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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

NICHOLE JAMES and HEMENE
JAMES, wife and husband,

Plaintiffs,

vs.

KOOTENAI COUNTY, a political
subdivision of the State of Idaho,
KOOTENAI COUNTY CORONER'S
OFFICE, a department of Kootenai County,
and WARREN KEENE, in his individual
and official capacity as KOOTENAI
COUNTY CORONER,

Defendants.

Case No. 2:19-CV-00460-BLW

**MEMORANDUM IN SUPPORT
OF PLAINTIFFS' MOTION FOR
LEAVE TO AMEND COMPLAINT TO
INCLUDE PUNITIVE DAMAGES
[DKT. 32-1]**

Plaintiffs Nichole James and Hemene James, by and through their attorneys Smith + Malek, PLLC, hereby submit this *Memorandum in Support of Plaintiffs' Motion for Leave to Amend Complaint to Include Punitive Damages*.

I. INTRODUCTION

Plaintiffs seek to amend their Complaint to assert a claim of punitive damages due to Defendants' gross deviation from reasonable standards of conduct. Defendants refused to return decedent Olivia Pakootas' body, in violation of Idaho law, and in blatant disregard for Plaintiffs' religious beliefs and traditions. Inclusion of a claim for punitive damages is appropriate because Defendants grossly and recklessly refused to release Olivia's body, despite requests from Olivia's family and the Coeur d'Alene Tribe, causing Plaintiffs emotional distress. Defendants acted intentionally to dismiss Plaintiffs' objections rooted in sincerely held religious beliefs. Defendants' behavior constitutes a bad act, coupled with a bad state of mind, thereby justifying inclusion of a claim for punitive damages in this matter. Plaintiffs respectfully request that the Court grant leave to amend the Complaint to add a prayer for relief for punitive damages for the reasons set forth below.

II. FACTUAL BACKGROUND

On June 1, 2018, Plaintiffs' 21-year-old daughter, Olivia, was tragically killed in a single-car accident on Highway 58 within the boundaries of the Coeur d'Alene Reservation. *Decl. of Francis SiJohn in Support of Pls.' Mot. for Leave to Amend Compl. to Include Punitive Damages* ("SiJohn Decl.") ¶ 2. Following the accident, Defendant Kootenai County Coroner's Office ("Coroner's Office") took possession of Olivia's body. *SiJohn Decl.* ¶ 3. Numerous

attempts were made to contact the Coroner's Office and Defendant Warren Keene ("Defendant Keene") by Plaintiffs and Plaintiffs' family members to determine the location of Olivia's body - such attempts were unsuccessful. *Decl. of Tara Malek in Support of Pls.' Mot. for Leave to Amend Compl. to Include Punitive Damages* ("Malek Decl."), at ¶ 5, Ex. D (Deposition of Defendant Keene) ("Keene Dep."), at 23:14–24:7; *Malek Decl.* ¶ 11, Ex. J (Deposition of Nichole James) ("Nichole Dep."), at 89:22–23; *Malek Decl.* ¶ 6, Ex. E. (Deposition of Hemene James) ("Hemene Dep."), at 52:5–10. Agents and representatives of the Coeur d'Alene Tribe also attempted contacting the Coroner's Office to communicate Plaintiffs' religious beliefs and objections to an autopsy of Olivia's body. *SiJohn Decl.* ¶ 5. Nearly 48 hours after Olivia's death, Defendant Keene made contact with Plaintiffs' family by calling Plaintiff Nichole James' brother, Francis SiJohn. *Nichole Dep.* 92:23–24; *SiJohn Decl.* ¶ 6. During this telephone conversation, SiJohn specifically informed Defendant Keene that, because of their religious beliefs, Plaintiffs and their family objected to an autopsy and requested that Olivia's body be returned for religious preparation and burial. *SiJohn Decl.* ¶¶ 7–8, 11; *Keene Dep.* 23:24–24:2; 136:1–8. Defendant Keene rebuffed SiJohn's pleas by stating that he "is a man of science" and that his science "trumps" their religious beliefs. *SiJohn Decl.* ¶ 9; *Hemene Dep.* 57:17. Defendant Keene refused to return Olivia's body and maintained that the Coroner's Office would carry out the autopsy. *SiJohn Decl.* ¶¶ 10, 12; *Nichole Dep.* 92:25–93:2; *Keene Dep.* 132:4–9. SiJohn then informed Defendant Keene that he intended to place a formal request with the Kootenai County Coroner's Office to reveal the location of Olivia's body and to return Olivia's body. *SiJohn Decl.* ¶ 11. Again, Defendant Keene refused. *SiJohn Decl.* ¶ 11.

