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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 REPLY 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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ARGUMENT

I. Respondent Downplays and/or Ignores the Bulk of Appellant's Plead Facts which Must be Considered as if True under a Rule (12)(6) Motion as Reviewed *de novo* by this Court.

Respondent's Response brief foregoes reciting a "Statement of Facts," but instead provides a general "Statement of the Case" which focuses on only a few paragraphs of Appellant/Plaintiff's complaint, while ignoring most of the plaintiff's allegations. Resp. Brief pp. 1-2. Respondent then suggests that the Appellant/Plaintiff's complaint and appeal consists of "vague assertions" that "it cannot prepare a full response to." *Id.* pp. 2-3.

Such an approach by the Respondent is misleading and suggests that this Court disregard the standard of review in this case which is a *de novo* review of whether the district court's granting of an IRCP § 12(b)(6) motion to dismiss was appropriate because 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). A *de novo* review allows this Court to consider this matter "anew; afresh; a second time." See *Black's Law Dictionary, Sixth Edition*. Additionally, this Court "exercises free review over questions of law." *Brannon v. City of Coeur D'Alene*, 153 Idaho 843, 847, 292 P.3d 234, 239 (2012) (citations omitted). Thus, as clearly set forth and asserted in the Appellant's Brief, the real issue before this Court is whether upon taking a fresh or second look at the complaint in its entirety and with all inferences drawn in the favor of the Appellant/Plaintiff, has the Appellant plead an actionable claim that can or should be recognized by law.

This is clearly a perspective that the Respondent would prefer that this Court avoid – given the comprehensive and shocking allegations made in the complaint, as referred to with

clarity in the Appellant's Brief. Appl. Br. pp. 5-7. R. Vol. I pp. 31-35. In summary, the Plaintiff/Appellant Jackie Raymond (Raymond) alleges that the Defendant/Respondent Idaho State Police (ISP) – who was charged with the responsibility with investigating a horrific accident killing Raymond's father caused by a Payette County deputy traveling over 115 MPH on a residential road – did in fact take measures to conceal, destroy or otherwise tamper with evidence and testimony to protect the liability of the deputy and the county, including suppressing and altering a report by its own investigatory agents finding that the deputy's actions were reckless. *Id.* Raymond further alleges that such actions by the ISP not only interfered with, delayed and reduced the amount of damages that she should have received under her wrongful death claim, but that ISP's actions caused severe emotional distress and anxiety and other general and special damages. Raymond is simply recommending to this Court that it exercise a *de novo* and free review over whether Idaho does or should recognize a tort for this horrendous conduct by the ISP and its agents. Viewed in that appropriate light, this Court should grant Raymond's appeal.

II. Idaho Recognizes a Third Party Spoliation of Evidence Claim, the Concerns of which Expressed by the California Supreme Court in *Temple County Hospital* Have Been and Are Easily Diffused.

Respondent attempts to pass of as mere "dicta" the "guidance in future litigation" and "framework for another cause of action" provided by this Court in in *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 178, 923 P.2d 416, 423 (1996). The *Yoakum* Court did not allow such a claim to move forward simply because it held that the alleged facts in that particular case were not "egregious" enough to warrant a claim. *Id.* However, this Court made it clear as it has in several other subsequent opinions that it would recognize a third party spoliation claim under the

right set of facts. *Id.* See also *Ricketts v. Eastern Idaho Equipment, Co. Inc.,* 137 Idaho 578, 581-82, 51 P.3d 392, 395-96 (2002) and *Cook v. Idaho Department of Transportation*, 133 Idaho 288, 298, 985 P.2d 1150, 1160 (1999). Respondent points to no Idaho authority which expressly rejects a third party spoliation claim.

Instead, Respondent relies heavily upon a 1999 California Supreme Court decision *Temple County Hospital v. Superior Court*, 20 Cal.4th 464 (1999), which determined that California would no longer recognize a third party spoliation cause of action. Again, Idaho has never referenced or relied upon this California decision, which therefore makes it inapplicable in this case. Nevertheless, the reasons that the California court provided for not allowing such a claim have been debunked and criticized in several other subsequent decisions from other jurisdictions, including neighboring states such as Montana and Utah.

