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IN THE SUPREME COURT OF THE STATE OF IDAHO

JACKIE MARIE RAYMOND, individually
as an heir, and as Personal Representative of
the Estate of BARRY JOHNSON,

Plaintiff-Appellant,

v.

IDAHO STATE POLICE, an Idaho State
agency,

Defendant-Respondent,

and

PAYETTE COUNTY, a political subdivision
of the State of Idaho, SCOTT SLOAN, and
JOHN and JANE DOES I-X,

Defendants.

Idaho Supreme Court
Docket No. 46272-2018

Payette Co. District Court
Case No. CV-2015-954

APPELLANT'S BRIEF

Appeal from the Third Judicial District Court
of the State of Idaho, in and for the County of Payette
Honorable Christopher S. Nye, District Judge, Presiding

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STATEMENT OF THE CASE

NATURE OF THE CASE

This case involves a question as to whether a cause of action exists in tort for a third party's purposeful destruction and/or tainting of evidence, witness tampering and/or intimidation, when such conduct interferes with a prospective claim, economic expectancy, or causes other damages such as emotional distress to another person. Plaintiff/appellant Jackie Raymond (Raymond) appeals the decision of the district court to dismiss her claims against defendant Idaho State Police (ISP), for the ISP's alleged intentional misconduct in its investigation

COURSE OF PROCEEDINGS BELOW

The complete procedural history of this case is voluminous and complex. However, for the purposes of this appeal, the following proceedings are relevant. On February 27, 2015, Raymond filed a complaint in the state district court for Ada County against defendant Payette County, Idaho, alleging wrongful death of her father Barry Johnson on October 18, 2011, and for "tortious interference with prospective action" and/or "tortious interference with prospective economic advantage" against ISP and Payette County. After the venue was moved to Payette County, on October 12, 2016, Payette County moved for a dismissal of the tortious interference claims under Rule 12(b)(6) of the Idaho Rules of Civil Procedure. ISP joined in the motion and filed a separate memorandum. The district court heard ISP and Payette's motion (along with other motions) on November 28, 2016. The district court entered a Memorandum Decision and Order on December 30, 2016, dismissing Raymond's tortious interference claims against ISP and Payette County. This decision did not affect Raymond's remaining claims against Payette County which now included an intrusion upon Raymond's right to seclusion. After a lengthy

legal battle, Payette County and Raymond settled the remaining claims, and final judgment was entered on July 10, 2018. Raymond filed an appeal of the dismissal of the claims against ISP on August 17, 2018.

STATEMENT OF FACTS

As it pertains to Raymond's claims against ISP, the following allegations of Raymond's complaint are considered true for the purposes of an IRCP § 12(b)(6) motion (as enumerated in the complaint).

11. On or about October 18, 2011, Barry Johnson was operating his 1983 Jeep CJ7 on Idaho State Highway 30 in an easterly direction, when he made a lawful turn into the driveway of his residence just outside New Plymouth, Idaho.
12. As Mr. Johnson was making his lawful left turn into his driveway, Defendant Scott Sloan was attempting to pass Mr. Johnson on the left, at speeds as high as 115 mph according to initial ISP investigation, a speed Sloan knew to be far too great for any evasive maneuvers in the likely event he would need to avoid lawful action by other motorists like Mr. Johnson.
13. Sloan was personally aware that driveways from private residences and farms lined Highway 30, and that pedestrians, bicyclists, and motorists often entered and exited Highway 30 from their residences or farms.
14. By driving at such a speed grossly in excess of the posted speed limit and in such a populated area with visible traffic, Sloan endangered life and property, drove without due regard for the safety of all persons using the highway, and recklessly disregarded the safety of others using highway, in violation of Idaho law and certain Idaho State statutes, including but not limited to Idaho Code §§ 49-654, 49-623, and 49-625, thereby rendering Sloan negligent *per se*.
15. As a direct and proximate result of Sloan's misconduct, his patrol car collided with Mr. Johnson's Jeep in an extremely violent manner and at an extreme rate of speed, ejecting Mr. Johnson as well as the engine and drive train from the Jeep, killing Mr. Johnson.
16. Based upon information and belief, Payette County was aware of Sloan's propensity to speed, drive recklessly, and flout the very laws he enforced, yet failed to take reasonable measures to reign him in, and failed to develop rules and

to properly train, supervise, and control its Deputies, including Sloan, in the safe operation of patrol cars when responding to a code call or pursuing a suspect, which was a substantial factor causing damages to Plaintiff.