In accordance with Plaintiffs’ religious practices and traditions, when a family member dies in a sudden and tragic manner, the decedent’s soul is still wandering at the location of the death. *Nichole Dep.* 134:24-135:9, 141:23- 143:7. Family members must keep watch over the body from the time of death to burial in order to assist the soul’s passage into the afterlife. *Nichole Dep.* 134:24-135:9, 141:23- 143:7; *Hemene Dep.* 103:6–9. The basis of Plaintiffs’ objection to the autopsy was to prevent desecration of the body and, more profoundly, to observe their religious practices of: gathering at the site of death for a ceremony; preparing the body for burial with embalming, washing, and dressing; observing a family wake and a community wake; and burying the body. *Compl.* ¶¶ 34–35; *Nichole Dep.* 109:11; *Hemene Dep.* 103:17. These practices must be followed within three days of death, following a particular pattern and timeline. *Nichole Dep.* 142:16–24; *Hemene Dep.* 76–83.

In Plaintiffs’ time of mourning, they were required to retain counsel to enjoin Defendants from performing an autopsy on Olivia’s body. *See generally Malek Decl.* ¶ 2, Ex. A (Motion for Temporary Restraining Order). In the course of litigation, Defendant Keene filed an affidavit, dismissing the religious beliefs and opposition presented by Olivia’s family. *Malek Decl.* ¶ 4, Ex. C (“Keene Aff.”). Defendants were ultimately restrained from performing an autopsy on Olivia’s body and Plaintiffs were permitted to recover their daughter’s body pursuant to a Court Order. *Malek Decl.* ¶ 3, Ex. B. By the time Defendants ultimately released Olivia’s body to her family pursuant to the Court Order, severe bruising and disfigurement had occurred. *Nichole Dep.* 106:3–6. Due to Defendants’ conduct, Plaintiffs were unable to practice their religious beliefs and traditions of preparing Olivia’s body for burial. *Compl.* ¶ 35; *Nichole Dep.* 109:14–111:18,

134:24-135:9, 141:23- 143:7; *Hemene Dep.* 76–83. Plaintiffs were deprived of staying with Olivia’s body from the site of her death until the time she was buried. *Compl.* ¶ 35; *Nichole Dep.* 109:14–111:18; *Hemene Dep.* 76–83. This left Plaintiff Nichole James fearing that her daughter’s soul was left lost and wandering. *Nichole Dep.* 134:24-135:9, 141:23- 143:7. Defendants’ disregard for Plaintiffs’ beliefs forced Plaintiffs to condense their religious traditions and caused them to suffer emotional distress. *Nichole Dep.* 113:18–114:5, 114:15–115:13, 124:19–125:11, 126:1–129:13, 131:10–132:21, 133:8–134:19; *Hemene Dep.* 90–99.

Upon learning that a Court Order had been entered demanding release of Olivia’s body, Defendant Keene extracted a cardiac blood draw from Olivia’s body—approximately 72 hours after her death. *Keene Dep.* 48:20–49:8, 117:4–9, 137:2–5. Defendant Keene declined to follow proper protocol necessary to obtain an accurate lab result under the circumstances. *Malek Decl.* ¶ 8, Ex. G (Expert Report of James Wigmore) (“Wigmore Rep.”), at 20. Notably, Defendant Keene did not sterilize the puncture site prior to insertion of the needle. *Keene Dep.* 113:10–14. A cardiac blood sample was collected from Olivia’s chest via the “blind stick plunge” method, though the sample should have been collected from Olivia’s vitreous humor. *Keene Dep.* 58:2, 58:22; *Wigmore Rep.* 19. Olivia’s blood sample was then mailed, unrefrigerated, to a National Medical Services (“NMS”) laboratory for testing. *Keene Dep.* 114:22–115:4, 119:23–120:2; *Wigmore Rep.* 3, 20.