The *Temple County Hospital* Court justifies its decision by claiming that recognizing a cause of action for a third party spoliation claim would "produce endless derivative litigation" and that damages are "irreducibly uncertain." *Id.* 20 Cal.4th at 473-76. The Court also suggests that third party spoliation can be remedied by contempt orders, sanctions, criminal statutes and/or other yet-to-be fashioned remedies by the California legislature. *Id.* at 476.

California's feeble attempt to address the troubling implications of third party spoliation of evidence has not been accepted or followed by numerous other jurisdictions. Nor have such jurisdictions allowed the fears expressed by California to outweigh the potential harms and wrongfulness of third party spoliation that an independent cause of action would remedy and deter. A worthy analysis of the pros of allowing such a claim is provided by the Connecticut Supreme Court in two of its opinions in 2007 and 2007 respectively.

In 2006, the Connecticut Supreme Court recognized a tort for first party intentional spoliation of evidence as an independent tort, noting that "the existing nontort remedies are insufficient to compensate victims of spoliation and to deter future spoliation when a first party defendant destroys evidence intentionally with the purpose and effect of precluding a plaintiff from fulfilling his burden of production in a pending or impending case." *Rizzuto v. Davidson Ladders, Inc.*, 280 Conn. 225, 243, 905 A.2d 1165 (2006). In so doing, the *Rizzuto* Court acknowledges other available remedies for spoliation, i.e. sanctions, criminal statutes, etc… but ultimately concluded that such remedies "provide an insufficient compensatory and deterrent effect" and do not "compensate the plaintiff for the loss of his underlying civil action." Id., at 242.

In 2007, the Connecticut Supreme Court also recognized an independent cause of action for a third party intentional spoliation of evidence claim, again rebutting the concerns raised by California in *Temple Community Hospital*. *Diana v. NetJets Services, Inc.*, 974 A.2d 841, 849 (Conn.Super. 2007). The Connecticut Court was undeterred by the "irreducible certainty of damages" argument, stating:

> We agree that this difficulty of proof is endemic to the tort of spoliation…but we disagree that it should preclude recognition of the tort.... The difficulty in determining the harm caused by a defendant's spoliation of evidence is attributable solely to the defendant's intentional bad faith litigation misconduct. If the plaintiff could establish precisely what the spoliated evidence would have shown, the tort would be unnecessary because the plaintiff would possess sufficient evidence to satisfy his burden of production in the underlying litigation.

Id.

The Connecticut Court further "acknowledges:"

> that, [t]he most difficult aspect of a spoliation of evidence tort is the calculation of damages.... In determining the proper measure of damages, we are guided by the purpose of compensatory damages, which is to restore an injured party to the position he or she would have been in if the wrong had not been committed.... To restore a victim of intentional spoliation of evidence to the position he or she would have been in if the spoliation had not occurred, the plaintiff is entitled to recover the full amount of compensatory damages that he or she would have received if the underlying action had been pursued successfully.... We recognize that various jurisdictions have criticized this measure of damages because there is the potential that the plaintiff would benefit more in an instance of spoliation than he might have in the underlying suit.... We conclude, however, that the risk of a windfall to the plaintiff sufficiently is minimized by requiring the plaintiff to prove that the defendant spoliated evidence intentionally with the purpose and effect of precluding the plaintiff's ability to establish a prima facie case in the underlying litigation and, further, by permitting the defendant to rebut the presumption of liability that arises upon this showing.

Id. at 849 (citations omitted) (emphasis added).

The Connecticut Supreme Court also thoroughly debunks the concern of "a spiral of contemporaneous or subsequent collateral or satellite litigation based on allegations of spoliating conduct" warned about in other jurisdictions. *Id.* The Court "dismissed" this assertion:

> with respect to the risk of meritless spoliation actions, we do not agree ... that recognition of the tort will result in an uncontrollable influx of frivolous claims.... [T]he limited scope of the tort, the difficulty of proof inherent in the tort and the safeguards embodied in our rules of practice ... are sufficient to deter the filing of such meritless actions.
> Lastly, the tort of intentional spoliation of evidence, as defined in this state, poses no risk of jury confusion, inconsistent verdicts or duplicative litigation because the underlying claim and the tort of intentional spoliation of evidence are mutually exclusive. In other words, a plaintiff who possesses sufficient evidence to present his underlying claim to the jury necessarily is unable to state a claim for intentional spoliation of evidence, and vice versa. Thus, the risk of jury confusion, inconsistent verdicts or duplicative litigation is eliminated entirely.

