1-19-2017

Hammer v. Ribi Respondent's Brief Dckt. 44447

IN THE SUPREME COURT OF THE STATE OF IDAHO

SHARON R. HAMMER, Plaintiff-Appellant, vs. NILS RIBI, Defendant-Respondent.	Case No. 44447 Blaine County Case No. CV-2015-428

RESPONDENT'S BRIEF

Appeal from the Fifth Judicial District in and for the County of Blaine
The Honorable Robert J. Elgee, Presiding

Kirtlan G. Naylor
Jacob H. Naylor
Tyler D. Williams
NAYLOR & HALES, P.C.
950 W. Bannock Street, Suite 610
Boise, ID 83702
Attorneys for Defendant-Respondent

James R. Donoval
1048 N. Torrey Pines Ave.
Eagle, ID 83616
Attorney for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES **Page**

STATUTES

RULES

I. STATEMENT OF THE CASE

A. Nature of the Case

Hammer brought this civil action against former City of Sun Valley Councilmember Nils Ribi based on what she perceived was an assault that occurred over five years ago on September 15, 2011, at City Hall during a break in a City Council meeting and arising from a discussion about budget matters. This is one of the last of numerous cases arising from the events surrounding Hammer's employment and termination as Sun Valley city administrator.[1]

In short, the District Court dismissed Hammer's Original Complaint because it did not state a claim of assault, though it granted Hammer leave to amend her complaint, which she did. The District Court then reviewed the Amended Complaint, applied the standard of assault proposed by Hammer, assumed she stated a claim, but dismissed the Amended Complaint because it failed to plead sufficient facts showing that Hammer was entitled to relief in light of the immunity afforded under the Idaho Tort Claims Act. The District Court also denied Hammer's request for a mental health examination of Ribi because his mental health is not at issue in this simple assault case.

---

[1] *See Hammer v. Sun Valley, et al.*, Blaine Co. Case No. CV-2011-928, *Donoval v. Sun Valley, et al.,* Blaine Co. Case No. CV-2011-985, *Hammer v. Idaho Counties Risk Management Program et al.*, Blaine Co. Case No. CV-2011-991, *Ribi v. Donoval*, Blaine Co. Case No. CV-2011-1040, *Donoval v. Sun Valley, et al.,* Blaine Co. Case No. CV-2012-479, *Hammer v. Ek*, Blaine Co. Case No. CV-2012-516, *Donoval v. Sun Valley*, Blaine Co. Case No. CV-2012-600, *Hammer v. Frostenson, et al.*, Blaine Co. Case No. CV-2013-308, *Hammer, et al. v. Sun Valley, et al.,* United States District Court, District of Idaho, Case No. 1:13-cv-00211-EJL, *Hammer v. King*, Blaine Co. Case No. CV-2013-609, *Hammer v. Sun Valley*, Blaine Co. Case No. CV-2013-637, *Hammer v. HSNO, et al.*, Ada Co. Case No. CV-OC-2014-15387, *HSNO, et al. v. Hammer*, Ada Co. Case No. CV-OC-2015-20144. The Ninth Circuit appeal in the federal case is still awaiting a decision.

Hammer now appeals the District Court's rulings and the dismissal of the action. As shown below, Hammer's convoluted, often confusing, and largely moot arguments on appeal do not show that the District Court erred. Accordingly, the Court should affirm the District Court's rulings.

B. Background

Hammer was employed as the Sun Valley City Administrator from June 2008 until January 2012. (R. at 265, ¶ 6.) As noted above, numerous lawsuits arose from Hammer's employment and termination from Sun Valley. (*See* note 1, *supra.*) This action was originally a part of the federal lawsuit that was filed in 2013. (R. at 264, ¶ 2.) In that case Hammer alleged several claims against Sun Valley, Ribi, and former-Sun Valley Mayor DeWayne Briscoe, based generally on accusations of misconduct during her employment, her termination, and afterward.[2] One of the claims was a cause of action for assault against Ribi personally, based on an alleged confrontation that occurred on September 15, 2011. In March 2016, after approximately three years of extensive litigation in the federal case, and almost five years since the alleged assault occurred, the federal District Court entered judgment in favor of Sun Valley, Ribi, and Briscoe. The court, however, chose not to exercise supplemental jurisdiction over the assault claim and dismissed it without prejudice, allowing Hammer to re-file it in state court. (R. at 265, ¶¶ 3-4.)

Hammer filed a verified complaint in state court on August 14, 2015. (R. at 7-17.) Ribi filed an answer on February 4, 2016, which included a defense that Hammer had failed to state a claim

---

[2] The same events on which Hammer based her federal lawsuit provided the same basis for Hammer's closely related state whistleblower action that was recently decided in favor of Sun Valley, Ribi, and Briscoe by the Idaho Supreme Court in *Hammer v. Sun Valley, et al.*, 2016 Opinion No. 149 (Dec. 21, 2016).

upon which relief can be granted and should therefore be dismissed. (R. at 21) He later filed a motion to dismiss and the District Court dismissed the Original Complaint from the bench on May 9, 2016, followed by a written order on May 12, because Hammer failed to state a claim for assault (despite having the benefit of years of extensive litigation leading up to the complaint, and very detailed allegations). (R. at 252) Instead, Hammer merely pled a "loud argument." (Tr. Vol. I, 77:1) Because the District Court determined that Hammer failed to plead an assault, it did not need to determine whether Ribi was immune under the ITCA.

The District Court granted Hammer leave to file an amended complaint. In doing so, it observed:

> I get the feeling that it's going to be difficult for you to improve on this pleading because I think you know where the line is and I think you're careful about what you can say happened and what Ms. Hammer – I think she's careful about what she can say happened. And there may be some additional facts that you want to allege, but it's got to be facts and you've got to allege them sufficient to constitute assault.
>
> My feeling – the only reason I'm saying this is because my feeling is that <u>if you had those, you might have said them already. You didn't. Maybe you do have a couple of additional more facts</u>, I don't know. I'm going to give you a chance to show me. So I'm going to let you amend your complaint. Like I say, it would have been preferable to see the amended complaint prior to now.[3]

(Tr. Vol. I, 80:20-81:11.) (emphasis added) (footnote added). During the hearing Hammer's own attorney stated:

> So even if you find that we have not added one or two minor phrases that would allege what we've told you Ms. Hammer is alleging happened in this incident, we should be able to add <u>a couple more facts</u>, to place in <u>a couple other facts to satisfy you</u>.

---

[3] The District Court made this last comment because Hammer did not submit a proposed amended pleading with her motion to amend, as is normal practice. (R. at 176-180.)

(Tr. Vol I, 66:12-16) (emphasis added).

