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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

COPY

CROSS-APPELLANTS' REPLY 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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I. INTRODUCTION

On March 15, 2012, the various Ada County defendants (the "Defendants") filed their Cross-Appellants' Brief in which they argue that the District Court erred by (i) allowing Rita Hoagland ("Hoagland") to bring a § 1983 action for the death of her adult child, (ii) not limiting discovery while qualified immunity defenses were being resolved, (iii) allowing Hoagland to seek punitive damages, (iv) disallowing attorney fees to the prevailing Defendants, and (v) not striking materials which lacked proper foundation and/or were not otherwise admissible.

In response, Hoagland filed her Appellant's Response and Reply Brief on April 27, 2012 (the "Cross-Response Brief"), which, among other things, severely convolutes the § 1983 issue at the heart of this matter. Hoagland states that the real issue in this litigation is the question of whether she must bring her § 1983 action as "a wrongful death claim, a survivorship claim, or can it be brought as both?" Cross-Response Brief, p. 2. What Hoagland refuses to accept is that state law (such as wrongful death and survivorship statutes) cannot be the basis for a federal § 1983 cause of action. *See Baker v. McCollan*, 443 U.S. 137, 146 (1979); *Lacy v. County of Maricopa*, 631 F. Supp.2d 1197, 1205 (D. Ariz. 2008). Rather, a plaintiff must prove that the defendant deprived the plaintiff of a clearly established *constitutional right. West v. Atkins*, 487 U.S. 42, 48 (1988) (emphasis added). Only if such a right has been violated do courts then turn to the question of standing, which can be obtained (or prohibited) by state law. Hoagland wants

this Court to skip over this fundamental tenet of § 1983 jurisprudence, and jump to the conclusion that a § 1983 claim exists just because a state actor is involved.[1]

In addition, Hoagland's Cross-Response Brief also misconstrues legal authority regarding allowable discovery limitations, fails to properly address Defendants' argument against punitive damages, and does not bother to respond to other issues on cross-appeal such as the Defendants' argument for attorney fees at the District Court level. Instead of setting forth clearly established law, Hoagland's Cross-Response Brief attempts to muddy the applicable legal standards and then, in the resulting confusion, invites this Court to adopt her cherry-picked legal interpretations that ignore and/or misinterpret existing case law.[2] This Cross-Reply Brief will attempt to address Hoagland's deficient responses and clarify the issues on cross-appeal.

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[1] As the U.S. Supreme Court noted, "Just as '[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,' *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official." *Baker*, 443 U.S. at 146.

[2] This is demonstrated by misleading statements in Hoagland's appellate briefing such as: "[T]oo often, the issues of whether the cause of action survives death and, if so, the nature of that claim, who can bring it, and what damages are available get muddled together in cases like this one." Cross-Response Brief, p. 3. Hoagland then ostensibly supports her statement with, "Plainly stated, this area of the law is murky and confusing." *Id.* (quoting *Estate of Terry Gee v. Bloomington Hospital*, 2012 WL 729269 (S.D. Ind)). However, this *Gee* quote only applies to the aspect of damages in that case, not the plethora of issues Hoagland alludes to. Though § 1983 cases are exceptional and more complex than many other areas of litigation, it does not necessarily follow that § 1983 law creates a free-for-all allowing courts to "fill in the blanks" indiscriminately – especially where there is a substantial body of law that explains the proper application of law under these circumstances. *See* Section II(A)(1)(b) below.

II. ARGUMENT

A. Hoagland Does Not Have a Basis to Bring a § 1983 Action for the Death of Her Adult Child.

For the first time under Idaho law, a parent of an adult child is being allowed to bring a § 1983 claim by virtue of Idaho's wrongful death statute. As argued in the Defendants' Cross-Appellants' Brief, the District Court erred by failing to follow the overwhelming case law which holds that a parent of an adult child cannot bring a § 1983 claim for the death of an adult child. This is a two-fold issue that involves (i) substantive § 1983 law and, if there is a basis to bring such a lawsuit, (ii) standing. However, almost all courts acknowledge that there is no legal basis for a § 1983 claim under the first component (substantive law) and the analysis ends there.

Unfortunately, in the matter at hand, the District Court skipped over the substantive law portion and appears to have only directly addressed the standing portion. Hoagland has needlessly compounded this error by confusing the standing and substantive law components with each other and, in a perplexing and novel turn, incorrectly suggesting that there is no constitutional question for this Court to decide. As previously argued in the Cross-Appellants' Brief and below, such arguments by Hoagland are flawed and should not be accepted by this Court.

1. Hoagland Does Not Have Standing or a Cause of Action.

Notwithstanding the lack of a substantive basis under § 1983 law,[3] in light of the fact that the District Court jumped to the issue of standing, the Defendants will briefly address the standing issue first before explaining why it is irrelevant in this case.

a. *The District Court Erred by Granting Hoagland Standing Before Determining the Existence and Violation of a Constitutional Right.*

As this Court is aware, for the first time under Idaho law a parent of an adult child is being allowed to bring a § 1983 claim by virtue of Idaho's wrongful death statute. In holding that Hoagland has standing to bring such a claim, the District Court specifically pointed out that it was not making a determination as to "whether Ms. Hoagland's § 1983 wrongful death claim will succeed; rather, the Court is simply determining that she may bring a wrongful death claim." R. p. 1586. Since no Idaho statute or case allowed standing for Hoagland's § 1983 claim, the District Court borrowed a standing theory utilized by an anomalous, twenty-year-old Fifth Circuit case. In *Rhyne v. Henderson County*, 973 F.2d 386 (5th Cir. 1992), the court engaged a legal fiction to allow a § 1983 case to continue in federal court. *Rhyne* borrowed Texas' wrongful death statute just long enough to allow the plaintiff federal standing. After standing was established, the state statute was then ignored and substantive federal § 1983 law (not the forum state's substantive cause of action) was followed for the remainder of the litigation. Without this fiction, the federal court could not have entertained the case.

