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

JACKIE RAYMOND, individually as an heir, and as Personal Representative of the Estate of Barry Johnson,

Plaintiff,

vs.

IDAHO STATE POLICE, an Idaho State agency, PAYETTE COUNTY, a political subdivision of the State of Idaho, and SCOTT SLOAN,

Defendants.

Idaho Supreme Court Docket No. 46272-2018

Payette County District Court
Case No. CV-2015-00954

RESPONDENT'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

This appeal stems from the district court's dismissal of Plaintiff-Appellant Jackie Raymond's claims against Defendant-Respondent Idaho State Police (ISP). Ms. Raymond's underlying *Complaint* sets forth two alternate causes of action against ISP regarding their investigation of a motor vehicle accident involving Ms. Raymond's father and Payette Deputy Scott Sloan.[1] R. Vol. I, pp. 34-35, ¶¶ 23-31. Those causes of action are specifically entitled: Count II, "Tortious Interference with Prospective Action" and Count III (in the alternative) "Tortious Interference with Prospective Economic Advantage." *Id.* The district court dismissed both claims against ISP for failure to state a claim pursuant to Idaho Rule of Civil Procedure 12(b)(6).

In support of her claims, Ms. Raymond's *Complaint* sets forth, in three paragraphs, allegations against all "defendants." R. Vol. I, pp. 32-33, ¶¶ 17-19. Ms. Raymond alleges that, that during ISP's investigation of the accident, all defendants conspired to interfere or impede or influence the criminal investigation of Deputy Sloan. *Id.* Ms. Raymond further alleges that the defendants' acts "thereby reduced the value of Plaintiff's claim and increased the cost in pursuing the claim." Vol. I, p. 32, ¶ 19. Specifically, in paragraph 19 of her *Complaint,* Ms. Raymond relies on a chain of hypotheticals to demonstrate that she was injured by defendants' alleged interference in the criminal investigation:

> [D]efendants 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

[1] Deputy Sloan and Payette County remained defendants in the underlying civil wrongful death lawsuit after ISP's dismissal. A stipulated judgment for dismissal was entered after Ms. Raymond subsequently reached a settlement with those defendants.

> matter *res judiciata*. 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.

Vol. I, p. 32, ¶ 19 (underline emphasis added).

In Count II, Ms. Raymond asserts that defendants were "negligent *per se*" under Idaho State and Federal criminal statutes and willfully destroyed or concealed evidence in an effort to "disrupt Plaintiff's case." R. Vol. I, p. 34, ¶¶ 24-27. Ms. Raymond describes such disruption as "a massive increase in 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." R. Vol. I, p. 34, ¶ 27. Similarly, in Count III, Ms. Raymond alleges that she had a valid economic expectation which was reduced, destroyed, or disrupted by defendants' interference. R. Vol. I, p. 35, ¶¶ 29-30. As a result, Ms. Raymond asserts her "ability to obtain legal redress for [her] injuries has been significantly impaired." R. Vol. I, p. 35, ¶ 31.

Upon motion by the defendants for failure to state a claim, the district court dismissed Count II for tortious interference with a prospective action and Count III for tortious interference with an economic advantage. R. Vol. I, pp. 112-113. The district court dismissed Count II because it found that Idaho has not recognized a cause of action for tortious interference with prospective action. R. Vol. I, pp. 111-112. Recognizing the existence of the tort of interference with an economic advantage, the district court nevertheless dismissed Count III, concluding that "a civil lawsuit does not represent the kind of noncommercial relationship and prospective economic advantage protected by the tort of intentional interference with an economic advantage." R. Vol. I, p. 113. The district court went on to hold that dismissal of both Counts II

and III was appropriate because those claims were each "premised on a fact that the Plaintiff cannot prove: that but for the Defendants' alleged misconduct, Sloan would have been convicted of manslaughter." *Id.* The district court determined that "speculating about one possible outcome in Sloan's criminal case is not a basis for relief in this civil case." *Id.*

On August 17, 2018, Ms. Raymond filed her Notice of Appeal, implying that she intended to appeal the district court's dismissal Counts II and III of her *Complaint*. Ms. Raymond described the preliminary statement of the issues on appeal as: "Did the district court err in dismissing the plaintiff's tortious interference claims against defendant Idaho State Police under Rule 12(b)(6) of the Idaho Rules of Civil Procedure?" R. Vol. I., p. 125, ¶ 3A (emphasis added). Similarly, Ms. Raymond's Nature of the Case section of her *Appellant's Brief* states that she "appeals the decision of the district court to dismiss her claims against defendant Idaho State Police (ISP) …" *Appellant's Brief*, p. 4 (emphasis added).