Hammer filed an unverified Amended Complaint shortly thereafter on May 20, 2016. (R. at 265-279.) However, the facts alleged in the Amended Complaint contained far more than "a couple more facts," despite Hammer's attorney's representation during the May 9 hearing. The Original Complaint was verified and contained a narrative that matched the factual statements made throughout the prior years of litigation, which now suddenly and dramatically changed. For example, the non-verified Amended Complaint contained numerous additional allegations about supposed "formal" findings of Willich that Ribi violated the city's Anti-Harassment policy (R. at 271, ¶¶ 35-36),[4] allegations about the purported scope of Ribi's "authority" as a City Council member (R. at 273-274, ¶¶ 45-47), and very detailed new allegations about the incident itself (R. at 272-277, ¶¶ 40-44, 48-51, 53-60, 63-64, 66-68; *see also*, Defendant's Annotated Amended Complaint, R. 389-403.) Most relevant here, Hammer contended for the first time ever in a pleading that Ribi "lunged" at her to physically stop her from going to talk to the mayor, with his arms outstretched at shoulder height, and got as close as six inches before Hammer had to step back form him to avoid contact. (R. at 272-275, ¶¶ 39-59.)

Specifically, the Amended Complaint's allegations about the September 15, 2011 alleged confrontation are as follows:

---

[4] During the May 9 hearing, in response to the Court's inquiry about the allegations of prior harassment, Hammer's attorney acknowledged "it is strictly an assault case, Your Honor." The Court then said: "All right. 'Strictly an assault case.' I'm going to take you at your word there because your pleadings sort of frame a preliminary harassment, it goes into that realm, and then it looks like what you're trying to plead is an assault case. So I'm going to take this as pleading of an assault case because you're telling me it's not a harassment case." (Tr. Vol. I, 14:23-15:6.)

39. On or about September 15, 2011, a City Council meeting was held. During the meeting, discussion was held regarding acceptable methods for modifying budgeted line items.

40. During a break in the meeting, Ms. Hammer left the Sun Valley City Council Chamber to make copies of some documents. Unbeknownst to Ms. Hammer, Defendant Ribi followed Ms. Hammer to the front area of the Sun Valley City Hall near the reception desk and copy room, approximately one hundred and fifty feet (150) from the Sun Valley Council Chamber table where Defendant Ribi had previously been seated.

41. When Ms. Hammer came out of the copy room with copies, Defendant Ribi was standing at the counter of the Sun Valley City Hall reception desk approximately five (5) feet from the door to the copy room.

42. When Defendant Ribi saw Ms. Hammer come out of the copy room, Defendant Ribi began speaking to Ms. Hammer.

43. Ms. Hammer stopped approximately two to three feet away from Defendant Ribi, to listen to what Defendant Ribi was saying. At that point, Defendant Ribi's left side of his body was closest to Ms. Hammer, with Defendant Ribi facing towards the reception area counter top.

44. Defendant Ribi told Ms. Hammer he wanted certain changes made to the Sun Valley budget and certain documents related to the Sun Valley budget that Defendant Ribi had placed on top of the reception area counter top.

***

48. Ms. Hammer tried to explain to Defendant Ribi the generally accepted accounting practices and procedures for modifying municipal budgets. Defendant Ribi became very agitated and continuously interrupted Ms. Hammer to tell her that he wanted particular changes made to the Sun Valley budget documents which contravened the generally accepted accounting practices for municipal governments, and which the other Sun Valley City Council members had not approved.

49. Every time Ms. Hammer tried to speak to Defendant Ribi about the correct budgeting procedures or that the modifications he sought were not approved by the other Sun Valley City Council members, Defendant Ribi cut her off, raised his arms in the air and began waiving his hands, saying angrily: "You don't understand!"

***

51. Ms. Hammer tried to defuse the tension, by speaking calmly and in a low volume, but as the confrontation continued, Defendant Ribi became more and more enraged.

52. Eventually, Ms. Hammer told Defendant Ribi that she was going to discuss the matter with Mayor Willich.

53. Upon Ms. Hammer telling Defendant Ribi that she was going to speak with Mayor Willich, Defendant Ribi raised his arms to approximately shoulder height, pivoted towards Ms. Hammer so that Defendant Ribi was directly facing Ms. Hammer, and took at least one step towards Ms. Hammer with his hands outstretched at Ms. Hammer's shoulder level.

54. The conduct of Defendant Ribi in moving towards Ms. Hammer was what can best be described as a thrust or a lunge.

55. At the same time that Defendant Ribi took a step, thrust or lunge towards Ms. Hammer with his hands outstretched at shoulder height, Defendant Ribi yelled: "No! You will not talk to the Mayor!"

***

57. During Defendant Ribi's thrust or lunge towards Ms. Hammer, at the closest point, Defendant Ribi's outstretched arms came within six inches of Ms. Hammer's shoulders.

***

59. In reaction to Defendant Ribi's physical movements towards Ms. Hammer and his verbal outburst, Ms. Hammer's heart began racing, she became alarmed, and, just before Defendant Ribi's hands made physical contact with Ms. Hammer's shoulders, Ms. Hammer stepped back away from Defendant Ribi, and stated: "Whoa!"

***

62. Ms. Hammer then turned away from Defendant Ribi and walked down the hallway of Sun Valley City Hall and back into the Sun Valley City Council Chamber where Mayor Willich, several Sun Valley City Council members and several Sun Valley staff members were present.

(R. at 272-276, ¶¶ 39-62.)

Ribi moved to dismiss the Amended Complaint, asserting that Hammer's newly conceived and disingenuous allegations still failed to plead an assault and, in any event, Hammer failed to show that she was entitled to relief in light of the presumption of immunity afforded to governmental officials under the ITCA. (R. at 280.) The District Court applied the assault standard requested by Hammer and assumed that she adequately pled a claim for relief. (Tr. Vol. II, 17:20-18:1, 21:16-23.) However, it granted Ribi's motion to dismiss under Idaho Code § 6-904(3) because Hammer's claim arose from an assault but she did not adequately plead facts showing that she was entitled to relief; specifically, her very detailed pleadings did not show that the alleged assault occurred outside the course and scope of Ribi's employment or that it was done with malice or criminal intent.[5] (Tr. Vol. II, 63:2-6) (R. at 493-494.)

Hammer now appeals several issues related to the dismissal of both the Original Complaint and her Amended Complaint and seeks a remand for further proceedings.

She also takes issue with the District Court's discretionary ruling on her I.R.C.P. 35 motion for a mental health examination of Ribi. Specifically, prior to the dismissal of the Original Complaint, Hammer sought a mental examination of Ribi under a theory that she personally believed Ribi suffered from one or more serious mental conditions that she believes make people predisposed towards violence and lying, and that she should therefore be able to prove that by way of a mental health examination to prove she was actually assaulted and to impeach Ribi's credibility. (R. at 34-50.) Ribi opposed the motion on the grounds that his mental health was not in controversy and there

---

[5] Hammer conceded during the hearing that criminal intent was not at issue. (Tr. Vol. II, 9:15-18; 19:10-20:9.)

was no good cause to order an examination. (R. at 155-168.) Instead, it was clear that Hammer was plainly using the discovery tool improperly to harass and embarrass Ribi, and to extort a settlement, by publishing false and defamatory accusations against him, which she had no reasonable basis to assert, under the protection of the litigation privilege if he did not pay a substantial settlement within two days. (R. at 166.) The District Court, at the May 9 hearing, denied Hammer's motion. (R. at 254.)