[3] *See* Section II(A)(1)(b) below.

The *Rhyne* case is additionally problematic because it never clearly established the substantive basis for the plaintiff's cause of action and instead appears to make an inadvertent analytical leap to establish standing that requires further clarification. If the mother in *Rhyne* was allowed to incorporate Texas' wrongful death statute (which allows a parent standing) into a § 1983 substantive due process cause of action, then it follows that the cause of action would similarly be specific to the mother based on *her* substantive due process rights, not her son's. The *Rhyne* court follows this path, but at the last minute adds the sentence "[t]o be more precise, our decisions allow recovery by Rhyne for her injury caused by the state's deprivation of *her son's constitutionally secured liberty interests*" (*Rhyne,* 973 F.2d at 391 (emphasis added)), which appears to contradict the court's own analysis. As a result, it is not clear whose substantive constitutional rights are at issue. Is it the mother's substantive due process liberty interest in maintaining a relationship with her son, or is it the son's due process rights regarding his treatment? If it is actually the mother's (which is more consistent with the court's legal analysis), then what are the contours of that right? The *Rhyne* court never resolved these issues and the District Court in this case did not elaborate on the matter when it based its standing determination on *Rhyne*.[4]

[4] This has led to much confusion by Hoagland as to how a § 1983 parental cause of action for the death of an adult child operates. As demonstrated in her briefing, she appears to believe that Idaho Code § 5-311 allows her to bring a § 1983 claim regardless of whether there is any independent federal basis for the § 1983 claim. *See* Cross-Response Brief, pp. 1-2. Put more succinctly, she is attempting to "federalize" Idaho's wrongful death statute, presumably so that she can avoid its statutory limitations (i.e. damage caps, no punitive damages, restrictions on attorney fees), but at the same time, she wants this Court to ignore the federal requirements

Regardless, the overarching issue is that before determining standing, a cause of action must first exist. Only then is it relevant to determine who can bring the claim. Unfortunately, the District Court glossed over this point, leaving this Court to resolve the fundamental issue of whether Idaho will recognize a federal constitutional right in favor of the parent of an adult child.[5]

b. *Even if Hoagland Has Standing, She Still Lacks a § 1983 Cause of Action.*

As noted in Defendants' prior briefing,[6] the landscape in the area of a parental § 1983 action for the death of an adult child has changed dramatically over the last thirty (30) years. Starting with its creation by the Seventh Circuit in 1984 to its almost unanimous rejection by current courts (including the Circuit that created it), this cause of action has run full circle to the point that it is now almost extinct. In 2007, a New York federal court detailed its nationwide survey of current law regarding a parent's § 1983 case for the death of an adult child:

> 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 (3rd Cir. 2003); *Butera v. District of Columbia,* 235 F.3d 637, 656 (D.D.C. 2001); C*laybrook v. Birchwell,* 199 F.3d 350, 357-58 (6th Cir. 2000);

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necessary to bring a § 1983 parental cause of action for the death of an adult child. *See* Section II(A)(2) below.

[5] This Court exercises free review over issues of law. *See Maresh v. State, Dept. of Health and Welfare ex rel. Caballero,* 132 Idaho 221, 224, 970 P.2d 14, 17 (1998).

[6] *See* Cross-Appellants' Brief, pp. 3-7.

> *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, 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, 2007 WL 2826649 at 10 (S.D.N.Y. 2007).

Allowing Hoagland to proceed with her § 1983 parental/adult child claim is contrary to the overwhelming body of law and would place Idaho in the unenviable position of recognizing an outlying, disfavored and nearly extinct cause of action that is "inadvertent and/or not particularly well thought out under Supreme Court precedent . . . ." *Rentz v. Spokane County*, 438 F. Supp. 2d 1252, 1265 (2006).[7] Given the clear direction of the vast majority of the federal Circuits (i.e. the First, Third, Fourth, Sixth, Seventh, Tenth, Eleventh, and District of Columbia Circuits)[8] and the U.S. Supreme Court's cautious approach with regard to the expansion of substantive due process claims,[9] it seems prudent to follow the currently accepted application of substantive due process claims and overturn the District Court's decision to allow Hoagland standing to bring a § 1983 action for the death of her adult child.

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[7] This description is by a Ninth Circuit District Court Judge lamenting his predicament of being bound to the Ninth Circuit precedent in an adult child lawsuit.

[8] *See Russ*, 414 F.3d 783, 787-88; *Trujillo*, 768 F.2d at 1190; *Valdivieso Ortiz*, 807 F.2d 6, 9; *McCurdy*, 352 F.3d 820, 830; *Claybrook*, 199 F.3d 350, 357-58; *Shaw*, 13 F.3d 791, 804-05; *Robertson v. Hecksel*, 420 F.3d 1254, 1260 (11th Cir. 2005); *Butera v. District of Columbia*, 235 F.3d 637, 656 (D.C. Cir. 2001).

[9] The Seventh Circuit noted:

> The Supreme Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking 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."

Russ, 414 F.3d at 789.

Though Hoagland does little to argue against the overwhelming case law on this matter (other than suggesting the Ninth Circuit's "inadvertent and/or not particularly well thought out"[10] position is somehow better reasoned than every other Circuit's approach), she does attempt to forward another argument – namely that the intentional interference requirement necessary for a § 1983 familial relations violation claim should be waived. Hoagland suggests that she can somehow bring a § 1983 parental claim for the intentional severance of a parent's relationship with an adult child by alleging that the Defendants were deliberately indifferent to Hoagland's relationship with her son. However, Hoagland is confusing two separate standards. A finding of "deliberate indifference" is insufficient to establish specific intent to sever a parent's relationship. Instead, Hoagland would need to show that each Defendant acted for the specific purpose of intentionally killing Bradley Munroe ("Munroe") to harm Hoagland, which has not (and cannot) even be alleged in this case if for no other reason than that Munroe took his own life. *See Russ,* 414 F.3d at 790. This is further supported by existing law on the subject:

> 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 ... 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

[10] *Rentz*, 438 F. Supp. 2d at 1265.

