Filed: 11/04/2021 13:26:19
Fourth Judicial District, Ada County
Phil McGrane, Clerk of the Court
By: Deputy Clerk - McDaniel, Corann

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LAWRENCE P. MANLAPIT, JR., individually as father of LAWRENCE P. MANLAPIT, III, DECEASED, Plaintiff, vs. KRUJEX FREIGHT TRANSPORT CORP.; KRUJEX TRANSPORTATION CORP.; KRUJEX TRANSPORTATION SYSTEMS, LLC; KRUJEX LOGISTICS, INC.; ALBERTSON'S COMPANIES; CORNELIU VISAN; DANIEL VISAN; LIGRA VISAN; STATE OF IDAHO; STATE OF IDAHO DEPARTMENT OF TRANSPORTATION: IDAHO STATE POLICE; PENHALL COMPANY; PARAMETRIX, INC.; SPECIALTY CONSTRUCTION SUPPLY LLC; AND DOES 1 through 150, inclusive; Defendants.	Lead Case No. CV01-2019-06625 (Consolidated with Case Nos. CV01-19-23246, CV01-20-00653, CV01-20-02624, CV01-20-07803, and CV01-20-08172) RULING ON MOTIONS FOR LEAVE TO AMEND COMPLAINTS TO ADD A CLAIM FOR PUNITIVE DAMAGES

On July 6, 2021, two motions were filed, each arguing that certain Plaintiffs should be allowed to amend their complaints to allege punitive damages against certain Defendants.

LEGAL STANDARD

Idaho statute prohibits a plaintiff from including a prayer for punitive damages in his or her complaint absent permission from the trial court. IDAHO CODE ANN. § 6-1604(2). Punitive damages may be requested only pursuant to a pretrial motion. *Id.* A trial "court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." *Id.* A trial court's decision to grant a motion to add punitive

damages is weighed according to the abuse-of-discretion standard, examining "(1) whether the [court] correctly perceived the issue as one of discretion; (2) whether the [court] acted within the outer boundaries of [its] discretion and consistently with the legal standards applicable to the specific choices available . . . and (3) whether the [court] reached [its] decision through an exercise of reason." *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 423, 95 P.3d 34, 41 (2004).

At trial, "the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted." IDAHO CODE ANN. § 6-1604(1). The award of punitive damages depends on a plaintiff's ability to prove both "a bad act and a bad state of mind." *Linscott v. Rainier Nat. Life Ins. Co.*, 100 Idaho 854, 858, 606 P.2d 958, 962 (1980). Mere deliberate or willful conduct or mere gross negligence is not sufficient grounds for an award of punitive damages. *Cummings v. Stephens*, 157 Idaho 348, 364 n.5, 336 P.3d 281, 296 n.5 (2014). The Idaho Supreme Court has construed the punitive damages standard narrowly, awarding damages where "there has been an injury to the plaintiff from an act which is an extreme deviation from reasonable standards of conduct, and the act was performed by the defendant with an understanding of or a disregard for its likely consequences." *Linscott*, 100 Idaho at 858, 606 P.2d at 962.

The award of punitive damages is limited by the purposes of such damages, which is "to deter similar conduct from happening again in the future." *Umphrey v. Sprinkel*, 106 Idaho 700, 710, 682 P.2d 1247, 1258 (1983). As a result, "punitive damages are not favored in the law and should be awarded only in the most unusual and compelling circumstances, and are to be awarded cautiously and within narrow limits." *Manning v. Twin Falls Clinic & Hosp., Inc.*, 122 Idaho 47, 52, 830 P.2d 1185, 1190 (1992).

A trial court may grant leave to add a claim for punitive damages if there is a "reasonable likelihood" of the moving party proving "oppressive, fraudulent, malicious or outrageous conduct" of the opposing party by "clear and convincing evidence" at trial. IDAHO CODE ANN. § 6-1604(1)-(2).

