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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

DICKINSON FROZEN FOODS, INC., an Idaho Corporation,

Plaintiff/Appellant,

v.

J.R. SIMPLOT COMPANY, a Nevada corporation; THOMPSON COBURN, LLP, a Missouri limited liability partnership; YARMUTH WILSDON, PLLC, a Washington professional limited liability company; MARK McKELLAR, an individual; JOHN DOE I-X, unknown individual and entities,

Defendants/Respondents.

Supreme Court Case No. 45580
Ada County No. CV01-17-03836

BRIEF OF RESPONDENT YARMUTH WILSDON, PLLC

Appeal from the District Court of the Fourth Judicial District for Ada County.

Honorable Lynn Norton, District Judge presiding.

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INTRODUCTION

J.R. Simplot Company ("Simplot") commenced litigation against Frank Tiegs and several entities he controls in the U.S. District Court for the Western District of Washington (the "Washington Litigation") in December 2016. As this Court well knows, petitioning a court for relief is a fundamental, First Amendment protected right. The Seattle law firm Yarmuth Wilsdon, PLLC ("Yarmuth"), along with the law firm (and now co-defendant), Thompson Coburn LLP, represented Simplot in the Washington Litigation.

One of the central allegations in the Washington Litigation was that Tiegs and his entities mismanaged and abused fiduciary and other duties regarding certain joint ventures that they undertook with Simplot, causing Simplot millions of dollars in damages. The Washington complaint detailed this mismanagement, and as part of doing so, quoted from a government report, a government-issued press release, and an audit report prepared by NSF International ("NSF," an organization that develops food and safety standards) related to Dickinson Frozen Foods ("DFF"), which is a closely-held Idaho corporation controlled by Frank Tiegs. These materials were related to the overall claims of mismanagement by Tiegs and his entities. The Washington complaint spanned 181 paragraphs and mentioned DFF in only 5 of them.

In addition to defending the Washington Litigation, Tiegs (who is DFF's President and signed the verified complaint at issue here) had DFF file in Idaho the defamation action that is on appeal here against Simplot and the two law firms representing Simplot, claiming a staggering $600 million in defamation "per se" damages – even though it sustained no actual damages. The

clear purpose of the defamation action was to disrupt – and distract from – the Washington Litigation, and to drive a wedge between Simplot and its lawyers.

Applying this Court's long-standing precedent concerning the absolute litigation privilege, District Judge Lynn Norton dismissed DFF's defamation claim in its entirety, correctly ruling that because DFF is another Tiegs-controlled entity, the statements concerning DFF's health and safety practices in the Washington complaint were "reasonably related" to the Washington Litigation. After considering a lengthy reconsideration motion, she held to her ruling of dismissal. The Judge below did not reach the personal jurisdiction defense that the law firms also raised.

On appeal, DFF now contends that Judge Norton read the absolute litigation privilege too broadly. DFF offers a misleading portrait of this Court's treatment of the privilege, and argues that it applies only in narrow, limited circumstances. DFF also offers a series of "waiver" arguments, and purports to show that Yarmuth somehow "lost" the protection of the privilege, or that it was otherwise "overcome." In making these arguments, DFF cites a multitude of cases. A close reading of those authorities, however, reveals that DFF – time and again – has misrepresented their holdings.

None of DFF's arguments hold water. The absolute litigation privilege in Idaho – and everywhere else – broadly protects any client and lawyer conduct or communications that are reasonably related to judicial proceedings. Whether a statement is "reasonably related" to litigation is not a question of fact, but a question of law for the court. The privilege applies even if the supposedly defamatory statement is made in bad faith, and with knowledge of its falsity.

The privilege is designed to grant litigants and lawyers maximum freedom to argue their cases and seek justice in court, without concern that they will be subject to the sort of retributive nuisance lawsuit that DFF has brought here. The privilege, moreover, is absolute, not conditional or qualified. It cannot be "waived" or "overcome."

Judge Norton correctly read and applied this Court's precedent concerning the absolute litigation privilege. Her ruling should be upheld. Moreover, her dismissal could also be upheld on the alternative grounds that there is no personal jurisdiction over the out-of-state law firms.

STATEMENT OF THE CASE

I. The Origin and Substance of DFF's Defamation Claim.

This defamation action stems from a lawsuit that Simplot filed in the Western District of Washington on December 2, 2016, against Frank Tiegs and various food processing and distributing companies he controlled. (R. Vol. 1, pp. 14-17 ¶¶ 1, 20). In that case, Simplot alleged that Tiegs and his entities had breached their fiduciary duties to Simplot with respect to certain joint ventures the parties had together, resulting in millions of dollars in losses. Yarmuth and co-defendant, Thompson Coburn, LLP, represented Simplot in the Washington case, and were involved in the preparation and filing of the complaints on behalf of Simplot in that action. As DFF noted in the Complaint here, Yarmuth is an out-of-state defendant – specifically, a Professional Limited Liability Company operating in the state of Washington. (R. Vol. 1, p. 16 ¶ 10). DFF did not allege that any publication of the allegedly defamatory allegations occurred in Idaho. Just the opposite. The only publications identified in the defamation complaint are (i) allegations in the Washington complaint and the Washington amended complaint, and (ii)

providing a copy of the Washington complaint to the parties' lender, which is located in Eastern Washington.

One of the central allegations Simplot raised against Tiegs and his companies in the Washington Litigation was that they routinely breached federal health and safety standards, which Simplot cited as further evidence of their overall mismanagement and part of the reason why the joint ventures managed by Tiegs and his companies lost money. As additional evidence of this disregard for health and safety standards, the Washington complaint quoted one government issued press release, one publicly available government report, and an audit report prepared by NSF, related to DFF. DFF was mentioned in just five paragraphs of a complaint that spanned 181 paragraphs. The following are the relevant excerpts from the First Amended Verified Complaint in the Washington Litigation which DFF quoted in its Complaint, and which were the subjects of the defamation claim here:

> 65. On or about December 1, 2015, in yet another incident, [the Occupational Safety and Health Administration, an agency of the federal Department of Labor ("OSHA")] cited Dickinson Frozen Foods ("DFF"), another Tiegs Affiliate located in Sugar City, Idaho, for a serious release of anhydrous ammonia. A true and correct copy of OSHA's press release related to this incident is attached hereto and incorporated as Exhibit N . . . .
>
> . . . .
>
> 68. On or about May 25, 2016, OSHA cited and fined DFF again for willful violations of employee safety laws. A true and correct copy of related OSHA documentation is attached hereto and incorporated as Exhibit P.
>
> 69. On or about May 31, 2016, OSHA cited and fined DFF again for willful violations of employee safety laws, including but not limited to, those found by OSHA through its investigation of the December 2015 incident referenced above (Exhibit N).

> 70. Additionally, on June 13, 2016, NSF International Food Safety LLC ("NSF") audited DFF's Sugar City, Idaho facility and cited DFF for a major violation of the FSSC 22000 Food Safety Management System ("FSSC 22000"), another safety and quality certification program in the food industry, after observing DFF's repeated failure to provide hot water in its plant's restrooms . . . . A true and correct copy of NSF's June 13, 2016 audit report is attached hereto and incorporated as Exhibit Q.

(R. Vo1. 1, pp. 17-20 ¶¶ 22-25, 28-34; pp. 1459-61 ¶¶ 65, 68-70).

The statements concerning DFF were related to the Washington Litigation because DFF is an entity under Tiegs' control, and Simplot alleged that similar poor management and unsafe operational practices occurred with respect to the Tiegs's entities that were managing and operating the parties' joint ventures that were the subject of the Washington Litigation. Even more to the point, DFF tacitly conceded that including these sorts of materials in a complaint cannot be defamatory because it included the same kinds of materials in its Complaint here – namely, news reports alleging that Simplot committed health and safety violations. (R. Vol. 1, pp. 30-45).

DFF filed this defamation action against Simplot and the President of Simplot's Food Group, Mark McKellar, and also for good measure sued the attorneys representing Simplot in the Washington Litigation. DFF also complained that the publicly filed Washington complaint was shared with Northwest Farm Credit Services ("NFCS"), a financial institution that was a creditor to one of the joint ventures involved in the Washington Litigation – as DFF itself concedes[1] – and which had an interest in the outcome of the Washington case.

