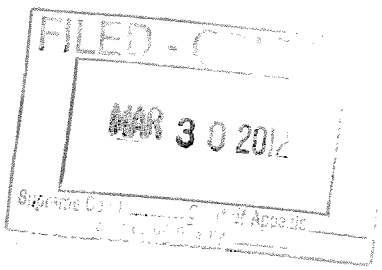
3-30-2012

Hoagland v. Ada County Cross Appellant's Brief Dckt. 38775

IN THE SUPREME COURT FOR THE STATE OF IDAHO

RITA HOAGLAND, individually and in her capacity as Personal Representative of the ESTATE OF BRADLEY MUNROE, Plaintiff-Appellant/ Cross- Respondent, vs. ADA COUNTY, a political subdivision of the State of Idaho; et al; Defendants-Respondents/ Cross-Appellants,	**Docket No. 38775-2011** **Ada County No. 2009-1461**



CROSS-APPELLANTS' BRIEF

Appealed from the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada

Honorable Ronald Wilper, District Judge, Presiding

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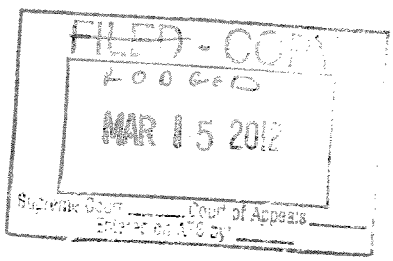

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I. STATEMENT OF THE CASE

This lawsuit began as a 42 U.S.C. § 1983 federal civil rights and state tort action brought on behalf of the Estate of Bradley Munroe by his personal representative Rita Hoagland, (the "Estate") and by Rita Hoagland individually as the mother of Bradley Munroe ("Hoagland") against various Ada County employees (the "Defendants"). While the theories and even the named defendants changed significantly through the course of the litigation, the claims all arose from the suicide of Bradley Munroe ("Munroe") on September 29, 2008, while he was incarcerated at the Ada County Jail (the "Jail").

A. Procedural History.

The applicable procedural history is set forth in Section I.A of the Respondents' Brief filed herewith. Respondents' Brief, pp. 1-3.

B. Statement of the Facts.

The applicable facts are set forth in Section I.B. of the Respondents' Brief filed herewith. Respondents' Brief, pp. 4-11.

II. ISSUES PRESENTED ON CROSS-APPEAL[1]

A. Did the District Court Err by Allowing Hoagland to Bring a 42 U.S.C. § 1983 Action for the Death of her Adult Child?

B. Did the District Court Err by Not Suspending/Staying Discovery When Qualified Immunity Was Raised by the Defendants in the 42 U.S.C. § 1983 Action?

C. Did the District Court Err by Allowing Hoagland to Seek Punitive Damages?

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[1] To the extent the Court upholds the District Court's dismissal, Defendants acknowledge certain cross-appeal issues may be rendered moot.

D. Did the District Court Err by Disallowing Attorney Fees to the Prevailing Defendants?

E. Did the District Court Err by Admitting and Considering Evidence and Documents From Hoagland Which Lacked Proper Foundation and/or Were Not Admissible Pursuant to Idaho Rule of Civil Procedure 56 and/or the Idaho Rules of Evidence?

F. Are the Defendants Entitled to Attorney Fees on Cross-Appeal.

III. ATTORNEY FEES ON CROSS-APPEAL

Should Defendants prevail on cross-appeal, they request costs and attorney fees pursuant to Idaho Code §§ 12-121, 12-123, and/or Idaho Appellate Rule 41.

IV. ARGUMENT

A. Did the District Court Err by Allowing Hoagland to Bring a 42 U.S.C. § 1983 Action for the Death of her Adult Child?

1. Munroe Was an Adult.

Munroe was a 19-year-old adult when he took his life in the Jail. At the time of his death, Munroe was homeless and it had been some time since he had resided with Hoagland. May 28, 2010 Dickinson Aff., ¶ 5; Exs. A, B (pending augmentation); R. p. 3851, Ex. 4 (Lundt Aff. Ex. A, pp. 5-9). Munroe was in and out of youth correctional facilities from 2002-2006, dropped out of high school his senior year, lived with a fiancé, and was homeless. *Id.*

2. Hoagland Elected to Pursue a 42 U.S.C. § 1983 Claim.

While Hoagland's First Complaint pled a state statutory Wrongful Death action, she dismissed and abandoned that cause of action electing to pursue only a § 1983 action. R. 1451-1540; *see also* Tr. 7/8/10 Hearing (68:20–25, 69:1-23). Thereafter, her 42 U.S.C. § 1983 lawsuit

on behalf of Munroe's Estate was properly dismissed by the District Court, since Idaho precludes an estate from being a viable § 1983 plaintiff. Nonetheless, the District Court allowed Hoagland's personal 42 U.S.C. § 1983 lawsuit to continue. Defendants appeal from that District Court determination, forwarding the nearly universal preclusion of parents as § 1983 plaintiffs for the unintentional loss of an adult child.

3. Standard of Review.

The Standard of Review for Issues A-C herein is set out in *Maresh v. State, Dept. of Health and Welfare ex rel. Caballero*. On these Issues, "[t]his Court exercises free review over a district court's conclusions of law. Hence, this Court may substitute its view for that of the district court on the issues of law presented by this appeal." *Maresh,* 132 Idaho 221, 224; 970 P.2d 14, 17 (1998) (citations omitted).

4. Creation and Retraction of Parental § 1983 Cause of Action in the Seventh Circuit.

Contrary to other federal circuits' interpretations of § 1983 actions for the death of an adult child, in 1984 the Seventh Circuit initially recognized a § 1983 cause of action for the incidental loss of society and companionship resulting from the death of an adult child. That case, *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), involved the fatal shooting of a 23-year-old by a police officer during a chase. The Seventh Circuit allowed the father of the shooting victim to recover under § 1983 for the violation of the father's substantive due process right to associate with his adult son. Twenty-one years later, with new U.S. Supreme Court decisions, and the declination of other circuits to follow suit, the window was closed by the same court. *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005), found the Seventh Circuit faced with a

scenario where another son was killed, this time a 22-year-old student at Northwestern University, fatally shot by a Chicago police officer. In *Russ,* the Seventh Circuit overruled *Bell,* stating:

> Since *Bell*, several of our sister circuits have considered whether the Constitution protects a parent's relationship with his adult children in the context of state action which has the incidental effect of severing the relationship. No other court of which we are aware has allowed a parent to recover for the loss of his relationship with his child in these circumstances. Most courts that have considered the issue have expressly declined to find a violation of the familial liberty interest where the state action at issue was not aimed at specifically interfering with the relationship.

Russ, 414 F.3d at 787.[2]

> Affording plaintiffs a constitutional due process right to recover against the state in these circumstances would create the risk of constitutionalizing all torts against individuals who happen to have families.

Id. at 790.

> We therefore overrule our decision in *Bell* insofar as it recognized a constitutional right to recover for the loss of companionship of an adult child when that relationship is terminated as an incidental result of state action.[3]

Id. at 791.

In *Russ,* the Seventh Circuit analyzed the cause of action in greater detail and acknowledged that claims for an adult child's death had been rejected by its sister courts (the 1st,

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[2] Citing *Trujillo v. Bd. of County Comm'rs*, 768 F.2d 1186, 1190 (10th Cir. 1985); *Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 9 (1st Cir. 1986); *McCurdy v. Dodd*, 352 F.3d 820, 830 (3rd Cir. 2003); *Claybrook v. Birchwell*, 199 F.3d 350, 357-58 (6th Cir. 2000); *Shaw v. Stroud*, 13 F.3d 791, 804-05 (4th Cir. 1994).