> the parent's liberty interests. *See Russ*, 414 F.3d at 786 (*citing Bell v. City of Milwaukee*, 746 F.2d 1205, 1243-44). 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 444, 452 n. 25 (7th Cir. 2006) (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 798-90. 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.

Estate of Perry ex rel. Perry v. Boone County Sheriff, 2008 WL 694696 at 11-12 (S.D. Ind. 2008).

Because Hoagland did not (and could not) allege her son's death was the product of any Defendants' intent to sever her relationship with her son,[11] she should not be allowed to improperly circumvent § 1983 jurisprudence by inventing new legal standards based on a cause of action that is not even available to her.

2. Contrary to Hoagland's Assertions, There *Is* a Constitutional Question for This Court to Decide.

In an unusual request, Hoagland now invites this Court to refrain from deciding "whether to recognize the type of a constitutionally protected due process right in the relationship between a parent and an adult child . . ." that had been created and then rejected by almost all of the Circuits. Cross-Response Brief, p. 11. She apparently believes that she can pursue a § 1983

[11] The current case does not even rise to the level of an intentional shooting by police, such as in *Russ*, where the required standard was still not met.

action based purely on "the borrowing of Idaho's wrongful death statute because she is an heir and the personal representative of Bradley's estate. . ." regardless of what federal law has to say on the matter. *Id.* at 12. Her plea to "federalize" a state tort is not only perplexing and misplaced, but appears to further demonstrate her failure to comprehend the difference between a state wrongful death action and a federal § 1983 claim.

a. *Section 1983 and State Wrongful Death Claims Are Different.*

Idaho Code § 5-311 contains Idaho's wrongful death statute. It allows:

> When the death of a person is caused by the wrongful act or neglect of another, his ... heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death....

A wrongful death claim is exclusively a state tort action, based on Idaho statutory law. 42. U.S.C. § 1983, on the other hand, requires a deprivation of a constitutional right:

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

The difference between § 1983 litigation and a state law wrongful death action is immediately clear. A § 1983 lawsuit is based entirely upon constitutional law. Decisions from the U.S. Supreme Court and its Circuits determine the requirements for a § 1983 prima facie case. The substantive requirements are necessarily steeped in constitutional law and include elevated burdens that a potential § 1983 plaintiff must meet in order to proceed with a claim.

In the present case, Hoagland asks this Court to ignore the federal requirements necessary to bring a § 1983 claim (i.e. an underlying substantive cause of action based on a violation of a constitutional right) and instead be allowed to proceed under § 1983 purely based on "the borrowing of Idaho's wrongful death statute because she is an heir and the personal representative of Bradley's estate." Cross-Response Brief, p. 12. Hoagland appears to miss the point that if she cannot prove the violation of a constitutional right, she cannot bring a § 1983 action.

b. *Hoagland Cannot "Federalize" a State Tort That She Has Abandoned.*

Notwithstanding Hoagland's misguided attempt to "federalize" Idaho's wrongful death statute, it should be noted that she has previously waived all of her state law wrongful death claims. Hoagland's original January 2009 Complaint contained an Idaho Code § 5-311 wrongful death action. R. pp. 26-27, ¶ 41-46. However, in light of the Defendants' first motion for summary judgment (which included arguments for dismissal of the § 5-311 claims),[12] Hoagland voluntarily abandoned those state claims. In a July 2010 District Court hearing, when questioned by the Court as to the nature of her pleadings, Hoagland's counsel left no doubt about Hoagland's intent to abandon the wrongful death claims:

Mr. Overson:	"The state claims? Counsel is right. We've not included them in the amended complaint. We've gone strictly under 1983."
Judge Wilper:	"And so you're good with that?"
Mr. Overson:	"Yeah."

Tr. 7/8/10 Hearing (68:20–25; 69:1).

[12] R. pp. 75-120.

At the same July 2010 hearing, Mr. Overson confirmed that Hoagland's wrongful death claim was abandoned, explaining that the Tort Claim had been brought on "behalf of the estate, but not [Hoagland] expressly." Tr. 7/8/10 Hearing (69:1-23); *see also* R. pp. 1451-1540.

Eventually, Hoagland filed a Third Amended Complaint referencing various statutes, including Idaho Code § 5-311, which was based purely on federal claims in which she charged the Defendants with "interference with Ms. Hoagland's familial relations, society and companionship of her son, which is a *due process interest protected under the Fourteenth Amendment of the United States Constitution*...." R. p. 1522, ¶ 382 (emphasis added). These constitutional allegations are unequivocally civil rights claims, and not state tort claims.

More recently, in January of this year, in a memorandum filed with the District Court and signed by Hoagland's counsel, Hoagland reiterated there was no state wrongful death claim, positing "on July 12, 2010, Plaintiff filed her First Amended Complaint which dismissed all state law tort claims . . ." and "[f]rom July 12, 2010 to the present, all claims pursued by the Plaintiff [Hoagland] have been brought under federal law pursuant to 42 U.S.C. § 1983." Mem. in Supp. of Pl's Mot. to Exonerate Security Undertaking, filed January 23, 2012, p. 2 (pending Motion to Augment Appellate Record, filed May 18, 2012).

Hoagland made a purposeful choice to pursue federal claims only and continually asserted to the Defendants and the District Court that her case no longer contained state claims. For her to imply anything else at this point would be improper. Nevertheless, to the extent that

this Court believes she is attempting to work around her federal deficiencies by arguing a state law basis for her claims, Defendants would ask that she be estopped from doing so.[13]

B. Defendants Were Entitled to Discovery Protection.

Given the discovery limitations available to § 1983 defendants, on May 5, 2010, Defendants asked the District Court for discovery protection. R. p. 66-74. However, it was completely refused, with no basis for the refusal provided by the District Court (August 16, 2010 Amended Order;[14] *see also* 7/8/2010 Hearing (94:24)), and the Defendants appealed the denial.