[1] DFF acknowledged in its Proposed Second Amended Complaint that "NFCS made a term loan to Pasco," which was one of the joint ventures involved in the Washington Litigation, in which Simplot had an ownership stake. (R. Vol. 1, p. 1397 ¶ 49). DFF also concedes that NFCS was a lender to Pasco in its brief here. DFF Brief at 15.

One other point should be stressed here. DFF argues – as it did below– that Yarmuth has already "admitted" that the statements were not related to the Washington Litigation and were made only to "attack Tiegs's character." This is simply false. As Judge Norton noted in the District Court, DFF's contention that Yarmuth "admitted" any sort of wrongdoing is "patently false" and "is not a valid representation of the facts in evidence." (R. Vol. 1, pp. 2042-43). [2]

II. The District Court Dismisses DFF's Defamation Claim Because the Statements at Issue Were Reasonably Related to the Washington Litigation, and Covered by Idaho's Absolute Litigation Privilege.

In response to the Idaho suit, all of the defendants filed motions to dismiss DFF's defamation claim. On June 12, 2017, Judge Norton granted those motions.[3] Correctly applying this Court's decision in *Taylor v. McNichols,* 149 Idaho 826, 243 P.3d 642 (2010), Judge Norton ruled – as a matter of law – that the statements referring to DFF could not form the basis of a defamation action because they were "reasonably related" to the Washington Litigation. For that reason, Yarmuth (and the other defendants) enjoyed absolute immunity under Idaho's litigation privilege. (R. Vol. 1, pp. 1348-52). Looking only at the four corners of the Complaint, Judge Norton held that it was clear the statements at issue were related to the Washington Litigation

[2] On April 7, 2017, Simplot filed a motion to amend the operative complaint in the Washington Litigation to remove the paragraphs referring to DFF. In doing so, Simplot stated explicitly that it did not believe the paragraphs relating to DFF were in any way defamatory. Rather, it filed the motion in order to take advantage of provisions in Washington's Uniform Correction or Clarification of Defamation Act. Pursuant to that Act, a party may retract a statement in response to receiving service of a summons and complaint alleging defamation. If a party makes such a retraction in a timely manner, the plaintiff claiming defamation "may not recover damages for injury to reputation or presumed damages." RCW 7.96.060. Simplot moved to amend the complaint and remove the paragraphs related to DFF simply out of an abundance of caution. Judge Norton recognized this in her opinion. (R. Vol. 1, pp. 2042-43).

[3] Yarmuth and Thompson Coburn also moved to dismiss for lack of personal jurisdiction pursuant to I.R.C.P. 12(b)(2). Because she dismissed DFF's defamation claim on the merits pursuant to I.R.C.P. 12(b)(6), Judge Norton expressly declined to consider or rule on the personal jurisdiction issue. (R. Vol. 1, p. 1354).

because DFF – like the entities involved in the Washington case – were controlled by Frank Tiegs, who was a defendant in the Washington Litigation and who signed the Complaint in the Idaho case as DFF's President. The statements concerning DFF were thus "reasonably related" to the broader allegations of mismanagement of Tiegs's entities at issue in the Washington Litigation.

Judge Norton simultaneously denied DFF's motion for leave to amend as "moot" because none of the proposed amendments would alter the litigation privilege analysis. (R. Vol. 1, p. 1354). DFF did not add any additional statements that it claimed were defamatory – it simply excerpted the same paragraphs from the Washington complaint detailed above. (R. Vol. 1, pp. 761-64 ¶¶ 26-29, 35-38). Beyond that, DFF contended that certain news sources had taken notice of the Washington complaint and generally reported on the Washington Litigation, but DFF did not contend that Yarmuth (or any other defendant) had provided the complaint to any of these news outlets. (R. Vol. 1, p. 767 ¶ 46). Because DFF's proposed amendments did not contain any new statements or allege that defendants made any new publication, amendment would be futile.

III. The District Court Denies DFF's Motion for Reconsideration and Second Motion for Leave to Amend the Complaint.

On June 22, 2017, DFF filed a Motion for Reconsideration, and a renewed Motion for Leave to Amend its complaint. In essence, the reconsideration motion made the same faulty arguments that DFF repeats here on appeal.

The second proposed amended complaint – again – did not contain any new allegedly defamatory statements – it simply offered selective quotes from the same paragraphs from the Washington complaint as before. (R. Vol. 1, pp. 1393-94 ¶¶ 34-35). It also explicitly acknowledged that NFCS had "made a term loan" to Pasco, one of the joint ventures involved in the Washington Litigation, and that NFCS therefore had a financial interest in the outcome of the Washington action. (R. Vol. 1, p. 1397 ¶ 49). The second proposed amended complaint also contained a series of conclusory assertions to the effect that Frank Tiegs "does not oversee . . . the day-to-day operations at any of DFF's facilities," and that DFF "was not legally responsible" for the actions of the entities involved in the Washington Litigation. (R. Vol. 1, pp. 1395-97 ¶¶ 39-46). Finally, the second proposed amended complaint attached the Washington complaint quoted above, as well as numerous other pleadings from the Washington Litigation, and DFF urged Judge Norton to review their contents. (R. Vol. 1, pp. 1385-1612).

Judge Norton denied both of DFF's motions on August 8, 2017. Following this Court's precedents, she correctly treated the application of the litigation privilege as a question of law for the court to decide. She again held that DFF could not maintain a defamation action based on the statements made in the Washington Litigation because they were "reasonably related" to the issues in that case. (R. Vol. 1, pp. 2029-35). She further held that DFF's proposed amendments would be futile. Because DFF did not allege any new defamatory statements, the litigation privilege analysis applied and acted "as an absolute bar to the defamation claims raised by [DFF]." (R. Vol. 1, p. 2045).

COUNTERSTATEMENT OF ISSUES PRESENTED ON APPEAL

1. The District Court correctly dismissed DFF's defamation claim because the Yarmuth law firm enjoyed absolute immunity under Idaho's litigation privilege, as the statements referring to DFF in the Washington complaint were reasonably related to the Washington Litigation. (Counterstatement to DFF Issue "b").

2. The District Court correctly denied DFF's motion to amend its complaint because the proposed amendments did not contain any new allegedly defamatory statements or publications, would not impact Yarmuth's absolute immunity pursuant to Idaho's litigation privilege, and were therefore futile. (Counterstatement to DFF Issue "a").

3. The District Court alternatively could have dismissed DFF's complaint against the law firms because it lacked personal jurisdiction over Yarmuth.[4]

ARGUMENT

I. Standard of Review on Motion to Dismiss Pursuant to I.R.C.P. 12(b)(6).

This Court reviews a district court's dismissal of a complaint under I.R.C.P. 12(b)(6) *de novo*, and applies the same standard as the district court. *Taylor*, 149 Idaho at 832.

"A complaint is subject to dismissal under Rule 12(b)(6) when an affirmative defense appears on the face of the complaint itself." *Gardner v. Hollifield*, 96 Idaho 609, 611, 533 P.2d

[4] Issues (c)-(e) presented in DFF's opening brief at page 9 are not relevant to Yarmuth. Additionally, Yarmuth was not required to file a notice of cross-appeal on the jurisdiction issue I.A.R. 15(a) provides: "If no affirmative relief is sought by way of reversal, vacation or modification of the judgment or order, an issue may be presented by the respondent as an additional issue on appeal under Rule 35(b)(4) without filing a cross-appeal." Here, Judge Norton expressly declined to rule on the jurisdiction issue, and never issued an order that could be appealed. As such, Yarmuth can raise the issue simply by listing it as an additional issue pursuant to Rule 35(b)(4).

730, 732 (1975). In the context of defamation actions, a complaint can and should be dismissed whenever "the complaint discloses the existence of an absolute privilege." *Id.* at 612.

II. The Statements Concerning DFF Were Absolutely Privileged Because They Were Reasonably Related to the Washington Litigation.