In *Myers v. Workman's Auto Ins. Co.*, the Idaho Supreme Court upheld the lower court's decision to allow a claim for punitive damages where an insurance company repeatedly breached its contractual obligation to pay bodily injury and property damages. 140 Idaho 495, 502, 95 P.3d 977, 984 (2004). Moreover, the Supreme Court found Workman's Auto's refusal to defend its insured customer was "an extreme deviation from reasonable standards of conduct" that caused its customer to have a default judgment entered against her and a loss of her driving privileges. *Id.* Workman's Auto exhibited no regard for its customer's plight by unreasonably delaying settlement and therefore Myers had a reasonable likelihood of proving Workman's Auto's "bad act and bad state of mind" by clear and convincing evidence at trial. *Id.*; *Linscott*, 100 Idaho at 854; 606 P.2d at 962; IDAHO CODE ANN. § 6-1604(1).

In *Vendelin*, the Idaho Supreme Court affirmed a trial court's decision to grant leave to amend for punitive damages against Costco, finding Ms. Vendelin had established a reasonable likelihood of success at trial because Ms. "Vendelin's expert believes that Costco's lack of adequate training programs constituted an extreme deviation from the industry standard of care." 140 Idaho 416, 425, 95 P.3d 34, 43 (2004). "That evidence is sufficient to demonstrate a reasonable likelihood of proving at least a disregard for likely consequences." *Id.*

By contrast, the Idaho Supreme Court found no reasonable likelihood of proving punitive damages at trial in *Seiniger Law Office, P.A. v. North Pacific Ins. Co*, 145 Idaho 241, 250, 178 P.3d 606, 615 (2008). In that case, the Supreme Court agreed with the trial court's decision to reject Seiniger Law Office's fraud claim "based on North Pacific's representation that it was actively pursuing its own subrogation interest, noting that there was simply no action on the part of North Pacific that led to Appellants' decision to settle with Farm Bureau." *Id.* Furthermore, the Supreme Court was unable to find the requisite bad state of mind because North Pacific was unaware of the mediation and had no knowledge of Farm Bureau's insistence on settlement. *Id.*

In *Gen. Auto Parts Co., Inc. v. Genuine Parts Co.*, the Idaho Supreme Court also found no bad state of mind, where the district court held "GPC's breach was simply done in 'pursuit of an economic opportunity' and did not amount to malicious or oppressive conduct." 132 Idaho 849, 853, 979 P.2d 1207, 1211 (1999). Because General Auto Parts did not have a reasonable likelihood of demonstrating GPC "acted with an extremely harmful state of mind," the company was not allowed to amend its complaint to assert a claim for punitive damages. 132 Idaho at 853, 979 P.2d at 1211; *Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 220, 923 P.2d 456, 465 (1996) (quoting *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 905, 665 P.2d 661, 669 (1983) (superseded by statute on other grounds)).

Applying Section 6-1604 and its question of whether conduct is oppressive, fraudulent, malicious, or outrageous calls for a legal conclusion. An expert witness, no matter how scientifically or technically qualified, is not qualified to give legal conclusions. The question of whether conduct is oppressive, fraudulent, malicious, or outrageous is not a question of expertise or technical knowledge, but a legal question for a court. The credentials or the nature of the investigation by an expert into this legal question are irrelevant. An expert giving a legal conclusion that a trial court must reach does nothing to help the finder of fact understand the evidence or determine a fact in issue. This is not to say that an expert's opinions regarding the present case are irrelevant or inadmissible at trial. This is merely to say that his or her legal conclusions as to legal questions are irrelevant to the determinations this Court must make: namely whether Plaintiffs have enough evidence to satisfy Section 6-1604. As to whether an expert believes the conduct here is oppressive, fraudulent, malicious, or outrageous, he or she is not qualified. And his or her conclusion is irrelevant.