The Issues Presented on Appeal in Ms. Raymond's *Appellant's Brief*, however, do not reference the dismissal of Count III, tortious interference with economic advantage. *See Appellant's Brief*, p. 8. Similarly, Ms. Raymond's *Appellant's Brief* is devoid of any argument that the dismissal of Count III was error. *See, e.g., Appellant's Brief*, pp. 10-13. The first argument section of her brief is entitled, "The Complaint States Sufficient Facts to Support a Claim of Intentional Interference with Prospective Civil Action by Spoliation of Evidence." *Appellant's Brief*, pp. 10. Ms. Raymond does not argue that her *Complaint*'s allegations sufficiently stated a claim for the existent tort of interference with economic advantage. At most, Ms. Raymond makes vague references that her *Complaint* pled "an allowable and recognized claim or claims." *See, e.g. Appellants Brief,* p. 9. Ms. Raymond's second main argument on

appeal asks this Court to fashion a new tort from "ISP's intentional or reckless conduct as alleged…" *Appellant's Brief*, p. 15.

Thus, ISP cannot prepare a full response to Ms. Raymond's vague assertions that the district court erred by dismissing its tortious interference claims. Furthermore, "[r]egardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court." *Bergeman v. Select Portfolio Servicing*, 164 Idaho 498, 432 P.3d 47, 50 (2018)(internal citations omitted). Nevertheless, in an abundance of caution, ISP will address the district court's dismissal of Count III in Section IV, below.

ISSUE PRESENTED ON APPEAL

Defendant ISP presents the following additional issue on appeal:

Has Ms. Raymond pursued this appeal frivolously, unreasonably, and without foundation, therefore entitling Defendant ISP to attorney fees and costs on appeal?

ATTORNEY FEES ON APPEAL

ISP should be awarded attorney fees and costs on appeal pursuant to Idaho Appellate Rules 41, Idaho Rule of Civil Procedure 54, and Idaho Code §12-121. Attorney fees and costs on appeal are appropriate under I.A.R. 41, I.R.C.P. 54(e)(1), and I.C. § 12-121, only if this Court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, and without foundation. *Stanley v. McDaniel*, 134 Idaho 630, 633, 7 P.3d 1107, 1110 (2000) Where an appeal turns on questions of law, an award of attorney fees under these sections is proper if the law is well settled and the appellant has made no substantial showing that the district court

misapplied the law. *Id*.; *see also*, *Stiles v. Amundson*, 160 Idaho 530, 534, 376 P.3d 734, 738 (2016) (arguments must be well-reasoned and have at least some precedential support).

Here, Ms. Raymond has not pointed to any misapplication of the law by the district court. Further, Ms. Raymond asks this Court to change well-established law and adopt a cause of action based on hypotheticals and damages that cannot be proven on the facts of this case. Ms. Raymond's appeal was also brought without foundation because, despite her contentions to the contrary, she has pursued and reached a settlement with the other defendants in the underlying case, thereby mooting any argument that ISP's alleged actions or inactions interfered with or terminated her right to recovery in that case. Attorney fees are further warranted because this appeal inappropriately seeks to re-litigate issues that have been resolved by a settlement with other parties to the underlying case.

ARGUMENT

I. Standard of review

This Court reviews an order dismissing an action pursuant to Rule 12(b)(6) for failure to state a claim, *de novo*. *Taylor v. McNichols,* 149 Idaho 826, 832, 243 P.3d 642, 648 (2010). Rule 8(a)(2) requires a complaint to contain a "a short and plain statement of the claim" showing that the plaintiff is entitled to relief. Thus, on review of a Rule 12(b)(6) dismissal, this Court determines whether the non-moving party has alleged sufficient facts in support of their claim, which if true, would entitle them to relief. *Idaho Wool Growers Ass'n, Inc. v. State*, 154 Idaho 716, 720, 302 P.3d 341, 345 (2012) (internal citations and quotations omitted). "In doing so, the Court draws all reasonable inferences in favor of the non-moving party." *Id*.

II. The district court did not err when it dismissed Plaintiff's claim for intentional interference with a prospective civil action against ISP because Idaho has not recognized such a tort and Ms. Raymond does not have standing to pursue such a claim.

Ms. Raymond acknowledges that the tort of intentional interference with a prospective civil action has not been adopted as an independent cause of action by Idaho courts. *Appellant's Brief*, p. 10. When dismissing Ms. Raymond's claim, the district court acknowledged this fact and declined to recognize a new tort, within its discretion. R. Vol. I, p. 112. Accordingly, because no such independent tort exists under Idaho law, Ms. Raymond's *Complaint* failed to state an appropriate claim under Rule 12(b)(6) and was properly dismissed. Even if such an independent cause of action existed in Idaho, Ms. Raymond's tortious interference with prospective civil action claim was supported by only conclusory, speculative allegations, and her alleged injury was based on several hypotheticals. Ms. Raymond failed to establish that she had standing to bring her claim, which further warrants its dismissal as a matter of law.