As set forth in Defendants' prior briefing, § 1983 creates special protections against discovery when a defendant raises qualified immunity as a defense. *See* Cross-Appellants' Brief, pp. 10-12; *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until [the] threshold immunity question is resolved, discovery should not be allowed."); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a

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[13] Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. *McKay v. Owens,* 130 Idaho 148, 152, 937 P.2d 1222, 1226 (1997) (quoting *Rissetto v. Plumbers & Steamfitters Local 343,* 94 F.3d 597, 600 (9th Cir. 1996)). The policies underlying judicial estoppel are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings. *Id.* Judicial estoppel is intended to prevent a litigant from playing fast and loose with the courts, *Heinze v. Bauer,* 145 Idaho 232, 253, 178 P.3d 597, 600 (2008), and to prevent abuse of the judicial process by deliberate shifting of positions to suit the exigencies of a particular action, *McKay,* 130 Idaho at 153, 937 P.2d at 1227. *Lawrence v. Hutchinson*, 146 Idaho 892, 900, 204 P.3d 532, 540 (Idaho App. 2009).

[14] 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, added to the Record pursuant to January 31, 2012 Order Granting Motion to Augment.

defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.").[15]

In response, Hoagland argues that though Defendants would be entitled to discovery protections, the U.S. Supreme Court has limited those protections on occasion: "*Harlow* sought to protect officials from the costs of broad-reaching discovery, and we have since recognized that *limited* discovery may *sometimes* be necessary before the district court can resolve a motion for summary judgment based on qualified immunity." *Crawford-El v. Britton*, 523 U.S. 574, 593 n. 14 (1998) (emphasis added).

To support her argument, Hoagland points to alleged unresolved factual issues, but does not specifically explain why this case falls into a special exception where *all* (not just limited) discovery should be allowed to proceed. Moreover, her argument is further brought into question by the vast amount of discovery that had already been provided to her by the Defendants. Only after responding to fifty (50) interrogatories (which exceeded the number of interrogatories allowed by I.R.C.P. 33(a)), forty-five (45) requests for production, one hundred-seven (107) requests for admission, providing eleven (11) supplemental discovery responses, and providing over four thousand (4,000) pages of bates stamped documents, did Defendants move for discovery protection. Tr. 7/8/10 Hearing (33:4–11). By this point, Hoagland could hardly claim she was denied access to information, and was well equipped to defend a summary

[15] In light of the special nature of discovery protection under § 1983 (which does not allow a court discretion to completely ignore such protection) and the fact that the District Court provided no basis for its denial, Defendants maintain that this Court exercises free review over questions of law such as this.

judgment motion. To the extent she believed otherwise, she could have asked the Court to allow limited requests.

Hoagland next argues that she was entitled to completely defeat the Defendants' discovery protection request because she had included "official capacity" *Monell*[16] claims and even though "individual capacity" defendants can avail themselves of discovery protection, a governmental entity cannot (since qualified immunity is not an available defense to it). Again, however, Hoagland fails to recognize that the inclusion of a governmental entity as a defendant does not destroy all of the protections that the "individual capacity" defendants would be entitled to.[17] Further, if all it took to avoid § 1983 discovery protection was a *Monell* claim, the discovery protection would have evaporated decades ago. Many (if not most) § 1983 cases include a *Monell* claim against a governmental entity since almost all § 1983 defendants are government employees. Hoagland's reliance on a *Monell* excuse is further belied by the fact that she already had access to applicable governmental policies (i.e. policy manuals, standard operating procedures, etc.) as part of the voluminous discovery previously provided by the

[16] *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978) is the U.S. Supreme Court case that allows certain governmental entities to be sued under § 1983 when the entity enacts and enforces unconstitutional policies, customs or practices.

[17] In fact, the District Court did not even address the *Monell* claim in its discovery protection ruling.

Defendants as discussed above. If this was still not sufficient, the District Court could have directed limited discovery procedures.[18]

But all of the above is theoretical, since the District Court's *carte blanche* refusal to place any restrictions on Hoagland's discovery requests is the basis for the Defendants' appeal. By failing to prohibit or place any restrictions on Hoagland's discovery requests, the District Court deprived Defendants of a seminal aspect of § 1983 law.

C. A Punitive Damages Claim Which Will Be Paid by Taxpayers Should Be Precluded Pursuant to § 1983 Jurisprudence.

The District Court erred by ruling that Hoagland could pursue a punitive damages claim against the Defendants in their individual capacity and, in doing so, created a paradox in which innocent taxpayers would bear the burden of an unjust punishment.

As previously set out in the Cross-Appellants' Brief, the U.S. Supreme Court carefully examined the purpose behind punitive damages in § 1983 actions and disallowed such awards against governments, stating: "we hold that a municipality is [absolutely] immune from punitive damages under 42 U.S.C. § 1983," *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981), explaining that a punitive damage award against a government is not allowed since it is essentially an award against the taxpayers. Though this could be seen as leaving the door open

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[18] Though governmental entities do not enjoy qualified or absolute immunity protections, the U.S. Supreme Court, cognizant of discovery protection as a foundation of § 1983 litigation, explained (overturning a heightened pleading requirement), "In the absence of such an amendment, federal courts and litigants must rely on summary judgment and *control of discovery* to weed out unmeritorious claims sooner rather than later." *Leatherman v. Tarrant County,* 507 U.S. 163, 168-169 (1993) (emphasis added).

for punitive damages claims against individuals, a serious problem arises in situations such as this where those individuals are statutorily required to by indemnified by a government.

In light of the indemnity provided by Idaho law,[19] as long as a governmental employee is acting within the course and scope of his/her duties, the government pays all damage awards against him/her, including punitive damages. As a result, a punitive damages claim against one of these individuals is really a punitive damages claim against the government, which is contrary to the holding of *Newport* and Idaho law. *See* Idaho Code § 6-918 (governmental entities and their employees are not liable for punitive damages in tort).

