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Barber v. City of Idaho Falls Respondent's Brief Dckt. 42513

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JESSE BARBER,

Plaintiff/Appellant,

v.

THE CITY OF IDAHO FALLS and
OFFICER SPENCER STEELE,

Defendant/Respondent.

Supreme Court Docket No. 42513

Bonneville County District Court No.
2011-2574

RESPONDENT'S BRIEF

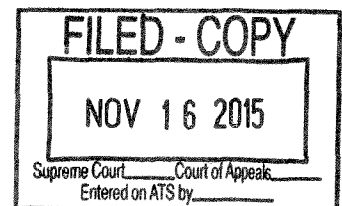
APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE.
Honorable JOEL TINGEY, District Judge, Presiding.

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III.
STATEMENT OF CASE

1. The City of Idaho Falls is a municipality organized under Idaho Law, located in Bonneville County. The Idaho Falls Police Department is a division of the City of Idaho Falls. Defendant Spencer Steele is a police officer with the City of Idaho Falls and was on duty and working on the date of the arrest of Appellant.

2. Appellant Jesse S. Barber has filed this action naming the “City of Idaho Falls” and the “Idaho Falls Police Department” as Defendants. The Idaho Falls Police Department is not a separate entity from the City of Idaho Falls. (R. 106: Cook Aff., ¶ 4). For purposes of this brief, the City of Idaho Falls and the Idaho Falls Police Department will be referred to jointly as the “City of Idaho Falls.” Barber also sued Spencer Steele, a police officer employed with the City of Idaho Falls.

3. On January 29, 2011, Appellant was observed by Officer Steele through the window of a home where drugs were known to be used in Idaho Falls, Idaho. (R. 103-105: Barber Depo., 97:6-9; R. 91: Steele Aff., ¶ 4).

4. Officer Steele believed that this amounted to a reasonable suspicion that crime was afoot, and he approached the home and knocked on the door. Appellant answered the door, and as soon as the door opened Officer Steele immediately noticed the overwhelming smell of marijuana coming from inside the home. (R. 91: Steele Aff., ¶ 5).

5. Officer Steele observed that Appellant's eyes were red and glassy. (R. 91: Steele Aff., ¶ 6). Officer Steele believed that marijuana was being used in the home based upon the smell and Officer Steele's observation of Appellant's appearance. (*Id.*).

6. Officer Steele asked if he could enter the home, and Appellant let him in. (R. 91: Steele Aff., ¶ 7). Once inside the home Appellant made his way to the kitchen, poured a large glass of milk, and drank it. (R. 103-105: Barber Depo., 99:15-25; 101:1-25).

7. Officer Steele testified that he believed that Appellant drank the milk to wash the green residue out of his mouth from marijuana use. (R. 91: Steele Aff., ¶ 8).

8. The residence was owned by Sheri Bible, Appellant's mother. Officer Steele asked Ms. Bible for permission to search the residence and she denied permission.

9. Due to the suspicion of marijuana use, Officer Steele arrested Plaintiff for "Frequenting Place Used, *Etc.*" in violation of Idaho Code § 37-2732(D).

10. Officer Steele has testified he did not hold any personal malice toward Appellant, and did not act intentionally or with criminal intent in arresting Appellant. (R. 91: Steele Aff., ¶ 10).

11. Captain Darren Cook was Officer Steele's supervisor at the City of Idaho Falls Police Department. Captain Cook and the City of Idaho Falls did not have any knowledge concerning Officer Steele that would cause them to believe Officer Steele may act unlawfully toward Appellant. Captain Cook and the City of Idaho Falls were not aware of any disciplinary proceedings against Officer Steele for false arrest or other policy violations in regard to Officer

Steele's understanding of the requirements to make an arrest. Captain Cook and the City of Idaho Falls had no knowledge that Officer Steele might engage in conduct that might be construed to amount to a wrongful arrest. (R. 106: Cook Aff., ¶ 5).

12. Officer Steele had received POST training and department training on the proper procedure for arrests. (R. 106: Cook Aff., ¶ 6).