II. ISSUES PRESENTED ON APPEAL

Hammer sets forth numerous convoluted issues on appeal. However, at its core her appeal raises the following salient issues:

1. Whether the District Court Properly Dismissed Hammer's Amended Complaint Because She Failed to Plead Sufficient Facts Showing She Was Entitled to Relief in Light of the Immunity Presumption Under the Idaho Tort Claims Act.

2. Whether the District Court Abused its Discretion in Denying Hammer's Request for a Mental Examination of Ribi.

III. ATTORNEYS FEES ON APPEAL

Ribi respectfully requests his attorney fees on appeal under I.C. § 6-918A because, as shown below, portions of Hammer's appeal were commenced and pursued in bad faith. *See Block v. City of Lewiston*, 156 Idaho 484, 490 (2014) (stating that I.C. § 6-918A is the exclusive source of fees under the Tort Claims Act). Hammer has acted in bad faith in pursuing her appeal of the dismissal of the Original Complaint because it is undisputed that she filed an Amended Complaint that superceded her original pleadings and any rulings related to it. Also, Hammer has acted in bad faith in pursuing a mental health examination of Ribi in an attempt to harass and embarrass him and to extort a settlement. Ribi also requests his costs under I.A.R. 40. In addition, costs and fees are

applicable to the pursuit of the appeal of the denial of the mental health examination under I.C. § 12-121 for being frivolous and as justice requires for being a continual means of harassment and abuse to Ribi. *See Hoffer v. Shappard*, 160 Idaho 870, 380 P.3d 681, 696 (2015) (Westlaw pinpoint citation for Idaho Reporter not yet available).

IV. ARGUMENT

A. The District Court Correctly Dismissed the Amended Complaint

1. Standard of Review

A District Court's decision on a motion to dismiss is reviewed de novo. Thus, when reviewing an appeal, the reviewing court applies the same well-established standard utilized by the District Court. *Summers v. Cambridge Joint Sch. Dist. No. 432*, 139 Idaho 953, 955 (2004). Additionally, dismissal may be affirmed on any proper ground if support for such exists in the record, even if the District Court did not address the issue or relied on different grounds or reasoning as long as the issue was raised below. *See, e.g., Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001).

Under Rule 12(c) of the Idaho Rules of Civil Procedure a party may, after the pleadings are closed, move for a judgment on the pleadings under the same standard as a motion to dismiss for failure to state a claim under Rule 12(b)(6). In order to state a claim, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" I.R.C.P. 8(a)(1) (emphasis added). While the court must accept as true all non-conclusory factual allegations a claim must be dismissed, even under Idaho's liberal pleading rules, if the allegations could not provide a basis for relief even when accepting the non-conclusory allegations as true. *Young v. City of*

Ketchum, 137 Idaho 102, 104 (2002). Thus, mere conclusory statements unsupported by adequate factual allegations are insufficient to survive a motion to dismiss.

2. Hammer's Original Complaint and Any Decisions Related to It Are Moot Due to Hammer's Filing of Her Amended Complaint.

As an initial matter, Hammer spends an inordinate amount of pages of her briefing to dispute rulings of the District Court with respect to the dismissal of her Original Complaint for its failure to state a valid claim. (*See* Appellant Br., p. 18-30.) However, that dismissal was without prejudice, and leave was granted for her to file an Amended Complaint, which she did. "The amendment of the complaint supersedes the original complaint and all subsequent proceedings are based upon the amended complaint." *Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 330 (2010) (citing *W.L. Scott, Inc. v. Madras Aerotech, Inc.*, 103 Idaho 736, 739 (1982)). Hammer's Amended Complaint is therefore the only relevant complaint for this Court's analysis on appeal. *See id.*

Hammer's appeal on any issue regarding the Original Complaint indicates a bad faith waste of judicial and private resources. She knows that the District Court granted her leave to amend her complaint to fix the original's deficiencies, and she knows that the District Court reconsidered itself and ultimately applied the exact assault standard that she requested. Yet she glosses over these things and appeals those issues nonetheless. Forcing Ribi to defend these arguments serves no purpose but to needlessly drive up the cost of litigation and waste the Court's and the parties' resources.

3. Ribi is Immune from Suit Under the Idaho Tort Claims Act.

The District Court assumed, for purposes of Ribi's motion to dismiss the Amended Complaint, that Hammer had pled sufficient facts to support her assault claim.[6] (Tr. Vol. II, 17:20-18:1, 21:16-23.) It then considered whether Hammer had pled sufficient facts showing she was entitled to relief in light of the statutory presumption of immunity afforded under the ITCA. (Tr. Vol. II, 63:2-6) Ultimately, the District Court dismissed Hammer's Amended Complaint because she failed to sufficiently plead facts showing that she was entitled to relief, as her own allegations showed that Ribi was immune. (*Id.*) Hammer now contests this dismissal through various arguments, all of which are meritless.

a. Immunity Must Be Resolved as Early As Possible in Litigation.

Immunity under ITCA is not merely an exception to liability, it is immunity from suit itself. "The Idaho Tort Claims Act, I.C. §§ 6-901-929, abrogates the doctrine of sovereign immunity and renders a governmental entity liable for damages arising out of its negligent acts or omissions. However, it preserves the traditional rule of immunity in certain specific situations." *Lawton v. City of Pocatello*, 126 Idaho 454, 458 (1994) (emphasis added) (citing *Sterling v. Bloom*, 111 Idaho 211, 214-15 (1986)); *see also Teurlings v. Larson*, 156 Idaho 65, 71 (2014) (holding that, under I.C. § 6-904(4), "Idaho has not waived its sovereign immunity" for the acts listed under that exception). "Historically, the doctrine of sovereign immunity barred suits brought against the government." *Walker v. Shoshone Cnty.*, 112 Idaho 991 (1987) (emphasis added) (discussing the judicial and

---

[6] This also included finding that Hammer had pled an assault under the elements found in IDJI 4.30, as demanded by Hammer. (Tr. Vol. II, 17:20-18:1, 21:16-23.)

legislative history that resulted in the enactment of the ITCA). In other words, traditionally the government was absolutely immune from suit, not merely from liability.

The ITCA is a waiver of some of Idaho's sovereign immunity, but the listed exceptions retain the state's sovereign immunity for those circumstances. Consistent with the basic doctrine of sovereign immunity, this is immunity from suit, not immunity from liability. As a result, the immunity under ITCA is essentially a qualified version of absolute immunity from suit under the doctrine of sovereign immunity.

With respect to the similar federal doctrine of qualified immunity, the United States Supreme Court has made clear that questions of immunity should be addressed as early as possible in litigation to avoid depriving a party of its intended effect (i.e., immunity from suit):

> Because qualified immunity is 'immunity form suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial.' *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis deleted). Indeed, we have made clear that the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims" against government officials [will] be resolved prior to discovery.' *Anderson v. Creighton*, 483 U.S. 635, 640 n. 2 (1987). Accordingly, 'we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curium*).