Instead of addressing this issue head on, Hoagland attempts to circumvent it by asserting that the lack of availability of punitive damages would somehow frustrate the purposes of § 1983,[20] culminating in the blanket statement that *not* allowing punitive damage awards against government employees creates an "insurmountable Supremacy Clause problem for the statute." Cross-Response Brief, p. 18. However, Hoagland's assertion that Idaho's governmental indemnification statute violates the Supremacy Clause is simply that – an assertion. She

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[19] [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).

[20] Ironically, allowing innocent taxpayers to be punished would appear to frustrate the deterrence purposes behind punitive damages.

provides no supporting argument,[21] most likely due to the fact that Defendants' position is based on the holding in the U.S. Supreme Court's *Newport* decision. Moreover, it does not appear that Hoagland's argument was raised at the District Court level, and as a result, is not appropriate for review on appeal.[22]

Hoagland also argues that a punitive damages award should be allowed, even though taxpayers would pay the damages, because the punitive damages award will result in negative employment consequences for the individual government employee. However, the same argument could be made for *any* judgment (punitive or not) against an employee or government. This hardly counters the U.S. Supreme Court's concern that taxpayers not be required to shoulder the burden of punitive damage awards.

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[21] As noted by this Court,

> We will not consider issues cited on appeal that are not supported by argument and propositions of law. *Farnworth v. Ratliff*, 134 Idaho 237, 999 P.2d 892 (2000); *Highland Enter., Inc. v. Barker*, 133 Idaho 330, 986 P.2d 996 (1999) (a one-sentence statement that an award of punitive damages violates due process is hardly sufficient to constitute argument); *Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 980 P.2d 355 (1999) (assertion that a particular statutory construction would violate due process will not be considered where it is not supported by argument and authority).

Inama v. Boise County ex rel. Bd. of Com'rs, 138 Idaho 324, 330, 63 P.3d 450, 456 (2003).

[22] *Kolar v. Cassia County*, 142 Idaho 346, 350, 127 P.3d 962, 966 (2005) (Appellate courts "will not entertain issues or theories not raised in the court below.").

As demonstrated above, Hoagland's arguments regarding punitive damages fail to address the real issue at hand – that taxpayers should not be subject to punitive damages – a sentiment echoed by both the U.S. Supreme Court and Idaho statutory law.[23]

D. Hoagland Waives Any Objection to Defendants' Request for Attorney Fees Below.

As noted in their prior briefing, Defendants expended considerable time and expense litigating Hoagland's claims. *See* Cross-Appellants' Brief, pp. 18-28. In both the District Court and on cross-appeal, the Defendants moved for attorney fees and illustrated their basis for such an award. In her Cross-Response Brief, Hoagland elected neither to controvert nor even address the Defendants' attorney fees arguments.

In *Backman v. Lawrence*, 147 Idaho 390, 210 P.3d 75 (2009), the Backmans raised the issue of whether the district court erred in awarding costs to respondents, but:

> failed to argue the issue or provide any support for their contention on appeal. Idaho Appellate Rule 35, which governs the content of briefs on appeal, requires that "[t]he argument ... contain the contentions of the appellant with respect to the issues presented on appeal, *the reasons therefor, with citations to the authorities,* statutes and parts of the transcript and record relied upon." I.A.R. 35(a)(6) (emphasis added). Furthermore, this Court has held that issues on appeal that are not supported by propositions of law or authority are deemed waived and will not be considered. *Hall v. Farmers Alliance Mut. Ins. Co.,* 145 Idaho 313, 323, 179 P.3d 276, 286 (2008). As such, this Court will not consider the Backmans' argument that the district court erred in awarding costs.

Id. at 401, 210 P.3d at 86 (emphasis in original).

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[23] Noticeably absent from Hoagland's Cross-Response Brief is any attempt to explain or distinguish the Defendants' argument that if punitive damages were available, the proper punitive damage measure is the U.S. Supreme Court's elevated standard described in *Kolstad v. American Dental Association,* 527 U.S. 526, 538 (1999), which notes that " . . . a positive element of conscious wrongdoing is always required." This case is more recent than those cited by Hoagland and her failure to argue otherwise is a tacit admission that *Kolstad* is controlling.

Although the Backmans were appellants, and in this cross-appeal Hoagland is a respondent, I.A.R. 35(b)(6) similarly mandates that Hoagland's "argument . . . contain the contentions of the respondent with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon." By failing to state any argument and citations to authorities, Hoagland has essentially waived all arguments against the grant of an award of attorney fees to the Defendants.

Given Hoagland's waiver, Defendants ask that this issue be remanded to the District Court for a calculation of fees to be awarded to the Defendants. Further, Defendants ask that fees be calculated for *all* Defendants, including those dismissed during the litigation by Hoagland, the District Court, plus those Hoagland chose not to include in her appeal.

E. Defendants' Motions to Strike Should Have Been Granted.

During motion practice at the District Court level, Hoagland attempted to submit over one thousand (1,000) documents attached to omnibus affidavits of her attorney, Darwin Overson. R. pp. 288-763, 2073-2197, 2625-2990, 3342-3465, 3505-3782. Defendants objected to a number of the exhibits and other submissions presented in this fashion. The primary and repeated objections and motions to strike were premised on the Overson Affidavits' lack of explanation regarding Mr. Overson's competence to testify to the documents attached to the affidavits and/or the basis for his personal knowledge regarding the documents.

In defense of her actions, Hoagland asserts that "Idaho courts have not addressed" whether "[e]vidence submitted at the summary judgment stage need not be in a form that would be admissible." Cross-Response Brief, p. 22. She cites federal court decisions and

interpretations of a federal rule in support of her position, including a quote from *Block v. City of Los Angeles*, 253 F.3d 410 (2001):

> To survive summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Federal Rules of Civil Procedure 56.