A. A claim for intentional spoliation has not been recognized in Idaho.

Ms. Raymond argues that the tort of intentional interference with a civil action by spoliation of evidence, while not formally adopted, has been recognized by Idaho courts, and therefore, the district court's dismissal was in error. Ms. Raymond relies upon a 1996 Idaho Supreme Court case, *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 173, 923 P.2d 416, 418 (1996), for the proposition that the tort of intentional interference with a civil action is an actionable tort in Idaho. A careful reading of *Yoakum* reveals that this Court did not adopt such a tort.

In *Yoakum*, parents of a minor sued a city's insurance company, alleging that the insurer committed wrongful, criminal acts in its investigation of the minor's wrongful death claim. 129 Idaho at 174, 923 P.2d at 419. Specifically, the parents alleged that an insured's private

investigator improperly changed his initial causation opinions and that the insurer's claims manager inappropriately contacted and threatened an underage witness. *Id*. Before bringing their suit against the insurer, the parents brought a wrongful death claim against the city, which they settled by accepting the city's offer of judgment. *Id*. After settling the wrongful death claim, the parents filed suit against the insurer asserting various causes of action, including spoliation of evidence, intentional harm to a property interest, and violations of several criminal statutes. *Id*.

The district court dismissed the parents' claims that were based on criminal statutes and later awarded summary judgment to the insurer on the remaining civil claims. *Id*. at 174-75, at 419-20. The parents appealed the district court's dismissal of their claims and this Court affirmed. *Id*., at 180, at 425. Specifically concerning the parents' claim for "spoliation of evidence," this Court recognized that such a tort had not been expressly adopted in Idaho. *Id*., at 177-78, at 422-23. Nevertheless, the Court went on to find that an essential element of that claim was not present; namely, that the insurer willfully destroyed evidence. *Id*., at 178, at 423. The Court declined to adopt a tort of intentional harm to a property interest due to the circumstances of that case, despite the "guidelines" available in the Restatement (Second) of Torts §§ 870, 871, for "fashioning the contours of new intentional torts a court may wish to create." *Id*.

In dicta, this Court took "the opportunity to opine on a possible cause of action for conduct more egregious than that presented here." *Id*. Relying on a California Court of Appeal case (*Smith v. Superior Court*, 151 Cal. App. 3d 491, 500, 198 Cal. Rptr. 829, 835 (Ct. App. 1984), *disapproved of by Cedars-Sinai Med. Ctr. v. Superior Court,* 954 P.2d 511 (1998), and a Supreme Court of Alaska case (*Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986)), the Court analogized the "possible" cause of action for "intentional interference with prospective civil action by spoliation of evidence" to the tort of "intentional interference with a

prospective economic advantage," which had been previously recognized in Idaho. *Id*., at 178-79, at 423-24. Relying on *Hazen*, this Court opined that, even if it were to recognize the tort of spoliation, the record before it did not reveal that the insurer's threatening and coercive conduct was an unreasonable interference with the parent's previously-settled wrongful death claim. *Id*., at 179, at 424.

This Court has continued to hold that the tort of spoliation had not been expressly adopted in Idaho. *See Ricketts v. E. Idaho Equip., Co*., 137 Idaho 578, 581, 51 P.3d 392, 395–96 (2002) (disposal of evidence did not show the requisite plan or premeditation to establish spoliation); *Cook v. State, Dep't of Transp*., 133 Idaho 288, 298, 985 P.2d 1150, 1160 (1999) (spoliation claim alleging defendant had intentionally or negligently "secreted, destroyed, lost or mislaid" evidence was dismissed for failure to file a tort claim). In yet other cases decided after *Yoakum*, this Court recognized the "spoliation doctrine," not as an independent tort, but rather as a "general principle of civil litigation which provides that upon a showing of intentional destruction of evidence by an opposing party, an inference arises that the missing evidence was adverse to the party's position." *Waters v. All Phase Const*., 156 Idaho 259, 263, 322 P.3d 992, 996 (2014). *See also*, *Courtney v. Big O Tires, Inc*., 139 Idaho 821, 823, 87 P.3d 930, 932 (2003); *Bromley v. Garey*, 132 Idaho 807, 812, 979 P.2d 1165, 1170 (1999).