IV. ARGUMENT

Appellant's Complaint is a *pro se* prisoner Complaint that alleges various facts and claims arising out of what Appellant describes as an "unlawful arrest . . . without a warrant or any other legal process . . . and without probable cause." *See R. 63-63: Amended Complaint* ¶ 4. In paragraphs 5-8 of the Amended Complaint, Appellant references the Idaho Tort Claims Act and alleges that the conduct of Officer Steele was done "maliciously, wantonly, and intentionally." *See R. 63-63: Amended Complaint* ¶ 8. Appellant also appears to allege, in paragraph 9 of the Amended Complaint, that the City of Idaho Falls was negligent in failing to supervise Officer Steele. Appellant never mentions the United States Constitution, § 1983 or any other federally protected right. No argument is advanced in this Appeal that a federally protected right was alleged and improperly dismissed. As such, based upon the wording of the Complaint and the district court's conclusions, the only issues on appeal arise under the Idaho Tort Claims Act.

On appeal, Appellant raises three issues in his opening Brief on Appeal: (1) whether there was a genuine issue of fact to support Appellant's claim of false arrest and false imprisonment; (2) that the exceptions of the Idaho Tort Claims act do not apply to negligence claims; and (3) that certain documents were withheld from the Appellate record. As will be addressed more fully below, each of these issues is without merit. An examination of the Complaint and the District Court's Memorandum Decision and Order, dated July 17, 2014 (R. 173-181) reveal that Barber's allegations were unsupported by sufficient evidence to withstand summary judgment. This Court should affirm the district court's grant of summary judgment and the matter should be dismissed with prejudice.

A. Appellant Misstates The Relevant Standard of Proof On His Claims.

Appellant suggests that he has created a genuine issue of fact sufficient to withstand a motion for summary judgment. In reviewing the record, it is clear that Appellant does not understand the required proof to withstand a motion for summary judgment. There were two primary causes of action advanced by Appellant: "unlawful arrest" (R. 63: Complaint, ¶ 4) and "vicarious liability" (R. 64: Complaint, ¶ 9). The claims sound in tort under the Idaho Tort Claims Act and do not contain allegations under § 1983. (*See* R. 176 ("to the extent Plaintiff refers to claims under 42 USC § 1983 in his response to Defendant's motion, any such claim is outside the scope of Plaintiff's pleadings and will not be considered.")). With the claims appropriately framed under the Idaho Tort Claims Act, the statutory burden of proof for such claims is elevated above a simple negligence theory of recovery.

In this case, Idaho Code § 6-904(3) applies to the facts of this case, which states in relevant 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, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. . . .

Idaho Code § 6-904(3). Where the underlying claim arises out of an alleged false imprisonment or false arrest, more than simply claiming the arrest or imprisonment was improper is required. Rather, in order for a plaintiff to survive a summary judgment motion, the plaintiff must introduce evidence that the acts of Defendant Steele were carried out with “malice or criminal intent.” *Id.* Importantly, there is a rebuttable presumption that all employees acted without malice or criminal intent. I.C. § 6-903(e).

While not statutorily defined, malice is defined in Black’s Law Dictionary as “1. The **intent**, without justification or excuse, to **commit a wrongful act**. 2. **Reckless disregard of the law** or of a person's legal rights. 3. **Ill will**; wickedness of heart.” MALICE, Black’s Law Dictionary (10th ed. 2014) (emphasis added). This Court has further reiterated the definition of malice in the context of the Idaho Tort Claims Act in *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1986), where this court stated that legal malice “involves the intentional commission of a wrongful or unlawful act without legal justification or excuse, whether or not

the injury was intended.” *See also James v. City of Boise*, 158 Idaho 713, 351 P.3d 1171, 1188 (2015), reh’g denied (June 19, 2015), reh’g denied (July 20, 2015). Criminal intent is likewise not statutorily defined but this Court also discussed the criminal intent term under the Idaho Tort Claims Act:

The Tort Claims Act does not define the term “criminal intent,” and that phrase is not a term of art. It has various meanings, including the intent to do wrong; the mens rea for a particular crime, which may include criminal negligence; and the intent to violate the law, which implies knowledge of the law violated. *Black’s Law Dictionary* 380–81 (7th ed.1999).

Id. at 713, 351 P.3d at 1187. This Court specifically clarified any ambiguity of the definition when it held as follows: “We hold that ‘criminal intent’ as used in the Idaho Tort Claims Act means the intentional commission of what the person knows to be a crime.” *Id.* at 713, 351 P.3d at 1188.