DFF advances two principal arguments against Judge Norton's dismissal of its defamation claim. First, DFF presents what it terms an "historical" analysis of the litigation privilege in Idaho, and concludes that the privilege is narrow in scope, and applies only to statements that are directly relevant to claims or legal questions that are actually in dispute. DFF then asserts that the statements made in the Washington Litigation were not privileged because DFF was not a party to the Washington Litigation, and the statements could not be directly relevant to the specific claims at issue there. Second, DFF makes a series of "waiver" arguments, all of which assert that Yarmuth somehow forfeited the immunity the privilege affords.

Both arguments are wrong. This Court has consistently expanded the scope and breadth of the litigation privilege, and it encompasses all statements or conduct that are "reasonably related" to judicial proceedings. Statements need not be relevant to any specific legal question. The absolute litigation privilege is also "absolute." If it applies, it confers absolute immunity. It cannot be waived.

A. The History of the Litigation Privilege in Idaho Is a Story of Consistent Expansion of the Immunity's Scope and Breadth and Shows This Court Completely Repudiating the Narrow Reading DFF Advocates Here.

Just as it did before Judge Norton, DFF presents this Court with a profoundly distorted picture of the history and current scope of the litigation privilege in Idaho. DFF contends that all the major decisions of this Court – going back more than 100 years – share a "common theme." Specifically, DFF argues that the litigation privilege only applies where the allegedly defamatory statements are "connected (i.e. pertinent, material, or reasonably related) to the content of the legal claims in litigation." DFF Brief at 26. According to DFF, "this standard requires a factual connection between the defamatory statements and the litigation claims which evokes a sufficient reason for making the statements in the litigation." DFF Brief at 27. In essence, DFF contends that statements must be sufficiently relevant that they would be admissible at trial under the Rules of Evidence. DFF argues that this has always been the law in Idaho, despite some shift in the language this Court has employed over time. DFF Brief at 24 n.13.

DFF is simply wrong. This Court – in line with every court in the country – has consistently expanded the scope and breadth of the litigation privilege, and has consistently reaffirmed the principle that litigants and their lawyers should be free to prosecute their cases without fear of exposing themselves to the sort of nuisance lawsuit that DFF has brought here. The controlling standard in Idaho – and everywhere else – is that ***any*** statement made during the course of judicial proceedings that is ***reasonably related*** to those proceedings broadly conceived – and not to any specific claim or claim element – is covered by the absolute litigation privilege, and cannot form the basis of a defamation claim. As discussed in detail below, DFF's effort to narrowly rewrite this standard is an attempt to resurrect case law from this Court that has long since been overturned. It is a futile exercise in revisionist history.

1. The Idaho Supreme Court's Initial Adoption and Interpretation of the Litigation Privilege.

This Court first recognized the absolute litigation privilege in 1911 in *Carpenter v. Grimes Pass Placer Mining Co.*, 19 Idaho 384, 114 P. 42 (1911). There, Carpenter was an employee of the Grimes Company, and sued Grimes to recover wages owed for work he performed. Grimes asserted counterclaims contending that Carpenter had stolen goods (pipe, lumber, gold nuggets) worth approximately $1,000 during his employment. Carpenter then filed a separate defamation action against Grimes based on those counterclaims.

Grimes filed a general demurrer – the 1911 equivalent of a Rule 12 motion to dismiss on the pleadings – arguing that "the complaint did not state facts sufficient to constitute a cause of action." 114 P. at 44. The trial court sustained the demurrer and dismissed the complaint. The only question on appeal was whether a statement "set up in pleadings in judicial proceedings is absolutely privileged," such that no claim for defamation could be based on it. *Id.* This Court characterized this as "a new question in this state," and noted Carpenter's contention that "one may be liable for maliciously setting forth certain facts although they are pleaded in a judicial proceeding." *Id.* After examining the historical origins of the privilege in the common law, the Court concluded:

> We are satisfied that the ends of justice and the public good can best be served by allowing litigants to freely plead any pertinent or material matter in a judicial proceeding to which they are parties, holding them accountable only for defamatory matter which is neither pertinent nor material to the subject under inquiry. . . . The courts will determine ***as a matter of law*** whether the matter pleaded was in fact pertinent or material.

Id. at 45 (emphasis added). Applying this rule, the Court upheld the trial court's dismissal of Carpenter's defamation claim. The statements Grimes made in the counterclaims were "both pertinent and material, in that the defendant sought to offset and counterclaim any judgment that the plaintiff might recover." *Id.* The Court further held that the statements were privileged whether they were made "with or without malice" – the privilege was absolute because Grimes "had a lawful right to plead the matter." *Id.* at 46.

Two essential principles first articulated in *Carpenter* remain good law today and are relevant here. First, because the privilege is absolute, it cannot be waived or lost even if the statements at issue were made maliciously. Second, the application of the privilege is a pure question of law, to be decided by the trial court at the pleadings stage. Although the scope of the litigation privilege has expanded over time, these principles have never changed.

2. <u>The Idaho Supreme Court Narrows the Scope of the Litigation Privilege, and Temporarily Adopts the Position That DFF Advocates Here</u>.

Eight years after *Carpenter*, this Court again addressed the litigation privilege in *Dayton v. Drumheller*, 32 Idaho 283, 182 P. 102 (1919). The decision in *Dayton* is noteworthy because it essentially adopted the position that DFF takes here – namely, that the litigation privilege protects only those statements that are directly relevant to a claim element or legal question at issue. What is devastating to DFF's position, however, is that then Chief Justice Morgan vigorously dissented from this narrow reading of the privilege, and this Court subsequently adopted Chief Justice Morgan's position and overruled *Dayton* in its entirety. *Richeson v. Kessler*, 73 Idaho 548, 552, 255 P.2d 707, 709 (1953).

In his dissent, Chief Justice Morgan observed that the majority (now overturned) had given the terms "pertinent" and "relevant" too technical a reading, and had fundamentally misunderstood that the litigation privilege exists to provide litigants and lawyers with broad leeway to advocate their positions without fear of reprisal suits. He argued that the majority had given these terms "the meanings usually intended by lawyers and judges when employing them in discussing the admissibility of evidence," which was a mistake:

> These words should not be used in cases of this kind in the sense in which they are usually employed by members of the legal profession. The substance of the law upon this subject when applied to the case under consideration is that if the language employed by Drumheller in his affidavit bore legitimate relation to – that it was published with legitimate reference to – the motion for a new trial, it was absolutely privileged, and the fact that, as a matter of law, it was incompetent to support the motion, is immaterial.

182 P. at 105.

Following this analysis, Chief Justice Morgan concluded that Drumheller's statements were absolutely privileged and that the trial court properly dismissed Dayton's claim at the pleadings stage. Chief Justice Morgan's expansive view of the litigation privilege would ultimately become the law in Idaho – and everywhere else.

3. The American Law Institute Publishes the First Restatement of Torts, Advocating the Broad Interpretation of the Litigation Privilege Favored by Chief Justice Morgan.

In 1923, the American Law Institute ("ALI") was organized and it began preparing the Restatement, with the goal of presenting "an orderly statement of the general common law of the United States." Restatement (First) of Torts (1934), Introduction, Object and Character of the Restatement. In 1938, the ALI first published the sections addressing the absolute litigation

privilege. Far from adopting the narrow definition of the majority in *Dayton*, the ALI staked out the position that Chief Justice Morgan advocated. Pursuant to the Restatement, litigants and their attorneys would be "absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of a judicial proceeding . . ., if it has ***some relation*** thereto." Restatement (First) of Torts §§ 586, 587 (1938) (emphasis added).

The ALI further noted that the privilege was:

> based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients. Therefore the privilege is absolute. It protects the attorney from liability in an action for defamation irrespective of his purpose in publishing the defamatory matter, his belief in its truth or even his knowledge of its falsity.

Restatement (First) of Torts § 586 cmt. a (1938). This absolute immunity would apply whenever "the defamatory matter has ***some reference*** to the subject matter of the pending litigation" even if it were not "strictly pertinent or relevant to any issue involved therein." *Id.* § 586 cmt. c (emphasis added). The privilege would be inapplicable only when the attorney's publication of defamatory matter had "***no connection whatever*** with the litigation." *Id.* § 586 cmt. c (emphasis added).