17. During ISP's investigation of the misconduct of defendant Sloan as alleged, and prosecution of Sloan therefor, the defendants conspired and attempted to, and did, cover up Sloan's misconduct and/or unduly influence the investigation, evidence, and witnesses accordingly, in order to shield defendants Sloan and Payette County from liability and responsibility for Sloan's aforesaid misconduct.
18. The defendants engaged in an enterprise or conspiracy with Sloan to, and did in fact, willfully and with full knowledge of Sloan's unlawful conduct, conceal evidence, harbor and protect Sloan from criminal and civil liability, and intimidate, influence, impede, deter, threaten, harass and obstruct witnesses and/or potential witnesses, all in violation of state and federal law but in favor of a corrupt policy and effort to protect fellow Idaho law enforcement officers from the consequences of their unlawful conduct.
19. The defendants also thereby reduced the value of Plaintiff's claim and increased the cost in pursuing the claim. Specifically, felony criminal charges were initially filed against Sloan for the vehicular manslaughter of Barry Johnson, in Idaho District Court in Payette County, Criminal Case No. 2012-566. After a preliminary hearing on April 13, 2012, before the Magistrate Judge, the Court found probable cause to bind Sloan over to District Court to answer the felony vehicular manslaughter charges. The matter was ultimately set for April 22, 2013. However, the defendants conspired to, and did, conceal and manipulate evidence, intimidate witnesses, and otherwise interfered with the prosecution, thereby causing the prosecutor to dismiss the charges. But for the defendants' cover-up and interference as alleged herein, the matter would have proceeded to trial and Sloan would have been convicted. Such conviction would have rendered liability in this matter *res judicata*. The absence of such a conviction exponentially increased the cost of proving liability in Plaintiff's civil case, and because of the defendants' evidence tampering has made it more difficult to prove liability, making Plaintiff's civil claim significantly less valuable than it otherwise would have been.

R. Vol. I, pp. 31-32.

Raymond alleged the following causes of action, as it pertained to the ISP:

COUNT II – TORTIOUS INTERFERENCE WITH PROSPECTIVE ACTION

24. The defendants were negligent *per se*, pursuant to 18 U.S.C. § 1512 and Idaho Code §§ 18-2604 & 2605, in directly or indirectly intimidating, harassing, corruptly persuading or engaging in misleading conduct toward, witnesses or potential witnesses in order to influence or cause to the withholding of their testimony or potential testimony.
25. The defendants' wrongful interference was wrongful beyond the fact of the interference itself, *inter alia*, because violated the aforesaid Idaho statutes.
26. The defendants knew litigation was likely to occur as a result of Sloan's misconduct as alleged above, and willfully destroyed or concealed evidence in an effort to disrupt Plaintiff's case, thereby disrupting Plaintiff's case as alleged above.
27. Such conduct resulted in disruption of Plaintiff's case, and damages to Plaintiff, including but not limited to a massive increase in the costs of pursuing liability of the wrongful death claims, a potential loss in the value of the claim, accruing interest from the significant delay in resolution of the claim, and general damages including severe emotional distress and humiliation suffered by Plaintiff.

COUNT III – (IN THE ALTERNATIVE)

TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

28. Plaintiff hereby incorporates paragraphs 1 through 27 above as if fully restated herein.
29. Plaintiff had a valid economic expectancy known to the defendants in the form of Plaintiff's claims and causes of action against Sloan and Payette County arising from the death of Mr. Johnson.
30. The defendants intentionally interfered with Plaintiff's valid economic expectancy, resulting in the reduction, destruction, or disruption thereof.
31. As a direct and proximate result of the defendants' misconduct alleged above, Plaintiff's ability to obtain legal redress for their injuries has been significantly impaired.