Id. at 949-50.

As further indicated by the Connecticut Supreme Court, a strong argument exists in particular for a third party spoliation claim due to a "lack of remedies available to third party spoliation victims" noting that:

> the evidentiary inference ... as well as most discovery sanctions ... are not available when a person who is not a party to the litigation and who is not an agent of a party intentionally has destroyed evidence…because the nontort remedies for third party spoliation, unlike those for first party spoliation, are not strong and effective deterrents, this factor weighs heavily in favor of recognizing a tort remedy for third party spoliation.... Tort law seeks not only to deter wrongful conduct but also to compensate those injured by such conduct. The nontort remedies for third party spoliation do not, however, compensate the victim for the harm caused by the destruction of evidence, unlike the nontort remedies for first party spoliation.

Id. at 851.

Finally, in a resounding rejection of the majority ruling in *Temple Community Hospital* the Connecticut Supreme Court cites the more sound reasoning found in the *dissenting* opinion which states: "Nor would a tort remedy for intentional third party spoliation create 'endless' litigation.... It would create a single lawsuit between the spoliation victim and the spoliator.... [T]here is nothing unique about third party spoliation in its potential for uncertainty in the fact or extent of harm, for almost every tort can present the same uncertainty." *Id.* (citing dissenting opinion of Justice Kennard in *Temple Community Hospital*).

Using a fairly similar analysis as Connecticut, and referencing at least twelve other states that have adopted a third party spoliation of evidence claim, the neighboring state of Utah has also recognized an independent claim for third party spoliation of evidence. *Hills v. United Parcel Service, Inc.,* 232 P.3d 1049, 1053-58 (Utah 2010) (See ft. 2 for a recitation of decisions from twelve states in alphabetical order). In reviewing the twenty-five year history and treatment of the issue in numerous jurisdictions throughout the country, the Utah Supreme Court

suggests a "general pattern" trending toward the acceptance of a third party intentional spoliation of evidence cause of action. *Id.* at 1056. The Court then proceeds to adopt such a cause of action for the State of Utah, finding:

> The preference for a third party spoliation tort is even more defensible. Like most courts, I (sic) agree that traditional nontort remedies adequately deter first-party spoliation and fairly compensate victims. Without creating a new cause of action, there are still a variety of remedies available to punish spoliators, deter future spoliators, and protect nonspoliators prejudiced by evidence destruction. Third party spoliation, however, paints a different picture. Almost all states-including those that have refused to adopt a tort of spoliation-acknowledge that when dealing with third party spoliators, traditional nontort remedies such as evidentiary inferences, discovery sanctions, and attorney disciplinary measures are unavailable or largely ineffectual…Accordingly, while most states have rejected a cause of action for first-party spoliation, nearly all jurisdictions that have adopted the tort in some form recognize a tort for third party spoliation. In other words, if a state were to adopt any form of spoliation tort, it would most likely be a third party intentional spoliation tort.

Id.

Simply put, Idaho would be on solid footing by allowing a third party intentional spoliation of evidence claim to move forward in this case. The so-called downsides of such a claim and availability of alternative remedies to address spoliation cited by the California Supreme Court nearly twenty years ago in *Temple County Hospital* are in actuality largely unfounded, easily refuted, and outweighed by the greater good that allowing an independent claim will achieve. Egregious and intentional wrongful conduct such as the destruction and tampering of evidence by a third party that protects a wrong doer from liability should be frowned upon, results in harm, and should therefore be actionable.