In the context of Appellant’s claims, the issue is not whether Respondent Steele “had a reasonable suspicion or probable cause to arrest or detain Barber,” rather it is “whether Steele acted with malice or criminal intent.” (R. 179). A review of Appellant’s Brief confirms an absence of any evidence that raises a genuine issue of material fact of malice or criminal intent. Appellant has erroneously focused on creating a genuine issue of fact as to probable cause, which is irrelevant under an application of Idaho Code § 6-904. The district court applied the correct standard, recognizing Appellant’s need to introduce some credible evidence into the record to demonstrate Steele had acted with malice or criminal intent. No evidence was produced and summary judgment was correctly granted. (R. 179 (“Accepting Barber’s factual statements

as true, Barber still fails to raise a genuine issue of material fact as to malice or criminal intent.”)).

B. The City of Idaho Falls is Absolutely Immune For The Actions Of Officer Steel.

Under Idaho law and the Idaho Tort Claims Act, the City may be subject to liability for money damages arising out of its negligent conduct and may be vicariously liable for the negligent acts of its employees in certain circumstances. I.C. 6-903. Under the express immunity of § 6-904(3), the City of Idaho Falls is immune from claims arising from false arrest. *White v. Univ. of Idaho*, 118 Idaho 400, 797 P.2d 108, 108–09 (1990). Idaho recognizes that an municipal employer would not be liable for the acts of an employee that were performed with malice or criminal intent:

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 employees act with malice or criminal intent. Such liability attaches to the individual employee alone.

Herrera v. Conner, 111 Idaho 1012, 1021, 729 P.2d 1075, 1084 (Ct. App. 1986). This Court again confirmed the *Sprague* and *Herrera* conclusions, holding:

[t]he requirement that an employee have acted “within the course and scope of their employment” plainly applies to the act of the employee and not of the governmental entity. Therefore, the language “and without malice or criminal intent” that follows the statute’s requirement that the employee have acted within the course and scope of employment, also by its plain language only applies to the employee. Thus, “[a] governmental entity ... shall not be liable for any claim

which arises out of ... libel, slander ... or interference with contract rights.” I.C. § 6-903(3)

Hoffer v. City of Boise, 151 Idaho 400, 402-03, 257 P.3d 1226, 1228-29 (2011). In *Hoffer*, the Court was addressing a claim arising from libel, slander or interference with contractual rights, however, the same qualifying language regarding “within the course and scope” and “malice or criminal intent” is used in the opening paragraph of Idaho Code § 6-904(3). Thus, an allegation (or even the existence) of malice or criminal intent on behalf of an employee is immaterial when considering whether a governmental entity may be sued under state common law tort theories. It follows that a governmental entity is immune from suit based upon the immunities afforded in § 6-904(3), *i.e.*, an alleged false arrest or incarceration. In this case, dismissal of the City for any acts arising out of false imprisonment or incarceration was appropriate by the lower court and this Court should affirm the grant of summary judgment.

C. There is No Evidence in the Record That the City Was Negligent in Its Hiring, Training, or Supervision of Steele.

Aside from a general negligence claim against the City, which is without merit, the Appellant also claimed the City was negligent in its hiring, training, or supervision of Officer Steele. “A negligent supervision claim is not based upon imputed or vicarious liability but upon the employer’s own negligence in failing to exercise due care to protect third parties from the foreseeable tortious acts of an employee.” *Rausch v. Pocatello Lumber Co., Inc.*, 135 Idaho 80, 86, 14 P.3d 1074, 1080 (Ct. App. 2000) (emphasis added). “An employer’s duty of care requires

that an employer who knows of an employee's dangerous propensities control the employee so he or she will not injure third parties." *Id.* (citing *Podolan*, 123 Idaho at 946, 854 P.2d at 289).

This claim lacked any supporting evidence and was appropriately dismissed. Absent from the record is any evidence of neglect by the City of Idaho Falls in Steele's training, certifications, supervision, etc. Conversely, the Affidavit of Darren Cook confirmed that the City of Idaho Falls and Officer Steel's supervisors were "not aware of any disciplinary proceedings against Officer Steele for false arrest or other policy violations that would cause us to believe that Officer Steele would commit a wrongful arrest." (R. 107: Cook Aff., ¶ 5). Likewise, "Officer Steele had received POST training and department training on the proper procedure for arrests, including the requirements to detain a person upon reasonable suspicion of criminal activity and/or to arrest a person based upon probable cause." (R. 107: Cook Aff., ¶ 6).