In each case where the destruction or concealment of evidence was alleged to have taken place, this Court declined to expressly adopt the tort of intentional interference with a civil action by spoliation of evidence. Indeed, Idaho courts have never recognized spoliation in the context presented in the instant appeal – when a plaintiff alleges that a third party's alleged "spoliation" in a criminal prosecution constituted intentional interference with a plaintiff's prospective civil action. Accordingly, because Idaho has not expressly recognized the tort of interference with a

prospective civil action, the district court did not err by dismissing Count II of Ms. Raymond's *Complaint* for failure to state a claim.

B. Ms. Raymond's alleged injury is based on pure speculation and therefore she does not have standing to pursue her claim against ISP.

Even if that such a claim has been recognized in Idaho, Ms. Raymond has not alleged sufficient facts, which, if true, would entitle her to relief. *See* I.R.C.P. 12(b)(6). Specifically, Ms. Raymond lacks standing to pursue her claim for intentional interference of a prospective civil action, as her allegations do not demonstrate an injury-in-fact.

This Court recently described the requirement of standing, as follows:

> It is a fundamental tenet of American Jurisprudence that a person wishing to invoke a court's jurisdiction must have standing. In order to satisfy the requirement of standing, a petitioner must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury. Standing requires a showing of a distinct palpable injury and fairly traceable causal connection between the claimed injury and the challenged conduct. This Court has defined palpable injury as an injury that is easily perceptible, manifest, or readily visible. The injury cannot be one suffered alike by all citizens in the jurisdiction. There must be a fairly traceable causal connection between the claimed injury and the challenged conduct. An interest, as a concerned citizen, in seeing that the government abides by the law does not confer standing.

Coal. for Agric.'s Future v. Canyon Cty., 160 Idaho 142, 146, 369 P.3d 920, 924 (2016)(internal citations and quotations omitted). Furthermore, standing can never be assumed based on a merely hypothetical injury. *State v. Philip Morris, Inc.*, 158 Idaho 874, 882, 354 P.3d 187, 195 (2015). "Indeed, when standing is challenged, mere allegations are not sufficient, and the party invoking the court's jurisdiction must demonstrate facts supporting this allegation." *Id.*

The allegations in Ms. Raymond's *Complaint* do not show a "fairly traceable causal connection between the claimed injury and the challenged conduct," and are based on several hypotheticals. For example, Ms. Raymond speculates that, but for ISP's alleged interference, not

only would have the prosecutor chosen to prosecute Deputy Sloan, a jury would have convicted him, which would have made Ms. Raymond's civil case against Deputy Sloan easier to prove, and would have resulted in a plaintiff's verdict (in a case of comparative fault), lower attorney fees, and higher damages in her wrongful death case. Ms. Raymond explicitly relies on these hypotheticals in support of her claims and does not cite to any facts, beyond speculation, to establish that she has suffered an actual injury due to ISP's alleged conduct.

Furthermore, Ms. Raymond's *Complaint* does not describe any individual act by ISP to support her allegations of misconduct. Ms. Raymond does not identify a witness or piece of evidence that was allegedly tampered with. While this Court must liberally construe Ms. Raymond's *Complaint* to "secure a just, speedy and inexpensive resolution of the case," *Seiniger Law Office, P.A. v. N. Pac. Ins. Co.*, 145 Idaho 241, 246, 178 P.3d 606, 611 (2008), Ms. Raymond asks this Court to ignore the actual language contained in the *Complaint*, wherein she specifically alleges that ISP's conduct prevented a prosecutor from charging Deputy Sloan and, in turn, prevented a jury from convicting him, which made her wrongful death case more difficult to prove. Reading the *Complaint* as Ms. Raymond urges on appeal does not secure a just, speedy, and inexpensive resolution of the case. Rather, finding a cause of action based on the language of Ms. Raymond's *Complaint* would inappropriately invite a jury to speculate about decisions made by a prosecutor not to pursue criminal charges and the outcome of a hypothetical criminal trial.

The district court correctly found that Ms. Raymond's claims against ISP were premised on pure speculation, which could not form a lawful basis for a valid claim. R. Vol. 1, p. 113. In other words, Ms. Raymond's claims were based on a conclusory and speculative hypothetical, that, but for ISP's alleged interference with Deputy Sloan's criminal case, not only would have

the prosecutor chosen to proceed with a criminal case, a jury would have convicted Deputy Sloan of manslaughter, resulting in a plaintiff's verdict for Ms. Raymond, greater damages, and fewer costs in her civil case. *See* R. Vol. I, p. 33, ¶ 19.