Pearson v. Callahan, 555 U.S. 223, 231-32 (2009); *accord Rosenberger v. Kootenai Cnty Sheriff's Dep't*, 140 Idaho 853, 857 (2004). Indeed, "[i]mmunity ordinarily should be decided by the court long before trial." *Hunter*, 502 U.S. at 228. Thus, questions of immunity should be addressed as soon as possible in litigation to avoid subjecting a governmental entity or its employees to laborious litigation if the immunity applies.

Consistent with these principles, and as discussed below, the District Court appropriately addressed whether Ribi was immune from suit at this early stage in the proceedings, and held that he was immune.

b. Hammer's Amended Complaint Failed to Show that She Was Entitled To Relief in Light of The Immunity Presumption.

The Idaho Tort Claims Act generally authorizes tort claims against cities and their employees[7] for wrongful acts that occur within the course and scope of their employment. I.C. § 6-903(1). However, the ITCA specifically exempts employees for assault when "acting within the course and scope of their employment and without malice or criminal intent. . . ." I.C. § 6-904(3). Therefore, it is clear that as a matter of law an employee can be immune even if he has committed an assault, and that a valid pleading of an assault alone is insufficient to avoid the statutory immunity. Further, the presumption is "that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment and without malice or criminal intent." I.C. § 6-903(5) (emphasis added). It is undisputed based on Hammer's Amended Complaint that the alleged assault occurred during a break in a City Council meeting at City Hall. (R. at 272, ¶ 40.) Consequently, the "time and place" requirement is satisfied here and analysis mandates the presumption that Ribi is immune from suit. It is Hammer's burden to show otherwise, which she has failed to do because her allegations do not show that: (a) Ribi acted outside the course and scope of his employment; or that (b) Ribi acted maliciously or with criminal intent.

---

[7]The term "employee" includes elected officials. I.C. § 6-902(4).

i. The Amended Complaint Fails to Show That Ribi Acted Outside the Course and Scope of His Employment.

The ITCA provides for a rebuttable presumption that "any action or omission of an employee within the time and at the place of his employment is within the course and scope of his employment. . . ." I.C. § 6-903(5); *Pounds v. Denison*, 120 Idaho 425 (1990). Additionally, the Idaho Supreme Court has explained that "[a]cts that are within the scope of employment are 'those acts which are so closely connected with what the servant is supposed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of employment.'" *Anderson*, 137 Idaho at 518 (quoting *Richard J. & Esther E. Wooley Trust v. DeBest Plumbing, Inc.*, 133 Idaho 180, 184 (1999)) (emphasis added). In other words, "an employee's conduct is within the scope of employment 'if it is of the kind which he [or she] is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, *at least in part*, by a purpose to serve the master.'" *Id.* (emphasis in *Anderson*) (bracketed language added); *Teurlings*, 156 Idaho at74-75.

Hammer asserts that the alleged assault occurred at City Hall, during a break in a City Council meeting that both Hammer and Ribi were attending as city officials, and it arose directly out of a dispute over a budget matter. (R. at 272-276, ¶¶ 37-67.) The alleged assault thus squarely fits into the "course and scope of employment" requirement, and at worst would simply be in the category of an improper method of carrying out the business of the employer (i.e., Sun Valley).

Hammer's arguments to the contrary wade into the minutia of what she believes are the precise contours of a City Councilmember's job duties, with a heavy emphasis on "authority." She asserts that Ribi had no "authority" outside of council chambers to discuss the budget with her, to

demand she make any changes, or otherwise direct her in any way with respect to the budget. (Appellant Br., p. 32-34.) This emphasis on "authority" is not part of the ITCA analysis. Certainly, no City Councilmember's job duties include the authority to assault employees. Yet, significantly, an intentional tort can still occur within the course and scope of employment. *See, e.g., Anderson v. City of Pocatello*, 112 Idaho 176 (1986) (police shooting); *Evans v. Twin Falls Cnty.*, 118 Idaho 210 (1990) (assault and battery); *Limbert v. Twin Falls Cnty.*, 131 Idaho 344 (346 (Ct. App. 1998) (battery). The analyses of whether an intentional tort occurred and whether it was within the course and scope of employment are separate and distinct. Thus, whether an employee acted within the course and scope of his employment does not turn on whether the employee committed an intentional tort. Otherwise, the applicable immunity provisions of ITCA would be meaningless, as the existence of a tort would automatically negate the immunity. Instead, whether the conduct was within the course and scope of employment is analyzed under I.C. § 6-903(5), *Pounds*, *Anderson* and related case law, as set forth above. Accordingly, Hammer's contentions that Ribi acted outside his authority in assaulting her is irrelevant to the correct analysis.

Likewise, the specific duties and authority of a city councilmember are not at issue. City councils in Idaho are indisputably involved in city budget matters. *See, e.g.,* I.C. § 50-1002 (stating, in part, "The city council of each city shall, prior to passing the annual appropriation ordinance, prepare a budget...."). Indeed, as Hammer has alleged, the very issue being discussed during the City Council meeting was the budget and the alleged assault here was directly related to, in Hammer's allegations, preventing Hammer from discussing the budget issue with the mayor instead of Ribi. Whether Ribi ultimately should have discussed a budget matter with Hammer outside of council

chambers does not resolve the relevant inquiry here of whether the confrontation was incidental to his undisputed job duties, which as pled in detail by Hammer, it plainly was.

ii. The Amended Complaint Fails to Show that Ribi Acted Maliciously or With Criminal Intent.

Because the alleged incident on September 15 occurred within the time and at the place of Ribi's employment, Ribi also is entitled to a statutory presumption that he acted without malice or criminal intent. I.C. § 6-903(5). "Criminal intent" under the ITCA simply 'means the intentional commission of what the person knows to be a crime." *James v. City of Boise*, 160 Idaho 466, 376 P.3d 33, 49 (2016) (Westlaw pinpoint citation for Idaho Reporter not yet available). There are no allegations in the Amended Complaint suggesting that Ribi acted with criminal intent and it does not appear that Hammer contends he did. (See footnote 6, *supra.*) Instead, it appears that Hammer's focus is on "malice."

"Malice" under the ITCA means "'the intentional commission of a wrongful or unlawful act, without legal justification or excuse and with ill will, whether or not injury was intended.'" *Miller v. Idaho State Patrol*, 150 Idaho 856, 870 (2011) (quoting *Beco Constr. Co. v. City of Idaho Falls*, 124 Idaho 859, 864 (1993). In other words, malice requires animosity and a desire to do harm for harm's sake. Restatement (Second) of Torts, ch. 29 Introductory Note (2014). This is often referred to as "actual malice," and differs from "legal malice" in that it requires the additional element of "ill will." *Anderson*, 112 Idaho at 182-83.

