense that his behavior must be reckless or heedless or wanton”, “all it requires is the willfulness which may be an indifference to the safety or rights of others.” *Id.*, p. 26, Ll. 15-19. That is not necessarily wrong, but the language used by Judge Hardin does not track the statutes. As mentioned above, Idaho Code § 18-101(1) reads:

The word “willfully” when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

See *State v. Poe*, 139 Idaho 885, 905, 88 P.3d 704, 724 (2004). Idaho Code § 18-101(2) reads:

The words “neglect,” “negligence,” “negligent,” and “negligently,” import a want of such attention to the nature of probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.

Concerning “willfulness”, the State put on no proof that Tams “intended” to spill any amount of liquid as he left the weigh station. No “purpose or willingness to commit the act (spilling)” was proven. Concerning “negligence”, the State put on no evidence that there was a “want of such attention to the nature of probable consequences of the act or omission (spilling) as a prudent man ordinarily bestows in acting in his own concerns.” Had the State put on proof that Tams had spilled just before Moore witnessed the spill coming out of the gas

station, or had the State put on evidence that Tams spilled through the town of Bonners Ferry and kept on driving, there would be evidence of a “want of such attention to the nature of probable consequences of the act or omission (spilling) as a prudent man ordinarily bestows in acting in his own concerns.”

On cross-examination, Tams admitted that if you want to take a corner a certain way, a driver can get liquid to come squirting out the sides. *Id.*, p. 88, L. 18 – p. 89, L. 1. However, there is absolutely no evidence that Tams did this. In fact, the only evidence is that Moore observed the large discharge come from under the trailer and not the sides. Judge Hardin was mistaken in this factual finding. The only evidence is that Tams drove cautiously, below the speed limit, didn’t swerve, and that Moore saw no reason why such a large amount of liquid came out of the trailer.

In order for his actions or omissions to be willful under Idaho Code § 18-101(1), Tams has to *intend to do* something (or *intend to fail to do* something) to cause this leakage. There is no evidence to support a finding that the large amount of liquid came out of Tams’ trailer due to high speed cornering or some other maneuver for which Tams created. The only evidence is this fluid came from under the trailer. The only evidence as to the source of such fluid from under the trailer is an animal stepping on a drain trap. Tams is not liable for an animal stepping on a drain trap.

In order for his actions or omissions to be negligent under Idaho Code § 18-101(2), Tams acts or omissions had to lack “such attention to the nature of probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.” Since the undisputed evidence is this spill came out from underneath Tams’ trailer, and not the sides, and the undisputed evidence as to the source of such fluid emanating from under was an animal stepping on a drain trap, Tams is not guilty of lacking “such attention to the

nature of probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns”.

Judge Julian was correct in not deciding this issue on a motion to dismiss. At the time of the motion to dismiss, limited information was presented to Judge Julian, but there were disputes of facts on issues such as how much liquid came out from under the trailer, and there were credibility decisions to be made. September 11, 2007, Transcript, p. 18, LI. 1–25. Judge Julian stated:

...and I don't know as we sit here now, what the State is going to be able to prove, if they can prove up willfulness, that is that somebody intentionally pulled a lever and drained manure onto the roadway, or whether it's going to be proof of negligence. But in either event it is clear that the defense is correct that it is the State's burden to prove willful or negligent, as defined by the criminal law, beyond a reasonable doubt. So, again, uh, those issues await trial. That's what we have trials for and that's, uh, that's where were going to address those issues.

*Id.*, LI. 18-25. However, at the conclusion of the evidence, Judge Hardin concluded that Tams was negligent, and thus, guilty of violating Idaho Code § 18-3906. *Id.*, p. 94, L. 17 – p. 95, L. 16. That finding is not supported by substantial evidence.

Moore felt that he cited Tams for both the large spill at the inception of Moore's observation of Tams, and the minor spilling off the travelled portion of the highway at the point he pulled Tams off the road. *Id.*, p. 15, LI. 6-12. However, a review of State's Exhibits 1-6, show this to be the sort of *de minimus* spill that Judge Hardin specifically stated he would not find to be a violation of Idaho Code § 18-3906:

A de minimus amount of material from a drain, I'd throw the case out in a heartbeat. The amount depicted in State's exhibit 1, State's exhibit 2, State's exhibit 6, State's exhibit 5 those are de mionimis amounts of material that do not merit any kind of sanction because hauling lievestock is a legitimate function. But exhibits 3 and 4 show that material obviously came out the sides of that vehicle. If it did it while stopping it'll do it while it's going threw corners...