The district court also correctly held that Ms. Raymond's claims were premature. R. Vol. 1, p. 113. At the time of her lawsuit, Ms. Raymond had not yet suffered any injury, nor was she likely to, because the outcome of the civil case had not yet been decided. *Id*. In other words, because Ms. Raymond's injury was predicated on the expense and outcome of her wrongful death claim, her *Complaint* did not demonstrate that she had suffered a distinct injury at the time of its filing, or that she was likely to suffer a distinct injury in the future. Accordingly, Ms. Raymond's speculative allegations are not sufficient to demonstrate that she had suffered an injury-in-fact necessary to establish standing to pursue claims against ISP. *See*, *Martin v. Camas Cty. ex rel. Bd. Comm'rs*, 150 Idaho 508, 514, 248 P.3d 1243, 1249 (2011) (a plaintiff did not have standing because alleged injury of "increased competition" was "thoroughly speculative" and was not "specific or distinct and palpable.").

Ms. Raymond's allegations of "reduced damages" and "increased attorney fees" also do not constitute an "injury-in-fact" because they cannot be established by known facts. *See*, *Philip Morris, Inc*., 158 Idaho 874, 882, 354 P.3d 187, 195 (2015). To the contrary, the only way for Ms. Raymond to establish injury would be to compare the outcome of a hypothetical civil case that took place after a hypothetical criminal conviction, to the outcome of another civil case that has yet to take place. Such an alleged injury is not visible, palpable, distinct, or sufficient to establish standing. Rather, it is based on conjecture and guesswork. Accordingly, the district court did not err when it dismissed Ms. Raymond's claim for tortious interference with a prospective civil action for failure to state a valid claim.

III. This Court should not adopt a new tort for intentional interference with a civil action by spoliation of evidence because such a tort would create endless litigation and because the facts of this case do not support such a tort.

For several reasons, this Court should not adopt a new tort for intentional interference with a civil action by spoliation of evidence. First, adoption of such a tort is likely to lead to endless litigation where the same facts and issues are contested in several different venues. Second, other sufficient remedies are available to deter such interference, including criminal laws punishing those who conceal or destroy evidence or intimidate witnesses. In addition, the facts of this case do not warrant the adoption of a new cause tort for intentional interference with a civil action.

A. The adoption of intentional interference with a prospective civil action will lead to endless, burdensome litigation.

In *Yoakum*, this Court relied in part on *Smith*, *supra*, the seminal California case that first recognized a claim for interference with a prospective civil action in 1984. The holding in *Smith* was later disapproved in the "first-party spoliation" context. *See*, *Cedars–Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 521 & n. 4 (1998). Also after *Yoakum*, California flatly rejected the tort of "third-party spoliation," which is most akin to the circumstances of the instant appeal. *See Temple Cmty. Hosp. v. Superior Court*, 976 P.2d 223, 225 (1999). A third-party spoliation claim alleges destruction of evidence by someone who is not alleged to have committed the underlying tort – in this case, ISP would be considered a third party because Ms. Raymond did not allege that ISP's conduct proximately caused the accident resulting in her father's death. Rather, Ms. Raymond alleges that ISP's conduct in the criminal investigation interfered with her wrongful death case against Deputy Sloan and Payette County.

In *Temple*, the Court described the "endless spirals of lawsuits over litigation-related conduct" that resulted with the adoption of intentional third-party spoliation claims. *Id.*, 976 P.2d at 229. The Court recognized the harm in depriving a party of evidence supporting their claim, but nonetheless considered the "greater harm of subjecting parties, witnesses and the courts to unending litigation over the conduct and outcome of a lawsuit." *Id.*, at 230. It further identified "the uncertainty of the fact of harm" that occurs in cases alleging third-party spoliation. Citing its decision in *Cedars-Sinai*, *supra*, the *Temple* Court held:

> As in the case of spoliation of evidence by a party, in the case of third party spoliation "[i]t seems likely that in a substantial proportion of spoliation cases the fact of harm will be irreducibly uncertain. In such cases, even if the jury infers from the act of spoliation that the spoliated evidence was somehow unfavorable [to a party], there will typically be no way of telling what precisely the evidence would have shown and how much it would have weighed in the spoliation victim's favor. Without knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action. The jury could only speculate as to what the nature of the spoliated evidence was and what effect it might have had on the outcome of the underlying litigation.

Id., at 230 (emphasis added).