[3] The term "incidental" is used because the plaintiffs had not alleged that the police officer shot Russ for the specific purpose of terminating Russ' relationship with his family. *Id.* at 790. Similarly, Hoagland has not alleged (and has no basis to allege) that Munroe's death was the result of specific intent by any Defendant to terminate Hoagland's relationship with Munroe.

3rd, 4th, 6th, and 10th Circuits) and would likely be disfavored by the U.S. Supreme Court.[4] The Seventh Circuit then reversed *Bell*, precluding the type of claim brought by Hoagland in the current action.

Additionally, in 2007, a Second Circuit district court explained:

> Whether a parent or sibling of an adult child can recover pursuant to § 1983 on the principle of interference with familial relations when the state action in question was not intended to interfere with the family relationship is a question of first impression in this circuit. A review of other circuits' holdings demonstrates that all circuits, save the Ninth Circuit, have ruled against permitting recovery for unintentional interference with an adult plaintiff's right to intimate association with an adult family member. *See Russ v. Watts,* 414 F.3d 783, 791 (7th Cir. 2005) (reversing earlier circuit precedent and finding that no other circuit has allowed recovery under these circumstances); *see also McCurdy v. Dodd,* 352 F.3d 820, 830 (3d Cir. 2003); *Butera v. District of Columbia,* 235 F.3d 637, 656 (D.D.C. 2001); *Claybrook v. Birchwell,* 199 F.3d 350, 357-58 (6th Cir. 2000); *Shaw v. Stroud,* 13 F.3d 791, 804-05 (4th Cir. 1994); *Valdivieso Ortiz v. Burgos,* 807 F.2d 6, 9 (1st Cir. 1986); *Trujillo v. Bd. of County Comm'rs,* 768 F.2d 1186,

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[4] The Seventh Circuit noted:

> The Supreme Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open ended." . . . The Court has cautioned that we must "exercise the utmost care" in extending constitutional protection to an asserted right or liberty interest because, in doing so, we "place the matter outside the arena of public debate and legislative action."

Id. at 789 (citations omitted). Nonetheless, in deference to Hoagland it should be noted that one circuit, the Ninth, *might* allow her to bring this type of claim. This anomaly was noted by the Seventh Circuit, but it did not dissuade that Circuit from rejecting the § 1983 parental cause of action. *Id.* at 788. Furthermore, at least one of the Ninth Circuit's own federal district courts has noted that the Ninth Circuit is alone in this regard and criticized the Circuit for its position:

> The development of Ninth Circuit precedent that parents are entitled to bring a companionship claim in the context of an adult child where the deprivation was incidental to the state action has, to say the least, not come about directly and explicitly, nor has it been supported by any extensive and rigorous analysis.

Rentz v. Spokane County, 438 F. Supp. 2d 1252, 1264 (2006). (Lamenting that though binding upon it, the Ninth Circuit's development of this precedent is "inadvertent and/or not particularly well thought out under Supreme Court precedent . . ." *Id.* at 1265.)

1190 (10th Cir. 1985); *but see Curnow by and through Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991).

Laureano v. Goord, WL 2826649 at *10 (S.D.N.Y. 2007).

Case law analyzing this § 1983 theory has not been stagnant. Courts are now moving towards abolishing any § 1983 familial rights theory regardless of the age of the plaintiffs or decedents, since the basis for all § 1983 familial death claims is identical. In *Estate of Perry ex rel. Perry v. Boone County Sheriff,* WL 694696 (S.D.Ind. 2008), a Seventh Circuit district court analyzed U. S. Supreme Court and Seventh Circuit case law and explained:

> Plaintiffs raise several § 1983 claims. The Minor Children contend that the Sheriff and Dr. Doolan deprived them of "a liberty interest in continued familial relations" with Perry. The Estate contends that the Sheriff and Dr. Doolan failed to properly train jail officers and that Dr. Doolan was deliberately indifferent to Perry's medical needs. The Court addresses each of these claims in turn.
>
> *a.* *Interference With Familial Relations.*
>
> Defendants contend that the interference with familial relations claim is foreclosed by the Seventh Circuit's decision in *Russ v. Watts,* 414 F.3d 783, 791 (7th Cir. 2005), *reh'g and reh'g en banc denied,* which provided that no such claim is available in cases involving adult children. *See also Thompson v. City of Chicago,* 472 F.3d 444, 452 n. 25 (7th Cir. 2006) (noting that similar familial relations claim of victim's mother and wife was properly dismissed). Plaintiffs argue that the *Russ* court left the door open for minor children to assert such a claim because it explicitly recognized that the needs of minor children "warrant [ ] 'sharply different constitutional treatment.' "*Russ,* 414 F.3d at 790 (quoting *Butera v. District of Columbia,* 235 F.3d 637, 656 (D.C. Cir. 2001); *McCurdy v. Dodd,* 352 F.3d 820, 829 (3d Cir. 2003)). The Court concludes that the claim should be dismissed.
>
> First, it is doubtful whether a substantive claim for interference with familial relations even exists under § 1983. The *Russ* court was certainly careful not to explicitly recognize such a right, and this Court is unaware of any current decision of the Seventh Circuit recognizing such a right. In fact, at least one Circuit Court has rejected such an argument. *See Shaw v. Stroud,* 13 F.3d 791, 805 (4th Cir.

> 1994). In doing so, the *Shaw* court noted that the Supreme Court "has never held that the protections of substantive due process extend to claims based on governmental action which affects the family relationship only incidentally." *Id.* (citations omitted). Indeed, that the Supreme Court would recognize such a right where the effect is merely incidental seems unlikely given that it has held that negligent infliction of harm is not actionable under § 1983. *See Daniels v. Williams,* 474 U.S. 327, 330-31 (1986).
>
> Further, where the claim has been recognized, it often arises in the context of circumstances implicating procedural due process, such as cases where a state attempts to separate a parent from a child without due process of law to protect the parent's liberty interests. *See Russ,* 414 F.3d at 786 (citing *Bell v. City of Milwaukee,* 746 F.2d 1205, 1243-44 (7th Cir. 1984)). Historically, the claim has been limited to situations where the state action is aimed at the relationship, *i.e.,* where the action is deliberate. *See id.* at 788-89 (citing *Daniels,* 474 U.S. at 331); *see also id.* at 790 (collecting cases); *Thompson,* 472 F.3d at 452 n. 25 (noting that plaintiffs lacked standing to raise such a claim under § 1983 because they had not alleged that the victim was killed "for the specific purpose of terminating [the victim's] relationship with his family").
>
> As the *Russ* court recognized, finding a constitutional violation based on official actions that were not aimed at the familial relationship inappropriately stretches due process "far beyond the guiding principles set forth by the Supreme Court." *Russ,* 414 F.3d at 789-90. Here, Plaintiffs have not presented any evidence, much less even alleged, that the actions of the Defendants were specifically directed at disrupting the familial relationship. Accordingly, the Court **GRANTS** both of the requests for summary judgment on this claim and **DISMISSES** the same **with prejudice.**

Estate of Perry, 2008 WL 694696 at *11, 12.

Because Hoagland did not allege Munroe's death was the product of any Defendant's *intent to* sever her relationship with her son, under current law her action cannot survive.