III. The Appellant has Plead a Valid and Justified Claim for Negligent and/or Intentional Spoliation of Evidence.

Interestingly, in December of 1999, approximately six months after the filing of the *Temple County Hospital* decision, the Montana Supreme Court issued an opinion of its own regarding both a third party negligent and intentional spoliation of evidence cause of action. *Oliver v. Stimpson Lumber Co*. 297 Mont. 336, 993 P.2d 11 (1999). The Montana Court provides a solid and reasoned approach that this Court should consider in the crafting of such a tort in Idaho.

In *Oliver*, the plaintiff filed a complaint containing an independent cause of action against his former employer and its insurer for knowingly or negligently altering and discarding a piece of equipment that would have been key evidence in a claim the plaintiff was considering against a third party for severe personal injuries involving the equipment. *Id*. at 339-41. The trial court dismissed the plaintiff's complaint for both negligent and intentional spoliation, after which the plaintiff appealed. *Id*. at 441.

The *Oliver* Court partially granted the plaintiff's appeal, but in so doing establishes elements for a third party cause of action for both a negligent and intentional spoliation of evidence claim. *Id*. at 347-354. The Court sets forth a well-reasoned basis for allowing such claims against third parties and why existing remedies are insufficient.

> When evidence is in the possession of a third party, however, the various sanctions available to the trial judge are inapplicable and other considerations arise. For instance, the property in question may be owned by the third party. A property owner normally has the right to control and dispose of his property as he sees fit. The owner of the property may legitimately question what right a plaintiff has to direct control over such property.

> Yet, the importance of evidence preservation and the critical importance it plays in the civil justice system cannot be ignored.

Id. at 345.

The Court lays out the elements of a Negligent Spoliation of Evidence Claim as follows:

1. existence of a potential civil action;
2. a legal or contractual duty to preserve evidence relevant to that action;
3. destruction of that evidence;
4. significant impairment of the ability to prove the potential civil action;
5. a causal connection between the destruction of the evidence and the inability to prove the lawsuit;
6. a significant possibility of success of the potential civil action if the evidence were available; and
7. damages.

Id. at 347.

The Court further delineates the various manners in which a "duty to preserve evidence" can be established in a third party negligent spoliation claim:

1. the spoliator voluntarily undertakes to preserve the evidence and a person reasonably relies on it to his detriment;
2. the spoliator entered into an agreement to preserve the evidence;
3. there has been a specific request to the spoliator to preserve the evidence; or
4. there is a duty to do so based upon a contract, statute, regulation, or some other special circumstance/relationship.

Id.

Noting that the "intentional destruction of evidence to disrupt or defeat another person's right of recovery is highly improper and cannot be justified," the Montana Court also provides elements for an alternative claim for a third party intentional spoliation of evidence claim:

1. the existence of a potential lawsuit;
2. the defendant's knowledge of the potential lawsuit;
3. the intentional destruction of evidence designed to disrupt or defeat the potential lawsuit;
4. disruption of the potential lawsuit;

5. a causal relationship between the act of spoliation and the inability to prove the lawsuit; and
6. damages.

Id. 352.

If Idaho follows these elements, then the Appellant has adequately plead a claim for both negligent and/or intentional spoliation of evidence. As the public agency charged with the investigation into the accident that caused the death of Raymond's father Barry Johnson, the ISP had either voluntarily taken on the duty, or had some regulatory or statutory duty to preserve evidence with regard to such investigation. Without question, there existed the potential of a wrongful death lawsuit related to such investigation. Raymond alleges that the ISP superiors and agents engaged in a number of destructive and damaging actions that destroyed and/or tampered with key evidence, in particular findings by the initial ISP investigators that the deputy that caused the accident acted recklessly and that alcohol use by Mr. Johnson was not a factor.

Raymond also alleges that the ISP's outrageous conduct related to criminal proceedings prevented felony negligence charges from being pursued against the deputy that would have resulted in *per se* liability against the deputy and his employer in her case. Without question, a criminal conviction against the deputy and/or an untampered and unimpeded investigatory report from the ISP would have been crucial evidence for Raymond's wrongful death claim. Instead the ISP's actions caused significant delays and made Raymond's claim much more difficult to prove than it should have been. She alleges damages caused by such actions (as discussed in detail *supra* in Section V). Thus, even if the ISP did not "intend" to destroy or tamper with evidence, it violated duties to preserve such evidence – therefore resulting in a negligent spoliation of evidence claim.