There is no evidence of prior contact between Officer Steele and Appellant that should have caused the City of Idaho Falls to believe that ill will existed between the two. Likewise, there was no evidence of recent incidents involving Appellant that would suggest he might be a "foreseeable" target of wrongful arrest. Ultimately, Appellant failed to establish that the City of Idaho Falls had knowledge of "foreseeable" tortious conduct by its officers that might pose a risk to Appellant. There are no facts in the record that it was foreseeable to the City of Idaho Falls that Officer Steele would wrongfully arrest Appellant. There had not been any prior contact between Officer Steele and Plaintiff that might cause the City of Idaho Falls to believe that ill-will existed between the two. There had not been any recent incidents involving Plaintiff that

would suggest he might be a “foreseeable” target of wrongful arrest. Captain Cook was not aware of any fact that would lead him to believe that Officer Steele might engage in a wrongful arrest. Officer Steele had received POST training and department training on the proper procedure for arrests. The record is devoid of any evidence to contradict these statements and create a genuine issue of fact to withstand summary judgment.

D. Officer Steele is immune under Idaho Code § 6-904(3).

Officer Steele is immune from claims arising out of a wrongful arrest, absent a showing that he acted with “malice” or “criminal intent.” *See, Idaho Code* § 6-904(3). There are no allegations in Appellant’s brief to suggest that Steele acted with malice or criminal intent. As discussed above, it is incumbent on Appellant to provide the Court with evidence that Steele intentionally committed a wrongful or unlawful act without legal justification or excuse (i.e., malice) or intentionally committed a crime against Appellant (i.e., criminal intent). It is a rebuttable presumption that Steele did not act with malice or criminal intent. I.C. § 6-903(e). Absent very specific evidence of this type of activity, summary judgment was appropriate. A review of the record reveals a single conclusory statement of Appellant’s claim of malice or criminal intent:

He replied by claiming that my mother refused a search, wich [sic] she never did, that I had smoked a ciggarette [sic] in his partner’s cruizer [sic] before, and that he knew I was a drug dealer and had used drugs before. None of these reasons are grounded in fact or any legal finding of note or record and furthermore served to expose the malicious intent behind officer [sic] Steele’s actions on behalf of his own personal grudges.”

(R. 168-169). Conversely, a review of the record confirms that Officer Steele did not act with malice or criminal intent when he arrested Appellant. The evidence in the record is that Steele had **no** malice and **did not act** with intentional or criminal intent. (*See, e.g.*, R. 92: Steele Aff., ¶ 10; R. 107: Cook Aff., ¶ 5). When Officer Steel arrived at Appellant's door, he stated that he had a reasonable suspicion of criminal activity when he talked with Appellant at the door, smelled marijuana, observed Appellant's bloodshot eyes and glassy look. (R. 92: Steele Aff., ¶¶ 5-6). Steele further confirmed that he observed Appellant pour and drink a large glass of milk in his presence, which he believed was done to wash the green residue out of his mouth left over from marijuana use. (R. 92: Steele Aff., ¶¶ 7-8). Nothing in these statements can be tortured to find malice or criminal intent. Because there was no malice or criminal intent by Steele in the record, dismissal of all claims against Steele was appropriate. This Court should uphold the district court's grant of summary judgment.

E. The Idaho Tort Claims Act Covers All Acts of Negligence.

Appellant makes the illogical assertion that the Idaho Tort Claims Act does not cover general negligence claims. As noted above, the Idaho Tort Claims act provides that “[e]xcept 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 with the course and scope of their employment or duties. . .” I.C. § 6-903(a). Of course, anytime a plaintiff claims negligence by a governmental entity, the Idaho Tort Claims Act is implicated. In considering a motion for summary judgment for a governmental entity

involving a question of immunity under the Idaho Tort Claims Act, the reviewing court should determine:

... whether tort recovery is allowed under the laws of Idaho; and, if so, whether an exception to liability found in the tort claims act shields the alleged misconduct from liability; and, if no exception applies, whether the merits of the claim as presented for consideration on the motion for summary judgment entitle the moving party to dismissal.

Harris v. State Dep't of Health & Welfare, 123 Idaho 295, 298 n. 1, 847 P.2d 1156, 1159 n. 1 (1992). Any argument that the exceptions under the Act do not apply is groundless. As has been discussed fully above, the lower court clearly analyzed the relevant standards of proof and found a dearth of evidence supporting any of the allegations in this matter. Ultimately, the underlying claims all **arise out of** an alleged wrongful arrest and incarceration. But for the claimed wrongful arrest, none of the other claims occur. As such, the enumerated exceptions under the Idaho Tort Claims Act absolutely apply.