Plaintiffs brought a Complaint for Damages on November 22, 2019, asserting claims of religious discrimination, intentional infliction of emotional distress, negligent infliction of

emotional distress, and injunctive relief. Now, Plaintiffs seek leave of the Court to amend the Complaint to include a claim for punitive damages pursuant to Idaho law.

III. STANDARD OF REVIEW

Rule 15(a) of the Federal Rules of Civil Procedure allows a party to amend its pleadings once as a matter of course or, if more than twenty-one days have passed since filing the pleading, by written consent of the adverse party or by leave of the court. F.R.C.P. 15(a). A “court should freely give leave [to amend] when justice so requires.” F.R.C.P. 15(a)(2). The federal standard for amending pleadings must be balanced against provisions of Idaho law concerning punitive damages. *Strong v. Unumprovident Corp.*, 393 F. Supp. 2d 1012, 1025 (D. Idaho 2005).

Under Idaho law, a court may grant leave to add a claim for punitive damages “if, after weighing the evidence presented, the court concludes that the moving party has established . . . a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.” I.C. § 6-1604(1). The trial standard for providing a claim for punitive damages is proof by clear and convincing evidence of oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted. *Id.* In determining whether a complaint may be amended to add punitive damages, a court need not conclude that the movant has established clear and convincing evidence, but rather the court must focus on whether there is a reasonable likelihood of such at trial. *Id.* The decision of whether or not to submit the question of punitive damages to a jury rests within the trial court’s sound discretion. *Hoglan v. First Security Bank of Idaho N.A.*, 120 Idaho 682, 687, 819 P.2d 100, 105 (1991).

The issue of punitive damages “revolves around whether the plaintiff is able to establish the requisite ‘intersection of two factors: a bad act and a bad state of mind.’” *Myers v. Workmen’s Auto Ins. Co.*, 140 Idaho 495, 503, 95 P.3d 977, 985 (2004). An award of punitive damages is appropriate where it is shown that the defendant acted in a manner which constituted “an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of, or disregard for, its likely consequences.” *Seiniger Law Office, P.A. v. North Pacific Ins. Co.*, 145 Idaho 241, 250, 178 P.3d 606, 615 (2008); *Cheney v. Palos Verdes Investment Corp.*, 104 Idaho 897, 905, 665 P.2d 661, 669 (1983).

In this matter, punitive damages are sought in connection with 1) Plaintiffs’ claims for religious discrimination in violation of the First Amendment and the Fourteenth Amendment pursuant to 42 U.S.C. § 1983; and 2) Plaintiffs’ state law claims for negligent and intentional infliction of emotional distress. In conjunction with federal claims under 42 U.S.C. § 1983, punitive damages may be awarded where a defendant’s conduct “was driven by evil motive or intent, or when it involved reckless or callous indifference to the constitutional rights of others.” *Dang v. Cross*, 422 F.3d 800, 807 (9th Cir. 2005). Punitive damages may also be awarded in connection with a state claim for emotional distress, with the primary purpose of deterring similar conduct in the future. *See Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 221, 923 P.2d 456, 466 (1996). This serves to “further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.” *See Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 149 Idaho 299, 333, 233 P.3d 1221, 1255 (2010) (quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996)); *see also* I.C. § 6-1601(9) (punitive damages award “over and above what

will compensate the claimant for actual personal injury and property damage, to serve the public policies of punishing a defendant for outrageous conduct and of deterring future like conduct”).

