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Hoffer v. City of Boise Respondent's Brief Dckt. 37901

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IN THE SUPREME COURT OF THE STATE OF IDAHO

RANDY HOFFER, an individual,)
)
Plaintiff/Appellant,)
)
vs.)
)
CITY OF BOISE, a municipal)
corporation,)
)
Defendant/Respondent.)

Appeal Case No. ~~36731~~

37901

**RESPONDENT'S BRIEF IN OPPOSITION
TO THE PETITION FOR REVIEW**

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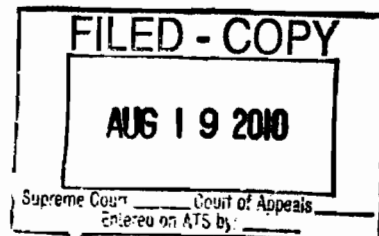


TABLE OF CONTENTS

Page No.

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE AND PROCEDURE	1
ARGUMENT	2
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

Page No.

Cases

<i>Herrera v. Conner</i> , 111 Idaho 1012, 729 P.2d 1075 (Ct. App. 1987).....	3, 4, 5
<i>Limbert v. Twin Falls County</i> , 131 Idaho 344, 955 P.2d 1123 (Ct. App. 1998).....	3, 4, 5, 6
<i>O'Connor v. Harms</i> , 111 N.J. Super. Ct. App. Div. 22, 266 A.2d 606 (1970)	5
<i>Sprague v. City of Burley</i> , 109 Idaho 656, 710 P.2d 566 (1985).....	passim
<i>Sterling v. Bloom</i> , 111 Idaho 211, 723 P.2d 755 (1986).....	4

Statutes

Idaho Code § 6-903.....	3, 6
Idaho Code § 6-903(c)	3, 6
Idaho Code § 6-904.....	3, 6
Idaho Code § 6-904(3).....	5, 6

COMES NOW, the City of Boise, by and through Scott B. Muir, Assistant City Attorney, and hereby files its response brief to the petition for review in the above-captioned matter.

STATEMENT OF THE CASE AND PROCEDURE

For purposes of convenience to the Court, Respondent City of Boise sets forth the statement of the case as originally contained in Respondent's Brief.

The City of Boise, hereinafter "the City" agrees with the Appellant's Statement of the Case, but supplements the statement of facts to give some context to the arguments. Electrical code violations at the Overland Trailer Park, hereinafter "trailer park", located at 5631 West Overland Road, Boise, Idaho are the origin of this lawsuit. In 2006, the trailer park was owned by Randall Hoffer, hereinafter "Hoffer". (R., p. 45). The City of Boise is responsible for enforcement of the Boise City Electrical Code, hereinafter "electrical code". A fire in one of the trailers at the trailer park in the late summer of 2006 alerted the City to life safety hazards created by violations of the electrical code. (R., p. 33, p. 68, Ex. 3). An inspection of the electrical system at the trailer park revealed that the electrical service was outdated, in disrepair, and lacked the required maintenance for minimum electrical safety requirements. The electrical system posed a real fire and shock hazard. (R., p. 34, ¶ 3-4; p. 68, Ex. 4, ¶ 5). After the inspection, Hoffer was notified of electrical code violations that needed to be corrected. (R., p. 34, ¶ 7; p. 68, Ex. 5, ¶ 8). The Boise City Electrical Inspector made the determination that the electrical system at the trailer park was an immediate hazard to life and property, which gave him the right and authority to cause such electrical installation to be disconnected under the electrical code. (R., p. 35-36, ¶ 12; p. 68, Ex. 4, ¶ 9). Upon refusal by Hoffer to remedy the violations, the electrical utilities to the trailer park were terminated. (R., p. 37, ¶ 20; p. 68, Ex. 5,

¶ 20). Incredibly, Hoffer then sued the City alleging: 1) tortious interference with contracts between Hoffer and the tenants of the trailer park, 2) tortious interference with contracts between Hoffer and prospective buyers of his trailer parks, 3) negligence, 4) intentional infliction of emotional distress, and 5) defamation. Hoffer alleged that the City and its agents and employees acted with malice and/or criminal intent as to all causes of action. (R., p. 9, ¶ 21; p. 10, ¶ 27 and ¶ 32; p. 11, ¶ 37 and ¶ 43).