ISSUES PRESENTED ON APPEAL

1. Has the plaintiff/appellant sufficiently plead a claim against the defendant/respondent ISP for intentional interference with prospective civil action by spoliation of evidence?
2. Should Idaho recognize a newly created tort claim for defendant/respondent ISP's alleged tortious conduct?

ARGUMENT

I. The Standard of Review is *De Novo*.

The Supreme Court “reviews de novo a district court's dismissal of a complaint under I.R.C.P. 12(b)(6) for failure to state a claim.” *Hoffer v. City of Boise*, 151 Idaho 400, 402, 257 P.3d 1226, 1228 (2011). *Idaho Wool Growers Ass'n, Inc. v. State*, 154 Idaho 716, 720, 302 P.3d 341, 345 (2012). “A 12(b)(6) motion looks only at the pleadings to determine whether a claim for relief has been stated. On review of a dismissal this Court determines whether the non-movant has alleged sufficient facts in support of his claim, which if true, would entitle him to relief. In doing so, the Court draws all reasonable inferences in favor of the non-moving party.” *Bergeman v. Select Portfolio Servicing*, 164 Idaho 498, 500, 432 P.3d 47, 49 (2018). “A motion to dismiss under I.R.C.P. 12(b)(6) will not be granted or upheld by the (Supreme Court) unless the non-moving party would be unable to prove any conceivable set of facts in support of its claim.” *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 175 923 P.2d 416, 420 (1996).

II. This Court Should Liberally Interpret Raymond's Complaint to Determine Whether a Just and Valid Claim against the ISP has Been Plead.

In its Memorandum Decision, the district court took a narrow view of Raymond's claims to ascertain whether she had plead an actionable claim against the ISP. For instance, the district court fixated on only a couple of Raymond's allegations and claims, *i.e.* whether a "per se" negligence claim existed for ISP's alleged criminal conduct or whether Raymond had to prove that the deputy who killed her father would have been convicted of a crime had the ISP not interfered with the criminal proceeding. R. Vol. I, p. 113. In this appeal, this Court should construe all of Raymond's allegations, in totality or in part, to determine whether she has plead an acceptable cause of action regardless of the technicalities of how the claims were plead.

This Court has held time and again that under the modern rules of pleading that complaints should be liberally construed to "ensure a just result is accomplished, rather than requiring strict adherence to forms of pleading." *Seiniger Law Office, P.A. v. N. P. Ins. Co.*, 145 Idaho 241, 246, 178 P.3d 606, 611 (2008). Indeed, under "notice pleading, a party is no longer slavishly bound to stating particular theories in its pleadings." *Id.* (citations omitted). As such, the focus should be on whether Raymond's complaint "informed" ISP of "material facts" to support a valid claim, with intended goal of "providing" Raymond "her day in court." *Brown v. Pocatello*, 148 Idaho 802, 807, 229 P.3d 1164, 1169 (2010). See also *Clark v. Olsen*, 110 Idaho 323, 325, 715 P.2d 993, 995 (1986), and *Navo v. Bingham Memorial Hospital*, 160 Idaho 363, 374, 373 P.3d 681, 693 (2016). As discussed *supra* in Sections I and II, Raymond's Complaint as liberally construed does plead an allowable and recognized claim or claims in Idaho.

III. The Complaint States Sufficient Facts to Support a Claim of Intentional Interference with Prospective Civil Action by Spoliation of Evidence.