*Id.*, p. 95, LI. 8-13. Judge Hardin did not specifically quantify the amount of liquid on the

ground in State's Exhibits 3 and 4. While those two photos show more than the truly *de minimus* amounts depicted in Exhibits 1, 2, and 6, they do not show a large volume of liquid which was once on the ground, and they show no solids. Judge Hardin used Exhibits 3 and 4 to essentially contradict Moore, who was steadfast in his testimony that the liquid he saw initially come out of Tams trailer did not come out of the sides of the trailer. Thus, what Judge Hardin observed next to the truck at scene of the stop as depicted in Exhibits 3 and 4 cannot change the only testimony by the only person who observed the initial spill at three-mile junction, Officer Moore. Moore's testimony is that the large spill came from under the trailer and not out the side of the trailer. The only evidence as to the cause of a spill from under the trailer would be an animal accidentally stepping on a floor drain. That being the undisputed facts of this case, Tams is not "negligent", nor is his conduct "willful."

#### **D. Interstate Commerce Clause.**

In Appellant's Rebuttal Brief, Tams for the first time argues:

A review of the Court Clerk's records in Boundary County will reveal that citations for violations of I.C. 18-3906 are almost exclusively Canadian licensed operators driving Canadian licensed cattle trucks. Such is a clear showing that Boundary County is applying a different standard in applying I.C. 18-3906 to Canadian livestock haulers en route to Washington meat packing plants than to local industry such as timber and agriculture. This is an indication that Boundary County and the City of Bonners Ferry is violating the commerce clause applying the equal treatment rule that Respondent raises.

Appellant's Rebuttal Brief, p. 6. This is an odd argument for Tams to make, as in his initial brief he stated: "Defendants do not contend the Idaho Law give preferential treatment to local trucks..." Appeal Brief, p. 8. While this issue was raised by the State (Respondent's Appeal Brief, p. 17), thus, avoiding preclusion of review of that issue on appeal under *Rhead v. Hartford Ins. Co.*, 135 Idaho 446, 452, 19 P.3d 760, 766 (2001), that issue was never raised before either magistrate. Most importantly, there is nothing in the record to

support Tams' claim that "A review of the Court Clerk's records in Boundary County will reveal that citations for violations of I.C. 18-3906 are almost exclusively Canadian licensed operators driving Canadian licensed cattle trucks." Accordingly, this Court will not address this issue.

Tams' Interstate Compact Clause argument (Appeal Brief, pp. 7-10; Appellant's Rebuttal Brief pp. 4-6) is without merit. There was no showing before either magistrate as to whether the state statute (Idaho Code § 18-3906) conflicts with national policy. *R.E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal.App.3d 653, 658, 112 Cal.Rptr. 585 (Cal.App.2 Dist. 1974). As pointed out by the State, "The Constitution was not intended to prevent the states from all regulations relating to the health, safety and life of their citizens, even though that legislation may indirectly burden interstate commerce. Respondent's Appeal Brief, p. 17, citing *General Motors Corp. v. Tracy*, 519 U.S. 278, 307, 117 S.Ct. 811, 828, 136 L.Ed.,2d 761 (1997). There was no showing of what national policy was involved.

#### **IV. CONCLUSION AND ORDER.**

IT IS HERBY ORDERED THAT Judge Julian's decision regarding interpretation of Idaho Code § 18-3906 (September 11, 2007, Transcript, p. 19, L. 1 – p. 20, L. 1) on Tams' motion to dismiss is reversed. Judge Julian is affirmed in all other aspects of his decision on Tams' motion to dismiss.

IT IS FURTHER ORDERED THAT Judge Hardin's decision following the conclusion of the trial, regarding interpretation of Idaho Code § 18-3906 (October 17, 2007, Trial Transcript, p. 96, L. 6) is reversed.

IT IS FURTHER ORDERED THAT Judge Hardin's decision following the conclusion of the trial, regarding the evidence supporting a finding that Tams acted willfully or negligently, is reversed.

IT IS FURTHER ORDERED THAT Tams' conviction is set aside, his appeal bond is to be refunded, and this matter dismissed.

DATED this 27<sup>th</sup> day of April, 2009

\_\_\_\_\_  
JOHN T. MITCHELL District Judge

**CERTIFICATE OF MAILING**

I hereby certify that on the \_\_\_\_\_ day of April, 2009 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Daniel P. Featherston  
Prosecuting Attorney – John R. Douglas

Honorable Quentin Hardin  
Honorable Justin Julian

**CLERK OF THE DISTRICT COURT  
BOUNDARY COUNTY**

BY: \_\_\_\_\_  
Deputy