Hammer uses the word "malice" twice in her Amended Complaint but only in a conclusory manner, which the Court need not accept as a determination of law. (*See* R. at 266, 277, ¶¶ 8, 72.) She does not plead sufficient facts showing that Ribi acted maliciously that would adequately

overcome the statutory presumption. Instead, she has only pled that Ribi was merely attempting to stop her from returning to the council chambers while they argued about the budget, when he allegedly raised his arms and stepped towards her, yelling: "No! You will not talk to the Mayor!" (R. at 275, ¶ 56.) There is nothing in these allegations showing Ribi acted maliciously–doing harm for harm's sake–during that confrontation. Hammer simply concludes that he did, which conclusory statement is insufficient for pleading purposes. *See, e.g., Young,* 137 Idaho at 104.

iii. Hammer Misapplies Well-Settled Law

Hammer argues that determinations of course and scope and malice can only be made by a jury. (Appellant Br., p. 30-37.) This is incorrect. The Idaho case law she relies on merely state that such matters are generally fact issues. (*See* Appellant Br., p. 32, 37.) Her representation of this case law is inaccurate as neither case stands for the blanket proposition that issues of course and scope of employment and malice "must" be a jury question. Instead, there were issues of fact in those cases based on the particular allegations and evidence presented that specifically required a finder of fact to evaluate. Neither case changes the well-settled standards of a motion to dismiss for failure to state a claim under either Rule 12(b)(6) or 12(c).

4. Hammer's Amended Complaint Fails to Plead an Assault Claim

Even if the Court determines that Hammer has adequately pled facts overcoming the immunity presumption, a separate basis for dismissal exists because Hammer still failed to actually plead an assault. In discussing Hammer's Amended Complaint, the District Court assumed that she had pled an assault under Hammer's requested standard of the Idaho Civil Jury Instruction (IDJI)

4.30.[8] (Tr. Vol. II, 17:20-18:1, 21:16-23.) The Court here can alternatively find that the Amended Complaint does not state a claim.

The elements of an assault under IDJI 4.30 include: (1) the defendant acted intending to cause a harmful or offensive contact with the plaintiff, or an immediate fear of such contact; (2) as a result, the plaintiff feared that such contact was imminent. IDJI 4.30. Phrased slightly differently, an assault is an "unlawful threat or offer to do bodily harm or injury to another." *Miller v. Idaho State Patrol*, 150 Idaho 856, 871 (2011).

This is similar to the parallel criminal statute of assault, which defines it as:

> (a) An unlawful attempt, coupled with apparent ability, to commit a violent injury on the person of another; or
>
> (b) An intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such another person that such violence is imminent.

I.C. § 18-901. *See also James v. City of Boise*, 160 Idaho 466, 376 P.3d 33, 49 (2016) (Westlaw pinpoint citation for Idaho Reporter not yet available) (recognizing that intentional torts listed in the ITCA can also constitute a crime).

> To constitute an actionable assault, the display of force must be under such circumstances as to cause the plaintiff reasonable apprehension of immediate bodily harm. In other words, assault requires a definitive act by one who has the apparent ability to do the harm or to commit the offensive touching.

6A C.J.S., Assault § 6 (emphasis added).

---

[8] Oddly, although Hammer strenuously argues that IDJI 4.30 is the "adopted" standard for the elements of civil assault, her appellate briefing repeatedly cites to criminal assault cases in order to establish her arguments that she had adequately pled an assault in her original complaint. (Appellant Br., p. 23-24.)

Further, "words not accompanied by circumstances inducing a reasonable apprehension of bodily harm, such as movements of drawing a fist, aiming a blow, or the show of a weapon, do not constitute an assault." *Williams v. Port Auth. of New York and New Jersey*, 880 F.Supp. 980, 994 (E.D.N.Y 1995) (emphasis added). An adequately severe overt act is required, not just some overt act, "even though the mental discomfort caused by a threat of serious future harm on the part of one who has the apparent intention and ability to carry out his threat may be far more emotionally disturbing than many of the attempts to inflict bodily contacts which are actionable as assaults." *Steel v. City of San Diego*, 726 F.Supp. 2d. 1172, 1189 (S.D. Cal. 2010) (quoting Restatement (Second) of Torts § 31, Comment A (2010)). Additionally, the threat of bodily harm must be immediate. *Steel*, 726 F.Supp.2d at 1189; *Hardin v. Wal-Mart Stores, Inc.*, 813 F.Supp.2d 1167, 1178 (E.D. Cal. 2011) (plaintiff did not have an apprehension of immediate harm even though the defendant acted aggressively by flipping off the plaintiff and "said he was going to get him[,]" because there was "no indication that he was going to attack the [p]laintiff at that point[,]" even in the face of an actual threat to do harm).

In an illustrative case with facts more extreme than those pled by Hammer, a New York court[9] failed to find sufficient facts to support an assault claim when the plaintiff alleged that her supervisor screamed at her during an argument in a meeting, was visibly angry and "red in the face," slammed the table with his hand, and advanced at her by wheeling his chair closer and closer to her. *Castro v. Local 1199*, 964 F. Supp. 719, 731-32 (S.D.N.Y. 1997). Additionally, the plaintiff asked

---

[9]New York defines assault, similar to Idaho, as intentional placing of another person in apprehension of imminent harmful or offensive contact. *See generally, United National Ins., Co. v. Waterfront New York Realty Corp.*, 994 F.2d 105, 108 (2d Cir.1993).

if her supervisor was threatening her life and he answered, "[t]ake it any way you want." The plaintiff then left the meeting. The court there deemed that these allegations were "forward-looking," and therefore the required imminence of the alleged harm did not exist, because the supervisor's actions were not accompanied by gestures sufficient to cause plaintiff to reasonably believe that she was in danger of imminent bodily harm.

Likewise, in *Williams v. Port Authority of New York and New Jersey*, 880 F.Supp. 980, 994 (E.D.N.Y.1995) the plaintiff was reprimanded by his supervisor, but the plaintiff alleged that the supervisor "used a racial slur, backed him against the wall, and threatened to 'get him.'" *Id.* (emphasis added.) The court there held that no assault occurred there because these actions were insufficient to impart an immediate threat of physical harm, such as raising his fist. *Id.* The court there held that there was nothing "to suggest imminent bodily contact," even recognizing that the supervisor allegedly backed the plaintiff against a wall in an office and verbally threatened him. Hammer's allegations are less severe than these, and as such, a claim of assault is not supported.

When looking at the elements of assault found in IDJI 4.30 or I.C. § 18-901, Hammer's Amended Complaint fails to state a claim. Despite the detailed allegations of Hammer's Amended Complaint (many of which are merely conclusions and factually irrelevant to whether an assault occurred) she still failed to adequately plead an assault. Where her original complaint merely showed that a "loud argument" occurred, her Amended Complaint merely alleged a loud argument combined with an apparent physical attempt to prevent Hammer from talking to the mayor about the budget. Hammer alleged that Ribi pivoted towards her, with his arms raised to about shoulder height, and he "took a step, thrust or lunge" towards her with his hands outstretched, getting as close as about

six inches stating "No! you will not talk to the Mayor!" before Hammer stepped back, walked unopposed around Ribi and returned to the City Council chambers. (*See* R. at 272-275, ¶¶ 39-59.)