MOTION AGAINST ALBERTSONS AND KRUJEX

On July 6, 2021, Plaintiff Lawrence Manlapit, Jr., Plaintiff Dorine Norko, and Plaintiff Estate of Lawrence Manlapit, III (collectively, "Manlapit Plaintiffs") and Plaintiff Daisy Johnson filed Manlapit/Johnson Plaintiffs' Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages against Defendants Albertson's Companies and Krujex Freight Transport Corporation, together with their Memorandum in Support of Manlapit/Johnson Plaintiffs' Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages against Defendants Albertson's Companies and Krujex Freight Transport Corporation ("Amend Memorandum"), the Declaration of Thomas M. Corsi, Ph.D., the Declaration of V. Paul Herbert, and a declaration of counsel ("Robbins Declaration"). Plaintiff Michael Westall, Plaintiff Kimberly Westall, and Plaintiff Estate of Karlie Westall (collectively, "Westall Plaintiffs") joined the motion against Krujex.

On August 16, Defendant Krujex filed its Memorandum in Opposition to Manlapit/Johnson Plaintiffs' Joint Motion for Leave to Amend Complaint to Add a Claim for Punitive Damages against Krujex Freight Transport Corporation, together with a declaration of counsel. On the same day, Albertsons Companies ("Albertsons") filed Defendant Albertsons Companies' Opposition to Manlapit/Johnson Plaintiffs' Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages against Defendants Albertson's Companies and Krujex Freight Transport Corporation, together with a declaration of counsel, the Declaration of Spencer Melville ("Melville Declaration"), and the Declaration of Lew Grill in Support of Defendant Albertsons Companies' Opposition to Manlapit/Johnson Plaintiffs' Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages against Defendants Albertson's Companies and Krujex Freight Transport Corporation.

On August 19, Manlapit Plaintiffs and Ms. Johnson filed their Reply in Support of Manlapit/Johnson Plaintiffs' Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages Against Defendant Albertson's Companies, together with a declaration of counsel

and the Supplemental Declaration of Thomas M. Corsi, Ph.D., in Support of Plaintiffs' Reply. On the same day, Plaintiffs filed their Reply in Support of Manlapit/Johnson/Westall Plaintiffs' Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages against Defendant Krujex Freight Transport Corporation.

Plaintiffs seek leave to amend their complaint to assert claims for punitive damages against Albertsons and Krujex, arguing their "outrageous conduct . . . offers a prime example of the catastrophic death and devastation that can result when a motor carrier and a shipper . . . blatantly disregard well-established safety principles and practices designed to ensure the life and/or safety of the general motoring public." Am. Mem. at 3. Plaintiffs argue Albertsons and Krujex "acted in a manner constituting an extreme deviation from reasonable standards of conduct." *Id.*

I. Albertsons

Plaintiffs contend Albertsons's failure to vet its partner carriers was an extreme deviation from reasonable standards of conduct. Plaintiffs point to Albertsons's lack of inquiry into Krujex's safety management controls as an egregious violation of industry standards. Robbins Decl., Ex. 15, 71:14-73:9. The evidence may show at trial that Albertsons did not enforce provisions of the Transportation Agreement which required Krujex to produce documentation of its safety controls. Robbins Decl., Ex. 15, 71:14-73:9. Plaintiffs also assert Albertsons had special knowledge which makes Albertsons's conduct more egregious. While here Albertsons was the shipper, moving its apples through Krujex acting as the carrier, Plaintiffs point out that at other times Albertsons internally carries its goods on its own vehicles. From this, Plaintiffs argue Albertsons should have known better and should be attributed with the knowledge of being a carrier also.

In *Myers v. Workman's Auto Ins.*, the insurance company repeatedly acted in bad faith by delaying payment without regard for the consequences to Ms. Myers such as a default judgment and loss of driving privileges. 140 Idaho at 502, 95 P.3d at 984. Here, Albertsons relied on the U.S. Department of Transportation ("USDOT") in making its assessment of safety management controls.