5. District Court's Analysis.

The District Court forwarded that a Fifth Circuit case allowed Hoagland to proceed in an Idaho Court. The case it relied upon, *Rhyne v. Henderson County*, 973 F.2d 386 (5th Cir. 1992),

was decided in 1992 – before nearly every circuit foreclosed this § 1983 cause of action. *Rhyne* determined that Texas law allowed the mother of a deceased jail inmate to bring a § 1983 action for *her* injuries after her son repeatedly threatened, attempted, then committed suicide in a county jail. *Rhyne* based its analysis on the fifty-year-old *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961). *Brazier*, in turn, was based upon Georgia's survivability statute, and "held that § 1983 incorporated *Georgia's* wrongful death and survival statute *remedies* under § 1983." *Rhyne*, 973 F.2d at 390 (emphasis added). *Rhyne* also quoted approvingly from *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985), explaining, "we look to *Texas law* for guidance for the *damages recoverable* for [plaintiff's son's] death." *Id.* at 390-391 (emphasis added).

Here, the District Court allowed Hoagland to utilize an extinct § 1983 theory, combining it with Idaho's Wrongful Death Statute. Idaho Law provides a wrongful death action because descendants' claims do not survive their passing in our state. It was never intended to be a vehicle to transform abandoned § 1983 theories into viable causes of action.

Allowing Hoagland to proceed with her § 1983 parental claim is contrary to the overwhelming body of law and would place this Court in the unenviable position of adopting an outlying, disfavored and nearly extinct analysis that is "inadvertent and/or not particularly well thought out under Supreme Court precedent . . . ." *Rentz*, 438 F. Supp. 2d 1252, 1256 (2006). Unlike the federal district court in *Rentz*, this Court is not subject to the dictates of the Ninth Circuit. Given the clear direction of the vast majority of the federal circuits (the First, Third, Fourth, Sixth, Seventh, Tenth, and District of Columbia) and the U.S. Supreme Court's cautious

approach with regard to the expansion of substantive due process claims,[5] it seems prudent to follow the currently accepted application of substantive due process claims and overturn the District Court's decision to allow Hoagland's § 1983 action for the death of an adult child.

B. Did the District Court Err by Not Suspending/Staying Discovery When Qualified Immunity Was Raised by the Defendants in the 42 U.S.C. § 1983 Action?

1. Introduction.

In light of the discovery protection afforded to defendants when issues of qualified immunity are at stake, in May of 2010, the Defendants moved the District Court for an order protecting them from further discovery pending the argument of the original summary judgment motion. R. pp. 66-74. At the hearing on both the protective motion and motion to continue on July 8, 2010, the District Court denied the request for a protective order, granting the Plaintiffs' Motion to Continue the Summary Judgment hearing.[6]

The Defendants appeal the District Court's decision not to stay discovery and make an early qualified immunity determination.

2. Standard of Review.

See Standard of Review in Issue A as stated above.

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[5] *See* n. 4.

[6] August 16, 2010 Amended Order Denying Motion for Discovery Protection; Granting Motion for Leave to Amend; Granting Rule 56(f) Motion; Continuing Motion for Summary Judgment; Partially Denying Motion to Strike; and Granting Motion to Shorten Time ("August 16, 2010 Amended Order"), added to the Record pursuant to January 31, 2012 Order Granting Motion to Augment; *see also* Tr. 7/8/10 Hearing (15:4).

3. Discovery Protection in 42 U.S.C. § 1983 Immunity Cases.

Suspending or preventing discovery and an early immunity determination is not novel. The U.S. Supreme Court and federal circuits all recognize and uphold its application when a defendant is protected by absolute or qualified immunity. In the case at bar both absolute and qualified immunity were raised in the Defendants' Answer. R. p. 62.

When a defendant raises qualified immunity, "[u]ntil [the] threshold immunity question is resolved, discovery should not be allowed." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). And, "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

In *Behrens v. Pelletier,* 516 U.S. 299, 308 (1996), the U.S. Supreme Court elaborated,

> *Harlow* and *Mitchell* make clear that the defense [of immunity] is meant to give government officials a right, not merely to avoid "standing trial," but also to avoid the burdens of "such pretrial matters as discovery . . ., as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'"

(Citations omitted.)

In *Crawford-El v. Britton,* 523 U.S. 574, 598 (1998), the U.S. Supreme Court reiterated:

> [I]f the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery. To do so, the court must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law.

(Citation omitted.)

Since the Defendants asserted qualified immunity, the U. S. Supreme Court instructs that the matter must be decided early in the proceedings so that the cost and expense of discovery and trial are avoided.[7]

This Court adopted the U.S. Supreme Court's governmental immunity position in *Nation v. Dept. of Correction*, 144 Idaho 177, 158 P.3d 953 (2007) and *Rosenberger v. Kootenai County Sheriff's Dept.*, 140 Idaho 853, 103 P.3d 466 (2004). In *Nation*, both absolute and qualified immunity were pled in a 42 U.S.C. § 1983 and state tort action brought against Ada County and the state of Idaho. Commenting on qualified immunity:

> The contours of qualified immunity are the same under both Idaho and Federal law; generally government officials performing discretionary functions are shielded from civil liability as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Nation, 144 Idaho at 186-187; 158 P.3d at 962-963 (citations omitted).

In *Rosenberger*, this Court explained, "[i]f qualified immunity is requested in a suit against an officer for an alleged violation of a constitutional right, a ruling on the issue of qualified immunity should be made early in the proceedings so that costs and expenses of trial

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[7] "The privilege is an *immunity from suit*, rather than a mere defense to liability. . . ." *Saucier v. Katz,* 533 U.S. 194, 200 (2001) (citations omitted) (commenting on qualified immunity). "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Id.* at 194 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). "[G]overnment officials are entitled to some form of immunity from suits for damages. . . . [P]ublic officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability." *Harlow*, 457 U.S. at 806. In 2009, the U.S. Supreme Court explained, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (citing *Hunter v. Bryant*, 502 U.S. 224, 232 (1991) *(per curiam)).*

are avoided where the defense is dispositive." *Rosenberger*, 140 Idaho at 857, 103 P.3d at 470 (*citing Saucier v. Katz*, 121 S. Ct. 2151, 2155).

Both federal and Idaho state law recognize that because of their work, governmental actors are protected by immunities in cases prosecuted under § 1983 and tort theories. Immunity is not simply a defense - it is *immunity* from discovery and litigation.[8]

When the Defendants sought discovery protection in this case, the District Court denied the request, providing no basis for its ruling. August 16, 2010 Amended Order (*see* n. 6.)

The Defendants appeal the District Court's decision not to grant the Defendants' motion for an order shielding them from further discovery obligations while the qualified immunity question was pending.

C. Did the District Court Err by Allowing Hoagland to Seek Punitive Damages?

1. Standard of Review.

See Standard of Review as stated in Issue A above.

[8] Although qualified immunity law provides discovery protection at the earliest possible stage in litigation, in the interest of cooperation the Defendants had already responded to fifty (50) interrogatories (even though that exceeded the number of interrogatories allowed by I.R.C.P. 33(a)), forty-five (45) requests for production, one hundred-seventy (170) requests for admission, eleven (11) supplemental discovery responses, and provided over four thousand (4,000) pages of bates stamped documents to Hoagland before moving for this protection. Tr. 7/8/10 Hearing (33:4–11). Defendants also spent considerable time and effort redacting uninvolved inmates' images from hours of video recordings from the Jail's VICON video camera system. Tr. 7/8/10 Hearing (33:12-25).

2. Section 1983 Punitive Damage Law.

The seminal § 1983 governmental punitive damages case is *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). In *Newport,* the district court jury returned a verdict containing a punitive damage award against the city of the same name. Newport appealed.

The U.S. Supreme Court's decision overturning the punitive damage award explained: "we hold that a municipality is [absolutely] immune from punitive damages under 42 U.S.C. § 1983." *Id.* at 271. The Court explained that a punitive damage award against a government is essentially an award against the taxpayers:

> We see no reason to believe that Congress' opposition to punishing innocent taxpayers and bankrupting local governments would have been less applicable with regard to the novel specter of punitive damages against municipalities.