Fifteen years after publication of these Restatement sections, this Court took the opportunity to adopt them and overturn its prior decision in *Dayton*.

4. The Idaho Supreme Court Adopts the Restatement Position on the Absolute Litigation Privilege and Overturns *Dayton v. Drumheller*.

In *Richeson v. Kessler*, 73 Idaho 548, 255 P.2d 707 (1953), this Court again addressed the litigation privilege. The dispute involved two attorneys, Richeson and Kessler. Lester Anderson and his wife had filed a lawsuit against the Village of Garden City. They were originally represented by Richeson. During the course of those proceedings, Kessler made an application to appear amicus curiae. Richeson submitted a brief objecting to Kessler's application. Later on, the Andersons discharged Richeson, and hired Kessler to proceed with the case. Kessler then discovered the brief Richeson had submitted objecting to his appearance, and drafted a letter to the trial judge (which was also provided to other counsel of record) contending that Richeson had engaged in "diabolical name-calling" and that his brief was "malicious and scurrilous." 73 Idaho at 550. In response to this letter, Richeson filed a separate defamation action against Kessler.

Kessler filed a motion to dismiss on the pleadings, and the trial court dismissed the case. *Id.* at 551. This Court explicitly adopted the Restatement sections discussed above, affirmed the trial court's dismissal, and articulated the following standard which remains good law today:

> With certain exceptions, unimportant here, defamatory matter published in the due course of a judicial proceeding, ***having some reasonable relation to the cause***, is absolutely privileged and will not support a civil action for defamation although made maliciously and with knowledge of its falsity.

Id. at 551-52 (emphasis added). The Court held that the letter "was written with reference and relation" to the broader litigation and was therefore "related to the judicial proceeding." *Id.* at 551. The Court further stressed that if "litigants and attorneys were not privileged in their

allegations in judicial proceedings" and "were to be subjected to prosecution for libel . . . justice would often be defeated." *Id.* at 552. Finally – and most importantly – the Court expressly overruled the narrow reading previously adopted in *Dayton*:

> Proceedings connected with judicature of the country are so important to the public good it is only in extreme cases and circumstances that a libelous publication in a judicial proceeding can be used as a basis for damages in a libel suit . . . If the case of *Dayton v. Drumheller*, 32 Idaho 283, 182 P. 102, be construed as in conflict with the views herein expressed ***the same is expressly overruled***.

Id. (emphasis added).

Two points should be emphasized here. ***First***, the allegedly defamatory statements had nothing to do with the claims being litigated, or any element of those claims. They involved personal insults between two lawyers, one of whom was no longer involved in the action. But this had no impact on the litigation privilege analysis. Kessler enjoyed absolute immunity to make the statements contained in his letter because they were reasonably related – broadly conceived – to the Andersons' lawsuit. This outcome is the direct result of the Court's decision to adopt the Restatement position, and to reject the narrow reading of *Dayton*. And the repudiation of the *Dayton* rule also amounts to a direct repudiation of the position that DFF has taken here.

Second, by the time Kessler made the allegedly defamatory statements, Richeson was no longer involved in the litigation. The Andersons had discharged him, and he had become an uninterested third-party, just as DFF purports to be here. This had no impact on the litigation privilege analysis because the statements at issue were reasonably related to the Andersons' lawsuit. In other words, this Court held that even statements concerning non-parties to litigation

are absolutely privileged provided they have some reasonable relation to the underlying proceedings. DFF's status as a non-party to the Washington Litigation thus has no bearing on the applicability of the absolute litigation privilege in this case.

5. This Court Reaffirms the Broad Reading of *Richeson*, and Expands the Litigation Privilege Even Further.

This Court again expanded the breadth of the litigation privilege more recently in *Taylor v. McNichols*, 149 Idaho 826, 243 P.3d 642 (2010). There, a man named Reed Taylor filed suit against two entities in which he held ownership stakes, as well as the managing agents of those entities. McNichols represented the entities and the managing agents in that lawsuit. While that action was pending, Taylor "attempted to exercise management authority" over the entities. 149 Idaho at 831. McNichols, as the attorney for the entities and agents, successfully obtained an injunction prohibiting Taylor's activities. Taylor then filed a separate action against McNichols, alleging various tort theories related to his representation of the entities and agents in the underlying case.

This separate action did not involve a claim for defamation, and Taylor did not sue McNichols for any allegedly defamatory statements. Nevertheless, McNichols claimed absolute immunity for his actions under the litigation privilege. This Court was thus presented with the question of "whether the privilege should extend to causes of action beyond defamation and libel," and answered the question affirmatively. *Id.* at 837.

The Court stressed that the litigation privilege is "deeply rooted in the common law" and is "predicated on the long-established principle that the efficient pursuit of justice requires that

attorneys and litigants must be permitted to speak and write freely in the course of litigation without the fear of reprisal through a civil suit." *Id.* at 836. The Court explicitly reaffirmed *Richeson*, and then proceeded to examine case law throughout the country, ultimately holding:

> We find that when an attorney is acting in his representative capacity pursuant to litigation, and not solely for his own interests, he shall enjoy the litigation privilege and shall not be subject to suit by an opponent of his client, arising out of his representative conduct and communications.

Id. at 842. The Court also stressed that it is "presumed" that attorneys are acting on behalf of their clients' interests, because to "find otherwise would invite attorneys to divide their interest between advocating for their client and protecting themselves from a retributive suit. Allowing such a divided interest would run contrary to the Idaho Rules of Professional Conduct." *Id.* at 841.[5]

6. The "Persuasive Case Law" That DFF Cites in Support of Its Narrow Reading of the Litigation Privilege Actually Supports the Broad Reading Presented Here.

In support of its contention that the litigation privilege in Idaho protects only those statements that have "a factual connection" with "actual, legally asserted claims," DFF cites a series of out-of-state authorities that it calls "persuasive case law." DFF Brief at 27-28. Nothing could be further from the truth. A review of those authorities reveals that they actually support the broad reading of the privilege discussed above. It is worth examining these authorities in

[5] DFF also cites *Weitz v. Green*, 148 Idaho 851, 230 P.3d 743 (2010) as part of its historical narrative that supposedly supports its narrow reading of the privilege. In point of fact, this Court in *Weitz* expanded the privilege to cover slander of title cases, and held that the same reasonable relation test would apply in such cases. *Weitz* thus offers DFF no support whatsoever.

some detail because they demonstrate just how misleading DFF's narrow reading of the litigation privilege is.

Thus in *Taylor v. Iowa Park Gin Co.*, 199 S.W. 853 (Tex. App. 1917), the Iowa Park Gin Company had provided cotton to the W.L. Moody Company, which the latter was supposed to sell at a profit. Iowa Park later sued W.L. Moody, contending that it had entered into a conspiracy with Taylor to sell the cotton below market value. Taylor then sued the Iowa Park Gin Company for libel based on these allegations. The court ruled that Iowa Park enjoyed absolute immunity pursuant to the litigation privilege:

> [S]tatements made by a party in his pleadings in judicial proceedings are absolutely privileged and can in no case give rise to an action for defamation. . . . As to the degree of relevancy or pertinency necessary to make alleged defamatory matter privileged, ***the courts favor a liberal rule. The matter to which the privilege does not extend must be so palpably wanting in relation to the subject-matter of the controversy that no reasonable man can doubt its irrelevancy and impropriety***. In order that the matter alleged in a pleading may be privileged, it need not be in every case material to the issues presented by the pleadings.

199 S.W. at 855 (emphasis added). In other words, the Texas court held that the litigation privilege is exceedingly broad, and even extends to statements about third parties – as DFF claims to be here. DFF's contention that *Iowa Park* supports its narrow reading is wrong.

The other "persuasive authority" DFF cites provides it no help either. The court in *Russell v. Clark*, 620 S.W.2d 865 (Tex. App. 1981), extended the broad rule announced in *Iowa Park* to cover not just statements contained in filed pleadings, but also to statements made in anticipation of litigation. In doing so, the court adopted the Restatement position (as this Court did in *Richeson*), and offered the following rationale:

> Public policy demands that attorneys be granted the utmost freedom in their efforts to represent their clients. To grant immunity short of absolute privilege to communications relating to pending or proposed litigation, and thus subject an attorney to liability for defamation, might tend to lessen an attorney's efforts on behalf of his client.