Although the Idaho appellate courts have yet to specifically review a claim of intentional interference with prospective civil action by spoliation of evidence, it has endorsed the viability of such a claim under the appropriate set of facts. This Court first recognized the possibility of such a claim in *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 178, 923 P.2d 416, 423 (1996). In *Yoakum*, the Supreme Court acknowledges § 870 and 871 of the *Restatement of Torts* as a basis for torts “not previously recognized in this state, *i.e.* liability for intended consequences and intentional harm to a property interest, based upon the Restatement (Second) of Torts §§ 870, 871 (1979).” *Id.*

Although the *Yoakum* Court did not craft a tort under the Restatement in that particular case, it does state:

however, **for guidance in future litigation we take this opportunity to opine on a possible cause of action for conduct more egregious than that presented here.** The guidelines offered by the authors of the Restatement and the cases which have **defined the intentional spoliation of evidence cause of action provide a framework for another cause of action based upon intentional conduct that unreasonably interferes with a party's prospective cause of action.** The tort of intentional spoliation of evidence has been alternatively identified by courts as the "intentional interference with prospective civil action by spoliation of evidence." The court in Smith described this tort as "closely analogous" to the intentional interference with a prospective business advantage, a tort which has been recognized in this state. *Idaho First National Bank v. Bliss Valley Foods*, 121 Idaho 266, 284-87, 824 P.2d 841, 859-62 (1991).

(*Id.* emphasis added)

The Court then provides the elements for such a cause of action as being similar to a

“prospective economic advantage,” *i.e.* that

a plaintiff must establish that the intentional interference by the defendant resulting in injury was wrongful. This may be shown by proof that either: (1) the defendant had an

improper motive to harm the plaintiff; or (2) the defendant used a wrongful means to cause injury to the prospective advantage.

Id.

This Court also recognized a tortious interference/spoliation claim in subsequent decisions to *Yoakum*, but again not finding that the facts of the particular case in support such of a claim. See *Ricketts v. Eastern Idaho Equipment, Co. Inc.*, 137 Idaho 578, 581-82, 51 P.3d 392, 395-96 (2002). *Cook v. Idaho Department of Transportation*, 133 Idaho 288, 298, 985 P.2d 1150, 1160 (1999).

Idaho is certainly not alone in recognizing this claim. The Supreme Court of Ohio recognized a “a cause of action exists in tort for interference with or destruction of evidence” with the following elements:

- (1) pending or probable litigation involving the plaintiff,
- (2) knowledge on the part of defendant that litigation exists or is probable,
- (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case,
- (4) disruption of the plaintiff's case, and
- (5) damages proximately caused by the defendant's acts;

such a claim should be recognized between the parties to the primary action and against third parties; and such a claim may be brought at the same time as the primary action.”

Smith v. Howard Johnson Co., Inc., 67 Ohio St.3d 28, 29m 615 N.E.2d 1037, 1038, 1993-Ohio-229, 230 (1993).

The State of New Jersey also recognizes such a claim, again, along the lines of “interference with prospective economic advantage for the “willful destruction or concealment of evidence.” *Viviano v. CBS, Inc.*, 251 N.J.Super. 113, 125-26, 597 A.2d 543, 549-50 (1991). In *Viviano*, which involved the defendants’ fraudulent concealment of documents that contained “key information” with regard to the liability of the defendants, the court opined as to the sound policy reasons justifying such a claim:

Immunizing the willful destruction or concealment of evidence would not further the policy of encouraging testimonial candor. As the court explained in *Petrik v. Monarch Printing Corp.*, This state's system of civil litigation is founded in large part on a litigant's ability under the authority of the Supreme Court rules, to investigate and uncover evidence after filing suit. Destruction of evidence known to be relevant to pending litigation violates the spirit of liberal discovery. Intentional destruction of evidence manifests a shocking disregard for orderly judicial procedures and offends traditional notions of fair play.

Id. 251 N.J. Super. at 121, 126-27 (1991) (citations omitted).