The Court had further concerns about the element of causation being subject to speculation, stating that "the extent to which the destruction of evidence caused a different result in the underlying litigation would be a matter of speculation." *Id.* at 231. Ultimately, the *Temple* Court held that California's lower courts were mistaken in recognizing a tort of intentional spoliation of evidence by analogizing it to the tort of intentional interference with prospective economic advantage (which is precisely what the *Yoakum* Court did when it opined that such a tort was "possible" in Idaho. *Id.*, at 231). Considering all of these factors above, including California's 14 years of experience with the tort, the *Temple* Court held:

> As we have seen, the injury in the case of spoliation is speculative. A litigant's expectancy in the outcome of litigation is peculiarly uncertain, being subject to the discretion of court and jury. Whether interference with the prospective advantage of prevailing in a lawsuit is committed by a party to the litigation or instead by a stranger to the litigation, the claimed fact of damage — loss or impairment of a hoped-for civil verdict — is equally speculative.

Id. The *Temple* Court acknowledged the additional burdens and costs of such a speculative cause of action, including jury confusion, potential for frivolous lawsuits, and the overall burden on the legal system, including the "inaccurate instrument of derivative tort litigation" and the "potentially endless litigation over a speculative loss" that would result from such claims. *Id*., at 231-233.

The majority of jurisdictions who have addressed this issue have declined to adopt an intentional spoliation claim for the same or similar reasons set forth in *Temple*. *See*, *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177, 1183 (Kan. 1987) (tort of "intentional interference with a prospective civil action by spoliation of evidence" was not recognized, absent duty or special relationship of the parties); *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.,* 456 N.W.2d 434, 438-39 (Minn.1990) (declined to allow an independent tort to continue prior to resolution of the underlying case, due to concerns about speculation); *Trevino v. Ortega*, 969 S.W.2d 950, 951–52 (Tex.1998) (declining to recognize a tort that would lead to duplicate litigation and insufficient re-litigation of the same issues); *Dowdle Butane Gas Co. v. Moore*, 831 So. 2d 1124, 1135-36 (Miss. 2002) (declining to adopt the tort due to uncertainty of harm and interest of finality in adjudication); *O'Neal v. Remington Arms Co., LLC,* No. CIV. 11-4182-KES, 2012 WL 3834842, at *3 (D.S.D. Sept. 4, 2012) (recognizing persuasive rationale by majority of states who have declined to adopt the new tort).

This Court should likewise decline to adopt a new tort that would likely lead to burdensome, endless litigation over speculative loss. This is precisely what would occur should Ms. Raymond be allowed to proceed on her claim.

B. Other remedies are available to deter the destruction of evidence.

Remedies exist to address the types of allegations that Ms. Raymond raises in her *Complaint*. In particular, state and Federal criminal statutes outlaw the destruction of evidence, tampering with witnesses, and other forms of misconduct that Ms. Raymond alleges in her *Complaint*. Indeed, she cites to the violation of such statutes as "an element" of her claim for intentional interference with a prospective civil action. *See*, *e.g.* 18 U.S.C. § 1512 (federal criminal statute prohibiting tampering with a witness, victim, or informant); I.C. § 2603 (state criminal statue prohibiting the destruction, alteration, or concealment of evidence); I.C. § 2604 (state criminal statute prohibiting intimidation of a witness); I.C. § 2605 (state criminal statute prohibiting the bribery of witnesses).[2]

The *Temple* Court identified these existing remedies and further held that such cases of third-party destruction of evidence were not a significant problem because "the nonparty who is not acting on behalf of a party but is independently motivated to destroy evidence with the intent to interfere in the outcome of litigation between other parties must be a rarity, perhaps because such destruction can subject the nonparty to criminal prosecution." *Temple*, 976 P.2d at 232. That is particularly true in this case. Ms. Raymond does not allege that ISP acted on behalf of Deputy Sloan or Payette County with the requisite premeditation or plan to interfere in the

[2] Despite the *Complaint's* one random reference to "defendants" destroying evidence, Ms. Raymond did not cite to I.C. § 18-2603 as a statute violated by ISP, which further demonstrates that Ms. Raymond's *Complaint* has not properly alleged that ISP intentionally destroyed

wrongful death lawsuit. *Ricketts*, 137 Idaho at 581, 51 P.3d at 395–96. Rather, the *Complaint* relies on speculation and does not identify any valid motivation for ISP to conceal or destroy evidence or otherwise interfere in the criminal investigation of Deputy Sloan.