Robbins Decl., Ex. 15, 71:14-73:9. While such reliance may (or may not) be misplaced without a USDOT safety rating, Albertsons did not demonstrate the requisite bad faith. *See* 140 Idaho at 502, 95 P.3d at 984. Instead, the evidence at trial may show Albertsons believed it would know if a carrier was unsafe based on USDOT reports. Robbins Decl., Ex. 15, 74:19-25. This may (or may not) have been an acceptable alternative to its own staff evaluations, as Mr. Geurts testified he was unfamiliar with the safety fitness standards required in 49 C.F.R. Part 385. Robbins Decl., Ex. 15, 74:16-17. Unlike Workman's Auto Insurance, who was trying to save money and knew what would happen to its customers if it repeatedly denied payments, the evidence so far does not go the effect Albertsons repeatedly ignored safety standards knowing the risk of such action.

In *Vendelin*, Costco demonstrated a repeated disregard for consequences, failing to implement an effective employee training program after *over 900* reports of customers being injured by falling merchandise. 140 Idaho at 422, 95 P.3d at 40. Here, Albertsons did not have a repeated history of accidents (let alone the over 900 incidents of injury in *Vendelin*) prior to the crash at issue here. Melville Decl. ¶ 4. Albertsons asserts it has had only one fatality in over five years. The evidence so far is to the effect that its Corporate Traffic team "managed almost 1 million loads in the past 5+ years without additional significant accidents." *Id.* Albertsons did not demonstrate the understanding of, and disregard for, consequences as was found in *Myers* or *Vendelin*.

While Albertsons may (or may not) have been negligent in the present case, Plaintiffs have not mustered sufficient evidence so far to show a "reasonable likelihood" that at trial they could "by clear and convincing evidence" show Albertsons's conduct was "oppressive, fraudulent, malicious or outrageous." The statute precludes allowing punitive damages to be asserted against Albertsons at trial on the facts so far presented. Plaintiffs' motion to amend its complaint to assert punitive damages against Albertsons is denied. *See* IDAHO CODE ANN. § 6-1604(1)-(2).

II. Krujex

Krujex's Vice-President Visan affirmed he was familiar with the Federal Motor Carrier Safety Regulations on a required federal form. Robbins Decl. at Ex. 7, Tab 111 at p.3571. The Federal Motor Carrier Safety Administration ("FMCSA") had not completed a Compliance Review of the company, but that federal agency sent Krujex a warning letter in December 2016 regarding Krujex's high driver-out-of-service rate. Robbins Decl., Ex. 2 at pp. 2-7; Ex. 6 at 19:8-15, 54:15-56:3. A Compliance Review following the June 2018 crash revealed numerous other deficiencies in Krujex's safety management systems, from failing to review new hires' driving records and backgrounds to "making, or permitting drivers to make, a false report regarding duty status." Robbins Decl, Ex. 2 at p. 5; Ex. 6 at 18:4-15, 19:21-20:1; Ex. 7 (Tab 111; 3552-3575).

In *Seiniger Law Off.*, Northern Pacific did nothing to influence Seiniger Law Office's decision to settle and had no knowledge of the law firm's mediation or of the Farm Bureau's insistence on settlement. 145 Idaho at 250, 178 P.3d at 615. That case, where punitive damages were not allowed, is distinguishable from the present case. Krujex knew the safety standards required for motor carriers and the evidence so far may show Krujex repeatedly ignored them according to the FMCSA Compliance Review. Robbins Decl., Ex. 2 at p. 5; Ex. 6 at 18:4-15, 19:21-20:1, 21:3-8, 29:5-16; Ex. 7 (Tab 111; 3552-3575). Plaintiffs may show these violations to be violations of important safety regulations. Krujex compounded its safety failures by certifying to Albertsons that it had "safety management controls adequate to meet or exceed the safety fitness standards prescribed in 49 C.F.R. Part 385." Robbins Decl., Ex. 9 (Ex. A of Melville Decl. Dec. 16, 2020) at p. 1. The evidence is to the effect that this certification was not correct.