F. All of the Documents Referenced By Appellant Were Part of the Record.

Appellant suggests that there were documents missing from the Record. However, a comparison between the Clerk's Record on Appeal and the Exhibits Attached to Appellant's Brief confirm a complete Clerk's Record.

Document Name	Clerk's Record Citation
Plaintiff's Brief in Response to Defendant's Memorandum In Support of Motion for Summary Judgment	R. 111 to 120
Ex. 1A (excerpt Defendants' Responses to Plaintiff's 2 nd Discovery)	R. 121
Ex. 1B (excerpt Defendants' Responses to	R. 122

Plaintiff's 2 nd Discovery)	
Ex. 1C (excerpt Defendants' Responses to Plaintiff's 2 nd Discovery)	R. 123
Affidavit of Jesse S. Barber (dated July 8, 2014)	R. 165-170
Ex. 2 (Affidavit And Memorandum In Support of Civil Complaint)	R. 124-127
Ex. 3 (excerpt Defendants' Responses to Plaintiff's Discovery)	R. 128
Ex. 4 (Bates No. City of Idaho Falls 000001-000005)	R. 129-131
Ex. 5 (Police Record)	R. 132-135
Ex. 6 (Jail Records Letter- dated August 12, 2013)	R. 136
Reply Memorandum In Support of Motion for Summary Judgment	R. 141-146
Memorandum In Support Of Motion for Summary Judgment	R. 82-90
Affidavit of Spencer Steele	R. 91-94
Affidavit of Darren Cook	R. 106-108
Affidavit of Blake G. Hall	R. 95-105

As confirmed above, the Clerk's Record on Appeal is complete and includes every document filed with the Court. As such, any claim that the record is incomplete is without merit. The only document not included in the Clerk's Record was the complete deposition transcript from the Deposition of Jesse S. Barber. As was previously addressed via Appellant's motion to augment, the complete transcript was never introduced into evidence for consideration by the lower court. Appellant failed to include the full deposition transcript in the proceedings below. The only portion of Barber's deposition that was made part of the record was pages 97-104. No other portions of the transcript were cited or analyzed in support of the Defendant's Motion for

Summary Judgment. As Idaho law makes clear, the Court is “bound by the record and cannot consider matters or materials not part of or contained therein.” *State ex rel. Ohman v. Ivan H. Talbot Family Trust*, 120 Idaho 825, 827, 820 P.2d 695, 697 (1991). Because the full deposition transcript was not available or considered by the lower court, it is likewise inadmissible here because it was never part of the record. There is no merit to the third issue raised on appeal and it should be ignored.

V.
ATTORNEYS’ FEES ON APPEAL

Pursuant to Idaho Appellate Rule 41, Defendants seeks an award of attorney fees in accordance with Idaho Code §§ 6-918A and 12-117. Section 6-918A provides a recovery to a municipal entity “showing, by clear and convincing evidence, that the party against whom or which such award is sought was guilty of bad faith in the commencement, conduct, maintenance or defense of the action.” Section 12-117 provides for a municipal entity to recover attorney fees when “the party against whom the judgment is rendered acted without a reasonable basis in fact or law.” Under the applicable statutes, the City is entitled to an award of attorney fees on appeal inasmuch the appeal has been brought frivolously, in bad faith, and without foundation.

Case law has held that an appeal is deemed frivolous when a party fails to make a legitimate showing that the trial court misapplied the law. *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 973 P.2d 142 (1999). In this case, there is no evidence that the district court misapplied the law. The language of the Idaho Tort Claims Act is clear that a plaintiff must

rebut the presumption that a officer acted with malice or criminal intent. No such showing was made. Rather, Appellant misapplies the standard of proof and relies on unsubstantiated conjecture in continuing to prosecute this matter. The district court's holdings were consistent with well-established Idaho law and Appellant has failed to present a legitimate argument that would justify the instant appeal. This Court should grant Defendants' request for attorneys' fees and costs on appeal.

VI. CONCLUSION

Based on the forgoing, the district court correctly analyzed the Idaho Tort Claims Act and the evidence in the record. The district court's grant of summary judgment was appropriate, recognizing there was no evidence in the record to support any malice or criminal intent by Office Steele. This Court should affirm the district court's ruling on appeal.

Dated this 13 day of November, 2015.



BLAKE G. HALL

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 13 day of November, 2015, by the method indicated below:

Jesse S. Barber
IMSI A-1-15A
PO Box 51
Boise, ID 83707

- Mailing
- Facsimile
- Email
- Hand-Delivery



BLAKE G. HALL