C. The facts of this case do not merit the adoption of a new tort in Idaho.

A review of case law around the country has not revealed a similar case where a plaintiff established a cognizable claim for spoliation by alleging that third party interference prevented a criminal conviction which thereby deprived the plaintiff of recovery in a subsequent civil case. Indeed, other states who have adopted this tort have not done so on those set of facts. *See*, *Hazen*, *supra* (recognizing the tort in a case where an arrest tape was alleged to have been altered after dismissal of criminal charges against plaintiff); *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 22 (Mont. 1999) (recognizing the tort, but declining to find it when plaintiff could not establish that defendant had intentionally destroyed evidence for the purpose of disrupting a third-party suit); *Hannah v. Heeter*, 584 S.E.2d 560, 573 (W.Va.2003) (recognizing intentional tort, but cautioning that party injured by spoliation must show more than the fact that the potential evidence was destroyed – must show an intent to defeat a pending or potential lawsuit); *Rizzuto v. Davidson Ladders, Inc.*, 905 A.2d 1165, 1178 (Conn. 2006) (tort recognized when third party destroyed ladder in a products liability case after repeated requests from plaintiff to preserve it).

Adopting a tort on the allegations raised in Ms. Raymond's *Complaint* allows for any party who disagrees with the outcome of a criminal investigation to assert a claim for interference with a potential civil case down the road. As discussed above, that invites frivolous lawsuits where any investigator performing their job is subject to liability if the investigation

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evidence, which the *Yoakum* Court recognized was necessary to pursue such a claim. *See* 129 Idaho at 424, 923 P.2d at 179.

does not result in the indictment and conviction of a party who may also be subject to liability in a subsequent civil suit.[3] In order to avoid such frivolous lawsuits and in order to establish a valid claim for the type of "unreasonable interference" considered by the *Yoakum* Court, a plaintiff must allege more than conclusory allegations of misconduct.

Ms. Raymond's *Complaint* makes one random allegation of destruction of evidence, without any reference to ISP in particular, and does not identify the evidence allegedly destroyed or how such evidence was vital to her civil case. In other cases where spoliation was found to be a valid claim, destruction of evidence was the main component and central allegation in the case. *See, e.g. Rizutto, supra; Hannah, supra; Oliver, supra.* Furthermore, taking Ms. Raymond's vague allegations as true and assuming that ISP destroyed evidence favorable to Ms. Raymond and that all hypotheticals turn out in her favor, Deputy Sloan's conviction does not guarantee her a plaintiff's verdict on her wrongful death claim, particularly in the context of comparative fault. Accordingly, Ms. Raymond's *Complaint* does not necessitate the adoption of a new tort on these facts.

Importantly, and as discussed above, Ms. Raymond cannot establish injury-in-fact. Her wrongful death lawsuit was allowed to move forward, and she ultimately reached a settlement with the remaining co-defendants on her wrongful death claim. Allowing this case to proceed on a new tort would require a jury to speculate regarding the comparative fault of the drivers and what damages, if any, Ms. Raymond would have recovered had she proceeded to trial with a hypothetical criminal conviction for Deputy Sloan. This is problematic for several reasons. It

[3] Ms. Raymond's claims of tortious interference with a prospective civil action and interference with a prospective economic advantage are also attempts to plead around the tort of negligent investigation, which has been expressly rejected in Idaho. *Wimer v. State*, 122 Idaho 923, 924-25, 841 P.2d 453, 454-55 (Ct. App. 1992); *Hagy v. State*, 137 Idaho 618, 622, 51 P.3d 432, 436 (Ct. App. 2002).

would require astounding speculation on the part of the jury. A jury would be asked to ignore the many potential outcomes of both a criminal and civil trial, based on several factors, including the evidence presented, credibility of witnesses, jury instructions, rulings by the court, and argument presented by counsel. Ms. Raymond would then ask a jury to presume that, had such a prosecution gone forward and a jury convicted Deputy Sloan on the facts presented, she would have prevailed at trial, her damages would have been much greater, and her path to recover would have been much easier. Such hypotheticals and intangible damages are not the circumstances contemplated by the Restatement (Second) or by this Court when it considered a potential new tort for interference with a prospective civil action.

In *Hills v. United Parcel Serv*., 232 P.3d 1049, 1058 (Utah, 2010), the Utah Supreme Court of Utah viewed favorably the policy reasons for adopting the independent tort for "third-party spoliation," but nevertheless declined to do so on the facts of that particular case. Similarly, this Court should not adopt a new tort for intentional interference with a civil action for spoliation of evidence on the facts of this case.

IV. The district court properly dismissed Ms. Raymond's claim for tortious interference with economic advantage.

Ms. Raymond's *Complaint* sets forth two "intentional interference" claims against ISP, both of which the district court dismissed for failure to state a claim. Ms. Raymond only argues on appeal that Count II of her *Complaint* was erroneously dismissed and that the Idaho Supreme Court should create an intentional tort, giving rise to that claim. It does not appear that Ms. Raymond is appealing the district court's dismissal of her claim for intentional interference with prospective economic advantage. "Issues on appeal are not considered unless they are properly supported by both authority and argument." *Hurtado v. Land O'Lakes, Inc*., 153 Idaho 13, 18,

278 P.3d 415, 420 (2012). Nevertheless, for the same reasons as set forth above, Ms. Raymond's claim for tortious interference with prospective economic advantage was also properly dismissed by the district court.