This incorrect information, taken with reasonable inferences at trial, may show Krujex lied to Albertsons about important safety data. This evidence the requisite bad state of mind. The inferences at trial may be that Krujex did not attempt to meet its obligations under the FMCSA and Transportation Agreement. Am. Mem. at 7-8. Robbins Decl., Ex. 2 at p. 5; Ex. 6 at 18:4-15, 19:21-

20:1, 21:3-8, 29:5-16; Ex. 7 (Tab 111; 3552-3575). That Krujex did not appropriately vet its drivers in contravention of USDOT regulations and hired Mr. Tsar without reviewing his background or driving record. Robbins Decl., Ex. 6 at 80:17-81:13; Ex. 7 (Tab 111; 3552-3575). In these regards, Krujex's conduct was worse than that of Swift Transportation in *Davis v. Nevarez*, where the U.S. District Court for the District of Idaho allowed punitive damages to be pled under Idaho law against a carrier who do not properly screen its driver. No. 3:07-CV-004270-EJL-LMB, 2009 WL 1532270 (D. Idaho May 29, 2009).

It is for the jury to decide whether any of the above facts are true, what weight to give them, and so determine whether Krujex is liable here. Taken all the evidence Plaintiffs have mustered so far, including reasonable inferences about what will be admissible and what may be believed, Plaintiffs have mustered sufficient evidence to show a "reasonable likelihood" that at trial they could "by clear and convincing evidence" show that Krujex's conduct was "oppressive, fraudulent, malicious or outrageous." The statute allows allowing punitive damages to be asserted against Krujex at trial on the facts so far presented. Plaintiffs' motion to amend its complaint to assert punitive damages against Krujex is granted. *See* IDAHO CODE ANN. § 6-1604(1)-(2).

MOTION AGAINST PENHALL AND SPECIALTY

On July 6, 2021, Plaintiff Lawrence Manlapit, Jr., Plaintiff Dorine Norko, and Plaintiff Estate of Lawrence Manlapit, III (collectively, "Manlapit Plaintiffs"), Plaintiff Daisy Johnson, Plaintiff C.J., Plaintiff Kimberly Westall, and Plaintiff Michael Westall filed their Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages against Defendants Penhall Company and Specialty Construction Supply, LLC ("Joint Amend Motion"), together with their Memorandum in Support of Manlapit/Johnson/Westall Plaintiffs' Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages against Defendants Penhall Company and Specialty Construction Supply, LLC ("Amend Memorandum"), the Declaration of Jim C. Lee, Ph.D., P.E., P.T.O.E. ("Lee Amend Declaration"), and the Declaration of Clay Robbins III ("Robbins Amend Declaration").

On August 16, Defendant Penhall Company ("Penhall") filed its Memorandum in Opposition to Plaintiffs' Motion to Amend Complaint to Add Punitive Damages against Defendant Penhall Company ("Penhall Opposition"), together with the Declaration of J. Nick Crawford ("Crawford Declaration"). Also on August 16, Defendant Specialty Construction Supply, LLC ("Specialty") filed its Memorandum in Opposition to Manlapit/Johnson/Westall Plaintiffs' Joint Motion for Leave to Amend to Add a Claim for Punitive Damages against Defendants Penhall Company and Specialty Construction Supply, LLC ("Specialty Opposition"), together with the Affidavit of Counsel in Support of Defendant Specialty Construction Supply, LLC's Opposition to Manlapit/Johnson/Westall Plaintiffs' Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages against Defendants Penhall Company and Specialty Construction Supply, LLC ("Perkins Affidavit").