IV. ARGUMENT

The Court should grant leave for Plaintiffs to amend their Complaint to add punitive damages because Defendants’ conduct demonstrates both a bad act and a bad state of mind, thereby satisfying both prongs of the *Myers* test. *See Myers*, 140 Idaho at 503, 95 P.3d at 985. Regarding a bad act, Defendants grossly deviated from reasonable standards of care in refusing to release Olivia’s body and extracting a cardiac blood draw, despite objections raised by Plaintiffs, their family, and the Coeur d’Alene Tribe. Regarding a bad state of mind, Defendants had knowledge of Plaintiffs’ objections, yet intentionally disregarded protocol and deprived Plaintiffs of the ability to observe important religious traditions. Accordingly, it is appropriate to permit Plaintiffs to amend their Complaint to add a claim for punitive damages.

A. Defendants grossly deviated from reasonable standards of care by refusing to provide Plaintiffs with Olivia’s body and preventing Plaintiffs from exercising religious beliefs.

Defendants committed a bad act, thereby satisfying the first prong of the *Myers* test. In this context, a “bad act” means that the defendant acted in a manner which constituted “an extreme deviation from reasonable standards of conduct[.]” *Seiniger Law Office*, 145 Idaho at 250, 178 P.3d at 615; *Cheney*, 104 Idaho at 905, 665 P.2d at 669. Defendants engaged in a “bad act” by refusing to release Olivia’s body for burial, in violation of Idaho law, after receiving numerous requests for the return of her body and objections to autopsy. *Keene Dep.* 23:14–24:7; *Nichole Dep.* 89:22–23; *SiJohn Decl.* ¶¶ 5–12; *Keene Aff.* 3–4.

Idaho law expressly required Defendants to, within 24 hours of the discovery of Olivia's body, release Olivia's body to Plaintiffs upon receiving notice of Plaintiffs' request to release the same. *See* I.C. § 19-4301C. Defendants failed to do so, despite receiving notice of Plaintiffs' objections and despite having knowledge of Plaintiffs' religious objections to the autopsy. *SiJohn Decl.* ¶¶ 5–8, 10–12; *Keene Dep.* 23:24–24:2, 136:1–8, 143:14–144:5. Plaintiffs should have been provided Olivia's body within 24 hours after notifying Defendants, but instead were forced to retain attorneys and initiate litigation to release Olivia's body and preclude Defendants from performing an autopsy. *Malek Decl.* ¶ 2, Ex. A.

Moreover, Defendants deviated from established protocols and procedures for dealing with a decedent's body under similar circumstances. Before releasing Olivia's body to Plaintiffs, Defendant Keene extracted a blood sample from Olivia's body to retrieve a toxicology specimen. *Keene Dep.* 137:5. The circumstances surrounding this blood draw deviated from reasonable standards of conduct in several respects. For example, the blood draw was performed approximately three days after Olivia's death, which significantly decreased the likelihood of a reliable alcohol analysis. *Keene Dep.* 31:25; *Wigmore Rep.* 19. And although Defendant Keene maintains that it is an unwritten "office policy" to obtain a blood sample from a decedent killed in a motor vehicle accident, other coroners at the Coroner's Office indicated that blood draws are atypical under such circumstances. *Keene Dep.* 57:7; *Malek Decl.* ¶ 10, Ex. I (Deposition of Kootenai County Chief Deputy Coroner Lynnette Acebedo), at 68:4–8; *Malek Decl.* ¶ 9, Ex. H (Deposition of Kootenai County Deputy Coroner JoAnn Porter), at 51:16–22. Despite its

abnormality, the blood draw was performed just after learning of the Court's order demanding release of the body to Plaintiffs. *Keene Dep.* 137:5.