The elements for a claim of intentional interference with an economic expectancy are: (1) The existence of a valid economic expectancy; (2) knowledge of the expectancy on the part of the interferer; (3) intentional interference inducing termination of the expectancy; (4) the interference was wrongful by some measure beyond the fact of the interference itself (i.e. that the defendant interfered for an improper purpose or improper means) and (5) resulting damage to the plaintiff whose expectancy has been disrupted. *Highland Enterprises, Inc. v. Barker*, 133 Idaho 330, 338, 986 P.2d 996, 1004 (1999) (emphasis added).

The district court dismissed Ms. Raymond's claims for several reasons. First, the district court determined that Ms. Raymond could not have a valid economic expectancy in her wrongful death suit. The court further determined that Count held dismissal of Count III was warranted because Ms. Raymond's wrongful death action was premised on a fact she should not prove: "That but for the Defendants' alleged misconduct, Sloan would have been convicted of manslaughter." R. Vol. I, p. 113. Finally, the district court held that Count III was prematurely asserted because the outcome of her wrongful death case was not known at the time she filed her claims against ISP. *Id.* For those reasons and those discussed below, the court's dismissal of Count III was not in error.

As set forth above, Ms. Raymond does not have standing to bring a claim for interference with an economic advantage. As held by the district court, Ms. Raymond's expectancy is based on a hypothetical criminal conviction and how it could have impacted her ability to prove her

wrongful death claim, which had yet to be decided. Such reliance on hypothetical outcomes cannot give rise to a valid economic interference claim.

Furthermore, Ms. Raymond's *Complaint* did not sufficiently allege the essential elements of an economic advantage claim. For the same reasons Ms. Raymond does not have standing to pursue her claim, she has not alleged a valid economic expectancy in her wrongful death lawsuit. Her recovery is based on hypothetical outcomes of a criminal trial and her alleged "resulting damages," cannot be determined with any reasonable certainty and are based on speculation. *See Trilogy Network Sys., Inc. v. Johnson*, 144 Idaho 844, 846, 172 P.3d 1119, 1121 (2007) (damages must be proved with a reasonable certainty and the existence of damages "must be taken out of the realm of speculation."). Such speculative injury cannot form the basis of a valid economic expectancy.

In addition, a civil lawsuit is not akin to the types of valid economic relationships that have given rise to interference claims in Idaho. *See*, *Highland Enterprises, Inc.*, 133 Idaho at 338, 986 P.2d at 1004 (1999) (plaintiff contractor alleged defendants' protests interfered with its expected profits); *Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 893, 243 P.3d 1069, 1081 (2010) (plaintiff employer alleged defendants intentionally interfered with its customer and employee relationships); *Syringa Networks, LLC v. Idaho Dep't of Admin.*, 155 Idaho 55, 64, 305 P.3d 499, 508 (2013) (plaintiff telecommunications company alleged defendant telecommunications company interfered with its ability to subcontract with a third party). *See also*, *Fox v. Country Mut. Ins. Co.*, 7 P.3d 677, 690 (Ore. 2000) (the purpose of such a claim is to protect the integrity of "voluntary economic relationships, both commercial and noncommercial, that would have very likely resulted in a pecuniary benefit to the plaintiff but for the defendant's interference") (emphasis added); *Cron v. Zimmer*, 296 P.3d 567, 576 (Ore. 2013) (same).

Ms. Raymond also fails to allege that her ability to prove her wrongful death case was terminated, which is an essential element to her claim. *Highland Enterprises, Inc.*, 133 Idaho at 338, 986 P.2d at 1004. In fact, Ms. Raymond has acknowledged that her claim against Deputy Sloan and Payette County moved forward and that she reached an eventual settlement. Accordingly, her economic advantage by definition was not terminated and thus, she has failed to state a cognizable claim.

CONCLUSION

Defendant ISP respectfully requests that this Court affirm the district court's decision dismissing with prejudice Ms. Raymond's claims against ISP for tortious interference with a prospective action and tortious interference with prospective economic advantage.

DATED this 3rd day of May, 2019.

MOORE, ELIA, KRAFT & HALL, LLP

By:/s/ Michael J. Elia_____
Michael J. Elia, Attorney for Respondent
Idaho State Police

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of May, 2019, I electronically filed the foregoing document with the Clerk of the Court using the iCourt system which will send electronic notification of this filing to the following:

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