Id. at 266. Continuing this theme, the Court expanded:

> [I]t remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party . . . . Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

Id. at 267.

In Idaho, this same rationale would preclude punitive damage awards in both official and individual § 1983 lawsuits.

3. Ada County and Official Capacity Defendants.

Hoagland sought and was allowed to amend her Complaint to include a prayer for punitive damages against both Ada County and the individually named Defendants who were sued in both their *official* and *individual* capacities. Tr. 9/13/10 Hearing (144:3 – 146:6). Based on the unequivocal holding of the U.S. Supreme Court, Ada County is absolutely immune from a punitive damages claim against it or its employees sued in their "official capacities," because a § 1983 *official capacity* suit is actually against the government:

> Official-capacity suits . . . "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55, 98 S. Ct. 2018, 2035, n.55, 56 L. Ed. 2d 611 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Brandon v. Holt,* 469 U.S. 464, 471-472 (1985).

Kentucky v. Graham, 473 U.S. 159, 165-166 (1985).

In other words, an award of punitive damages against an officer in his official capacity "is in reality an assessment against the county, which is immune from such damages." *Mitchell v. Dupnik,* 75 F.3d 517, 527 (9th Cir. 1996). In the present case, both Ada County and the individually named Defendants (when sued in their official capacities) are immune from an award of punitive damages.

4. Section 1983 and Individual Capacity Defendants.

However, the District Court allowed Hoagland to seek an award of punitive damages against the Defendants in their *individual* capacities.[9] In a § 1983 action, when sued in an *individual* capacity, some states allow the sued individual to be *personally* liable for a punitive damage award, and the judgment to be executed against the employee's *personal assets*. *See Kentucky*, 473 U.S. at 166.

> Moreover, there is available a more effective means of deterrence. By allowing juries and courts to assess punitive damages in *appropriate circumstances* against the offending official, based on his *personal financial resources*, the statute directly advances the public's interest in preventing repeated constitutional deprivations.

Newport, 453 U.S. at 269 (emphasis added).

However, under Idaho state law, the "official capacity" or "individual" capacity distinction is without difference. No governmental employee, while acting within his or her course and scope of employment, will face paying damages from personal financial resources. Idaho Code § 6-903(b) requires governmental entities in Idaho to defend and *indemnify* their employees:

> [A] governmental entity shall provide a defense to its employee, including a defense and *indemnification against any claims brought against the employee in the employee's individual capacity* when the claims are related to the course and scope of employment, and be *responsible for the payment of any judgment* on any claim or civil lawsuit against an employee for money damages. . . .

Idaho Code § 6-903(b) (emphasis added).

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[9] September 27, 2010 Order on Pending Motions ("September 27, 2010 Order"), added to the Record pursuant to January 31, 2012 Order Granting Motion to Augment.

Since the governmental entity is required to provide indemnification, the employee's *personal* financial resources will never be at risk and punitive damages are inapplicable.

Because of these statutory provisions, in Idaho, a claim of punitive damages cannot be allowed against a county defendant named in his/her individual capacity absent an allegation the employee was acting outside his or her course and scope of duties.[10]

Since all litigation costs and any applicable indemnification (including an award of punitive damages against an indemnified employee) would be paid from Ada County tax dollars, a punitive damage award against its employees is ineffective when taxpayers are at risk:

> The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial, and we are sensitive to the possible strain on local treasuries, and therefore on services available to the public at large. Absent a compelling reason for approving such an award, not present here, we deem it unwise to inflict the risk.

Newport, 453 U.S. at 270-271.

In the case at bar, even the District Court understood this quandary, questioning its decision to allow punitive damages, explaining:

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[10] There is further support for this conclusion. The Idaho Legislature retained common-law immunity from punitive damages. The Idaho Tort Claims Act (Idaho Code §§ 6-901, *et. seq.*) waived certain of its sovereign immunities to allow some litigation and damages against the state and its subdivisions. However, the Act *did not* waive immunity from punitive damages. In fact, the reservation of that immunity is blunt: "Governmental entities and their employees shall not be liable for punitive damages on any claim allowed under the provisions of this act." Idaho Code § 6-918. Noteworthy is the fact that the *Newport* decision gave great weight to common-law immunities: "One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Newport*, 453 U.S. at 258.

> And having said all that, the court is still struck with the irony of asking a jury to award punitive damages if the facts support a finding of reckless or callous indifference when as a matter of fact, a jury would be entering an award with the specific intention of deterring a specific employee and any award would be paid not by the employee but by the employer in this case.
>
> But, I suppose we can cross that bridge when we come to it, because I'll grant the motion to file the third amended complaint and the motion for enlargement of time in the same breath.

Tr. 9/13/10 Hearing (145:18–146:4); *See* n. 9.

Based on the above, the Defendants ask this Court to overturn the District Court's decision to allow punitive damages in a § 1983 case against governmentally indemnified defendants.[11]

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[11] Even if this Court finds punitive damages are not precluded as a matter of law, the pleadings in this case did not rise to the level necessary for a punitive damages award. The standard set for the imposition of punitive damages is purposefully high: "We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983).

The U.S. Supreme Court explained the basis for this high standard: Punitive damages are awarded in the jury's discretion "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." *Id.* at 54.

In *Kolstad v. American Dental Association,* 527 U.S. 526 (1999), the U.S. Supreme Court defined the terms "malice" and "reckless indifference" as used in *Smith v. Wade*. *Id.* The U.S. Supreme Court stated, "Most often, however, eligibility for punitive awards is characterized in terms of a defendant's motive or intent. Indeed, the justification of exemplary damages lies in the evil intent of the defendant. Accordingly, a positive element of conscious wrongdoing is always required." *Kolstad*, 125 U.S. at 538 (citations omitted).

Hoagland did not allege "conscious wrongdoing" on the part of any defendant, nor has she forwarded any facts supporting a need for "deterrence and punishment." Quite the opposite, the evidence shows that Defendant James Johnson was deeply affected by Munroe's death, both personally and professionally, describing it as a "tragic occurrence" that was "pretty devastating." R. p. 2482 (21:11,19) He testified that Munroe's death left him "saddened [and] shocked" and was "traumatic." R. p. 2482, (21:9-24); R. p. 2483 (24:4-8). Hoagland's case, at its core, is a disagreement with Johnson's clinical decision. Ultimately the District Court found

D. Did the District Court Err by Disallowing Attorney Fees to the Prevailing Defendants?[12]

1. Introduction.

Since its inception in early 2009, this litigation transformed dramatically. What started as a two (2) plaintiff action under state tort law and § 1983 against the Jail detention staff was replaced by an entirely different § 1983 action against twenty-five (25) new defendants, reduced by the District Court to a single plaintiff § 1983 claim against one (1) social worker, and then dismissed completely. This was due in large part to the Defendants' continuous efforts (through numerous motions and other argument) to frame the issues and parties in response to Hoagland's arguments that were not supported in law or fact. Having had to expend considerable time and expense defending the same entitles the Defendants to their attorney fees.

2. Standard of Review.

> We review a trial court's determinations regarding motions for new trial and attorney fees for abuse of discretion. *Bybee v. Isaac,* 145 Idaho 251, 255, 178 P.3d 616, 620 (2008); *Shore v. Peterson,* 146 Idaho 903, 915, 204 P.3d 1114, 1126 (2009). We assess whether the trial court "(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to

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no support to even sustain a § 1983 case, which undermines Hoagland's argument for punitive damages.

[12] On October 17, 2011, the District Court issued its Order Granting Defendants' Request for Costs. Supp. R. pp. 133-144. The Order properly awarded the Defendants discretionary costs and costs as a matter of right. Accordingly, the Defendants are no longer pursuing their Cross-Appeal as to that issue.