Furthermore, the blood extraction was performed recklessly and without regard for preservation of the specimen. Defendant Keene did not sterilize the puncture site prior to insertion of the needle. *Keene Dep.* 113:10–14. According to NMS protocols, individuals should extract a blood sample from a secondary location to confirm the results of the primary sample. *Wigmore Rep.* 16. Contrary to these protocols, Defendant Keene took only one blood sample from Olivia's chest, and through a method among the least reliable for postmortem alcohol analyses: the "blind stick plunge" method. *Keene Dep.* 58:2, 58:22; *Wigmore Rep.* 1, 13–14, 17, 19. Moreover, Defendant Keene extracted the sample from Olivia's chest—despite there being significant damage to the chest from the accident—"because it was the first place [he tried]," rather than from a more reliable location such as the vitreous humor. *Keene Dep.* 49:8; *Wigmore Rep.* 3–4, 19; *Porter Dep.* 55:15–17. Finally, NMS recommends that postmortem blood samples for alcohol be refrigerated in transport. *Wigmore Rep.* 3, 20. Olivia's blood sample was mailed, unrefrigerated, to a NMS laboratory for testing, further contaminating the specimen. *Keene Dep.* 114:22–115:4, 119:23–120:2; *Wigmore Rep.* 3, 20. Given the carelessness of the blood extraction, no reliable conclusions can be made from the consequent test results with respect to Olivia's blood-alcohol concentration at the time of the accident. *Wigmore Rep.* 19–20.

Based on these facts, it is reasonably likely that a trier of fact will determine that Defendants' conduct grossly deviated from reasonable standards of care. *See* I.C. § 6-1604(1). Defendants not only violated Idaho Code § 19-4301C, but exercised extremely poor practices

when performing a blood extraction. Defendants are liable for punitive damages because this conduct rises to the standard of extreme, outrageous, and a reckless indifference to the constitutional rights of Plaintiffs. *See Payne v. Wallace*, 136 Idaho 303, 307, 32 P.3d 695, 699 (2001) (citing I.C. § 6-1604)); *Dang v. Cross*, 422 F.3d 800, 807 (9th Cir. 2005). Accordingly, Defendants' conduct demonstrates a bad act under the first prong of the *Myers* test.

B. Defendants had knowledge of Plaintiffs' requests for Olivia's body and their religious objections to an autopsy, yet acted in complete disregard for Plaintiffs' religious beliefs.

Defendants had a bad state of mind, thereby satisfying the second prong of the *Myers* test. In this context, a "bad state of mind" means that the defendant carried out the bad act "with an understanding of, or disregard for, its likely consequences." *Seiniger Law Office*, 145 Idaho at 250, 178 P.3d at 615; *Cheney*, 104 Idaho at 905, 665 P.2d at 669. As stated previously, Defendants engaged in a "bad act" by refusing to release Olivia's body despite Plaintiffs' requests otherwise and performing a cardiac blood draw, both of which constituted extreme deviations from reasonable standards of conduct. These actions were undertaken with an understanding of, or disregard for, their likely consequences because Defendants had knowledge of Plaintiffs' religious objections when committing these bad acts. *SiJohn Decl.* ¶¶ 5–8; *Keene Dep.* 23:24–24:2, 136:1–8. After many failed attempts to contact Defendants, Plaintiffs finally made contact with Defendant Keene through a telephone conversation between Defendant Keene and Plaintiff Nichole James' brother, Francis SiJohn. *Keene Dep.* 23:15; *SiJohn Decl.* ¶ 6. SiJohn specifically informed Defendant Keene that, because of their religious beliefs, Plaintiffs and their family objected to an autopsy and requested that Olivia's body be returned for religious

preparation and burial. *SiJohn Decl.* ¶¶ 7–8, 11; *Keene Dep.* 23:24–24:2, 136:1–8. Defendant Keene refused, maintaining that the autopsy would be carried out. *SiJohn Decl.* ¶¶ 10, 12; *Keene Dep.* 132:4–9. In response to the family’s religious objections, Defendant Keene told SiJohn that he “is a man of science” and that his science “trumps” their religious beliefs. *SiJohn Decl.* ¶ 9; *Hemene Dep.* 57:17. The following day, Defendants learned that a Court Order had been entered demanding release of Olivia’s body. *Malek Decl.* ¶ 3, Ex. B; *Keene Dep.* 136:9–14, 137:2–5; *Malek Decl.* ¶ 7, Ex. F (Deposition of Kootenai County) (“County Dep.”) 55:3–8. Despite this, Defendant Keene nonetheless performed the blood extraction for testing before sealing Olivia’s body for release to Plaintiffs. *Keene Dep.* 137:2–5. Defendant Keene’s callous disregard for the Plaintiffs’ religious practices was again demonstrated when he filed an affidavit that largely dismissed Plaintiffs’ religious beliefs and opposition presented by Olivia’s family. *Keene Aff.* 3–4.