620 S.W.2d at 868.

The California cases do not help DFF either. In *Silberg v. Anderson*, 786 P.2d 365 (Cal. 1990), the California Supreme Court explicitly adopted the broad "reasonable relation" standard that is the norm in Idaho and everywhere else. In doing so, it expressly overruled prior decisions that suggested the privilege may be lost if the statement at issue was not made in the "interest of justice." 786 P.2d at 215-18.[6]

Thus ***not one*** of the cases DFF relies on as "persuasive authority" actually supports its narrow reading of the absolute litigation privilege.

B. The District Court Properly Dismissed DFF's Claims Because Yarmuth Enjoyed Absolute Immunity Under the Litigation Privilege.

According to DFF, Judge Norton "failed to perform the correct litigation privilege analysis" because she did not examine each supposedly defamatory statement to see if it related to a specific claim element at issue in the Washington Litigation. DFF Brief at 29. DFF's entire argument against Judge Norton's ruling thus rests on the notion that she failed to apply the privilege analysis that this Court once adopted in *Dayton*, but then entirely repudiated in *Richeson* and *Taylor*. DFF then proceeds to spend three pages discussing the nature of derivative

[6] In rejecting the "interest of justice" standard in favor of the "reasonable relation" analysis, *Silberg* also overruled the other decision that DFF cites as "persuasive authority" – namely, *Bradley v. Hartford Accident & Indem. Co.*, 30 Cal. App. 3d 818, 106 Cal. Rptr. 718 (1973). For obvious reasons, *Bradley* cannot help DFF here.

claims, and explaining that as a matter of corporate technicality, DFF is an independent entity that has a distinct management structure from the entities involved in the Washington Litigation. This is all entirely beside the point.

As the trial Court correctly observed in its ruling, "DFF's status in the Washington Litigation is immaterial." (R. Vol. 1, p. 1350). The only question that matters is whether the statements about DFF had some reasonable relation to the Washington Litigation, and the answer to that question is clearly yes. DFF is an entity under the control of Frank Tiegs – indeed, Tiegs verified the complaint as DFF's President. The statements at issue concerned the health and safety practices of Tiegs's entities, which was a central issue in the Washington Litigation. The statements were thus sufficiently related to the overall claims of mismanagement that Simplot alleged. They reinforced Simplot's central allegations that it lost millions of dollars because of business practices of Tiegs and his entities. Recognizing these facts, the District Court held:

> Because the statements in the Washington Complaint and Amended Complaint were reasonably related to Frank Tiegs's business operations, which include DFF, the Court finds that [the] statements were reasonably related to the Washington Litigation. Therefore, the Court finds Plaintiff's defamation per se claims are barred by the litigation privilege.

(R. Vol. 1, pp. 1351-52).

DFF does not dispute any of this. Instead, DFF contends that "the derivative nature of the Washington federal litigation claims isolated the claims - in terms of materiality, pertinence, relevance, and reasonable relation - from the defamatory statements about DFF's food safety practices." DFF Brief at 32. DFF notes that Washington U.S. District Court Judge Ricardo Martinez dismissed certain of Simplot's direct claims in the Washington Litigation, and that the

remaining derivative claims belonged to the joint ventures (in which Simplot held ownership stakes), rather than to Simplot itself. Based on this, DFF argues that because the derivative claims belonged to the joint ventures, the statements concerning DFF could have "nothing to do with the internal . . . member disputes in the federal litigation." DFF Brief at 30.

Again, DFF is simply wrong. DFF is asking this Court to examine each supposedly defamatory statement, and to determine that none of them were directly relevant to the specific derivative claims asserted in the Washington Litigation. This is precisely the sort of narrow reading of the litigation privilege represented by *Dayton*, and which has not been good law in Idaho since at least 1953, when this Court decided *Richeson*.

The District Court properly rejected this argument in denying DFF's Motion for Reconsideration. (R. Vol. 1, pp. 2031-32). Because the statements concerning DFF were reasonably related to the matters at issue in the Washington Litigation, broadly conceived, they are absolutely privileged, and cannot form the basis for any defamation claim as a matter of well-established Idaho law.

C. DFF's Various "Waiver" Arguments Fail Because the Litigation Privilege Is Absolute and Cannot Be Waived.

DFF's remaining arguments all consist of variations on the notion that the absolute litigation privilege can somehow be "waived" or otherwise "overcome." Each of these arguments fails for an axiomatic reason – the litigation privilege is ***absolute***. It is not a conditional or qualified privilege which can be defeated by a showing that defamatory matter was published with malice or in bad faith. *Gardner*, 96 Idaho at 613-14. It is improper to

dismiss a complaint on a Rule 12(b)(6) motion based on a qualified privilege because the "malice" question implicates disputed issues of fact. Conversely, claims should be dismissed at the pleadings stage whenever – as was the case here – "the complaint discloses the existence of an absolute privilege." *Id.* at 612.

Tellingly, DFF has failed to cite a single case that supports the idea that the absolute litigation privilege, where it applies, can be "waived." Not one of the cases DFF cites even mentions "waiver" in the context of the absolute litigation privilege. No such case exists.

1. Providing a Copy of the Washington Complaint to the Parties' Lender, Northwest Farm Credit Services, Did Not Result in Any "Waiver" of the Litigation Privilege.

DFF's first argument is that providing a copy of the publicly filed Washington complaint to NFCS "had the effect of waiving or nullifying the litigation privilege." DFF Brief at 33. The District Court held that publication of the complaint to NFCS was covered by the absolute litigation privilege because NFCS was a lender to Pasco, one of the joint ventures involved in the Washington Litigation as a party, and that NFCS thus had a financial stake in the outcome of that litigation. For that reason, providing a copy of the complaint could not form the basis of any defamation action. In the words of Judge Norton:

> The Court finds it reasonable for a limited liability company, such as Pasco, to have an interest in informing its creditors of pending lawsuits that may affect business relationships or revenue. The Second Proposed Amended Complaint also identified Simplot as a fifty-percent member of Pasco. . . . From NFCS's status as a creditor to Pasco, and Simplot's status as a member of the debtor limited liability company, the Court determines the publication to NFCS was reasonably related to Simplot's interests in the federal litigation. . . .

(R. Vol. 1, pp. 2033-34).

In making this determination, Judge Norton joined other courts that have unanimously held that the litigation privilege applies whenever allegedly defamatory materials are provided to third parties that have some interest in the proceedings. Such publications fall within the privilege because they are deemed to be "reasonably related" to the judicial proceeding. Contrary to DFF's contention, the publication does not need to be done in connection with, or in furtherance of, the claims in the litigation. DFF Brief at 33. It is sufficient if the litigation could have some impact on the interests of the third party. Indeed, as Judge Norton correctly observed in her Order dismissing DFF's defamation claim, the litigation privilege applies unless the publication is made to third parties "wholly unconnected" with the underlying proceedings. (R. Vol. 1, p. 1350).

In briefing before the District Court, Yarmuth cited numerous authorities for this position that DFF entirely ignores here. For instance, in *Ghafourifar v. Community Trust Bank, Inc.*, No. 3:14-cv-01501, 2014 WL 4809782 (S.D.W. Va Aug. 27, 2014), a lender who had asserted claims against a bankrupt LLC and its managing member provided a copy of a publicly-filed motion to a non-party member of the LLC. The court dismissed the managing member's defamation claim against the lender as a matter of law under Rule 12(b)(6) because the litigation could impact the financial interests of the non-party member. The crucial point was that the third party had "an interest in the litigation." *Id.* at *12. The court clarified this point by stating that the privilege is only inapplicable when "statements [are] made to those without an interest" in the proceedings. *Id.*

Other cases further underscore this point. Thus, in *eCash Technologies, Inc. v. Guagliardo*, 127 F. Supp. 2d 1069 (C.D. Cal. 2000), *aff'd*, 35 F. App'x 498 (9th Cir. 2002), plaintiff filed a lawsuit for trademark infringement against defendant, claiming that its

registration of the internet domain name "eCash.com" infringed the trademark. Plaintiff's lawyer then sent a letter to a third party – which was auctioning the rights to the "eCash.com" domain – informing the company that the domain name was subject to a pending lawsuit. This act was held privileged because the communication had "some relation" to the proceedings. 127 F. Supp. 2d at 1082. The third party had an interest in knowing of the lawsuit because it could impact the auction. Also, the "communication merely inform[ed] a third party of the *pendency* of [the] litigation," and thus "clearly [fell] within the privilege." *Id.*; *see also Epicor Software Corp. v. Alternative Technology Solutions, Inc.*, No. SACV-00448-CJC, 2013 WL 3930545, at *5 (C.D. Cal. June 21, 2013) ("[C]ommunications 'merely informing a third party of the pendency of the litigation' are within the scope of the privilege.").