Raymond has also clearly plead a claim for "intentional" spoliation of evidence under the Montana standard, a claim which has fewer elements because of the inherently "impropriety" or egregiousness of such conduct. She alleges that the ISP engaged in measures to protect the deputy and his employer from liability, by purposefully tampering with and destroying key evidence that would have been crucial to her wrongful death claims. Again, although much of the ISP's wrongful conduct was geared toward shielding the deputy from criminal liability, the ISP should have easily foreseen that such conduct would "disrupt" or "defeat" Raymond's liability claims in her civil lawsuit. Hence, such actions rise to the level of "intentional" spoliation of evidence. Raymond alleges real damages as a result of such conduct, discussed *supra* in Section V.

In sum, while the district court declined to appropriately and fully consider whether Idaho has or should recognize a spoliation claim for the ISP's egregious conduct, nothing prevents this Court on a *de novo* review from allowing such a claim as applied to the allegations in this case. In so doing, this Court will not be on untrodden ground, but has sound principles and precedent to draw upon from nearby jurisdictions to support such a claim.

IV. The Respondent's Alleged Immoral Conduct and the Severity of the Harm to Appellant Rises to the Level of a "Prima Facia" Tort under *Restatement* § 870.

It may be possible that the Appellant's claims do not neatly fit within a spoliation of evidence claim or that some of the wrongful conduct committed by the Respondent is not necessarily related to destruction or tampering of evidence. As such, this Court should consider whether an additional or separate tort claim should be permitted under § 870 of the Restatement

of Law which this Court has recognized as a "catch all" provision for un-traditional categories of tort. *Rest. Torts, 2nd § 870.* (See, *Yoakum* 129 Idaho at 178, 923 P.2d at 423).

The Respondent's response to the Appellant's arguments on the application of § 870 again leans heavily on the *Temple County Hospital* decision and attempts to downplay or disregard much of the Appellant's allegations – passing them off as "vague." This response is lacking and does not truly refute the points made by the Appellant on this issue. The multitude of reasons why this Court should not follow *Temple County Hospital* are discussed at length in Section II *infra*. However, given the unique and unusual considerations at play, the Appellant hereby provides additional basis and support for why the Court should allow such a tort in this case.

The inclusion of § 870 to the *Restatement of Torts 2nd* is the culmination of the evolution of common law, legal trends, and policy considerations. For a thorough and excellent recitation of the history of this tort, see "Concurring Opinion Appendix A" to Missouri Court of Appeals Southern District, Second Division decision *Billingsley v. Farmers Alliance Mutual Insurance Co.,* SD35102 (dec. June 18, 2018). Historically, it has been referred to as a "prima facie" tort which has its roots in a 1904 United States Supreme Court Opinion by Justice Oliver Wendell Holmes in *Aikens v. Wisconsin,* 195 U.S. 194, 25 S.Ct. 3, 49 L.Ed. 154 (1904). As conceptualized by Holmes: "Prima facie, the intentional infliction of temporal damages is a cause of action which as a matter of substantive law, whatever may be the form of the pleading, requires a justification if the defendant is to escape." *Id.* Holmes also refers to the notion of "disinterested malevolence" or when ordinarily lawful conduct that in actuality was not done to

achieve a beneficial end for the actor but was done solely with a malevolent intent to injure the plaintiff, the conduct became actionable. *Id.*

After the *Aikens* decision, the concept of a prima facie tort developed in various forms and reservations, with § 870 of the *Restatement* (drafted in 1977) representing an attempt to resolve and "balance the interests." *Id.* See comments *c.*, *d.* and *e.* The *Restatement* comments recommend that in determining whether a prima facia tort exists, the court balances the "harms that individuals must bear as the price of living in a society composed with many individuals" for which there is no cause of action with "other types of harm are just as clearly entitled to the protection of the law." *Id.* comment f.