Cross-Response Brief, p. 22. However, the sentences following that quote tell a different story:

> With respect to evidence submitted by affidavit, Rule 56(e) requires that the 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." F.R.C.P. 56(e). The Menkus affidavit appears inadequate under Rule 56(e). Not made on personal knowledge, it did not set forth facts that would be admissible in evidence. It is clear from the affidavit that Menkus was not personally involved in any of the disciplinary suspensions . . . . Rather than set forth facts that would be admissible in evidence, the affidavit was instead based on inadmissible hearsay. F.R.C.P. 802. It was thus an abuse of discretion to consider the information contained in the Menkus declaration.

Block, 253 F. 3d at 418-19.

This case cited by Hoagland actually supports the Defendants' position. Moreover, Idaho case law is in complete agreement with *Block* in addressing the sufficiency of affidavits. In *Cates v. Albertson's, Inc.*, 126 Idaho 1030, 895 P.2d 1223 (1995), this Court noted:

> Ball's affidavit is not based upon personal knowledge as required by Rule 56(e).... Nothing in Ball's affidavit establishes that Ball has any personal knowledge .... 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 the District Court the Defendants objected and moved to strike exhibits for which Hoagland failed to set out the necessary foundation. Hoagland did not cite contrary Idaho law or offer curative amendments to the Overson Affidavits. Rather, Hoagland argued the Defendants did not properly object to her hundreds of pages of improperly supported documents. This attempt to shift the focus from her failure to provide proper foundation is the same unsuccessful tack taken in *Cates*.

1. Defendants' July 1, 2010 First Motion to Strike.

Defendants filed their first Objection and Motion to Strike (R. pp. 914-932) in response to Hoagland's 482-page Affidavit of Counsel in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, which had been filed June 21, 2010. R. pp. 288-763. The Defendants filed a sixteen (16) page memorandum supporting their objections, which initially explained their general objections to Mr. Overson's ability to lay foundation for the attachments, then set out each objection specifically by exhibit, exhibit number, and the content of each. R. pp. 914–932. The Defendants also objected to thirty-three (33) factual misstatements by Hoagland. These objections were also set out individually, with explanations for each. R. pp. 920-931.

As noted previously, Hoagland abandoned her original Complaint rather than defend it against summary judgment. This left the Defendants' Motion to Strike the 482-page Overson Affidavit in legal limbo since the District Court did not rule specifically on each of the Defendants' objections. Instead, the District Court stated that the Motion to Strike was denied "only to the extent evidence contained therein was admissible." August 16, 2010 Amended Order; Tr. 7/8/10 Hearing (94:24). That would have likely been the end of the matter, but unfortunately, Hoagland continues to cite to this Overson Affidavit.[24] As a result, Defendants believe it is incumbent upon them to appeal the District Court's determination not to specifically strike (i) the Munroe 2001 psychiatric records (R. pp. 644-645), (ii) 2002 psychiatric evaluation (R. pp. 547-550), (iii) a hard copy of an on-line F.D.A. brochure regarding the prescription drug Celexa (R. pp. 609-630), (iv) Boise City police reports (R. pp. 640-651), and (v) Saint Alphonsus Regional Medical Center emergency room records (R. pp. 652-661).

Instead of specifically addressing the Defendants' arguments in her Cross-Response Brief, Hoagland attempts to re-focus the arguments away from her foundationless exhibits by arguing that the Defendants lodged improper "blanket objections." Hoagland may perceive that the objections were "blanket" because they were worded similarly, but any similarity in the objections was driven by the fact that Hoagland was attempting to lay foundation for hundreds of

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[24] For example, see Hoagland's August 13, 2010 Affidavit in support of her Third Amended Complaint (R. pp. 1398-1408), and National Commission on Correctional Healthcare ("NCCHC") letters (R. p. 533) cited in Hoagland's Affidavit in Support of Opposition to Restated Summary Judgment (R. pp. 2046-2072).

different documents with a single Overson Affidavit. Since the basis for most of the objections were the flaws with the Overson Affidavit, the objections had a similar ring.

Hoagland also argues that her filing of another Overson Affidavit (R. p. 1398) "cured many of the Defendants' objections." Cross-Response Brief, p. 24. It did not. No matter how many affidavits he filed, Mr. Overson could not meet the requirements of I.R.C.P. 56(e). He does not possess the requisite knowledge to lay foundation for psychiatrist's narratives, hospital reports, doctor's reports, nursing notes, Idaho state juvenile detention records, or Boise police reports. A Second Overson Affidavit cannot correct the first - each will suffer from the same flaws. As a result, the Defendants ask that all of their objections to strike be granted.

2. Defendants' December 3, 2010 Second Motion to Strike.

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), which included a nearly three-inch thick collection of documents as an attachment. R. pp. 2073–2079.

Though the District Court struck some items, it did not strike (i) certain letters from the NCCHC (R. p. 532) argued to the Court on December 10, 2010 (Tr. 12/10/10 Hearing (189:12-19, 190:13-20); R. pp. 2246-2253) and (ii) the Jail and Court Services Bureau Standard Operating Procedures manuals (R. pp. 382-451, 452-517). As noted in Defendants' prior briefing, Mr. Overson could not lay foundation for any of these documents. Cross-Appellants' Brief, pp. 32-33. Surprisingly, Hoagland fails to make any argument on appeal in opposition to

Defendants' position regarding these documents.[25] Accordingly, she has waived any objection and the documents should be stricken.

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[25] Instead, Hoagland improperly argues issues she never appealed – namely that the District Court should not have stricken certain items she attempted to rely upon, specifically Ada County Detective Buie's ("Buie") investigative report. By making such arguments, Hoagland is not responding to the Defendants' issues on cross-appeal and is instead attempting to reverse the District Court's decisions that were adverse to her, but which she failed to include in her appeal or in her opening Appellant's Brief. This is not allowed since respondents (or cross-respondents such as Hoagland) must cross-appeal (or include in the original appeal as in Hoagland's case) any issue upon which they seek affirmative relief by way of reversal, vacation, or modification of the judgment or order. *See* I.A.R. 15(a). Quite simply, Hoagland cannot utilize her Cross-Response Brief to raise new issues on cross-appeal that she should have initially raised in her own appeal.