These allegations simply did not show anything approaching an unlawful attempt, coupled with apparent ability, to commit a violent injury on Hammer, nor did they show an intentional, unlawful threat to do harm or violence, coupled with an overt act, creating a reasonable fear of imminent violence.[10] These facts likewise did not demonstrate a threat of a harmful or offensive contact. Instead, Hammer alleges merely that Ribi made a single, unsuccessful attempt to stop her from returning to City Council chambers. Her own pleading indicates that she easily avoided any attempt simply by stepping backwards, and then was unopposed as she walked around Ribi to return to the chambers. This is analogous to *Castro* and *Williams*, *supra*, where more severe conduct did not constitute assault. Simply put, a loud argument with a minor element of some potential limited physicality of the kind here (no clenched fist, no aiming a blow, no showing a weapon) is insufficient to support Hammer's claim of assault. Based on Hammer's detailed yet conclusory and inadequate pleading, she failed as a matter of law to show that she is entitled to relief for a claim of assault.

Hammer takes great pains to argue that only the jury instruction is applicable here and the Court cannot look to any other source, including a criminal statute defining assault. Contrary to Hammer's repeated assertions, the Idaho Supreme Court has not "approved" the IDJI to be the "proper elements of civil assault," but instead has explicitly stated that it "is not approving any

---

[10]Violence is more than mere unwanted physical contact or attempted physical contact as Hammer has alleged here. It connotes an intent to do harm, to hurt, damage, abuse, injure or kill something. It is a more intense level of physical force or attempted physical force. *See, e.g.,* Black's Law Dictionary, "violence" (10th ed. 2014); Merriam-Webster Dictionary, "violence" (available at www.merriam-webster.com/dictionary/violence) (last visited May 26, 2016).

specific instruction." (Introduction to the Idaho Civil Jury Instructions, published on the Idaho Supreme Court website at https://www.isc.idaho.gov/main/civil-jury-instructions) As useful as they may be to instruct a jury at trial or to state basic elements of the law, there is no legal basis to solely rely on the jury instructions for legal precedent to the exclusion of case law or statute.

More so, the court in *James* addressed the tort liability of assault, battery, and false imprisonment through citation to their criminal statutes and discussion of the criminal counterparts. In discussing battery specifically, the Court stated, "[t]here is no difference between the intent necessary to commit the tort of battery and intent necessary to commit the crime of battery." *James*, 376 P.3d at 49. It further made clear that an intentional tort could also be a crime. This is consistent with the general proposition that many intentional torts, such as assault or battery, are very similar to their criminal counterparts and courts may therefore appropriately consider multiple statements of the law when evaluating a claim. Thus, in the event this case is remanded it is not necessary to do so with a pronouncement that a jury instruction is the sole source of law governing a matter. Rather, trial courts should be free to consider the full range of relevant law.

Hammer also argues that she adequately pled a claim of assault merely because Ribi answered, and therefore had notice of her claim. (Appellant Br., p. 28-30.) This ignores that Ribi's answer contained a specific defense that Hammer had failed to state a claim for relief. (R. at 21.) Any answer filed by Ribi does not automatically concede that Hammer's complaint is sufficient as a matter of law and cannot be dismissed. Such an interpretation is contradictory to the Idaho Rules of Civil Procedure, which allow for a dismissal on the pleadings after an answer is filed. I.R.C.P. 12(c). The cases cited by Hammer support the proposition that a defendant cannot claim they had no notice

of a claim if they are able to answer that claim, even if inartfully pled in the complaint. (Appellant Br., p. 28-30.) To repeat, Hammer's complaint warrants dismissal not because there is no notice of an alleged assault, but because the facts as pled fail to show she is entitled to relief, as they actively preclude a finding that an assault occurred. Hammer's cases are inapplicable and distinguishable for that reason.

Overall, Hammer's Amended Complaint was disingenuous and plainly designed to improperly take advantage of the oral argument, briefing and comments made by the District Court about Hammer's deficient allegations. Far from merely alleging "a couple more facts," the Amended Complaint set out extensive additional, detailed allegations never before raised, despite years of litigation. Not only did these new allegations fail to plead an assault (or to rebut the immunity presumption, as discussed above), in submitting a signed pleading containing such baseless and disingenuous allegations in order to overcome a motion to dismiss, Hammer and her attorney's conduct reflected a complete disregard for appropriate judicial process and a bad faith pursuit of this appeal.

B. Hammer's Request for a Medical Examination of Ribi is Legally Baseless and Only Sought to Harass and Abuse.

Hammer asks this Court to overrule a discretionary decision of the District Court denying her a I.R.C.P. 35 mental health examination of Ribi.[11] (Appellant Br., p. 37-47.) However, the District Court soundly exercised its discretion and reversal is not warranted here. Simply put, Ribi's health

---

[11] Usually, under I.R.C.P. 35 this is an independent medical exam. However, Hammer requested that her own, already specially retained expert witness be the person to perform the examination. (*See* Appellant Br., p. 38; R. at 404-406.)

was not in controversy in this simple assault action and there was no good cause to require an examination. Instead, it is apparent from the record that Hammer improperly sought a mental health examination in order to harass and embarrass Ribi, and to extort a settlement. Her pursuit of this request on appeal reflects further bad faith.

A court's decision to deny a request for a mental health examination is reviewed for abuse of discretion. I.R.C.P. 35(1) (providing that the court "may" order a mental health examination). Accordingly, such a decision must be upheld so long as (1) the trial court correctly perceived the issue as discretionary; (2) the trial court acted within the outer boundaries of its discretion and consistently with the applicable legal standards; and (3) the trial court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94 (1991).

Rule 35 of the Idaho Rules of Civil Procedure provides in part:

> When the mental or physical condition . . . of a party . . . is in controversy, the parties by stipulation or the court in which the action is pending may order the party to submit to a physical or mental examination by a physician, or qualified mental health professional as defined in section 6-1901, Idaho Code, excluding nurses, if the mental emotional, or psychological condition of a party is at issue . . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination, including any tests or procedures to be performed, and the person or persons by whom it is to be performed.

I.R.C.P. 35(a) (emphasis added); *see also* F.R.C.P. 35(a) (setting forth similar standard).

While there is limited case law in Idaho regarding the requirements of "in controversy" and "good cause" the Court may look to federal case law for guidance. *See, e.g., Chacon v. Sperry Corp.*, 111 Idaho 270, 275 (1986) (stating that courts are required to interpret Idaho procedure as uniformly

as possible with federal cases in order to "establish a uniform practice and procedure in both the federal and state courts in the State of Idaho.").