Not one of the cases DFF cites says anything about the absolute litigation privilege being "waived" or "overcome." A brief review of those cases demonstrates that the litigation privilege applies unless the publication is made to a person, or the public at large, with ***no connection whatsoever*** to the underlying proceedings, or with no interest in the outcome of the litigation. Thus in *Spencer v. Spencer*, 479 N.W.2d 293 (Iowa 1991), the litigation privilege did not apply because defamatory letters were published "to persons no longer having, or never having, any interest in the Spencer trust proceedings." 479 N.W.2d at 295. That is not the case here.

Similarly, in *Bender v. Smith Barney, Harris Upham & Co.*, 901 F. Supp. 863 (D.N.J. 1994), plaintiff brought a claim for gender discrimination, and provided a copy of her complaint to a "magazine reporter" with the express aim "of obtaining publicity." 901 F. Supp. at 871. The privilege did not apply because the reporter had no interest in the litigation, but was "writing

a piece on the subject of gender discrimination in the brokerage industry." *Id.* The case has no application to the alleged facts here, but even on its own merits, the case result is likely wrong given the First Amendment interest of the press.[7]

DFF's reliance on *Simpson Strong-Tie Co. v. Stewart, Estes & Donnell*, 232 S.W.3d 18, 20 (Tenn. 2007), for the notion that "publications to recipients who are unconnected to the litigation will not be privileged" is particularly misplaced. DFF Brief at 33. In point of fact, the court in *Simpson* held that an attorney was free to publish "what may be defamatory information" in newspapers to attract clients "even when the communication is directed at recipients unconnected with the proposed proceeding." 232 S.W.3d at 20. Far from supporting DFF"s "waiver" theory, the court in *Simpson* adopted a highly expansive view of the privilege. None of the remaining cases DFF cites support its "waiver" analysis either. In fact, they support the universally recognized principal that publication to third parties is covered by the litigation privilege provided the third party has an interest in the litigation – as NFCS did here.[8]

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[7] DFF's reliance on *Milford Power Ltd. P'ship by Milford Power Assocs. v. New England Power Co.*, 918 F. Supp. 471 (D. Mass. 1996), is misplaced for the same reason. There, Milford filed suit against New England Power, and then issued a press release accusing New England Power of criminal misconduct. The press release was designed to be widely disseminated and – according to New England Power – was part of a broader scheme of extortion. That is not the situation here. DFF only alleges that defendants shared the complaint with a creditor with a direct interest in the outcome of the litigation.

[8] *See Messina v. Krakower*, 439 F.3d 755, 762 (D.C. Cir. 2006) (pre-litigation letter outlining claims shared with potential mediator privileged because mediator had "the requisite interest in or connection to the litigation"); *Schulman v. Anderson Russell Kill & Olick, P.C.*, 458 N.Y.S.2d 448, 453 (N.Y. 1982) (communications are not absolutely privileged when they are "sent to persons wholly unconnected" to the underlying litigation); *Seltzer v. Fields*, 244 N.Y.S.2d 792, 795-96 (N.Y. 1963) (litigation privilege applies "if the offending statement may possibly bear on the issues in litigation now or at some future time"); *Sodergren v. Johns Hopkins Univ. Applied Physics Lab.*, 773 A.2d 592, 604 (2001) (the court never reached "the issue of publication to a third person not directly involved in the case" because the "facts of this case" did not require it).

2. The District Court Correctly Ruled That Yarmuth Did Not "Lose" the Protection of the Litigation Privilege by Engaging in any "Illegitimate Litigation Tactics."

DFF next argues that Yarmuth somehow forfeited the protection of the privilege by engaging in "street fight tactics" aimed at impugning the character of Frank Tiegs. DFF Brief at 37. But the rule in Idaho is that "defamatory matter published in the due course of a judicial proceeding, having some reasonable relation to the cause, is absolutely privileged and will not support a civil action for defamation ***although made maliciously and with knowledge of its falsity.***" *Richeson*, 73 Idaho at 551-52 (emphasis added). Even if DFF's contention that Yarmuth published the statements concerning DFF in the Washington complaints in a bad faith attempt to besmirch the character of Tiegs is true (and it is not), ***it simply does not matter.*** The ***only*** question that matters is whether the statements at issue were reasonably related to the Washington Litigation. The answer to that question is clearly "yes."

Not one of the cases DFF cites supports the notion that Yarmuth lost the protection of the privilege by acting "outside the scope of legitimate representation." DFF Brief at 36. In *United States v. McCourt*, 925 F.2d 1229 (9th Cir. 1991), the court reiterated the well-known rule that in a criminal trial, Federal Rule of Evidence 404(b) prohibits introduction of prior bad acts to prove propensity to commit similar bad acts in the future. The litigation privilege was not at issue and was never mentioned. Likewise, *Reed v. Baltimore Life Insurance Co.*, 733 A.2d 1106 (Md. Ct. Sp. App. 1999), involved a motion for recusal of the trial judge – the litigation privilege was not addressed or even mentioned. Finally, the court in *Clark v. Druckman*, 624 S.E.2d 864 (W. Va. 2005) – like this Court did in *Taylor* – expanded the litigation privilege to cover not only

statements, but also conduct related to judicial proceedings. The court further held that the absolute litigation privilege would not immunize litigants against claims of actual fraud or malicious prosecution – claims not at issue here. The court in *Clark* did not create any generalized "waiver" rule for what one party might subjectively view as "illegitimate litigation tactics."

It is true that this Court in *Taylor* noted that an attorney's independent conduct, which is outside the scope of his representation, is not covered by the litigation privilege. But that is axiomatic. The litigation privilege only applies to statements that are reasonably related to judicial proceedings. No one is contending that Yarmuth or the other lawyer defendants deserve protection for every statement they make in whatever context merely because they are lawyers. The only statements at issue are those concerning DFF contained in the Washington complaints, which the District Court determined were reasonably related to the Washington Litigation, and therefore privileged.

As a final note, it is ironic that DFF and Frank Tiegs present themselves here as victims of "street fight" tactics. DFF Brief at 37. All Yarmuth did was represent its client Simplot in a lawsuit in Seattle. It is DFF – through Tiegs, its President, signing a verified complaint – that initiated this satellite litigation in Idaho with the transparent aim of trying to invade its opponents' attorney client privilege, distract from and disrupt the Washington Litigation, and drive a wedge between Simplot and its lawyers in the Seattle case. This point is underscored by the fact that Tiegs sued not only Simplot, but also its lawyers, claiming no actual compensatory damages but instead defamation "per se" damages of $600 million. (R. Vol. 1, p. 23 ¶ 44 & n.1).

3. The District Court Correctly Ruled That the Statements Concerning DFF Were Covered by the Absolute Litigation Privilege Even Though DFF Was Not a Party to the Washington Litigation.

DFF's final – and equally unpersuasive – contention is that the litigation privilege is inapplicable because DFF was an "innocent third-party," and that the litigation privilege cannot apply to statements about third parties. DFF Brief at 37-39. Again, this is simply untrue. The ***only*** question at issue here is whether the statements concerning DFF were reasonably related to the Washington Litigation.