The district court's reliance upon the Idaho Supreme Court decision *Courtney v. Big O Tires*, 139 Idaho 821, 87 P.3d 390 (2003) to suggest that Idaho does not recognize an intentional interference/spoliation claim is misplaced. In its Memorandum Decision, the district court cites *Courtney* and other appellate decisions to suggest that a spoliation claim merely allows for a jury instruction on spoliation pursuant to the Idaho Rules of Evidence, and not an independent claim. R. Vol I. p. 112. However, none of the decisions referenced by the district court contain an actual holding disallowing an independent claim for intentional interference by spoliation of evidence. In addition, in each of the cases cited by the district court the spoliation claim was brought against the defendant in whom the plaintiff had brought the initial claims affected by alleged spoliation. The fundamental difference in this case is that Raymond's tortious interference claims subject in this appeal lie against a third party, the ISP, for tortuously interfering and tampering with evidence supporting her claim against the first party defendant Payette County. Again, this Court has recognized the existence of an independent claim for spoliation under the right facts.

In many respects, this appeal involves a question of first impression. This Court has yet to consider a case that has sufficient plead facts to support an interference by spoliation claim.

Nor has it yet to consider such a claim brought against a third party for spoliation. The allegations of the complaint, if true, reach the requisite level of “egregiousness” to warrant and justify such a claim. Raymond alleges that the ISP engaged in wide-ranging and specific acts of witness tampering, intimidation, harassment, concealment and destruction, for the purposes of protecting the deputy who killed her father from liability, and by implication his employer Payette County’s liability. Such conduct effectively tainted Raymond’s wrongful death claim against Payette County, making it a much more difficult claim to prove than it should have been, and resulting in substantial delays and costs in pursuing the claim. Raymond also alleges ISP’s outrageous and/or illegal conduct caused general damages, including severe emotional and mental anguish and distress. Indeed, it is difficult to find a more appropriate set of facts to support an intentional interference by spoliation claim than Raymond’s alleged facts. This Court should recognize her claim, grant the appeal, and let Raymond have her day in court.

IV. This Court Should Allow a Newly Recognized or Fashioned Tort for ISP’s Alleged Intentional and Outrageous Conduct.

As indicated by this Court in the *Yoakum* decision (and previously referenced in Section III, *infra*) nothing prohibits a court from fashioning and creating a new intentional tort. *Yoakum*, 129 Idaho at 177-78, 923 P.2d at 422-23. The *Second Restatement of Torts* which is oft relied upon by the Idaho Supreme Court as authority contains a “catch all” provision that allows for liability when there has been an “intentional act” causing harm that does not necessarily fall within a “traditional category of tort liability:”

§ 870 Liability for Intended Consequences – General Principle

One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances.

This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.

Rest. Torts, 2nd § 870. (See, *Yoakum* 129 Idaho at 178, 923 P.2d at 423).

The "comment" after the rule explains its well-founded purpose:

Nature of Section. This Section is intended to supply a generalization for tortious conduct involving harm intentionally inflicted. Generalizations have long existed for negligence liability, involving conduct producing unreasonable risk of harm to others (See §§ 282, 291-294), and for strict liability, involving the carrying on of an activity that is abnormally dangerous (See §§ 519-520). As for conduct intentionally causing harm, however, it has traditionally been assumed that the several established intentional torts developed separately and independently and not in accordance with any unifying principle. This Section purports to supply that unifying principle and to explain the basis for the development of the more recently created intentional torts. More than that, it is intended to serve as a guide for determining when liability should be imposed for harm that was intentionally inflicted, even though the conduct does not come within the requirements of one of the well established and named intentional torts.

Id. Comment "a."

Additionally, the *Restatement of Torts* further suggests that such a tort could extend as well to "intentional harm to a property interest:"

§ 871. Intentional Harm to a Property Interest.

One who intentionally deprives another of his legally protected property interest or causes injury to the interest is subject to liability to the other if his conduct is generally culpable and not justifiable under the circumstances.

Rest. Torts, 2nd § 871.

Moreover, the Idaho Tort Claims Act implies a possible tort for a governmental agent's "gross negligence" and "reckless, willful and wanton conduct." IC § 6-904C. Such conduct is described in the Act as follows:

1. "Gross negligence" is the doing or failing to do an act which a reasonable person in a similar situation and of similar responsibility would, with a minimum of contemplation, be inescapably drawn to recognize his or her duty to do or not do

such act and that failing that duty shows deliberate indifference to the harmful consequences to others.