> it; and (3) reached its decision by an exercise of reason." *Sun Valley Potato Growers, Inc. v. Tex. Refinery Corp.*, 139 Idaho 761, 765, 86 P.3d 475, 479 (2004) ...Statutory interpretation is a question of law over which this Court exercises free review. *Dyet v. McKinley*, 139 Idaho 526, 529, 81 P.3d 1236, 1239 (2003).

Carrillo v. Boise Tire Co., Inc., WL 666038 *4 (Idaho 2012).

3. State and Federal Law.

Though this matter was brought in state court, Hoagland's theories were based in state (at least at one time) then solely in federal law. As a result, both state and federal law allow the Defendants to recover costs and attorney fees.

a. Idaho Law.

I.R.C.P. 54(e)(1) allows attorney fees to be awarded to a prevailing party. Attorney fees may also be awarded pursuant to Idaho Code § 12-121 when the case was brought or pursued frivolously, unreasonably or without foundation. Idaho Code § 12-117 additionally allows witness fees and other reasonable expenses where the opposing party acted without a reasonable basis in fact or law. *See Halvorson v. N. Latah County Highway Dist.*, 151 Idaho 196, 245 P.3d 497 (2011). This Court teaches that "[w]hen deciding whether the case was brought or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account." *Nampa & Meridian Irr. Dist. v. Washington Federal Sav.*, 135 Idaho 518, 524, 20 P.3d 702, 708 (2001).

b. Federal Law.

The attorney fees provision of 42 U.S.C. § 1983 is found in § 1988. The applicable portions of § 1988 read:

(b) Attorney's fees

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs . . . .

This statute not only allows a court to award attorney fees to a prevailing party, but also to a prevailing defendant upon the finding "that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[13] *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (citations omitted).

Lastly, "[a plaintiff's] decision to terminate an ill conceived and wrongly prosecuted law suit cannot serve to limit the consequences of a course of action it initiated and persistently followed." *Fidelity Guarantee Mortg. Corp. v. Reben*, 809 F.2d 931, 937 (1st Cir. 1987). In essence, a plaintiff's voluntary dismissal of § 1983 claims does not bar recovery by a defendant.

4. Argument.

In light of the somewhat convoluted history of this matter, it may be best to chronologically discuss the individual stages of this litigation, specifying the results and basis for recovery by the applicable Defendants at each stage.

a. Hoagland's First Complaint and the Defendants' First Motion for Summary Judgment.

On January 23, 2009, Hoagland and the Estate filed a Complaint (R. pp. 19-29) containing claims based on Hoagland and the Estate's allegation that the detention deputies were

[13] The Defendants do not argue that Hoagland's case was brought in subjective bad faith. However, and as the law provides, the Defendants believe the case as filed and pursued was frivolous, unreasonable, or without foundation.

watching a televised football game instead of preventing Munroe from taking his life while he was an inmate at the Jail. The separate claim against Ms. Robertson ostensibly stemmed from a telephone conversation with Hoagland.

After the July 30, 2009 acceptance of the Complaint (R. pp. 30-31), on September 11, 2009, the Defendants provided their first discovery response, including a detailed detective's investigative report, demonstrating that Hoagland's allegations were factually unfounded. R. p. 3368; *see also*, Tr. 7/8/10 Hearing (26:17-25; 27-30).

In addition to being on notice that the factual basis of her Complaint was flawed, Hoagland had filed § 1983 claims on behalf of an invalid party (the Estate) and was also aware that *she* had not filed a notice of tort claim (required as a condition precedent under Idaho law). R. p. 105; May 28, 2010 Dickinson Aff., Ex 11 (pending augmentation by this Court). Further, the Estate failed to allege facts that could constitute a basis for Hoagland's intentional infliction of emotional distress claim against Ms. Robertson.[14] Despite Hoagland's knowledge of these problems, Hoagland made no attempt to address the deficiencies of her Complaint. *See* Tr. 7/8/10 Hearing (17:4-25; 18-23).

On February 2, 2010, Hoagland's counsel indicated they were considering amending their Complaint to add parties, but not additional counts. May 28, 2010 Dickinson Aff. at ¶ 2. (pending augmentation); Tr. 7/8/10 Hearing (25:5-25;26); R. p. 1002, ¶ 12. However, no such amendment was forthcoming. *Id.* In light of the stated § 1983 claims, early resolution of the

[14] Which was most likely attributable to the nonexistence of such facts.

Defendants' applicable immunity defenses was required by law.[15] As a result, in early May the Defendants provided Hoagland with notice of their intent to file for summary judgment.[16] Hoagland's counsel responded, stating they intended to amend the Complaint by May 21, 2010. R. p. 1002, ¶ 12; Tr. 7/8/10 Hearing (25:2-25). However, amendment was forthcoming. Given the impending trial date, the Defendants found themselves in an untenable position where they could not afford to continue waiting, and a week later moved for summary judgment on the existing Complaint, including the filing of a forty-one (41) page accompanying Memorandum and fourteen (14) supporting affidavits in support.

Instead of addressing the majority of the arguments raised by the Defendants, Hoagland effectively admitted that her allegations were brought without a reasonable basis in fact and/or law when she abandoned each of the state law claims and dismissed all of the Defendants against whom the federal § 1983 claims were originally directed.[17] *See* R. pp. 818-875. This was, in essence, a complete retraction of the Complaint.

A year and a half after filing, Hoagland forwarded she was not prepared to defend against summary judgment and asked the District Court to prevent the Defendants from proceeding with summary judgment until she spoke with her expert witness and undertook more discovery to help

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[15] *See* earlier discussion on pp. 9-12.
[16] *See* the original Motion for Discovery Protection, filed May 5, 2010. R. p. 73.
[17] This includes Marshall McKinley, Michael Vineyard, Paul Reiger, Kirt Taylor, Adam Arnold, Kevin Manning, and Leslie Robertson. Again, Sheriff Gary Raney was not named as a defendant in regards to the federal § 1983 claims. *See* R. p. 25.

her determine what claims she may have.[18] Tr. 7/8/10 (64:2-21). The District Court continued summary judgment.[19] Since Hoagland's Amended Complaint dropped the original Defendants, they were the prevailing party with respect to their Summary Judgment Motion, and were entitled to reasonable attorney fees pursuant to Idaho Code §§ 12-117, 12-121 and 42 U.S.C. § 1988. This is true regardless of the fact that Hoagland abandoned her claims. *See Fidelity,* 809 F.2d 931 at 937.

b. *Hoagland's Three (3) Amended Complaints and the Defendants' Motion to Dismiss.*

Over the next two (2) months, Hoagland amended her First Complaint multiple times (R. pp. 1088-1176, 1177-1270), but waited until September 14, 2010, to finally file her Third Amended Complaint, which was ninety (90) pages long and contained four hundred and sixty-six (466) paragraphs. R. pp. 1451-1540. It was a *completely different* Complaint from the original. Seven (7) of the eight (8) original Defendants were replaced with thirteen (13) new Defendants[20] and the only original Defendant remaining (Sheriff Gary Raney) was now being sued under a *completely different* theory. The basis of Hoagland's new lawsuit dramatically changed. Instead of being based on the alleged actions of Jail detention staff, it was now based on the alleged actions of Jail medical and administrative staff. The focus of the lawsuit shifted entirely from

[18] This continued the time and expense incurred by the Defendants, contrary to the U.S. Supreme Court's admonition that immunity cases are to be decided early in litigation to prevent defendants from discovery and litigation burdens.
[19] August 16, 2010 Amended Order (*see* n. 6).
[20] The new Defendants were listed as: Ada County; Linda Scown; Kate Pape; Steven Garrett, M.D.; Michael E. Estess, M.D.; Ricky Lee Steinberg; Karen Barrett; Jenny Babbitt; James Johnson; Jeremy Wroblewski; David Weich; Lisa Farmer; and Jamie Roach.

the actions of the individual detention deputies and Ms. Robertson to the medical care Munroe received at the Jail, along with policies and customs of the Ada County Sheriff's Office. Gone in their entirety were the state law claims. Instead, Hoagland now alleged only § 1983 civil rights claims requiring a much higher burden, and the allegations were much different from those alleged in the original Complaint.