In an effort to get around this rule, DFF argues that no court in Idaho has ever addressed whether the litigation privilege extends to third parties, but that is false. As discussed above, the allegedly defamatory statements at issue in *Richeson* had no connection to the underlying claims being litigated, and were directed at a lawyer (Richeson) who had been discharged from representing the Andersons at the time the statements were made. Richeson had become a third party to the underlying litigation. The statements Kessler made about him were still covered by the litigation privilege because they had a reasonable relationship to the lawsuit. 73 Idaho at 551-52.

Aside from the *Richeson* decision itself, Yarmuth cited extensive precedent below demonstrating that courts universally acknowledge that statements made about third parties are covered by the absolute litigation privilege provided they were reasonably related to the litigation. *See, e.g, Collins v. Red Roof Inns, Inc.*, 566 S.E.2d 595, 603 (W. Va. 2002) ("[A] party to a dispute is absolutely privileged to publish defamatory matter about a third person who

is not a party to the dispute" if "the defamatory statement is related to the prospective judicial proceeding.").[9]

DFF entirely ignores these authorities because it has no answer to them. Indeed, the precedent DFF cites actually supports the principle that statements concerning third parties are covered by the privilege. *See, e.g. Anderson v. Hartley*, 270 N.W. 460 (Iowa 1936); *Taylor v. Iowa Park Gin Co.*, 199 S.W. 853, 855 (Tex. App. 1917) ("The fact that the person alleged to have been defamed in the pleadings is not a party to the proceedings has been held not to detract from the privileged character of the publication.").

In ruling that "DFF's status in the Washington Litigation is immaterial," Judge Norton got it exactly right. (R. Vol. 1, pp. 1350-52). In her words: "Because the statements in the [Washington Litigation] were reasonably related to Frank Tiegs's business operations, which include DFF . . . [the] statements were reasonably related to the Washington Litigation" and cannot form the basis of a defamation action. (R. Vol. 1, p. 1352).

III. The Trial Court Properly Denied DFF's Motion to Amend Because Any Such Amendment Would Have Been Futile.

While it is generally true in Idaho that "motions for leave to amend pleadings are to be liberally granted," the trial court should also consider whether the proposed amendment would state a valid claim. *Taylor*, 149 Idaho at 847. "A court is not required to permit the amendment

[9] *See also Simon v. Navon*, 951 F. Supp. 279, 282 (D. Me. 1997) (statements made about third-party prior to filing of lawsuit were absolutely privileged because they were "the very definition of communications in anticipation of litigation" and had "some relation to the proceeding"); *Jenevein v. Friedman*, 114 S.W.3d 743, 749 (Tex. App. 2003) ("even statements aimed at non-parties are absolutely privileged if they bear some relation to the proceeding").

of a complaint where such amendment would be futile." *Eagle Equity Fund, LLC v. TitleOne Corp.*, 161 Idaho 355, 362, 386 P.3d 496, 503 (2016). If "the amended pleading does not set out a valid claim . . . it is not an abuse of discretion for the trial court to deny the motion to file the amended complaint." *Id.* (quoting *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A.*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991)).

As Judge Norton correctly ruled – not just once, but twice – amendment would have been futile here. DFF's defamation claim in both the first and second proposed amended complaints was based on exactly the same statements in the Washington Litigation to which DFF objected in the original complaint.[10] The first proposed amended complaint also noted that some Idaho news outlets had reported on the Washington Litigation, but never alleged that any defendant provided the Washington complaint to the news media. Apparently some reporters in Idaho did what reporters do – they looked up court filings in the public record and used them in news articles. Neither Yarmuth, nor any one of the defendants, can control what the news media does, and they cannot be held responsible for "defamation" based on the independent actions of reporters.

The second proposed amended complaint added a series of conclusory allegations to the effect that DFF was a separate entity from the joint ventures involved in the Washington Litigation, and that Frank Tiegs exercised no managerial control over DFF. As discussed above, this is simply irrelevant to the litigation privilege analysis. None of this changed the fact that

[10] *Compare* R. Vol. 1, pp. 17-20 ¶¶ 22-25, 28-34 *with* pp. 761-64 ¶¶ 26-29, 35-38 *with* pp. 1393-94 ¶ 34-35.

DFF is a Tiegs entity, that Tiegs verified the Complaint on behalf of DFF, and that the allegedly defamatory statements concerning DFF's health and safety practices were reasonably related to the Washington Litigation for that reason. In acknowledging that NFCS was a lender to Pasco, moreover, the second proposed amended complaint confirmed that providing NFCS a copy of the complaint was an absolutely privileged publication.

The simple fact of the matter is that DFF cannot base any defamation claim on the statements in the Washington complaints for all of the reasons discussed above, and in Judge Norton's orders. Courts have routinely refused to permit plaintiffs to amend in this precise situation. *See Mnyandu v. Cnty. of Los Angeles*, No. CV 14-6485, 2015 WL 6445652, at *3 (C.D. Cal. Aug. 4, 2015) (Dismissing plaintiff's claim under Rule 12(b)(6) under litigation privilege and holding "leave to amend . . . would be futile given defendants' absolute immunity"); *In re Microbilt Corp.*, 588 F. App'x 179, 180 (3d Cir. 2014) (holding that conduct in legal proceeding is protected by absolute litigation privilege and "that any amendment to the complaint would be futile").[11]

None of the authorities DFF cites has any impact on this analysis. DFF relies principally on *Savage v. Scandit, Inc.*, 163 Idaho 637, 417 P.3d 234 (2018), to argue that Judge Norton erred in denying its motions to amend. But that decision never even addressed the absolute immunity

11 *See also Allstate Ins. Co. v. Shah*, No. 2:15-cv-01786, 2017 WL 1228406, at *3 (D. Nev. Mar. 31, 2017) (The court dismissed the abuse of process claim under Rule 12(b)(6) and held: "[b]ecause the litigation privilege shields Allstate from this claim, amendment of the counterclaim would be futile. Thus, dismissal is with prejudice."); *Lory v. Fed. Ins. Co.*, 122 F. App'x 314, 319 (9th Cir. 2005) (denying motion to amend where complaint dismissed on Rule 12(b)(6) under litigation privilege).

conferred by the litigation privilege, or any other privilege or immunity. The case revolved around ***issues of fact*** as to when certain payments from an employer to an employee became due for purposes of the Idaho Wage Claim Act. Amendment was proper because plaintiff could plead additional facts demonstrating that she was entitled to the payments. Here, whether the statements at issue were reasonably related to the Washington Litigation presented a ***pure question of law***.[12]

DFF's final argument is an act of pure desperation. DFF comments that "[s]ome jurisdictions do not allow the assertion of the litigation privilege in a motion to dismiss." DFF Brief at 20. That is both irrelevant and a false statement of law. This Court has explicitly held that a complaint "is subject to dismissal under I.R.C.P. 12(b)(6)" if the complaint "discloses the existence of an absolute privilege." *Gardner* 96 Idaho at 612. Indeed, this Court upheld Rule 12(b)(6) dismissals (or their equivalent) in *Carpenter*, *Richeson* and *Taylor.*

In short, DFF misconceives the nature of the litigation privilege. It is an ***absolute*** immunity from any lawsuit based on statements that are reasonably related to judicial proceedings. DFF could not plead new "facts" demonstrating how or why certain statements were irrelevant to the specific claims at issue in the Washington Litigation. It was a question of law for the court. When Judge Norton determined that the statements at issue were reasonably related to the Washington Litigation, the absolute litigation privilege applied and the case was

[12] DFF cites some additional case law on page 18 of its brief that all stand for the unremarkable proposition that a court should grant leave to amend when additional facts would permit a plaintiff to state a claim. *See Markstaller v. Markstaller*, 80 Idaho 129, 134-35, 326 P.2d 994, 997 (1958); *Clark v. Olsen*, 110 Idaho 323, 325, 715 P.2d 993, 995 (1986); *Crews v. Ellis*, 531 So.2d 1372, 1377 (Fla. Dist. Ct. App. 1988). Not one of these cases so much as mention the absolute litigation privilege, or has any other relevance to the issues presented here.

over. DFF's proposed amendments were futile because they did not allege any new defamatory statements, or any new publication by any defendant.