On August 19, Plaintiffs filed their Joint Reply to Defendant Specialty Construction Supply, LLC's Opposition to Manlapit/Johnson/Westall Plaintiffs' Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages against Defendants Penhall Company and Specialty Construction Supply, LLC ("Joint Reply to Specialty"), together with the Declaration of

Clay Robbins, III in Support of Manlapit/Johnson/Westall Plaintiffs' Joint Reply to Defendant Specialty Construction Supply, LLC's Opposition to Manlapit/Johnson/Westall Plaintiffs' Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages against Defendants Penhall Company and Specialty Construction Supply LLC ("Robbins Reply Declaration"). Also on August 19, Plaintiffs filed their Reply Memorandum in Support of Manlapit/Johnson/Westall Plaintiffs' Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages against Defendant Penhall Company ("Joint Reply to Penhall").

Plaintiffs seek leave to amend their complaint to assert claims for punitive damages against Penhall and Specialty, arguing the defendants' "actions, or lack thereof . . . reflect an extreme departure from reasonable standards of conduct in choosing to intentionally deviate from the TCP and Special Provisions specifically prepared for the Project." Am. Mem at 55. Plaintiffs argue Penhall and Specialty's actions "were done with a clear understanding, and disregard of, the likely consequences of the unapproved deviation from the TCP." *Id.*

I. Penhall

The evidence at trial may show Penhall chose to deviate from its planned Temporary Traffic Control Plan ("TTCP") on multiple occasions without submitting a new written plan for Idaho Transportation Department ("ITD") approval. *Id.* at 853, 979 P.2d at 1211; Am. Mem. at 16. And that Penhall's July 26, 2017 meeting agenda acknowledged written "authorization is required prior to any additional work or change order work being performed." 132 Idaho at 853, 979 P.2d at 1211; Am. Mem. at 16-17.

A mere contractual breach may not constitute the level of egregious behavior required for punitive damages, as the Idaho Supreme Court established in *Taylor*. 129 Idaho at 494, 927 P.2d at 884. However, in *Myers*, the Supreme Court noted Workman's Auto's numerous opportunities to correct its breaches and evident disregard for its insured customer warranted an amendment for punitive damages. 132 Idaho at 853, 979 P.2d at 1211. Here, the evidence may show Penhall had

multiple opportunities to comply with the TTCP's prohibition on closing more than two lanes of traffic, yet the company executed repeated triple-lane closures throughout Fall 2017 and Spring 2018. Am. Mem. at 19-20. When it did so, Penhall knew, or should have known, of the consequences of its decision—traffic queues extending for about two miles and multiple congestion complaints from the public—which characterized the situation as "excessive" and "extreme." *Id.* at 44-45. The evidence may show Penhall witnessed traffic problems firsthand and would have understood the safety risks they created because of its status as the "largest provider of concrete cutting, concrete breaking, excavation, and concrete highway grinding services in the United States." Am. Mem. at 15. Yet the evidence at trial may show Penhall persevered in repeatedly closing additional lanes beyond the two lanes it was authorized to close. The evidence may show Penhall Project Manager Jeromy Magill admitted the company's urgency in completing the project was a paramount concern and that triple-lane closures would accelerate completion.

Penhall argues its conduct does not demonstrate a "bad act or bad state of mind" because its implementation of traffic control measures, employee training, and response to long traffic queues did not constitute "an extreme deviation from reasonable standards of conduct." Penhall Opp'n at 17*; see Linscott*, 100 Idaho at 854; 606 P.2d at 962. Penhall goes on to contend that it delegated traffic control measures to Specialty, its subcontractor, and was therefore unaware of the formation of traffic queues. Penhall Opp'n at 19, 21.