The Defendants next filed a Motion to Dismiss (pursuant to I.R.C.P. 12(b)(6)) based on the ineligibility of Hoagland and the Estate as valid § 1983 plaintiffs under Idaho law. This argument was not new, as it had been brought, briefed, and argued earlier in the Defendants original Motion for Summary Judgment. In its November 2, 2010 Memorandum and Order (R. pp. 1578-1588), the District Court agreed that Idaho law precluded the Estate from bringing claims and dismissed Count I of the Third Amended Complaint, explaining that "Idaho law does not allow Munroe's estate to bring a claim." R. p. 1584. Hoagland and the Estate filed a Motion to Reconsider. R. pp. 1797-1805. The District Court explained its analysis, but did not alter its dismissal. R. pp. 2315-2356. The Defendants filed motions and memoranda twice to dismiss a plaintiff who brought suit with no standing.[21] As such, the Defendants are entitled to attorney

[21] Unbeknownst to the District Court and the Defendants, Hoagland had also filed an identical lawsuit in U.S. District Court. Counsel for the Defendants discovered the federal complaint, captioned *Hoagland v. Ada County, et al.*, 10-CV-00486-EJL, and during an oral argument on October 7, 2010, brought the concurrent federal court filing to the District Court's attention. The Defendants orally moved to dismiss the state lawsuit pursuant to I.R.C.P. 12(b)(8) which provides for dismissal where there is "another action pending between the same parties for the same cause." The District Court declined to entertain the oral motion, but said it would entertain a written motion. Tr. 10/7/10 Hearing (153-155). The Defendants assumed Hoagland would dismiss her federal lawsuit, but the federal case continued U.S. District Court Judge, issuing a Litigation Order. Faced with defending the same lawsuit in different forums, the Defendants

fees pursuant to I.R.C.P. 54(d) and (e), Idaho Code §§ 12-117 and 12-121, and 42 U.S.C. § 1988 incurred in defending against claims filed and pursued without a reasonable basis and without foundation.

c. The Defendants' Restated Motion for Summary Judgment.

In light of the dismissal of the Estate and the complete shift in Hoagland's underlying theories and culpable parties under the Third Amended Complaint, the Defendants found it necessary to research, brief, and collect affidavits to support a restated summary judgment argument tailored to the new § 1983 claims. The Defendants' Restated Motion for Summary Judgment was filed on November 12, 2010. R. pp. 1668-1696.

Hoagland's Third Amended Complaint can be subdivided into twenty-five (25) separate § 1983 claims/Defendants. One (1) claim was made against Ada County, twelve (12) were made against individuals in their official capacities, and twelve (12) were made against individuals in their personal capacities. The Defendants repeatedly argued that pursuant to the high bar required to be met to pursue § 1983 actions, a plaintiff must be able to demonstrate direct causal connections resulting in specific constitutional violations. On January 20, 2011, the District Court granted summary judgment to twenty-four (24) of the twenty-five (25) new Defendants. R. pp. 2315-2356. Only one Defendant (in his individual capacity) was left in the lawsuit.

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filed a written motion and memorandum with the District Court requesting dismissal. Only then, after the Defendants had expended additional resources, did Plaintiffs dismiss their duplicative federal case. R. pp. 2198-2200.

On February 7, 2011, Hoagland moved for reconsideration but, out of the twenty-four (24) dismissals, only asked this Court to reconsider five (5) claims/Defendants,[22] essentially admitting nineteen (19) of the claims/Defendants in the Third Amended Complaint were forwarded without a reasonable basis in law or fact. R. pp. 2360-2362. The Defendants forward that each of the dismissed Defendants was entitled to reasonable costs and attorneys' fees pursuant to I.R.C.P. 54(d) and (e), Idaho Code §§ 12-117 and 12-121, and 42 U.S.C. § 1988.

d. *The District Court's Findings Regarding Hoagland's Discovery Compliance.*

The District Court, referencing Hoagland's discovery compliance during this litigation, noted: "Additionally, Plaintiff's discovery production was limited. As a result, while undertaking their own investigation, Defendants incurred copying fees and investigator fees." Supp. R. p. 140. Because Hoagland's discovery responses were "limited," the Defendants were obliged, for case preparation purposes, to investigate and discover much information on their own.[23]

e. *Conclusion.*

Distilled to its essence, both state and federal law provide that a prevailing party may be awarded fees when a lawsuit is brought without a reasonable basis or foundation in law and/or

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[22] These appeared to consist of official capacity claims against Ada County, Sheriff Gary Raney, Linda Scown, Kate Pape, and an individual capacity claim against Kate Pape.

[23] *See* R. pp. 950, 951 (referencing Defendants' repeated attempts to obtain Hoagland's medical records.); *See* also, Tr. 12/9/10 Hearing (20-22). In a later hearing, the Defendants explained their inability to obtain Hoagland's medical history, Munroe's medical history and juvenile probation history from Hoagland. R. pp. 950-952; Tr. 9/15/10 Hearing (14).

fact. Furthermore, one must take into account the entire course of the litigation to make a finding. *Nampa & Meridian Irr. Dist.*, 135 Idaho at 525, 20 P.3d at 708.

As demonstrated by the history set forth above, many of Hoagland's claims had no basis in law and/or fact. Applicable law is always accessible to a party's counsel, but in some cases a plaintiff could assert that facts of the case were unknown to them early in the lawsuit. However, the Jail's criminal investigation into Munroe's death was provided to Hoagland and the Estate in Defendants' First Discovery Response dated September 11, 2009. R. pp. 1015-1036. It was apparent in September 2009 that Hoagland's "television watching" allegation was without factual basis. And, even though she had information disproving her allegations, she waited until July of 2010 (after the Defendants filed for summary judgment) to abandon them.

The Defendants have prevailed more than once, obtaining a dismissal against one of two Plaintiffs, abandonment of all stated claims against the eight (8) original Defendants, and court-ordered dismissals on behalf of the twenty-five (25) Defendants. This does not include the claims and defendants dismissed in the federal action. The Defendants prevailed largely because Hoagland's allegations lacked a reasonable basis in fact and/or law and were filed without foundation. Ada County taxpayers have expended thousands of dollars defending this matter on behalf of the dismissed Defendants, and are entitled to recovery of their attorney fees, pursuant to I.R.C.P. 54(d) and (e), Idaho Code §§ 12-117 and 12-121, and 42 U.S.C. § 1988. Based on the foregoing, the Defendants respectfully request this Court overturn the District Court's decision not to award Defendants' attorney fees.

E. Did the District Court Err by Admitting and Considering Evidence and Documents From Hoagland Which Lacked Proper Foundation and/or Were Not Admissible Pursuant to Idaho Rule of Civil Procedure 56 and/or the Idaho Rules of Evidence?

1. Introduction.

Hoagland's motion practice created an evidentiary quagmire for both the Defendants and the District Court. Instead of supporting her evidence with affidavits from witnesses who possessed personal knowledge and who could provide foundation for the evidence proffered, her attorney signed omnibus affidavits ("Overson Affidavits") purporting to lay foundation for hundreds of documents.

