

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

BRIAN BENSEN,)
)
) *Plaintiff,*)
 vs.)
)
) **KOOTENAI COUNTY; ROCKY WATSON;**)
) **MATTHEW ZIRKER; KOOTENAI COUNTY**)
) **SHERIFF'S OFFICE; ALL EMPLOYEES OF**)
) **K.C.S.O.; JOHN and JANE DOE I through**)
) **X (unknown parties),**)
)
) *Defendants.*)
 _____)

Case No. **CV 2010 10269**
**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendants' Motion to Dismiss.

Plaintiff Brian Bensen (Bensen) filed his Complaint on November 29, 2010. He alleges that defendants Kootenai County, Sheriff Rocky Watson, (former) Deputy Zirker and other individuals who currently are or previously were employed by the Kootenai County Sheriff's Department (hereinafter KCSD collectively) have committed perjury, slander, libel, and theft. Complaint, pp. 2, *et seq.* Bensen states Deputy Zirker, a former employee of KCSD, improperly issued him a citation for the offense of injury to a child on November 6, 2009, and that such issuance amounted to perjury, libel and slander. *Id.*, pp. 2-3. Bensen further alleges KCSD failed to properly investigate a report of theft he filed on January 6, 2006. *Id.*, p. 3. Bensen's final contention is that the KCSD committed theft and malicious harassment in not returning a BB gun to him following Deputy Zirker's investigation of the injury to child claim made against Bensen.

Id., pp. 4-6. Bensen seeks that KCSD reveal the name of the individual who pawned a camera stolen from his home in 2006 and turn over all reports generated in connection with the matter; he also prays for relief in the form of \$2.1 million in damages. *Id.*, pp. 7-8.

On December 22, 2010, KCSD filed Defendants' Motion to Dismiss for failure to file a notice of a tort claim and failure to post a bond. Defendants' Motion to Dismiss, p. 1. On the same date, KCSD filed the Affidavit of Daniel English and its memorandum in support of motion to dismiss. Oral argument was held on May 17, 2011. As of the time of oral argument, Bensen had not replied to KCSD's motion. Bensen did not attend oral argument on May 17, 2011. Counsel for defendants was present.

II. STANDARD OF REVIEW.

The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. See *Idaho Schs. For Equal Educ. v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 728 (1993); *Rim View Trout Co. v. Dep't. of Water Resources.*, 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). The grant of a 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. See *Moss v. Mid-American Fire and Marine Ins. Co.*, 103 Idaho 298, 302, 647 P.2d 754, 758 (1982); *Eliopoulos v. Idaho State Bank*, 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct.App.1996). When reviewing an order of the district court dismissing a case pursuant to I.R.C.P. 12(b)(6), the non-moving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. See *Idaho Schs. for Equal Educ.*, 123 Idaho at 578, 850 P.2d at 729; *Miles v. Idaho Power*

Co., 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). "The issue is not whether the plaintiff will ultimately prevail, but whether the party 'is entitled to offer evidence to support the claims.' " *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (quoting *Greenfield v. Suzuki Motor Co. Ltd.*, 776 F.Supp. 698, 701 (E.D.N.Y.1991)). Whether a court has properly dismissed a case for lack of jurisdiction pursuant to I.R.C.P. 12(b)(1) is a question of law over which reviewing courts exercise free review. *Downey Chiropractic Clinic v. Nampa Restaurant Corp.*, 127 Idaho 283, 285, 900 P.2d 191, 193 (1995); *Meisner v. Potlach Corp.*, 131 Idaho 258, 260, 954 P.2d 676, 678 (1998).

III. ANALYSIS.

There are three reasons why defendants' motion to dismiss must be granted.

A. This Court Lacks Subject Matter Jurisdiction.

KCSD in effect argues that this Court lacks the subject matter jurisdiction to rule on Plaintiff's claims because of a failure to comply with the Idaho Tort Claims Act (ITCA). Memorandum in Support of Motion to Dismiss , pp. 4, *et seq.* Because Bensen alleges KCSD employees engaged in tortious conduct in the course and scope of their duties, Bensen was required to comply with the notice and bond requirements of the ITCA, according to KCSD. *Id.*, pp. 4-6. Bensen has not responded to KCSD's motion for summary judgment. Where a plaintiff's claim sounds in tort, the Court lacks subject matter jurisdiction where there was a failure to comply with the notice requirements of the ITCA. *Madsen v. Idaho Dept. of Health and Welfare*, 116 Idaho 758, 761, 779 P.2d 433, 436 (Ct.App. 1989). In *Wickstrom v. North Idaho College*, the Idaho Supreme Court held that a plaintiff's demand letter failed to serve as notice pursuant to the ITCA where it did not state the names and addresses of the claimants, the amounts of

claimed damages, or the nature of the injury claimed; the Court barred the claim. 111 Idaho 450, 451-2, 725 P2d 155, 156-7 (1986).

Here, Bensen has not filed a tort claim notice. Affidavit of Daniel English, p. 2, ¶¶ 3, 4. Thus, Bensen failed to give KCSD an opportunity to evaluate the claims and approve or deny them within 90 days, pursuant to the ITCA. I.C. §§6-909, 6-910. The ITCA clearly states, “if a claim is denied, a claimant may institute an action in the district court against the governmental entity or its employees in those circumstances where an action is permitted by this act.” I.C. § 6-910. Bensen’s claims sounding in tort can properly be dismissed.

B. Bensen has Failed the Bonding Requirements of I.C. § 6-610.

KCSD also argues that Bensen failed to comply with the bond requirements of I.C. § 6-610 by not posting a required bond. Memorandum in Support of Defendants’ Motion to Dismiss, pp. 4-5. The Court of Appeals in *Beehler v. Fremont County*, 145 Idaho 656, 182 P.3d 713 (Ct.App. 2008) held that compliance with I.C. § 6-610 is mandatory in cases against law enforcement officers, with only a narrow exception for indigent prisoners and non-prisoners who seek a waiver under I.C. § 31-3220. *Beehler*, 145 Idaho 656, 660, 182 P.3d 713, 717. The facts in *Beehler* are similar to the instant matter, as the Beehlers did not comply whatsoever with the requirements of § 6-610. This Court can, therefore, reasonably determine that Bensen has failed to state a claim against KCSD upon which relief may be granted.

C. Bensen has Failed to Respond to Defendants’ Motion to Dismiss.

Idaho Rule of Civil Procedure 56(e) provides in part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not

so respond, summary judgment, if appropriate, shall be entered against the party.

I.R.C.P. 56(e). Because the instant motion is a motion to dismiss under I.R.C.P. 12, I.R.C.P. 56(e) only applies by analogy; however, the logic remains. Bensen cannot rest on his pleadings to avoid dismissal. Bensen has not filed any affidavits or briefs. Bensen has not set forth any reason that any part of his complaint is based on anything other than tort. Thus, Bensen's complaint must be dismissed.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court must grant Defendants' Motion to Dismiss.

IT IS HEREBY ORDERED Defendants' Motion to Dismiss is GRANTED. Benson's Complaint and this matter is DIMSISSED in its entirety.

Entered this 17th day of May, 2011.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Party pro se</u>
Peter Erbland, Seann Mumford	208 664-6338	Brian Bensen 1895 E. 12 th Ave. Post Falls, ID 83854

Jeanne Clausen, Deputy Clerk