IV. The Suit Could Also Have Been Dismissed Because of a Lack of Personal Jurisdiction Over Yarmuth, a Seattle Law Firm.

Pursuant to I.R.C.P. 12(b)(2), a District Court must dismiss an action if it lacks personal jurisdiction over a defendant. If a plaintiff fails to "allege[] facts that would give rise to personal jurisdiction" in the complaint, dismissal pursuant to I.R.C.P. 12(b)(2) is warranted. *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 314, 870 P.2d 663, 667 (1994); *Schnieder v. Sverdsten Logging Co.*, 104 Idaho 210, 214 n.2, 657 P.2d 1078, 1082 n.2 (1983) (plaintiff bears the "burden of proving jurisdictional facts"). Here, DFF invoked Idaho's long-arm statute, "which provides for specific rather than general jurisdiction." *Telford v. Smith Cnty., Texas*, 155 Idaho 497, 501, 314 P.3d 179, 183 (2013); R. Vol. 1, p. 16 ¶ 13. As such, DFF bore the burden of pleading and proving facts sufficient to invoke specific personal jurisdiction over Yarmuth.

Generally, a trial court in Idaho "has no personal jurisdiction outside of the state boundaries." *Brannon v. City of Coeur d'Alene*, 153 Idaho 843, 851, 292 P.2d 234, 242 (2012). Thus, to exercise jurisdiction over an out-of-state defendant, two requirements must be met: "(1) the act giving rise to the cause of action must fall within the scope of Idaho's long-arm statute, Idaho Code section 5-514; and (2) jurisdiction must not violate the out-of-state defendant's due process rights." *Gailey v. Whiting*, 157 Idaho 727, 730, 339 P.3d 1131, 1134 (2014). DFF failed to plead facts that would satisfy either requirement.

A. DFF Failed to Allege Facts Sufficient to Establish Jurisdiction Under the Long-Arm Statute.

DFF alleged a single tort claim (defamation per se) against out-of-state defendant Yarmuth. As such, the relevant provision of the long-arm statute was section 5-514(b), which permits assumption of jurisdiction over non-resident persons or entities for causes of action arising from "[t]he commission of a tortious act ***within this state***." I.C. § 5-514(b) (emphasis added). That means that "not just any contacts by the defendant with Idaho" will permit exercising jurisdiction, "but only those out of which the suit arises or those that relate to the suit." *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 75, 803 P.2d 978, 981 (1990).

DFF's complaint did not allege that Yarmuth committed any tortious act within Idaho. To the contrary, DFF alleged a defamation claim against Yarmuth based on Yarmuth filing a pleading in a federal court in Seattle, Washington. (R. Vol. 1, pp. 1459-61). The Washington complaint was filed by Washington lawyers in a Washington court in Seattle to get that Washington court to act on the claim for relief in Washington. Later sending a copy of the complaint to NFCS's representatives – who are also in Washington – does not change the lack of jurisdiction. None of Yarmuth's actions occurred in Idaho, or were otherwise directed at Idaho.

This Court's decision in *Gailey* is on point. There, Bill Gailey, an Oregon resident, brought a claim for professional negligence against Kim Whiting, a life insurance agent who sold Gailey a policy in Boise. 157 Idaho at 729. Gailey travelled to Boise to purchase the policy from Whiting's agency. In 2011, Gailey called Whiting for advice about the policy and Whiting advised Gailey to surrender his policy and cash out the remainder of its value. Gailey contacted Whiting by telephone, but Whiting was no longer in Idaho – he had moved to Hawaii and had

cancelled his Idaho insurance license. Gailey followed Whiting's advice and later suffered adverse tax consequences as a result. *Id.*

Gailey filed suit against Whiting in Idaho, asserting a claim of professional negligence. The trial court dismissed for lack of personal jurisdiction over Whiting, and this Court affirmed: "Whiting committed the allegedly tortious act of giving bad advice in Hawaii, not in Idaho. Because Whiting did not commit the alleged tort in Idaho, there is no basis in this case over which the district court could have exercised personal jurisdiction over Whiting under Idaho Code section 5-514(b)." *Id.* at 732. Because the long-arm statute provided no basis to assume jurisdiction, this Court did not reach the due process analysis. *Id.*

That is the situation here. Everything that Yarmuth did on behalf of Simplot occurred in Washington, and DFF does not – because it cannot – allege otherwise. DFF's assertion in briefing before Judge Norton that Yarmuth somehow "expressly aimed" the supposedly defamatory statements at Idaho is also grossly misleading and unavailing. In all of the cases DFF cited, the out-of-state defendant either travelled into Idaho and committed a tort, or engaged in tortious activity by making telephone calls or sending emails to Idaho residents that directly resulted in harming them.[13] That is not the case here.

B. The Due Process Clause of the U.S. Constitution Precludes Jurisdiction.

[13] *See, e.g., Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 727, 152 P.3d 594, 598 (2007) (long-arm statute applied where Maine corporation made fraudulent representations to Idaho resident and shipped faulty product into Idaho); *Doggett v. Elecs. Corp. of Am., Combustion Control Div.*, 93 Idaho 26, 27-28, 454 P.2d 63, 64-65 (1969) (defendant sent a defective boiler into the stream of commerce which exploded in Idaho); R. Vol. 1, pp. 1274-77.

Even if the Idaho long-arm statute applied here (and it does not), the district court still lacked jurisdiction over Yarmuth under controlling precedent. In *Walden v. Fiore*, 571 U.S. 277 (2014), the U.S. Supreme Court clarified the circumstances in which assumption of jurisdiction over an out-of-state defendant violates due process in the tort context. There, plaintiff claimed to be a "professional gambler" who was stopped and investigated at an Atlanta airport for transporting large amounts of cash. A police officer involved in the stop submitted a "probable cause" affidavit to the U.S. Attorney's Office in Georgia, which resulted in the cash being seized temporarily. After the investigation concluded and the cash was returned, plaintiff filed suit against the officer in Nevada, contending that submission of the probable cause affidavit caused him injury. All of the officer's actions occurred in Georgia, but plaintiff contended Nevada had jurisdiction because the effects of those actions were felt in Nevada, the plaintiff's home state. The U.S. Supreme Court disagreed:

> Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. ***The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way.***

571 U.S. at 290 (emphasis added). Because the officer prepared and submitted the affidavit in Georgia, and none of his activities occurred in or had any meaningful connection with Nevada, the Nevada court could not assume jurisdiction over him consistent with due process.

Just last year, the Supreme Court again emphasized that specific personal jurisdiction is narrow, and does not permit a forum state to assume jurisdiction over an out-of-state defendant

based on tenuous connections. In *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., San Francisco Cnty.*, __ U.S. __, 137 S.Ct. 1773 (2017):

> Our settled principles regarding specific jurisdiction control this case. In order for a court to exercise specific jurisdiction over a claim, there must be an affiliation between the forum and the underlying controversy, ***principally, [an] activity or an occurrence that takes place in the forum State. When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State***.

137 S.Ct. at 1781 (quotation marks and citation omitted) (emphasis added).

Here, Yarmuth prepared the Washington complaints in Washington and filed them in a Washington federal court in Seattle. Yarmuth did nothing in Idaho. The only connection that Idaho has to this case is that DFF is located here. That is plainly insufficient to establish personal jurisdiction under the authorities discussed above.[14]

CONCLUSION

Based on long-established and clear Idaho precedent, the rulings below were correct and the judgment should be affirmed.

[14] DFF's argument before Judge Norton that personal jurisdiction is proper because it felt the "effects" of the alleged defamation in Idaho is also unavailing. In all of the cases DFF cited, defendants had substantial contacts with the forum state, and took deliberate action aimed at harming an individual in the forum state. *See e.g., Calder v. Jones*, 465 U.S. 783 (1984) (California could assume jurisdiction over National Enquirer because author was physically present and researched article in California, and article was published and distributed in California); *Nw. Voyagers, LLC v. Libera*, No. CV09-378, 2009 WL 3418199 (D. Idaho Oct. 19, 2009) (personal jurisdiction existed because defendants sent numerous emails, and made numerous internet postings, all designed to damage former business partners in Idaho).

DATED this 25th day of July, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of July 2018, a true and correct copy of the foregoing was served on the following by the manner indicated:

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