Based on these facts, it is reasonably likely that a trier of fact will determine that Defendants acted with a bad state of mind. Defendants had an understanding of Plaintiffs’ religious beliefs due to their objections to the autopsy. *SiJohn Decl.* ¶¶ 5, 7–8; *Keene Dep.* 23:24–24:2, 136:1–8. A reasonable trier of fact could conclude that Defendants recklessly disregarded these beliefs by refusing to release Olivia’s body. In particular, Defendant Keene’s refusal to release Olivia’s body after speaking with SiJohn demonstrates a deliberate and callous indifference to Plaintiffs’ constitutional rights to practice their religious beliefs. *SiJohn Decl.* ¶ 10; *Keene Dep.* 23:24–24:2; 132:4–9, 136:1–8. Similarly, a factfinder could determine that Keene’s Affidavit dismissing the religious beliefs and opposition presented by Plaintiffs

demonstrated a deliberate and callous indifference to Plaintiffs' constitutional rights to practice their religious beliefs. *Keene Aff.* 3–4. A factfinder could also reasonably determine that the blood extraction was performed in disregard for the likely consequences of further postponing Plaintiffs' religious burial procedures. Likewise, it is reasonably likely that Defendant Keene refused to release Olivia's body without regard for Plaintiffs' emotional distress that followed. *Nichole Dep.* 113:18–114:5, 114:15–115:13, 124:19–125:11, 126:1–129:13, 131:10–132:21, 133:8–134:19; *Hemene Dep.* 90–99. Accordingly, Defendants' conduct demonstrates a bad state of mind with respect to its bad acts, thereby satisfying both prongs of the *Myers* test. Plaintiffs should therefore be permitted to amend their Complaint to add a claim for punitive damages.

C. Punitive damages are appropriate in this case to deter similar bad conduct.

Punitive damages in this case are merited in order to send a strong message of deterrence to similarly-situated counties and coroner's offices. *See Weinstein*, 149 Idaho at 333, 233 P.3d at 1255; *Walston*, 129 Idaho at 221, 923 P.2d at 466. Idaho law clearly sets forth the required procedures for handling a request for release of a decedent's body. *See* I.C. § 19-4301C. Defendants violated this statute by refusing to release Olivia's body, in the face of express objections from Olivia's family and despite knowledge of Plaintiffs' religious reasons for demanding the return of Olivia's body. *SiJohn Decl.* ¶¶ 5–12; *Keene Dep.* 23:14–24:7; *Keene Aff.* 3–4; *County Dep.* 54:17–18. Coroners should not be permitted to deliberately violate Idaho law and dismiss the religious objections of next of kin. Such utter disregard of duties should not be permitted to continue unpunished. This case is optimal to send the deterrent message to Defendants and other coroner's offices that insisting on an autopsy and refusing to return a

decendent's body, despite objections rooted in religious beliefs and traditions, is wholly unacceptable. Punitive damages are warranted in this case to deter similar bad conduct in the future.

V. CONCLUSION

For the foregoing reasons, there is more than sufficient evidence upon which the trier of fact can conclude that Defendants committed a bad act that grossly deviated from reasonable standards, with a bad state of mind. Accordingly, Plaintiffs respectfully request that this Court grant their Motion for Leave to Amend Complaint to Include Punitive Damages and allow Plaintiffs to file the *Amended Complaint*.

DATED this 10th day of January, 2022.

SMITH + MALEK, PLLC

/s/ Tara Malek
Tara Malek, ISB No. 8709
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of January, 2022, I filed the foregoing electronically through CM/ECF system, which caused the following parties or counsel to be served by electronic means:

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