Unlike other discovery devices, Rule 35 requires the party seeking the examination to first obtain the trial court's permission upon an affirmative showing that the mental health condition at issue is actually in controversy and there is good cause for the proposed examination. *Herrera v. Lufkin Indus., Inc.*, 474 F.3d 675, 689 (10th Cir. 2007) (citing *Schlagenhauf v. Holder*, 379 U.S. 104, 117-118 (1964)). The "in controversy" and "good cause" requirements are related and often overlap such that the two prongs may be addressed as one inquiry. The United States Supreme Court has thus explained:

> [Showing "in controversy" and "good cause" is] not met by mere conclusory allegations of the pleadings-nor by mere relevance to the case-but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination. Obviously, what may be good cause for one type of examination may not be so for another. The ability of the movant to obtain the desired information by other means is also relevant.
>
> Rule 35, therefore, requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements of 'in controversy' and 'good cause,' which requirements, as the Court of Appeals in this case itself recognized, are necessarily related. This does not, of course, mean that the movant must prove his case on the merits in order to meet the requirements for a mental or physical examination. Nor does it mean that an evidentiary hearing is required in all cases. This may be necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods short of a hearing. It does mean, though, that the movant must produce sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the Rule.
>
> Of course, there are situations where the pleadings alone are sufficient to meet these requirements. A plaintiff in a negligence action who asserts mental or physical injury, *cf. Sibbach v. Wilson & Co., supra*, places that mental or physical injury clearly in

> controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury. This is not only true as to a plaintiff, but applies equally to a defendant who asserts his mental or physical condition as a defense to a claim, such as, for example, where insanity is asserted as a defense to a divorce action. *See Richardson v. Richardson*, 124 Colo. 240, 236 P.2d 121. *See also, Roberts v. Roberts*, 198 Md. 299, 82 A.2d 120; Discovery as to Mental Condition Before Trial, 18 J.Am.Jud.Soc. 47 (1934).

Schlagenhauf v. Holder, 379 U.S. 104 , 118-119 (1964) (emphasis added); *see also, Kador v. City of New Roads*, 2010 WL 2133889 (M.D. La. 2010) ("the factors in determining 'good cause' have often been merged with the requirements necessary to find a plaintiff's physical condition is 'in controversy'."); *Lane v. Pfizer, Inc.*, 2007 WL 221959 (N.D. Okla. 2007) (recognizing that the two prongs may be addressed as one inquiry).

One oft-cited federal district court case explains that a mental examination should only be ordered where: (1) the moving party has a cause of action for intentional or negligent infliction of emotional distress; (2) there are factually supported allegations of a specific mental or psychiatric injury or disorder; (3) there is a claim of unusually severe emotional distress; (4) a party offers expert testimony to support a claim of emotional distress; or (5) a party concedes that his or her mental condition is in controversy within the meaning of Rule 35(a). *Turner v. Imperial Stores*, 161 F.R.D. 89, 97 (S.D. Cal. 1995). None of these scenarios are present here.

To reiterate, it was Hammer's burden to affirmatively show that Ribi's mental health is really and genuinely in controversy and that there is good cause for an examination. She could not meet this burden as she has attempted to do here by merely accusing Ribi in a conclusive manner that he has some disorder.

For example, in *Schlagenhauf v. Holder*, *supra*, several bus passengers sued Schlagenhauf, their bus driver, for negligence arising from injuries they suffered when their bus collided with a tractor-trailer. 379 U.S. at 106. The passengers sued Greyhound Corporation (owner of the bus), Schlagenhauf (the bus driver), Contract Carriers, Inc (owner of the tractor), National Lead Company (owner of the trailer), and Joseph McCorkill (driver of the tractor). Greyhound cross-claimed against Contract Carriers and National Lead. After deposing Schlagenhauf, Contract Carriers amended its answer to state that Schlagenhauf was not mentally or physically capable of driving the bus at the time of the accident. It then petitioned (along with National Lead) the court to compel Schlagenhauf to undergo a series of mental and medical examinations. *Id.* at 107-108. The motion was based on the assertion that Schlagenhauf's mental and medical conditions were in controversy because those things had been raised in Contract Carrier's answer to the cross-claim. Contract Carrier's attorney also asserted in an affidavit, which was based on deposition testimony in the case, that Schlagenhauf had seen red lights 10 to 15 seconds before the accident, that another witness had seen the rear lights of the trailer from a further distance, and that Schlagenhauf had been involved in a prior accident. *Id.* at 108. For Common Carriers, these facts raised the possibility that the bus driver had vision problems as well as cognitive problems that inhibited his ability to timely stop the bus, and thus warranting a series of Rule 35 examinations. *Id.* The Supreme Court disagreed.

In its analysis the Supreme Court made clear that Rule 35 places the burden on the moving party to show that each condition is really and genuinely in controversy and that there is good cause for each examination. This is not met by an attorney or party merely asserting that a condition is at issue or is relevant, though at times it may be met by the pleadings alone. *Id.* at 118. For example,

the court explained that the standard may be met by a plaintiff in a negligence lawsuit who claims to have suffered from a mental or physical injury, thereby placing such a condition in controversy and warranting an examination to determine the existence and extent of such asserted injury. *Id.* Similarly, the standard may be met where a defendant asserts a defense to a claim, such as insanity in a divorce proceeding. *Id.*

However, where a party does not place the condition in controversy, the moving party must affirmatively present facts demonstrating that the condition is truly in controversy and that good cause exists. Thus, in *Schlagenhauf*, the moving party was not entitled to a mental health examination of the bus driver because the moving party only had the assertions of the attorney, based on sparse facts, which was insufficient to show that the bus driver had a mental condition "warranting wide-ranging psychiatric or neurological examinations." *Id.* at 120-121.[12]

The Supreme Court concluded:

> The Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations. The "good cause" and "in controversy" requirements of Rule 35 make it very apparent that sweeping examinations of a party who has not affirmatively put into issue his own mental or physical condition are not to be automatically ordered merely because the person has been involved in an accident – or, as in this case, two accidents – and a general charge of negligence is lodged. Mental and physical examinations are only to be ordered upon a discriminating application by the district judge of the limitation prescribed by the rule. To hold otherwise would mean that such examinations could be ordered routinely in automobile accident cases. The plain language of Rule 35 precludes such an untoward result.

---

[12]The Supreme Court stated that on remand an eye examination may be appropriate in light of the guidelines set forth in the decision.

379 U.S. at 122 (internal footnote omitted, emphasis added). The same logic certainly applies to an alleged assault case where the defendant does not place his own mental health at issue.

Ribi did not file a counterclaim nor has he asserted a defense implicating his mental health. Likewise, in all of the years of discovery in the related cases brought by Hammer, his mental health has not been placed at issue in any meaningful or relevant manner, but only through defamatory speculation and conclusory amateur diagnosis by Hammer's counsel. And, in fact, Hammer did not ever seek a mental health examination of Ribi during the related federal lawsuit[13] where her assault claim was first brought prior to being dismissed and re-filed in state court. Yet, over four years after the alleged "assault" Hammer now baselessly seeks to compel Ribi to undergo an invasive mental health examination. Her purported "facts" upon which she bases the motion, however, are nothing but her and her husband/attorney James Donoval's own subjective and conclusory belief–and "diagnosis"–that Ribi suffers from mental health disorders (antisocial personality disorder, dissocial personality disorder, narcissistic personality disorder). (R. at 43-48.) She also relied on the purported "diagnosis" of Evan Hanson, (see R. at 39), her own mental health therapist in Oregon, even though Hanson has never met or treated Ribi, has no counseling relationship with him, and has not submitted an affidavit or declaration at all, let alone one stating he has "diagnosed" Ribi. More so, Donoval has himself expressed significant misgivings about Hanson's competency. (*See* Appendix A, Donoval September 23, 2011 Letter to Evan Hanson, filed under seal.)