Notwithstanding the above, her arguments are also fundamentally flawed. For example, during Hoagland's deposition of Health Services Unit ("HSU") Administrator Leslie Robertson ("Robertson"), Hoagland showed Robertson a portion of Buie's investigative report. Defendants objected because of the potential for tainting Robertson's memory with another person's narrative. R. p. 2074 (CD titled "Exhibits A-K to Affidavit of Counsel in Support of Plaintiffs' Opposition to Defendants' Restated Motion for Summary Judgment," Robertson Deposition at p. 10 (31:11 – 32:23)). Hoagland then requested that Buie's report be attached as an exhibit to Robertson's deposition.

Hoagland argues Buie's report should have been received into evidence because it was attached to Robertson's deposition. Buie memorialized a number of interviews in his report, including Robertson's, but attaching Buie's report as an exhibit to Robertson's deposition does not provide the necessary foundation for it to be admitted for this Court's consideration.

Hoagland also forwards that Buie's report is admissible as an I.R.E. 803(5) recorded recollection. Cross-Response Brief, p. 26. This argument fails because the report is Buie's narrative, not *Robertson's* recorded recollection.

Hoagland next argues Buie's report is a record of a regularly conducted activity of a detective. *Id.* Whether it is or is not, an administrator from the HSU is neither the custodian nor a competent witness to lay the necessary I.R.E. 803(6) foundation for regularly conducted activities in the detective's division.

Hoagland additionally asserts Buie's report is admissible pursuant to I.R.E. 901. Cross-Response Brief, p. 26. I.R.E. 901 has ten (10) subsections. Unfortunately, Hoagland elected not to identify the germane subsection she forwards, or even make an argument in support of the same.

3. Defendants' February 25, 2011 Third Motion to Strike.

The Defendants filed their third Motion to Strike (R. pp. 3250-3262) in response to Hoagland's Affidavit in Support of her February 2011 Motion for Reconsideration (R. pp. 2625-2990) and the Affidavit and Supplemental Report of Dr. Thomas White (R. pp. 3012-3030), which included newly proffered expert opinions brought to light after Dr. White's deposition had been conducted by the Defendants. The District Court did not strike the bulk of Dr. White's new opinion, and as explained in their argument on pages 33-35 of their Cross-Appellants' Brief, Defendants appeal the District Court's decision to allow these items because they were untimely and prejudicial to the Defendants. Hoagland argues that the Defendants were not prejudiced by what she characterizes as "supplementation" since Defendants were free to move for a continuance and an additional deposition. However, putting the onus on Defendants to conduct additional work after-the-fact that would not have been necessary had Hoagland timely provided her expert with the information he sought is unfair to Defendants, especially considering the

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Hoagland also asserts Buie's report should have been admitted as a "statement of a party opponent" pursuant to I.R.E. 804(b)(3). Cross-Response Brief, p. 26. Hoagland conflates two evidentiary rules in this argument. If she is referring to an "admission by a party opponent," pursuant to I.R.E. 801(d)(2), she has not met the required criteria that Buie represented the Defendants for civil litigation purposes, or that he was somehow authorized to bind the Defendants by his comments. If Hoagland is asserting the report is an I.R.E. 804(b)(3) "statement against interest," she has not shown the statements were "contrary to Buie's pecuniary or proprietary interest" or how any statement tended to "subject [Buie] to civil or criminal liability." *Id.*

Lastly, contrary to Hoagland's repeated assertions, and as discussed above, merely receiving a document during the discovery process does not provide the necessary I.R.C.P. 56(e) foundation for Hoagland's documentary submissions. Cross-Response Brief, p. 26.

impending trial date and the time and expense that would be required to conduct a second deposition of Dr. White in Overland Park, Kansas.[26]

4. Defendants' March 4, 2011 Fourth Motion to Strike.

The Defendants filed their fourth Motion to Strike on March 4, 2011 (R. pp. 3315-3325), objecting and moving to strike Hoagland's mischaracterizations of Deputy Jeremy Wroblewski's ("Wroblewski") interaction with Munroe that were contained in her Motion for Reconsideration. R. p. 3244. The District Court struck her counsel's psychiatric diagnoses divined from the

[26] As part of her argument, Hoagland again improperly argues issues she never appealed. *See* n. 25 above. During depositions, it was Hoagland's practice to attach exhibits to the deposition transcript, even though foundation may not have been laid, or the exhibit referred to during the deposition. Hoagland's Affidavit in Support of her February 2011 Motion for Reconsideration (R. pp. 2625-2990) attempted to admit every exhibit to every deposition (R. p. 2628, ¶¶ 13, 14). She now argues (regardless of whether or not they had been stricken) that all the exhibits to every deposition should be admitted. This wholesale attempt to admit evidence is improper because foundation must be established for *every* document Hoagland wishes to have admitted.

"sound" of Munroe's voice on non-admitted Jail telephone audio recordings[27] (R. pp. 3244-3245; 3492-3493), but did not strike Hoagland's improper and/or inaccurate rendition of the facts.

This was an error by the District Court, since it is incumbent on the parties to present relevant facts to ensure the District Court has a complete record. This same motivation, to protect the factual record, underscored the Defendants' filing of motions to strike with regard to Hoagland's mischaracterizations of Wroblewski's actions. R. pp. 3315-3325. Repeatedly in District Court, and even on appeal, Hoagland omitted relevant observations by Wroblewski that

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[27] Once again, Hoagland is improperly attempting to use Defendants' cross-appeal as a vehicle to appeal the District Court's decision to strike her references to the non-admitted recordings, as Hoagland did not include this determination in her appellate issues or her appellate brief. *See* n. 25 above. Regardless, her arguments are again unpersuasive.