While Penhall may assert that it was unaware of traffic congestion on 1-84, the evidence may show Penhall's project supervisor Bruce Kidd received a call from State Communications on June 15, 2018, which is one day before the accident occurred on June 16, 2018. Am. Mem at 19, 21. The operator informed Mr. Kidd of public traffic complaints, but Mr. Kidd did not inform Specialty or make any adjustments because he "saw no reason to" do so. *Id.* at 21. The Idaho Supreme Court asserted in *Mason v. Tucker & Associates*, knowledge "acquired by an agent during the course of the agency relationship, and while the agent is not acting in an interest adverse to that of the principal, is

imputed to the principal; and notice to the agent constitutes notice to the principal." 125 Idaho 429, 433, 871 P.2d 846, 850 (1994). Here, Mr. Kidd was the project supervisor and so the evidence at trial may show he was an authorized agent of Penhall, with his knowledge of traffic congestion conditions imputed to Penhall as the principal. Am. Mem. at 21.

As for Penhall's assertion of delegation to Specialty, no "delegation of performance relieves the party delegating of any duty to perform or any liability for breach." IDAHO CODE ANN. § 28-2-210. The temporary traffic control plan and special provisions required Penhall to keep at least two lanes of traffic open at all times, to submit changes to the plan in writing fourteen days in advance, and to hire an experienced Traffic Control Manager ("TCM") to resolve conflicts and make improvements as necessary for traffic flow. Am. Mem. at 12. The evidence at trial may show Penhall did not adhere to any of these provisions, instead choosing to execute triple-lane closures without written notice and to hire Specialty without verifying the credentials of its TCM for the project. Am. Mem at 18-20.

Despite Project Supervisor Kidd's recognition of the safety risks posed by traffic congestion, the evidence may show he failed to inform Specialty or even other Penhall employees of the public complaints regarding traffic. Am. Mem. at 21. Penhall has not submitted any evidence regarding its training programs or standard operating procedure, though this communication breakdown demonstrates a gap in any corporate safety culture. As the "largest provider of concrete cutting, concrete breaking, excavation, and concrete highway grinding services in the United States," Penhall would have been familiar with the importance of temporary traffic control plans and the consequences of plan deviation. Reply Penhall at 9. Nevertheless, Penhall chose not to follow designed safety measures, where the evidence at trial may show it was trying to do so to complete the project faster. *Id.*

It is for the jury to decide whether any of the above facts are true, what weight to give them, and so determine whether Penhall is liable here. Taken all the evidence Plaintiffs have mustered so

far, including reasonable inferences about what will be admissible and what may be believed, Plaintiffs have mustered sufficient evidence to show a "reasonable likelihood" that at trial they could "by clear and convincing evidence" show that Penhall's conduct was "oppressive, fraudulent, malicious or outrageous." The statute allows allowing punitive damages to be asserted against Penhall at trial on the facts so far presented. Plaintiffs' motion to amend its complaint to assert punitive damages against Penhall is granted. *See* IDAHO CODE ANN. § 6-1604(1)-(2).

II. Specialty

Unlike North Pacific, which had no knowledge of key facts driving Seiniger Law Office's decision to settle with Farm Bureau, here Specialty had full understanding of the original TTCP, revision requirements, and Penhall's triple-lane closures. *See* 145 Idaho at 250, 178 P.3d at 615; Am. Mem. at 35. Specialty held itself out as a traffic control expert, yet its Traffic Control Manager agreed to Penhall's request for triple-lane closures without written authorization to change the TTCP. Am. Mem. at 37; *see* 145 Idaho at 250, 178 P.3d at 615.

Despite the Special Provisions of the I-84 contract calling for a TCM with at least five years of experience, Specialty selected Josh Roper for the position, an ATSSA certified Traffic Control Supervisor who had never served in the role on a highway construction project. Am. Mem. at 18, 34. As in *Vendelin*, where the court found the reasonable likelihood standard met because that plaintiff's expert testified the lack of adequate training for Costco employees constituted "an extreme deviation from the industry standard of care," here the evidence may show Specialty decided to use an inexperienced TCM and to close three lanes of traffic without written authorization. 140 Idaho at 425, 95 P.3d at 43; Am. Mem. at 18, 34, 37.