2. "Reckless, willful and wanton conduct" is present only when a person intentionally and knowingly does or fails to do an act creating unreasonable risk of harm to another, and which involves a high degree of probability that such harm will result.

Id.

This appeal once again presents a question of first impression for this Court, as to whether a new tort should be fashioned from ISP's intentional or reckless conduct alleged by Raymond. Her complaint, taken in its entirety or as to its parts, if true, describes a deeply troubling pattern of conduct that clearly warrants a triable claim. Raymond alleges that the ISP, who was charged with an objective duty to investigate the death of Raymond's father, Mr. Johnson, and help make anyone who was wrongfully responsible for his death accountable – instead engaged in a concerted effort and conspiracy to *protect* the person wrongfully responsible for Mr. Johnson's death. Such conduct included far more than a sub-par investigation and even spoliation of evidence, but alleged that the defendants did:

conceal evidence, harbor and protect Sloan from criminal and civil liability, and intimidate, influence, impede, deter, threaten, harass and obstruct witnesses and/or potential witnesses, all in violation of state and federal law but in favor of a corrupt policy and effort to protect fellow Idaho law enforcement officers from the consequences of their unlawful conduct...(and that such conduct constituted a violation of) 18 U.S.C. § 1512 and Idaho Code §§ 18-2604 & 2605, in directly or indirectly intimidating, harassing, corruptly persuading or engaging in misleading conduct toward, witnesses or potential witnesses in order to influence or cause to the withholding of their testimony or potential testimony... (Complaint ¶¶ 18 and 24). R. Vol I, pp. 32-35.

The complaint also alleges that such egregious conduct not only “would have rendered liability in this matter *res judicata*,” but also resulted in “a massive increase in the costs of pursuing liability of the wrongful death claims, a potential loss in the value of the claim, accruing

interest from the significant delay in resolution of the claim, and general damages including severe emotional distress and humiliation suffered by Plaintiff.” (Complaint par’s 19 and 27) *Id.*

Of further note, as an element to these claims, Raymond alleges that defendants violated a number of criminal statutes with regard to witness tampering and intimidation, destruction of evidence, harassment under 18 U.S.C. § 1512 and Idaho Code §§ 18-2604 & 2605. These allegations, if true, add an additional layer of egregious conduct that warrant a claim of wrongdoing. Again, Raymond is not necessarily relying upon the criminal statutes themselves as a separate “cause of action,” but rather to expand upon the already deeply serious allegations that she has made to support a tort claim against the defendants.

Because Raymond has quite clearly alleged unjustifiable conduct that was intentionally injurious or harmful to her as well as her “property” interests (*i.e.* the wrongful death claims), the Court need not follow some pre-established “tort” to fit the allegations in order for Raymond to be able to try her claims. Rather, the Court simply can rely upon the “unifying principle” set forth in § 870 of the *Restatement of Torts*, to fashion a newly recognized cause of action and thus allow Raymond to proceed with her claims. Again, given the gravity and extensiveness of the allegations, and the liberally construed standard for stating relief in a complaint, this Court should look for ways to allow relief for the wrongs that have been committed, rather than find ways to deny such opportunity for justice.

Finally, the Court can also consider what appear to be envisioned claims of gross negligence and/or reckless conduct as defined under the Idaho Tort Claims Act. IC § 6-904C.

Raymond's allegations suggest a "deliberate indifference" and/or an intentional act or failure to act creating an "unreasonable risk" to Raymond's interests, and therefore fits within these definitions.

CONCLUSION

Pursuant to the foregoing, this Court should grant Raymond's appeal and remand the case for further proceedings.

DATED this 21st day of March, 2019.

PETERSEN MOSS HALL & OLSEN

/s/ Nathan M. Olsen

Nathan M. Olsen

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2019, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

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