The "severity" of the harm, including the "significance of the emotional harm" is an "important consideration" in this balancing test. *Id.* The "motive" and "means" of the defendant is also "a very important factor," in particular the "moral and legal character" of the conduct. *Id.* comment *h.* "If the means is illegal or unfair or immoral according to the common understanding of society this constitutes a factor favoring liability." *Id.*

The allegations in this case do clearly meet the requisite threshold for a prima facia tort. The allegations, if true, show that instead of promoting and enforcing the law as it is charged and obligated to do, the state's chief law enforcement agency ISP instead *prevented* justice and *protected* a law breaker. More disconcerting is that the person the ISP was protecting was acting in his capacity as a law enforcement officer when he broke the law. In other words, the ISP's actions put itself and the interests of another law enforcement officer in the course of duty *above* the law. Indeed, it is difficult to envision a more "immoral" and "unfair" act in society.

The severity of the harm to the Appellant Raymond is also readily apparent. Instead of being able to rely and trust upon the ISP to properly conduct its investigation into the culpability of the person who killed her father, the agency did the opposite. The consequences to Raymond are crushing, not only in terms of her right to obtain justice and compensation for the loss of her father, but the enormous emotional toll on her. Instead of being able to pursue a fairly straight forward wrongful death claim in which liability is clear, she finds herself up against the power and weight of the state's police force, which would much prefer to protect the person who killed her father than allow her justice. The natural result for any person in this situation would likely be severe anxiety and depression caused by this upside-down approach by law enforcement. The loss of faith and confidence in law enforcement would be a source of grief and fear in itself. As will be discussed further *supra* in Section V, the damages are clear.

In conclusion, as envisioned by the *Restatement* drafters and the great Justice Holmes, the law should not allow serious and obviously harmful conduct from being actionable just because a recognized tort has yet to emerge to provide relief for such conduct. There should be no such "escape" from liability for the wrong-doer. Yet that is precisely what the Respondent is suggesting this Court do. The Appellant should be allowed to proceed with a prima facia tort for the wrongs blatantly committed by the Respondent.

V. The Respondent's Inherently Wrongful Conduct, and the Character of the Wrongful Conduct Itself Naturally Results in Damages that Can be Determined by the Jury.

Respondent also suggests to this Court that the Appellant's alleged damages cannot be "proven" and that such damages are "speculative." Here again, the Respondent is attempting to take advantage of the uncertainty caused by its own actions to avoid liability. Additionally,

Respondent is disregarding basic concepts of types of damages that have been plead and are allowed for the caused harms.

In this case, the Appellant is seeking both special, general and compensatory damages. "Special damages" arise from "the special circumstances of the case" which the law "presumes or implies from the mere invasion of the plaintiff's rights." 22 *Am Jur 2d Damages* § 43. General damages are those "that are the natural and necessary result of the wrongful act or omission asserted as the foundation of liability. In other words, general damages are those which are traceable to, and probably the necessary result of, the injury." 22 *Am Jur 2d Damages* § 42. Finally, "compensatory damages" compensate pecuniary losses, not only for losses that have occurred, but future losses. 22 *Am Jur 2d Damages* § 29. Such damages also include "wounded feelings and mental anguish" and under such non-economic losses. *Id.*

As it applies to spoliation claims and prima facia torts, due to the nature of such torts, wide latitude is given to the jury to ascertain such damages. The general policy for such an approach is explained by the United States Supreme Court which suggests that the inability to prove precise damages due to the "nature of the tort" should not prevent wrongdoer from "making amends" for his wrongful acts:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise…As the Supreme Court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer, instead of upon the injured party…Juries are allowed to act upon probable and inferential, as well as direct and

> positive, proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit…To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be thus certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence, and invite depredation. Such is not, and cannot be, the law, though cases may be found where courts have laid down artificial and arbitrary rules which have produced such a result. Whatever of uncertainty there may be in this mode of estimating damages is an uncertainty caused by the defendant's own wrongful act, and justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced.

Story Parchment Co. v. Paterson Parchment Paper Co., 51 S.Ct. 248, 250-51, 282 U.S. 555, 564-65 75 (1931) (citations omitted).