In Spring 2018, Mr. Roper noticed traffic queues developing again and again and informed the ITD inspector. *Id.* Mr. Roper later testified in his deposition that he had the authority to open closed lanes of travel to alleviate congestion as well as the responsibility to notify ITD of unauthorized lane closures. *Id.* Despite his, his successor Mr. Garling's, and their assistant Loux's

awareness of their responsibility to remedy traffic queues, no such action was taken. *Id.* at 43. While Penhall may not have notified Specialty of motorists' complaints regarding congestion Specialty was witnessing, Mr. Garling testified traffic was backed up on evenings preceding the accident and on the night of the accident. *Id.* at 47-48. As a company in the business of traffic control, the evidence may show Specialty knew of the safety risks posed by traffic back-ups, yet did not take action to reduce these traffic back-ups. *Id.* at 52. The evidence may show that one of these back-ups, the one on June 16, 2018, was a cause of the accident here.

Specialty argues its conduct does not demonstrate a "bad act or bad state of mind" because its noncompliance with the TTCP did not constitute a deviation from the standard of care or from the Manual on Uniform Traffic Control Devices ("MUTCD"). *Linscott*, 100 Idaho at 854; 606 P.2d at 962; Specialty Opp'n at 4. Furthermore, Specialty notes that the accident occurred within the advanced warning area. The thrust of Specialty's argument is that truck driver Mr. Tsar would have encountered construction signs and warnings before the collision. Specialty Opp'n at 4. Specialty also disputes that adherence to the TTCP would have prevented the accident because "Mr. Tsar's vehicle never slowed or swerved in an attempt to avoid the accident" despite numerous visible signs and brake lights. *Id.* The thrust of the argument is to place blame on Mr. Tsar for the accident and so not on Specialty.

The standard for allowing an amendment to add claims for punitive damages is that a movant demonstrate a "reasonable likelihood" of proving facts to support punitive damages by "clear and convincing" evidence at trial. IDAHO CODE ANN. § 6-1604(1)(2). The evidence may show Specialty repeatedly deviated from the TTCP. That Specialty allowed a triple-lane closure on the evening in question. That Specialty knew of the traffic back-ups being caused by prior triple-lane closures. That Specialty understood the safety risks posed by traffic congestion on that Interstate. That Specialty knew congestion before or after warning signs creates dangerous conditions for drivers, especially at night, due to rapid reductions in traffic speed and potential for rear-end collisions. Joint

Reply Specialty at 8-10. That Specialty knew a way to reduce the risk of accident would have been to reduce the stopped or slowed traffic. That Specialty knew that on prior evenings, its warning area was inadequate and its signage inadequately placed. Specialty's argument that Mr. Tsar would have crashed his vehicle regardless of Specialty's conduct is a question not yet answered by a jury.

It is for the jury to decide whether any of the above facts are true, what weight to give them, and so determine whether Specialty is liable here. Taken all the evidence Plaintiffs have mustered so far, including reasonable inferences about what will be admissible and what may be believed, Plaintiffs have mustered sufficient evidence to show a "reasonable likelihood" that at trial they could "by clear and convincing evidence" show that Specialty's conduct was "oppressive, fraudulent, malicious or outrageous." The statute allows punitive damages to be asserted against Specialty at trial on the facts so far presented. Plaintiffs' motion to amend its complaint to assert punitive damages against Penhall is granted. *See* IDAHO CODE ANN. § 6-1604(1)-(2).

CONCLUSION

Manlapit/Johnson Plaintiffs' Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages against Defendants Albertson's Companies and Krujex Freight Transport Corporation is GRANTED IN PART. Those Plaintiffs may amend as to Krujex. Manlapit Plaintiffs/Johnson/C.J./Westall's Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages against Defendants Penhall Company and Specialty Construction Supply, LLC is GRANTED.

IT IS SO ORDERED.

DATED: 11/3/21

PETER G. BARTON
District Judge