A cursory review of the Overson Affidavits (R pp. 288-550, 2073-2197, 2625-2990, 3342-3465, 3505-3782) reflects how Hoagland directs the District Court to search through numerous pages of attachments to find what she cites to, and her attorney attempts to lay foundation for almost all of her documentary submissions.

The first Overson Affidavit purported to lay foundation for everything from Munroe's psychiatric hospital records (R. p. 544) to counsel's written "impressions" of what records were not included in discovery, explaining: "[he had] reviewed all of the medical records. . . ." R. p. 290, ¶¶ 17, 24; p. 291, ¶¶ 28, 35, 38. Further Overson Affidavits described Jail videos that counsel watched (R. pp. 2074-2075, ¶ 7), and Hoagland attempted to offer an Overson Affidavit into evidence nearly two weeks after the case was dismissed. R. pp. 3505-3782. This inappropriate submission of evidence, and arguments based on the same, obligated the Defendants to object and move to strike numerous pages of improperly submitted documents.

The shear volume of attachments to these affidavits forced Defendants to interpose broad, generalized objections. The District Court was likewise confronted with the proposition of evidentiary rulings on pages of improperly submitted evidence. The District Court struck a number of Hoagland's submissions, but still allowed a number of improper submissions. Hoagland even cites to this Court evidence the District Court *struck*.[24]

The Defendants were required to file six objections and motions to strike before the District Court.

2. Standard of Review.

See Standard of Review as set forth in Issue D above.

3. Law.

Rule 56(e), I.R.C.P. provides in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . .

In *Cates v. Albertson's, Inc.*, 126 Idaho 1030, 895 P.2d 1223 (1995), Ball, the attorney representing Cates, authored an affidavit that was objected to. This Court agreed that the information forwarded in conjunction with Ball's affidavit was improper and could not be considered, explaining:

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[24] On pages 43 and 48 of Appellant's Brief, Hoagland improperly bases her appellate arguments before this Court on unadmitted telephone audio recordings specifically, along with her arguments, stricken by the District Court. R. p. 3493. On page 8 of Appellant's Brief, Hoagland improperly bases her arguments to this Court on a portion of Dr. White's opinion specifically stricken by the District Court. R. pp. 3491, 3492.

> Ball's affidavit is not based upon personal knowledge as required by Rule 56(e). The only evidence offered through the Ball affidavit is worker's compensation records from Market Transport/United Express attached as exhibits to the affidavit. Nothing in Ball's affidavit establishes that Ball has any personal knowledge of either the accidents discussed in the records or the preparation and maintenance of the records themselves. Because the affidavit fails to establish that Ball is competent to testify as to the matters contained therein, this Court will not consider the contents of the affidavit in opposition to Albertson's affidavit.
>
> Cates argues that, because nothing in the record indicates that the records are not accurate and kept in the ordinary course of business, the exhibits to Ball's affidavit are admissible under the business records exception to the hearsay rule. This contention misstates the requirements of I.R.C.P. 56(e). It is Cates' burden to affirmatively show that Ball is competent to testify to the matters contained in the affidavit and that the affidavit is based on Ball's personal knowledge. Because the Ball affidavit fails to affirmatively establish that Ball has personal knowledge of the contents of the records offered through that affidavit or that the affidavit sets forth facts that would be admissible at trial, the contents of and exhibits to that affidavit will not be considered in opposition to the motion for summary judgment.

Id. at 1034, 895 P. 2d at 1227.

In oral argument on the Defendants' first Motion to Strike, Hoagland's attorney argued to the District Court that anything produced in discovery is admissible for summary judgment purposes arguing: "All I knew is they produced discovery. And under the standard on summary judgment, if they produce it to me, I'm entitled to say that's been verified, that's authentic, and use that in summary judgment." Tr. 7/8/10 Hearing (79:12-16).

Hoagland's argument that anything produced to her in discovery and attached to the "Overson Affidavits" is admitted is inconsistent with I.R.C.P. 56(e) and *Cates*. Before evidence can be admitted and considered by the court, proper foundation must be supplied by a witness with personal knowledge competent to testify to the contents. It is Hoagland's burden to supply

proper foundation for her exhibits. The Defendants ask this Court to hold that Hoagland's failure should have resulted in her evidence being stricken from consideration by the District Court.

4. Motions to Strike.

a. Motion to Strike #1.

On July 1, 2010, Defendants filed their first Objection and Motion to Strike in response to an Overson Affidavit. R. pp. 914-932. The concern surrounded submissions supporting Hoagland's fifty-five (55) page Memorandum in Opposition to Defendants' Motion for Summary Judgment, filed June 23, 2010 (R. pp. 818-875), and found in Hoagland's 482 page Affidavit of Counsel in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed June 21, 2010 (R. pp. 288-763).

Because Hoagland abandoned her original Complaint rather than defending it against summary judgment, the Overson Affidavit and Motion to Strike the 482-page affidavit was left in a legal limbo. The District Court did not rule specifically on each objection; instead deciding the Motion to Strike was denied "only to the extent evidence contained therein was admissible." August 16, 2010 Amended Order; Tr. 7/8/10 (94:8-14). Because Hoagland's Appellate Brief continues to cite to this Overson Affidavit, and due to the District Court's lack of specific evidentiary rulings regarding the Affidavit, the Defendants unfortunately must reassert their same objections to Hoagland's continued lack of foundation.[25] The Defendants object to this

[25] The Defendants object to evidence where opposing counsel fails to set out his qualifications to testify to the existence, non-existence, or contents of records (*e*.g. R. pp. 290, 291, ¶¶ 17, 21, 24, 28, 35, and 38) and his ability to lay foundation for documents, his failure to set out how each is

Overson Affidavit as it fails to provide foundation for the attached Munroe 2001 psychiatric records, Munroe 2002 emergency room visit records, a 2002 psychiatric evaluation,[26] a hard copy of an on-line F.D.A. brochure regarding the prescription drug Celexa[27] (R. pp. 609–630), Boise City Police reports (R. pp. 640-651), and Saint Alphonsus emergency room records (R. pp. 652-661). The Defendants appeal the District Court's determination not to strike this evidence and also move this Court not to consider the same as a basis for this appeal.

b. Motion to Strike #2.

The Defendants filed their second Motion to Strike (R. pp. 2246-2253) in response to Hoagland's Affidavit in Support of her Opposition to Defendants' Restated Motion for Summary Judgment. R. pp. 2046-2072. This Motion to Strike was targeted at portions of the nearly three-inch thick collection of documents appended to another Overson Affidavit. R. pp. 2073–2079, p. 3851, Ex. 2).

Hoagland based portions of her arguments on attached responses including letters from the National Commission on Correctional Healthcare (NCCHC), which were objected to and argued to the Court on December 9th and 10th, 2010. R. pp. 2246-2253. The subject NCCHC letters (R. pp. 2228-2237) appear to have been shared with Overson, but he cannot lay foundation, since he was the neither sender nor the recipient of the documents. Further, the

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admissible at trial and how he is competent to testify to the matters contained therein. (R. pp. 539-542, Ex. 11.)

[26] R. p. 919.

[27] The District Court allowed the Celexa information over the Defendants' arguments. Tr. 7/8/10 Hearing (39-40, 79-82, 94).

Overson Affidavit cannot lay foundation for the Jail and Court Services Bureau Standard Operating Procedures manuals. R. pp. 382-451, 452-517.