ARGUMENT

Hoffer in his Petition for Review asks this Court to overturn *Sprague v. City of Burley*, 109 Idaho 656, 669-70, 710 P.2d 566, 579-80 (1985) and its progeny and re-interpret the Idaho Tort Claims Act. The appeal challenges only the dismissal of counts one, two, and five of Hoffer's complaint.

The statutory provisions bearing on this argument are part of the Idaho Tort Claims Act, and are set forth in pertinent part, as follows:

6-903. LIABILITY OF GOVERNMENTAL ENTITIES – DEFENSE OF EMPLOYEES. (a) Except as otherwise provided in this act, every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties, whether arising out of a governmental or proprietary function, where the governmental entity if a private person or entity would be liable for money damages under the laws of the state of Idaho, provided that the governmental entity is subject to liability only for the pro rata share of the total damages awarded in favor of a claimant which is attributable to the negligent or otherwise wrongful acts or omissions of the governmental entity or its employees.

(c) The defense of its employee by the governmental entity shall be undertaken whether the claim and civil lawsuit is brought in Idaho district court under Idaho law or is brought in a United States court under federal law. The governmental entity may refuse a defense or disavow and refuse to pay any judgment for its employee if it is determined that the act or omission of the employee was not within the course and scope of his employment or included malice or criminal intent.

6-904. EXCEPTIONS TO GOVERNMENTAL LIABILITY. A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

3. Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

It is clear from the statutory scheme that the legislature intended that a governmental entity be immune from liability resulting from employees acting with malice and/or criminal intent. The governmental entity will not be held responsible for the actions of its employees which the legislature deems to be outside of the governmental entity's control; i.e., acts or omissions of employees that are outside of the course and scope of his employment or included malice or criminal intent. In the instant case, the City's ability to disavow and refuse to pay "any judgment for its employee" as referred to in Idaho Code § 6-903(c), will never come to fruition. A judgment will never be rendered against any City employee, as Hoffer only named the City as the defendant, without naming any individual employee.

This Court is absolutely correct in its interpretation of the Idaho Tort Claims Act in its holdings from *Sprague, supra*; *Herrera v. Conner*, 111 Idaho 1012, 729 P.2d 1075 (Ct. App. 1987); and *Limbert v. Twin Falls County*, 131 Idaho 344, 346, 955 P.2d 1123, 1125 (Ct. App. 1998). The pertinent holding was succinctly set forth in *Herrera, supra*, as follows:

Resolution of this issue is controlled by *Sprague v. City of Burley, supra*. In *Sprague*, the Supreme Court recognized that I.C. § 6-903(a) (the Idaho Tort Claims Act) provides for liability for governmental entities for the "negligent" or "wrongful" acts by the entity or its employees in those cases where a private person would also be liable. However, the Court pointed out that I.C. § 6-903(c) negates entity liability if the employee acts with malice or criminal intent. Such liability attaches to the individual employee alone.

Herrera, 111 Idaho at 1021-1022.

These holdings are clear that if a governmental employee acts with malice or criminal intent, it is he/she alone that is liable for that conduct. In the instant case, Hoffer alleges that the City's employees acted with malice and/or criminal intent, but does not name any City employee as a defendant.

The doctrine of *respondeat superior* states that an employer is liable for negligent acts or omissions of its employee committed in the scope of his or her employment. *Sterling v. Bloom*, 111 Idaho 211, 247, 723 P.2d 755, 791 (1986). The logical extension of that definition is that liability can attach to the City through the doctrine of *respondeat superior*, only through the actions of its employees. The doctrine of *respondeat superior* does not entail some wrongful conduct by the City as an entity, but only through actions by its employees. Pursuant to the Idaho Tort Claims Act and this Court's holdings in *Sprague*, *Herrera*, and *Limbert*, *supra*, the City is not liable for the actions of its employees if they acted with malice or criminal intent. Liability attaches to the individual employee alone, and Hoffer did not name any employees as defendants. The City, as a municipal corporation, cannot act with malice as an entity. There can only be personal malice of individual employees.

The Superior Court of New Jersey, Appellate Division, addressed whether a public corporation can act with malice in the context of a malicious interference with an employment contract.

The gist of the action was one for Tort, and more particularly the tort known as "malicious interference with a contractual relationship." An essential element of that tort is "malice," as it is in the case of the tort known as "malicious prosecution." But a public corporation, such as a city or other public body, by reason of its being an artificial legal entity created by law to perform limited governmental functions, cannot entertain malice, as a public corporation. A public body may be held answerable in some cases for the tortious acts of its officers and employees. But where "malice" is an essential ingredient of the tort,

a city or comparable public agency is not vicariously liable for the personal malice of the city's officers or employees in performing their public duties.