These recordings of Jail telephone calls were submitted to the District Court after a contested Motion in Limine hearing. The Defendants were seeking admission of the recordings for trial use (R. p. 1808); Hoagland was opposed to the admission. R. p. 1821, ¶ 7. To consider the evidentiary issues, the District Court requested copies so it could listen to the recordings to aid its determination for the motion in limine. Tr. 12/9/10, p. 37, LL. 4-25; R. pp. 3492, 3493. The Defendants submitted copies to the District Court as instructed, but neither party laid foundation for them.

Hoagland now asserts, contrary to the District Court's findings, that she actually laid foundation for the Jail audio tapes through one of the Overson Affidavits. Cross-Response Brief, p. 30. Defendants have repeatedly argued that the Overson Affidavits are ineffective for most foundation requirements, and certainly Mr. Overson cannot provide foundation for telephone audio tape recordings from the Jail's telephone system.

Hoagland also argues that the Jail telephone tapes should be admitted since they were attached to Buie's report (Cross-Response Brief, p. 31, n. 139) – the same Buie report the District Court struck when Hoagland attempted to admit it though Robertson. *See* argument above in n. 25.

Hoagland lastly proposes that the Jail audio tape recordings are "self-authenticating." I.R.E. 902 describes evidence which may be "self-authenticating." Audio recordings of telephone calls are not listed in the Rule, and Hoagland does not volunteer which of I.R.E. 902's eleven (11) subsections is the germane subsection.

were significant to this litigation. R. p. 3244; Appellant's Brief, pp. 5, 11, 15, 16, 29, 30, 32, 47, 48. Hoagland's approach is best expressed in her Cross-Response Brief:

> While the Defendants complain that Mrs. Hoagland unfairly presented Wroblewski's testimony by leaving out important parts of the testimony, the trial court had before it the entire transcript of Wroblewski's deposition. Nothing was hidden from the trial court.

Cross-Response Brief, pp. 35-36.

Notwithstanding the questionable nature of this approach to litigation, Hoagland also attempts to downplay her obligations to avoid mischaracterizing evidence by suggesting that the Defendants are "not willing to accept that the standard on summary judgment requires that the record be viewed in the light most favorable to the non-moving party." Cross-Response Brief, p. 36. Defendants do not disagree with the statement as a matter of law, but viewing the facts in the light most favorable to the non-moving party does not allow that party to mislead courts and/or expect courts to ignore uncontroverted facts supplied by the moving party.

F. Defendants Should Be Awarded Costs and Fees on Appeal.

Both parties have requested costs and attorney fees on appeal.

1. Hoagland Is Not a Prevailing § 1983 Plaintiff.

Hoagland forwards that her § 1983 claims "expressly allow for recovery of costs and fees to the prevailing 1983 plaintiff." However, Hoagland fails to understand that even if she were to prevail on appeal, she has yet to prevail on any of her underlying § 1983 causes of action. Justice Scalia, writing for the majority, framed a similar issue thusly:

> In order to be eligible for attorney's fees under § 1988, a litigant must be a "prevailing party." Whatever the outer boundaries of that term may be, Helms does not fit within them. Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail. *See Hanrahan v. Hampton,* 446 U.S. 754, 757 (1980). Helms obtained no relief. Because of the defendants' official immunity he received no damages award. No injunction or declaratory judgment was entered in his favor. Nor did Helms obtain relief without benefit of a formal judgment-for example, through a consent decree or settlement. *See Maher v. Gagne,* 448 U.S. 122, 129 (1980). The most that he obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made. Cf. *Hanrahan,* 446 U.S. at 758-759.

Hewitt v. Helms, 482 U.S. 755, 759-760 (1987) (*overruled in part on other grounds by Sandin v. Conner,* 515 U.S. 472 (1995)).

Even if Hoagland prevails on her appeal and/or the Defendants' cross-appeal, she has obtained no relief on the merits of her § 1983 claims. She received no damages, injunction, or declaratory judgment in her favor. She did not obtain relief by way of a consent decree or settlement. Prevailing on appeal or cross-appeal would not fulfill the U.S. Supreme Court's definition of "prevailing" for § 1983 purposes.[28]

2. The Defendants Are Entitled to Costs and Fees on Appeal.

As noted in their Cross-Appellants' Brief, Defendants request that if they are successful on appeal, they be granted costs and attorney fees pursuant to Idaho Code §§ 12-121, 12-123, and/or I.A.R. 41.

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[28] Hoagland cites two cases, *Miller v. Ririe Joint School Dist. No. 252*, 132 Idaho 385, 973 P.2d 156 (1999) and *McCown v. City of Fontana*, 565 F.3d 1097 (9th Cir. 2009). Because the plaintiffs in *Miller* and *McCown* prevailed in the trial court, neither case is applicable to this matter.

III. CONCLUSION

For the reasons discussed above, Defendants respectfully request that this Court determine Hoagland cannot bring a § 1983 action for the death of her adult child, remand this matter to the District Court for a determination of attorney fees to be awarded to the Defendants at the trial court level, and award Defendants' attorney fees and costs on appeal. To the extent not made moot by dismissal of Hoagland's claims, Defendants also respectfully request reversal of the District Court's decision to (i) not limit discovery while qualified immunity defenses were being resolved, (ii) allow Hoagland to seek punitive damages, and (iii) fail to strike materials which lacked proper foundation and/or were not otherwise admissible.

RESPECTFULLY SUBMITTED this 18th day of May 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 18th day of May 2012, I served a true and correct copy of the foregoing CROSS-APPELLANTS' REPLY BRIEF to the following persons by the following method:

Eric B. Swartz Joy M. Bingham Jones & Swartz, PLLC 1673 W. Shoreline Drive, Suite 200 P.O. Box 7808 Boise, ID 83707-7808	_x___ Hand Delivery _____ U.S. Mail _____ Electronic Mail _____ Facsimile (208) 489-8988
Darwin L. Overson Attorney at Law 2369 Ridgeview Way Boise, ID 83712	_____ Hand Delivery _x___ U.S. Mail _____ Certified Mail _____ Electronic Mail