The District Court considered the Defendants' Second Motion to Strike, finding Hoagland failed to provide foundation for Ada County Detective Buie's report, that Overson's narration of a video was improper, and Overson's testimony regarding records was not inadmissible. However, the Court did not address the remainder of the objections. R. p. 2317.

c. *Motion to Strike #3.*

i. *Dr. White's New Opinion and Exhibits.*

In support of her February 2011 Motion for Reconsideration, Hoagland filed another Overson Affidavit (R. pp. 2625-2990) and an Affidavit and Supplemental Report of Dr. Thomas White (R. pp. 3012-3030). Hoagland based her Motion for Reconsideration partially upon her new Overson Affidavit and partly on newly proffered opinions found in White's Supplemental Report, both of which the Defendants objected to and moved to strike pursuant to I.R.C.P. 56(e) and 12(f) and applicable case law. R. pp. 3250-3262. Ruling on the motions, the District Court allowed Exhibits 11, 13, and 14. R. pp. 3486-3504. The District Court also allowed the bulk of Dr. White's new opinion, determining that the Defendants should have filed an I.R.C.P. 56(f) Motion to Continue the hearing rather than objecting to the inclusion. The District Court did strike Dr. White's legal conclusions about deliberate indifference. R. pp. 3491-3492.

The Defendants appeal the District Court's determination to allow the remainder of Dr. White's report and explain the basis of their objections below.

ii. Dr. White's Supplemental Report Was Untimely.

Dr. Thomas White is a retired prison psychologist hired to testify for Hoagland. His report, produced pursuant to the Court's scheduling order and the Idaho Rules of Civil Procedure, consisted of 13 pages dated October 11, 2010.

Preparing for trial, the Defendants traveled to Overland Park, Kansas and on November 18, 2010, deposed Dr. White. During the deposition, the Defendants asked Dr. White what "opinions he reached in this matter." He responded that he would testify about staff members at the facility, Munroe's assessment and his judgment about the case. R. p. 3226 (6:19-7:1-12). He was asked, "Were there any more opinions or did that kind of encapsulate everything?" Dr. White answered, "That's kind of an umbrella notion . . . but that's generally it, yes." And, to make sure, "Were there any other opinions or did we get everything probably in there?" Dr. White responded, "No, I think that was it." R. p. 3226 (7:16-21).

Near the end of January 2011, Hoagland filed a new 14-page *Supplemental* Report from Dr. White. In the new report, White explained he lacked deposition transcripts of the Defendants and other witnesses when he authored his original Report. R. pp. 3016-3030. But, this was not the fault of the Defendants' scheduling.

The Defendants objected and moved to strike Dr. White's Supplemental Report, pursuant to I.R.C.P. 12(f) and 26(b)(4), due process, and the trial Court's Scheduling Order.[28] *See City of McCall v. Seubert*, 142 Idaho 580, 130 P.3d 1118 (2006).

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[28] By waiting until the Defendants conducted Dr. White's deposition, after the Court's Restated Summary Judgment ruling, Hoagland gained a clear and unfair advantage – the Defendants were

The District Court did strike a portion of Dr. White's new opinions where he inappropriately opined as to application of the legal standard in this action.[29] R. pp. 3491-3492. Defendants' appeal the District Court's determination that the new decision was an allowable supplement to White's earlier opinion.

d. *Motion to Strike #4.*

The Defendants filed their fourth Motion to Strike on March 4, 2011. R. pp. 3315-3325. The basis of the objection was Hoagland's argument in District Court briefing (R. pp. 3244-3245) containing her counsel's psychiatric diagnoses divined from the "sound" of Munroe's voice on non-admitted Jail telephone audio recordings,[30] stricken by the District Court. R. pp. 3244-3245.

The Defendants also objected and moved to strike Hoagland's mischaracterizations of Deputy Wroblewski's interaction with Munroe. R. pp. 3315-3325. Both on appeal and below, Hoagland's rendition of the facts could be misleading because of her omission of important facts. R. p. 3244. In her Appellant's Brief (pp. 5, 11, 15, 16, 29, 30, 32, 47, 48), Hoagland focuses on the interaction between booking Deputy Wroblewski and Munroe when Munroe was booked the morning of September 29, 2008. Wroblewski was present as social worker James Johnson interviewed Munroe, then less than 30 minutes later, Wroblewski finished booking Munroe. The

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prejudiced since they were precluded from deposing Dr. White about his new opinions, and he could tailor his new opinion to the District Court's Order.

[29] Hoagland now argues the same to this Court, improperly citing to this stricken portion of Dr. White's opinion. Appellant's Brief, p. 8.

[30] Hoagland improperly argues to this Court based upon this same stricken evidence in her Appellant's Brief at pages 47 and 48.

important portion of the interaction is Munroe explaining he was suicidal when he came in the night before, but was no longer suicidal. Wroblewski marked that Munroe was suicidal (the night before), but he could not recall if there was an explanation area to explain Munroe's comments that he was suicidal when he was brought to the Jail, but no longer. R. p. 3296 (63:25-64:17). Wroblewski explained this repeatedly (*See* R. pp. 3289 (35:12-21), 3291 (42:23-43:1), 3296 (63:20-21), 3298 (72:1-2), 3300 (79:22-24), but Hoagland continually omits that portion of Wroblewski's testimony. Hoagland's assertions change the context and conversation between Wroblewski and Munroe significantly, and should have been stricken below.

The Defendants also called the District Court's attention to Hoagland's assertion below (R. p. 3244) and now on appeal (Appellant's Brief, pp. 4, 32, 47, 48) that when booked, Munroe stated he heard voices and saw "shadow people." Again, Hoagland fails to include that in Munroe's telephone call earlier the same morning, he stated that the only drug he wanted was Thorazine, and he would tell them "he heard voices" so that he could get it. R. p. 3851, Ex. 4 (Lundt Aff., Ex. A, p. 12).

The District Court allowed both of Hoagland's mischaracterizations to remain, stating "that due to the amorphous nature of the motion, the Court is unable to address it with specificity." R. p. 3493. The Defendants ask this Court to overturn the District Court's decision not to strike Hoagland's partial assertions describing Wroblewski's interactions with Munroe.

F. Are the Defendants Entitled to Attorney Fees on Cross-Appeal?

Should the Defendants prevail on cross-appeal, they request costs and attorney fees pursuant to Idaho Code §§ 12-121, 12-123, and/or Idaho Appellate Rule 41. The basis for an award of costs and attorney fees on cross-appeal is already set forth in the contemporaneously filed Respondents' Brief at pp. 74-75 and in the interest of efficiency will not be repeated, but instead incorporated by reference.

V. CONCLUSION

The Defendants have cross-appealed a number of rulings by the District Court. While many of the cross-appeal issues will be rendered moot if this Court upholds the District Court's dismissal of Hoagland's lawsuit, other issues, if decided, will lend important guidance to governmental defendants and district courts. For instance, nationwide § 1983 law (save for the Ninth Circuit for the time-being) provides no cause of action for parents suing on behalf of an adult child. It would be helpful for this Court to decide that Idaho law is consistent with the rest of the nation.

Secondly, protection from discovery and early determination on summary judgment is the very backbone of immunity. The Defendants moved for both, but were denied. Defendants ask this Court to instruct district courts to follow the teachings of the U.S. Supreme Court on this issue.

In Idaho, unless a governmental employee acts beyond the course and scope of his job, his or her employer must defend and indemnify him or her. Since the Defendant won't be

personally liable for punitive damages, Plaintiffs should be precluded from asking for the same in a § 1983 action.

Lastly, the Defendants request this Court overturn the District Court's refusal to award attorneys fees to the Defendants, and that the noted evidence submitted by Hoagland be stricken.

RESPECTFULLY SUBMITTED this 15th day of March 2012.

GREG H. BOWER
Ada County Prosecuting Attorney

By: _____
James K. Dickinson
Senior Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of March 2012, I served a true and correct copy of the foregoing CROSS-APPELLANTS' BRIEF to the following persons by the following method:

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