---

[13]The Federal case, *Hammer, et al. v. Sun Valley, et al.* Case No. 1:13-cv-00211-EJL was filed May 3, 2013.

Based on these groundless accusations, Hammer filed her Rule 35 motion on April 13, 2016, (R. at 24), but did not file any supporting affidavits or a memoranda at that time. Instead, her attorney/husband James Donoval sent a letter to defense counsel, also dated April 13, with copies of the supporting materials she intended to file at a later date. (R. at 170.) The letter made clear that the Rule 35 motion (as well as a motion for punitive damages) was being utilized improperly as a tactic to extort a settlement by threatening to file the materials containing the defamatory information unless Ribi agreed in writing to settle for $150,000 (or $200,000 with a confidentiality clause) within two days on April 15. (*See id.*)

Defense counsel responded to this threat in a letter, dated April 15 (the date of Donoval's deadline for Ribi to agree to pay Hammer). (R. at 171-172.) The letter explained to Donoval that it was inappropriate to attempt to extort a settlement by threatening to release false and defamatory information about Ribi. It also explained that the Rule 35 motion was baseless because Ribi's mental health is simply not in controversy in this case and there is no good cause for a mental health examination. More so, the letter explained it is frivolous and reckless for Hammer or Donoval to claim that they have obtained a "diagnosis" of Ribi from Hammer's own therapist, who has never even met or treated Ribi and therefore has no basis whatsoever to diagnosis him. (*Id.*) The letter strongly demanded that Hammer not proceed with the frivolous and defamatory motion. (*Id.*)

Donoval responded by letter later that same day, repeating his amateur "diagnosis" of Ribi and stated obtusely that "putting pressure on opponents to settle matters is a justified tactic in

litigation. . . ."[14] (R. at 173-174.) Donoval's letter confirms that Hammer's motion is based on the purported "diagnosis" of Evan Hanson and, because a small percentage of the population suffer from mental health disorders, Hammer should be able to have Ribi "tested for such." (*Id.*) This is just the type of blackmail Justice William O. Douglas raised as a concern when he dissented in part from the *Schlagenhauf* majority opinion:

> I do not suppose there is any licensed driver of a car or truck who does not suffer from some ailment, whether it be ulcers, bad eyesight, abnormal blood pressure, deafness, liver malfunction, bursitis, rheumatism, or what not. If he or she is turned over to the plaintiff's doctors and psychoanalysts to discover the cause of the mishap, the door will be opened for grave miscarriages of justice. When the defendant's doctors examine plaintiff, they are normally interested only in answering a single question: did plaintiff in fact sustain the specific injuries claimed? But plaintiff's doctors will naturally be inclined to go on a fishing expedition in search of anything which will tend to prove that the defendant was unfit to perform the acts which resulted in the plaintiff's injury. And a doctor for a fee can easily discover something wrong with any patient– a condition that in prejudiced medical eyes might have caused the accident. Once defendants are turned over to medical or psychiatric clinics for an analysis of their physical well-being and the condition of their psyche, the effective trial will be held there and not before the jury. There are no lawyers in those clinics to stop the doctor from probing this organ or that one, to halt a further inquiry, to object to a line of questioning. And there is no judge to sit as arbiter. The doctor or the psychiatrist has a holiday in the privacy of his office. The defendant is at the doctor's (or psychiatrists's) mercy; and his report may either overawe or confuse the jury and prevent a fair trial.

Id. at 125. Justice Douglas went on to state that applying Rule 35 to defendants requires safeguards to protect against "the awful risks of blackmail that exist in a Rule of that breadth." *Id.* at 127 (emphasis added). These concerns raised by Justice Douglas are particularly relevant to the present case where Hammer and Donoval are plainly seeking to utilize Rule 35 for an improper purpose.

---

[14]Donoval did not attempt to explain how "putting pressure" on litigants to settle based on threatening to file documents containing baseless and defamatory accusations is appropriate.

Hammer's attempt to extort a settlement failed and, consequently, she filed her defamatory memorandum in support of the Rule 35 motion on September 22. The memorandum contained accusations that Ribi has one or more serious mental health disorders that supposedly cause him to have a propensity for violence and for dishonesty. (R. at 43-48.) In "support," the memorandum generally re-alleged facts from the Original Complaint and identified the basic criteria of antisocial personality disorder, dissocial personality disorder, and narcissistic personality disorder, as found in the DSM-IV-TR.[15] (*Id.*) Hammer then went on at length discussing these complex psychological disorders, including their differences and how they manifest etc., apparently based on her and her attorney's reading of an outdated version of the DSM and a couple of articles and books she had apparently read. (*Id.*) She then concluded that Ribi probably had one or more of mental conditions and she was entitled to have him undergo a mental health examination to prove her belief. (*Id.*)

As clearly demonstrated, Hammer completely failed to meet her burden to show that Ribi's mental health was actually in controversy and that there was good cause for an examination. Her accusations had no basis in fact, but instead were and still are frivolous, reckless and made in bad faith. Ribi's mental health is simply not an issue in this case, and never has been, despite Hammer's baseless attempts to unilaterally make it an issue. Hammer's motion was plainly an improper attempt

---

[15] The DSM refers to the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. The manual provides the nomenclature and standard criteria for the classification of mental disorders. *See* American Psychiatric Association, discussion of the DSM, *available at* https://www.psychiatry.org/psychiatrists/practice/dsm (last visited January 19, 2017). The current DSM in use is the Fifth Edition, not the Fourth Edition cited by Hammer. In any event, the manual "is intended to be used in all clinical settings by clinicians of different theoretical orientations." *Id.* (emphasis added). Presumably, this does not include attorneys attempting to extort and harass opposing parties.

to extort a settlement and defame Ribi, and she has improperly taken unfair advantage of the litigation exception to defamation in an attempt to do so. She has continued this misconduct by pursuing this issue on appeal. This misconduct by Hammer and her attorney was not rewarded by the District Court and this Court should not reward it here.

V. CONCLUSION

For the reasons set forth herein, this Court should affirm the District Court's decisions. Hammer has failed to set forth any meritorious argument as to why the District Court's decisions were in error or should be reversed. Further, this Court should award the Respondents their attorney fees and costs on appeal under the statutes cited above because Hammer has pursued a large portion of this appeal frivolously and in bad faith.

DATED this 19th day of January, 2017.

NAYLOR & HALES, P.C.

By: _____ FOR:

Kirtlan G. Naylor, Of the Firm
Attorneys for Defendant-Respondent
Email: kirt@naylorhales.com

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January, 2017, I caused to be served via U.S. Mail, a true and correct copy of the foregoing upon:

James R. Donoval
1048 N. Torrey Pines Ave.
Eagle, ID 83616
Attorney for Plaintiff-Appellant

FOR:
Kirtlan G. Naylor