O'Connor v. Harms, 111 N.J. Super. Ct. App. Div. 22, 26-27, 266 A.2d 606, 607 (1970).

Immunity is granted by Idaho Code § 6-904(3) to the City and its employees while acting within the course and scope of their employment and **without malice or criminal intent** for any claim which "arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, **libel, slander**, misrepresentation, deceit, or **interference with contract rights.**"

The Supreme Court of Idaho has stated, "the Idaho Tort Claims Act specifically exempts governmental entities from liability where the employees act with malice." *Sprague v. City of Burley*, 109 Idaho 656, 669-70, 710 P.2d 566, 579-80 (1985). The Court of Appeals of Idaho has had a couple of opportunities to address this issue. In *Herrera v. Conner*, 111 Idaho 1012, 729 P.2d 1075 (Ct. App. 1987), Plaintiff Herrera filed suit against the City of Burley, County of Cassia, the State of Idaho, and individual law enforcement officers who allegedly falsely arrested and abused him. The Court of Appeals of Idaho upheld the granting of summary judgment under the Idaho Tort Claims Act:

Because the amended complaint alleged that the officers acted with malice, and because the Idaho Tort Claims Act exempts entities from liability where the employees act with malice, as a matter of law Herrera could not recover from the city, the county, or the state. Therefore, the district court properly granted summary judgment for the city, the county, and the state on claims under the Idaho Tort Claims Act. [footnote omitted].

Id., 111 Idaho at 1022, 729 P.2d at 1085.

In *Limbirt v. Twin Falls County*, 131 Idaho 344, 346, 955 P.2d 1123, 1125 (Ct. App. 1998) the Court of Appeals had before it another case on point with the instant case. In *Limbirt*,

the plaintiff sued Twin Falls County, Twin Falls County Sheriff's Office, and John Does (1-5), as employees of the Twin Falls County Sheriff's Office alleging federal civil rights violations along with tortious state law claims, including the officers committing a battery by handcuffing her.

Idaho Code § 6-904, however, specifically addresses the question of immunity in the context of a battery. It provides in pertinent part:

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

.....

3. *Arises out of assault [or] battery. . . .*

(Emphasis added). The statute creates immunity for a government entity and its employees when a battery is committed without malice or criminal intent. Therefore, by application of I.C. §§ 6-903 (c) and 6-904 (3), a governmental entity is absolutely immune from suits arising out of a battery. When a battery is committed by an employee while acting beyond the scope of employment or is committed by an employee with malice or criminal intent, liability attaches to the individual employee.

Id., 131 Idaho at 346, 955 P.2d at 1125.

“Liability attaches only to the employee when the act is committed maliciously or with criminal intent.” *Limbert*, 131 Idaho at 346, 955 P.2d at 1125 (emphasis added). In any variation, the City is not liable for the employee's actions. If the employee acted without malice or criminal intent, the City is immune from liability for tortious interference with contract and defamation pursuant to Idaho Code § 6-904(3). If the employee acted with malice or criminal intent, the City is not liable for the employee's conduct pursuant to Idaho Code § 6-903(c). Further, Hoffer never named any City employee as a defendant. Therefore, the District Court was absolutely correct in its dismissal of Counts One, Two, and Five of the Complaint.

CONCLUSION

Hoffer did not name any City employees as defendants, but alleges that the City and its agents and employees acted with malice and/or criminal intent as to all causes of action. The City, as an entity, cannot act with malice and/or criminal intent. Malice and/or criminal intent is only applicable to individual employees or agents of the City, and the Idaho Tort Claims Act and *Sprague, supra* are clear and correct that liability for conduct involving malice and/or criminal intent can only attach to the individual alone. The City is absolutely immune from suits arising from tortious interference with contracts or defamation. The City asks that this Court deny Appellant's Petition for Review and affirm its holding in *Sprague v. City of Burley*, 109 Idaho 656, 669-70, 710 P.2d 566, 579-80 (1985) and its interpretation of the Idaho Tort Claims Act.

DATED this 9th day of August 2010.

BOISE CITY ATTORNEY'S OFFICE



SCOTT B. MUIR
Assistant City Attorney


CERTIFICATE OF SERVICE

I hereby certify that I have on this 19th day of August 2010, served the foregoing

Respondent's Brief as follows:

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