Jurisdictions that have adopted a spoliation of evidence cause of action have followed this approach. Such justification is well stated by the Montana Supreme Court in *Stimpson*:

> Generally, a plaintiff is required to prove damages with reasonable certainty. However, we have previously stated that when there is strong evidence of the fact of damage, a defendant should not escape liability because the amount of damage cannot be proven with precision…The speculative nature of damages is inherent in the uncertainties of proof relevant to the tort of spoliation of evidence. Thus, the interest of the plaintiff to recover the entire amount of damages that he would have received if the underlying action had been pursued successfully must be balanced with the defendant's interest in not providing the plaintiff with a windfall. The plaintiff should not be allowed to benefit more from the spoliation than he would have in the underlying suit. On the other hand, the defendant should be adequately punished for his offending conduct and should be required to adequately compensate the plaintiff for the loss of his ability to pursue the underlying suit.

Stimpson at 351.

In essence, this Court should not excuse the Respondent's alleged wrongful conduct, which in itself, resulted in an uncertainty of damages. That would be a perverse application of the law. Additionally, Appellant has plead a number of non-economic damages including

emotional distress, anguish and so forth resulting from the Respondent's conduct which has always been recognized by Idaho as allowable damages.

In regard to the loss of value to a prospective claim resulting by spoliation of evidence, the Montana Court has suggested a formula that balances the uncertainties:

> In taking these interests into consideration, it is necessary for the damages to be discounted to account for the uncertainties. Therefore, we hold that damages arrived at through reasonable estimation based on relevant data should be multiplied by the significant possibility that the plaintiff would have won the underlying suit had the spoliated evidence been available. For example, if a jury determined that the expected recovery in the underlying suit was $200,000 and that there was an estimated 60 percent possibility that the plaintiff would have recovered that amount in the underlying suit had it not been impaired by the spoliated evidence, then the award of damages would be $120,000 (60 percent of $200,000).

Stimpson at 351-52.

There is no reason that a similar approach could not be taken in the Appellant's case, despite the fact that the underlying case has been resolved. If Appellant can prove that the Respondent did in fact interfere with, destroy or otherwise tamper with the evidence in her cause (or any other such prima facia tort), there is nothing that prevents a jury from determining the value of her claim had the wrongful conduct not occurred. Indeed, a jury is routinely requested to determine pecuniary amounts based upon less than complete facts. An appropriate jury instruction can be formulated that balances all of the interests and uncertainties.

Additionally, the questions regarding damages for the Appellant's loss of claim are not as complex and uncertain as the Respondent is leading the Court to believe. Raymond simply needs to show what the evidence would have been had the ISP not engaged in its wrongful and tortious conduct. With an untainted investigatory report showing reckless behavior that caused the death of Mr. Johnson, liability would have been clear. The jury would simply need to

determine what the damages would have been if liability were clearly established. This is a question well within the province of a jury. Moreover, damages could be appropriately awarded for the delays – including statutory interest. Given the passage of time in this case, this will not be an unsubstantial amount.

Finally, as overlooked by the Respondent, the Respondent has alleged non-economic and special damages. As is true in any case, the jury will consider all of the factors and evidence to determine an appropriate amount of damages for these types of injuries. The appeal should therefore be granted.

VI. No Basis Exists for the Awarding of Respondent's Attorney Fees.

Respondent has also requested that this Court award its Attorney Fees on appeal. This request in itself is brought "frivolously, unreasonably, and without foundation" pursuant to IAR § 41. At the very least, the authorities are split on the issues presented on appeal and Idaho has laid the framework and recognized authority for the Appellant's claims. The Appellant has also provided ample reason why her damages are not based on "speculation" but are inherent within the claims.

Without citing to any authority or any part of the record, Respondent argues that Appellant's claims against the ISP have been somehow "litigated" and "settled." This is a specious and wholly un-supported claim. Finally, the Court should note that the Respondent did not seek nor receive an award of attorney fees by the district court for the dismissal of the case, and it is curious as to why it now believes it should be entitled to attorney fees on appeal. Simply put, no basis exists whatsoever for the awarding of Respondent's attorney fees.

CONCLUSION

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

DATED this 24th day of May, 2019.

PETERSEN MOSS HALL & OLSEN

/s/ Nathan M. Olsen
Nathan M. Olsen

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 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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/s/ Nathan M. Olsen
Nathan M. Olsen